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30-year employee fired after getting cancer

Court awards $55,000 in extra damages on top of 22 months' notice to show its 'repugnance'

| BY JEFFREY R. SMITH |

AN ONTARIO employer must pay nearly two years' salary plus $55,000 in extra damages to a long-term employee it fired after she reduced her hours and took medical leave for cancer treatment, the Ontario Superior Court of Justice has ruled.

Shelley Altman, 59, first became affiliated with Montreal-based musical instrument retailer Steve's Music Store in 1978. At that time, her husband was the assistant manager of a Steve's Toronto location and she helped out doing unpaid work. She soon began working at the front counter and advanced through various positions, becoming store manager in 1998.

Steve's was a family-run business and over the years Altman became close to many of the family members. She often worked from home on her days off and was rarely out of contact with the store. She represented Steve's on an advisory board for the Music Industries Association of Canada and became well-known in the industry.

Long-term employee diagnosed with cancer

In December 2007, Altman was diagnosed with lung cancer. She had part of her lung removed and had to take one month off work. She began chemotherapy in April 2008, followed by radiotherapy, which lasted until September. During this period, Altman worked reduced hours and occasionally had to take time off when the physical effects of the treatment were too much.

Steve's agreed to pay her full salary while she worked reduced hours during her treatment. Altman wanted to continue working as much as she could because she felt it was her duty and it helped her have parts of a normal life.

On Oct. 15, 2008, Altman received a letter from a law firm representing Steve's that accused her of being "remiss in your duties and obligations towards Steve's Music in failing to work minimum number of hours required by your employer." The letter outlined her tendency to arrive late and leave early or be absent for days at a time without providing prior notice. It concluded with a warning that a failure to work regular hours would result in termination of her employment.

WRONGFUL DISMISSAL

The letter shocked Altman, not just because of the nature of her relationship with Steve's and its owners, but also because nobody had told her the company considered her remiss in fulfilling her duties or that her job was in danger. Fearful for her job, she went to work the next day but began a medical leave the day after that. The leave was originally for three months but was extended by her doctor for another three months in January 2009.

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In This Issue

Teacher hired full-time while on mat leave entitled to full benefits

AN ONTARIO school board violated its collective agreement by not paying the proper level of parental leave benefits for a teacher who was promoted while on parental leave, an arbitrator has ruled.

The teacher worked for the Ottawa-Carleton District School Board and began her pregnancy leave on Feb. 3, 2009. At the time she went on leave, she held a part-time teaching position equal to 0.6 of a full-time position (FTE). Under the collective agreement between the school board and the teachers' union, the school board paid 85 per cent of the premium costs for parental and maternity leave benefits for full-time teachers. For part-time teachers, the school board paid a prorated portion of 85 per cent, with the teacher covering the remaining portion of the premium.

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Ask an Expert

with

Tim Mitchell

Armstrong Management Lawyers

Have a question for our experts?
Email **carswell.celt@thomsonreuters.com.**

HUMAN RIGHTS: Career development program for younger workers

Question: Our employees have very specific individual responsibilities and too many absences can hurt the business. Can we require employees to get flu shots (if they're not allergic) to reduce the chance of them needing sick days or spreading it around the workplace?

Answer: An individual's bodily integrity is accorded the highest degree of privacy protection. As such, an employee cannot be compelled to submit to a flu shot without that employee's freely given consent or a contractual, collective agreement or statutory right of the employer to insist on employee immunization. The case law provides no support for recognition of an employer right to require flu shots to protect the employer's financial interests or to reduce its potential liability for sick pay.

Arbitral jurisprudence has recognized a right in some employers to insist their active workforce be immunized. Specifically, employers engaged in the provision of health care and residential care services, especially those catering to the elderly or others at particular risk, have been found justified in redeploying or temporarily sidelining employees who refuse to get flu shots.

In one such case — *SEIU, Local 183 v. Trillium Ridge Retirement Home* — the employer had introduced a mandatory policy requiring its active staff to be vaccinated or to take antiviral medication during an outbreak of influenza in the facility. Employees who refused were required to remain off work without pay for the duration of the outbreak. The union grieved, taking the position that the employer's policy constituted an unreasonable invasion of the employees' bodily integrity.

In upholding the policy, the arbitrator cited a number of considerations supporting its reasonableness. These included the facts that employees were not compelled to be vaccinated but merely suffered financial consequences unless they had a medical or religious reason for refusal; there was ample evidence of the effectiveness of vaccination in controlling transmission and severity of flu symptoms and complications, indicating a rational connection to the legitimate objective of protecting the health and safety of facility residents and staff; and employees were informed as to the nature and purpose of the policy and the consequences of refusal.

A number of subsequent decisions arising in similar contexts have upheld such policies and actions taken in pursuit of them where those actions were not overly intrusive and did not overreach the employer's legitimate interests: *Carewest v. A.U.P.E.*; *Chinook Health Region v. U.N.A.*; *Interior Health Authority v. BCNU.*

In *Interior Health Authority v. BCNU*, the collective agreement expressly extended to the employer a right to impose mandatory immunization. Despite this, the union challenged the employer's immunization policy and invoked the Canadian Charter of Rights and Freedoms. It was alleged the policy offended the employees' right to liberty and security of the person because the employer refused to pay employees who were held out of service because of their refusal to get immunized or receive antiviral medication.

The arbitrator held that the charter did not protect economic rights to exercise particular employment nor did it protect interests that were not of fundamental importance. The employees had a choice and the economic consequences of refusal to be immunized were not so severe as to amount to coercion — the effective denial of an individual's choice over her body. In the absence of effective coercion, the charter was not triggered. The arbitrator refused to follow a contrary arbitration decision holding that a non-disciplinary suspension for refusing to undergo immunization amounted to forced medical treatment contrary to the charter.

Where the employer does have a right to compel immunization, it has been held to be a very serious employment offence for an employee to continue to work without compliance. In the 2006 arbitration *North Bay General Hospital v. O.P.S.E.U.*, the employee was justifiably dismissed when it was discovered she worked without immunization. Interestingly, the board awarded punitive damages in the amount of $750 for a technical breach of the employee's privacy rights brought about by the occupational health and safety department's disclosure of her medical information to her managers.

These samplings of arbitral jurisprudence on the issue of mandatory immunization indicate two points. First, arbitrators acknowledge that unimmunized employees can disrupt an employer's workplace, giving the employer a potential right to require either immunization or an effective distance from at-risk employees, patients or clients. This distance may include a layoff without pay for the duration of an influenza outbreak. Second, the existence of a right to remove employees from the workforce involves the application of a balancing process that occurs in any case where an employer's interests come into conflict with fundamental rights of the workforce.

To date, that balancing process has permitted removal of employees where their presence creates life-and-death risks for others, typically under the

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Miner digs himself a hole with refusal

Miner fired for insubordination argued he wasn't hired or trained to do more dangerous drilling work

| BY JEFFREY R. SMITH |

A SASKATCHEWAN miner was not insubordinate when he refused a supervisor's order to do a job he wasn't hired for and didn't want to do, the Saskatchewan Provincial Court has ruled.

Donald Duguay, 45, was a miner hired by Mudjatik Thyssen Mining Joint Venture, a mining contractor in northern Saskatchewan, in November 2007. When he applied, Duguay indicated he had experience and skills in blasting and drilling at various mine sites. During his interview, Mudjatik asked Duguay if he could operate a jackleg and stopper drill, a type of pneumatic drill that drills holes for support systems in the roof of underground mines. Duguay had no training on this type of drill and said he didn't want to do that type of work, as it is the most dangerous in underground mines.

WRONGFUL DISMISSAL

Duguay was hired as an operator of a Cubex drill, a drill with which he had experience and training, at Rabbit Lake Mine. He signed an employment agreement that stipulated he would undertake whatever tasks Mudjatik assigned him within the limits of his skill and safe working conditions, any training needed for his work, and he would do his job as required. Duguay accepted the agreement, believing the requirements applied within the scope of his position as a Cubex drill operator.

In his record of training history, Duguay indicated he had knowledge of rock bolting, the type of work done with a jackleg drill, but no formal training. Most miners had a general knowledge of rock bolting.

First warning for insubordination

On Oct. 6, 2008, Duguay and another miner were loading explosives into holes for excavations. Duguay had a disagreement with his supervisor over whether there should be a person guarding the blasting site. Legislation required "effective guarding of entrances to the blasting site" and Duguay felt only a fence was required. However, the supervisor said there needed to be a person present in accordance with Mudjatik policy. Duguay insisted he was right, saying no-one had raised the issue with him before in 11 months with the company.

Duguay was asked to sign a warning, the first step in a four-step disciplinary process — the fourth step was dismissal — but refused. The supervisor told Duguay the warning would be overlooked but said if Duguay was insubordinate again, he would be fired.

Four weeks later, on Nov. 1, 2008, Duguay was operating a front-end loader carrying electricians over a flooded section of the mine. The scoop accidentally rolled into the water, dumping the electricians and a pump, damaging company property and endangering the electricians. Duguay accepted responsibility and signed a step two warning.

Miner refused to do job he wasn't hired to do

The day after the front-end loader accident, Duguay's supervisor asked him to take jackleg and stopper training. Duguay didn't feel this was part of his job and refused. He was then sent to work rock bolting with another miner who could operate the jackleg drill and mostly just passed along equipment.

Halfway through the shift, the supervisor came by and said Duguay needed to be trained as a bolter but Duguay again refused, saying he was a Cubex driller. The supervisor became angry and fired Duguay, to which Duguay replied, "fine."

Duguay was shocked and believed he had been set up to be fired. He sued Mudjatik for wrongful dismissal. Mudjatik argued Duguay effectively resigned by refusing to follow direct orders from his supervisor, which constituted insubordination and a step four warning.

The court first determined Duguay did not resign and response of "fine" to his supervisor's assertion he was fired was not a formal act of quitting.

The court agreed Duguay's refusal to place a guard at the blast site was a clear defiance of a direct order, regardless of his past practice, and constituted insubordination. However, his refusal to take rock bolting training and operate a jackleg drill was a different story. Duguay was hired to be a Cubex drill operator and associated duties. Mudjatik didn't make it clear upon hiring him that he would be expected to perform other duties and it should have renegotiated his employment terms and provided opportunity for training instead of thrusting him into a new job, said the court. This was particularly important considering the rock bolting duties were more dangerous.

Since the incident didn't amount to insubordination, the court found the move from a step two warning on Nov. 1 to termination was an overreaction.

"(Duguay) was not warned that if he did not agree to rock bolt he would be terminated," said the court. "Given that he was hired as a Cubex driller, he ought to have been provided a clear indication that he would be expected to learn and perform those duties and failure to comply would result in termination."

The court ordered Mudjatik to pay Duguay three months' notice, as he was only employed with the company for a year and found comparable work a month after his dismissal. The notice amount was reduced by employment insurance benefits and earnings in his new job during the notice period for a final total of $11,394. See *Duguay v. Mudjatik Thyssen Mining Joint Venture*, 2010 CarswellSask 875 (Sask. Prov. Ct.).

CASE IN POINT: IMMIGRATION

Proactive employer can make work permit process easier

Employer's failure to apply for an LMO that led to expiry of foreign worker's work permit constituted unjust dismissal

BACKGROUND

Passive employer, unemployed foreign worker

HOW MUCH is it an employer's responsibility to ensure a foreign worker it employs has his documentation up to date? When looking to employ foreign workers, employers have to obtain a Labour Market Opinion for the worker before a work permit. But the two items are linked and failure to make a timely application for one can lead to complications.

One employer found out it probably should have paid more attention to the status of the work permit renewal application of one of its foreign workers when it was forced to let him go after the application was rejected. As it turned out, it was a sequence of events that didn't have to happen the way it did.

| BY SERGIO KARAS |

IS AN employer under a duty to obtain the necessary documents for the renewal of a work permit held by a foreign worker? Can an employer terminate a foreign worker who fails to obtain a work permit when the employer should have assisted him with the process?

These questions arose in the recent decision of *Lee v. Anglo-Eastern Ship Management Ltd.* as a result of a complaint of unjust dismissal by a foreign worker. An adjudicator of the Canada Labour Arbitration Division (CLAD), held that the employer had to reinstate with retroactive compensation a foreign worker who was in the process of renewing a work permit. The decision implies that the employer was under a positive duty to assist the foreign worker in obtaining a work permit based on prior conduct and expectations.

In *Lee*, a long-time employee of Anglo-Eastern Ship Management, Siu Wing Enrico Lee, was transferred to Canada from Hong Kong to assume the position of technical officer in 1997.

The employer didn't obtain a new LMO, possibly because the employee had applied for permanent residence. The work permit application was rejected because of the absence of an LMO.

The position was referred to in the offer of employment as "a permanent position." The employee started as a temporary foreign worker and held a work permit, which was renewed from time to time by Citizenship and Immigration Canada, with the assistance of the employer. As business increased, Anglo-Eastern hired another technical officer, who was a Canadian citizen. This situation continued until Anglo-Eastern experienced a business slowdown due to the economy. After carefully evaluating its options, Anglo-Eastern decided to give notice of termination to the Canadian employee, in consideration that Lee had 21 years of service with the company. Around the same time, the general manager of Anglo-Eastern was requested by Lee to "sign a document relating to the renewal of his work permit." The general manager drafted a letter in support of the work permit renewal, which Lee sent directly to Citizenship and Immigration Canada. It appears that neither Lee nor the general manager requested any legal advice or assistance from anyone else in the company as to what was necessary in order for Lee to obtain a work permit, nor was there any inquiry made as to how previous work permits were obtained.

Work permit expired while waiting for decision on permanent residency

The evidence showed that while Lee always requested his own work permit, Anglo-Eastern obtained a Labour Market Opinion (LMO), which was part of the documentation submitted to Citizenship and Immigration Canada. However, in this particular instance, an LMO was not obtained. The decision is somewhat obscure as to why that was not done, but it discloses that Lee had applied for permanent residence. It is reasonable to conclude that he thought he would receive it prior to the expiry of his work permit and therefore did

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CASE IN POINT: IMMIGRATION

Employer knew worker had applied for new work permit

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not take the necessary steps to obtain an LMO from the company. In any event, his application for a work permit was rejected by Citizenship and Immigration Canada.

The reasons for the refusal were essentially that an LMO was not obtained by the employer, and Lee's work permit had already expired. Lee was then obligated to apply for restoration within 90 days of the refusal. Lee never informed the general manger of the refusal because he expected the restoration to be granted. However, Anglo-Eastern discovered Lee did not have a work permit and it terminated his employment on the basis that he was not entitled to work in Canada.

Employer rehired Canadian to take foreign worker's place in permanent job

Anglo-Eastern found itself in a precarious situation due to the fact that Lee was the only technical officer and he could not legally work in Canada. The company turned to the second technical officer — a Canadian citizen — whose services were about to be terminated and requested him to remain on the job. Essentially, the company had to rehire him. The Canadian citizen insisted that he be hired on a permanent basis, to which the company agreed.

In the meantime, Anglo-Eastern assisted Lee in obtaining the necessary LMO and work permit, which was eventually reinstated.

There was some evidence that the general manager made regular enquiries from Lee as to his status. The adjudicator concluded that it was clear from the evidence that obtaining a work permit was primarily the responsibility of the employer, bearing in mind Lee had always been involved in the procedure as the most interested party. In addition, the adjudicator noted that the general manager was aware Lee's work permit would expire and Lee had applied for renewal as well as for permanent residency. Further, the adjudicator found that the general manager was aware Lee could rectify the situation within 90 days after the refusal of his permit and, at the time of rehiring the Canadian citizen, the general manager was himself involved in assisting Lee with that process. It was then reasonable to conclude the Canadian citizen could have worked as technical officer until Lee was again entitled to work in Canada and there was no reason for the Canadian citizen to have been hired on a permanent basis. The employer had a duty to accommodate the foreign worker and could have made other arrangements rather than replace him on a permanent basis.

The employer found itself in a precarious situation due to the fact the employee was the only technical officer and could not legally work in Canada. It turned to another technical officer who was about to be terminated and asked him to stay on the job.

In the end, the company was obligated to reinstate the foreign worker with pay retroactive to the date of dismissal, except for the period in which he did not have a valid work permit.

Tips for employers

Lee highlights the need for employers to be proactive in the work permit process for their foreign workers. It also emphasizes the need for employers to be vigilant and to obtain regular updates concerning the process of a work permit application both from the foreign worker and from anyone representing the employer. On a further note, the case also implies employers may be held liable for damages if they do not take the necessary steps to ensure that foreign workers have the required documentation in place to work in Canada on a timely basis and there are no gaps between the time of expiry of a work permit and its renewal date. Employers should endeavor to obtain the appropriate legal advice and take control of the work permit renewal process as it is unwise to leave it up to the foreign workers to do it on their own.

For more information see:

- *Lee v. Anglo-Eastern Ship Management Ltd.*, 2010 CarswellNat 5740 (Can. Adjud. app. under Can. Lab. Code).

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MORE CASES IN POINT

To view more Cases in Point and other articles from past issues and online postings, go to www.employmentlawtoday.com and click on "Advanced Search."

Shock at warning letter led to 3 more months of leave

...continued from page 1

Employee terminated for not fulfilling job duties

On April 1, 2009, Altman contacted Steve's to tell the company she would be able to come back to work on April 8. A few days later, she revised her return date to April 20 because she had hurt her back.

Altman received a response from Steve's lawyers shortly thereafter that referred to the previous letter. It stated her position had been abolished and "Steve's Music has no obligation to reinstate you." In addition, the letter said Steve's was entitled to deduct amounts from her remaining pay to offset her absences, late arrivals and early departures from work. As a result, Altman received nothing upon termination.

Altman sued for wrongful dismissal, claiming pay in lieu of reasonable notice, statutory severance pay, damages for mental distress and punitive damages for bad faith. However, Steve's argued the employment contract was frustrated because Altman couldn't fulfill her job duties and wouldn't be coming back to work. The company pointed to the fact Altman's doctor indicated she was permanently disabled for disability payments after cancer was found in her bones and brain in fall 2009.

Altman initially won a summary judgment that ordered Steve's to pay her the statutory minimum eight weeks termination pay and $46,551.06 for proceeds from a deferred profit sharing plan the company had made contributions to on her behalf.

At trial, the court found Steve's was not entitled to withhold any of Altman's pay to cover for any overpayments due to her reduced hours and absences. Steve's originally decided to pay her full salary nor deduct her vacation entitlement while she underwent treatment, so any overpayment was a company decision, not an administrative error, said the court. As a result, it owed her any outstanding salary and bonus payments that were due in her final paycheque, as well as vacation pay.

The court found Steve's didn't have to pay any statutory severance pay, as this was only required of employers with a payroll of $2.5 million or more under Ontario's Employment Standards Act, 2000. Though Steve's total payroll was over that figure, its payroll in Ontario was $2.1 million, said the court.

The court also found there was no indication Altman was permanently disabled at the time of her termination. Her diagnosis of not being able to work and application for long-term disability came months later and Altman had indicated she would be able to return to work in April 2009. As a result, the court found there was no frustration of the employment contract and Altman was entitled to 22 months' pay in lieu of notice.

Extra damages for poor treatment of employee

In addition to the pay in lieu of notice, the court supported Altman's claim for additional damages. It found the October 2008 warning letter was inappropriate given her service record and the fact she had no previous warning. It exacerbated the stress she was feeling from her cancer treatment and played a role in the medical leave she went on two days later, said the court.

"Steve's treatment of Ms. Altman was callous and insensitive. She deserved to be treated better than twice having a bailiff deliver a letter replete with mistruths from Steve's lawyers — especially when Steve's knew she was recovering from cancer treatment," said the court. "These letters devastated Ms. Altman and caused her significant mental distress to the point of clinical depression."

The court ordered Steve's to pay Altman $35,000 for breaching its duty to deal with her in good faith and fairness in the manner of dismissal. The court also felt an additional $20,000 in punitive damages was necessary to "express the court's repugnance at the conduct" and avoid a repeat of the circumstances.

For more information see:

■*Altman v. Steve's Music Store Inc.*, 2011 CarswellOnt 1703 (Ont. S.C.J.).

ASK AN EXPERT

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employees' care; where the employees are inconvenienced by loss of earnings but not loss of a job; where the banishment from the workplace is of limited duration; where only those whose presence actually creates a risk are affected; and where other less intrusive means of obtaining consent to immunization have been tried without success.

If the circumstances existing in a workplace do not provide similarly compelling justification for a mandatory immunization policy, it is unlikely such action would be permitted.

For more information see:

■*SEIU, Local 183 v. Trillium Ridge Retirement Home* (Dec. 18, 1998), J. Emrich — Arb. (Ont. Arb. Bd.).
■*Carewest v. A.U.P.E.*, 2001 CarswellAlta 1851 (Alta. Arb. Bd.).
■*Chinook Health Region v. U.N.A., Local 120*, 2002 CarswellAlta 1847 (Alta. Arb. Bd.).
■*Interior Health Authority v. BCNU*, 2006 CarswellBC 3377 (B.C. Arb. Bd.).
■*North Bay General Hospital v. O.P.S.E.U.*, 2006 CarswellOnt 8751 (Ont. Arb. Bd.).

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MORE CASES

COMPILED BY JEFFREY R. SMITH

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On Sept. 23, 2009, the teacher applied for and was successful in landing a full time position (1.0 FTE) with the school board. However, she was still on leave. Though her leave officially ended on Feb. 3, 2010, she made an arrangement with the school board to wait until the new school year in September to start work. As a result, she took unpaid leave until the end of the current school year on June 30, 2010. When she returned to work in September 2010, she assumed the full-time position.

However, the teacher had a dispute over her benefits premium during her leave. The school board paid the prorated portion of the premium for the entire length of her leave, based on her 0.6 FTE position at the beginning of her leave. The teacher argued the school board should have paid the maximum 85 per cent of the premium once she was hired to a full-time position in September 2009 for the remainder of her leave. Because she was on leave, she wasn't treated as a full-timer until a year after she was hired full-time, which discriminated against her based on her family status, said the teacher.

The school board disagreed, saying its consistent practice over the years was to determine the teacher's status at the beginning of her leave and set its benefits contribution for the full period of her leave. It pointed to situations where teachers decided during their leave to become part-time when they returned, but the school board paid their full-time benefits for the balance of the leave. As a result, all comparable teachers were treated equally.

The arbitrator found the teacher obtained full-time status in September 2009 and should have been treated as a full-time teacher at that point. This included being entitled to the full employer contribution outlined in the collective agreement, said the arbitrator. The arbitrator upheld the grievance and found the school board breached the collective agreement's provision on employer-paid benefit premiums. See *Ottawa-Carleton District School Board v. Ottawa Carleton Elementary Teachers' Federation*, 2011 CarswellOnt 1368 (Ont. Arb. Bd.

LABOUR RELATIONS: A tale of two unions and one position

AN ONTARIO health care worker was entitled to bump a less senior member of another union to take a position that was part of her own bargaining unit, an arbitrator has ruled.

The Regional Municipality of Niagara's public health department had a job classification identified as health promoter for which registered nurses could work as well as other employees who were not qualified registered nurses. The health promoter position was part of the collective agreement between Niagara and the Canadian Union of Public Employees (CUPE). However, registered nurses with Niagara had their own bargaining unit under the Ontario Nurses' Association (ONA).

Before 2001, Niagara allowed registered nurses to compete for health promoter positions. If an ONA member won a job as a health promoter, the member would stay in the ONA. However, in 2001, CUPE asked Niagara to stop this practice, since the job was under its collective agreement.

The two unions reached a settlement with Niagara that allowed ONA members to apply for the position and if successful, they would remain in the ONA and paid under the rates in its collective agreement.

In April 2010, there was one registered nurse, Marian Landry, who held down a health promoter position for Niagara. However, Donna Mills, a CUPE member with more seniority who had been laid off, used her seniority rights to bump Landry out of the health promoter job. Landry then used her rights under the ONA collective agreement to displace another ONA member with less seniority from a nurse position. A chain reaction of bumps ensued, resulting in an ONA member moving from a permanent job to a temporary one.

The ONA filed a grievance arguing its collective agreement and the settlement with CUPE didn't allow CUPE members to displace any of its members from the health promoter position. It also argued it was unfair for its members to bear the brunt of a layoff in the CUPE bargaining unit, pointing to the chain reaction within its members it caused and the fact its own layoff provisions were only triggered by a reduction in the nurse work force, rather than these circumstances.

The arbitrator found the specific circumstances were not covered in either of the collective agreements nor the settlement. However, the settlement that allowed ONA members in the health promoter position to remain in the ONA bargaining unit did not offer protection against being bumped, said the arbitrator.

The arbitrator found there were only two possible solutions to such circumstances: Either CUPE members could bump any ONA members from the job or only an ONA member could bump an ONA member. Since the position was in the CUPE bargaining unit, the arbitrator found it was "preferable to allow CUPE members to bump ONA members... than allow ONA members to bump into the CUPE bargaining unit."

The settlement didn't contemplate an ONA member taking the health promoter position any other way other than applying for a vacancy, said the arbitrator, and expanding this allows ONA members to bump into it would be beyond reasonable contemplation without clear wording. In addition, both Mills and Landry followed their rights under their respective collective agreements without violation or preference of one over the other, said the arbitrator.

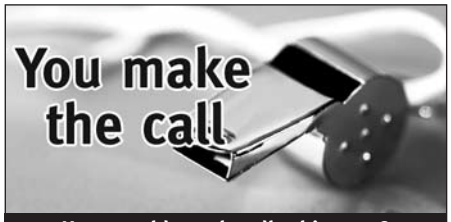
The arbitrator dismissed the grievance, finding nothing improper in allowing a CUPE member to bump an ONA member from the position within its own bargaining unit. See *Niagara (Regional Municipality) v. O.N.A.)*., 2011 CarswellOnt 1367 (Ont. Arb. Bd.).

Employer not blowing smoke over policy

THIS INSTALMENT of You Make the Call features an employee who was fired for smoking at work.

Mate Belic worked in the Mississauga, Ont., weld shop of Strongco, a mobile equipment dealer for the construction, mining and oil and gas sector. Strongco had a policy of a smoke-free workplace. The policy stipulated that smoking was only allowed outside in designated smoking areas. Employees who violated the policy were subject to warnings followed by disciplinary action.

The policy was put in effect and communicated to employees in June 2009. In August 2009, Belic was caught smoking in the shop and was given a verbal warning. Eleven days later, he was caught again and received a written warning. In November, he received a one-day suspension and in January 2010 a three-day suspension, both for smoking at work.



How would you handle this case? Read the facts and see if the judge agrees

On Feb. 11, 2010, the service manager went to the weld shop to check on the progress of a job Belic was working on. The manager could see through a window on the shop door that it was dark inside. He could make out Belic standing inside and saw a glowing ember. After watching Belic for about 20 seconds, the manager banged on the door, surprising Belic. According to the manager, he saw a cigarette in Belic's hand as he turned to the door before Belic shoved it in his coat pocket and opened the door.

The manager asked Belic why he was smoking and Belic denied it. The manager consulted with senior management and they decided Belic should be fired, considering it was the fifth time he had been caught smoking in the workplace in the past six months.

On the morning of Feb. 12, 2010, management met with Belic and the union chairperson and presented Belic with a termination letter. Belic was shocked and said, "I can't believe you're doing this, it's only smoking." Management replied that he had been warned.

Belic testified he had not been smoking when the manager came to the door, but rather he had turned off the lights and was checking a gas tank before leaving the shop. He said he was startled by the banging on the door and he hadn't been smoking when the manager made the accusation. It was also noted the manager didn't indicate he saw or smelled any smoke, nor did he ask Belic to show him the cigarette.

You make the call

- ☑ Did Strongco have cause to terminate Belic's employment?
  OR
- ☑ Was dismissal too severe a punishment?

IF YOU SAID Strongco had just cause to terminate Belic's employment, you're right. The arbitrator found Belic's claims must be viewed in the context of his smoking habits, which showed he was addicted to cigarettes. It's common for an addict to understate or deny his addiction, said the court, and his past misconduct supported the likelihood the manager's observations were correct.

"It is clear from the repetitive incidents of violation of the workplace smoking prohibition, resulting in multiple disciplinary penalties, that the addiction is far from under control," said the arbitrator.

Belic's account wasn't necessarily a deliberate lie but instead he may have convinced himself he wasn't smoking in the shop after seemingly conceding it in the termination meeting. However, he had to "bear the principal burden of failing to observe the employer's non-smoking policy."

Though the arbitrator agreed Belic was guilty of smoking in the office repeatedly and praised Strongco's application of progressive discipline for his previous misconduct, the arbitrator found dismissal was too severe. Strongco was ordered to reinstate Belic with the five months since his firing serving as a suspension without pay, a severe enough penalty that the arbitrator felt would drive home the seriousness of Belic's repeated misconduct. Belic was ordered to undergo remedial tobacco addiction treatment and given the condition that any future violation of Strongco's no-smoking policy would be grounds for immediate dismissal without the right to grievance or arbitration of the dismissal. See *Strongco Inc. v. CAW-Canada, Local 252*, 2010 CarswellOnt 10489 (Ont. Arb. Bd.

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