

Employers' Advisor

WORKPLACE NEWS IN THE LONG-TERM CARE SECTOR

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The Dignity of the Addicted Nurse and the Interests of the Residents

The Regional Municipality of Waterloo operates a long-term care home. For some 2 years a registered nurse in its employ who was addicted to controlled substances was stealing narcotics from the employer and from the residents who were prescribed the narcotics to alleviate their suffering. According to an agreed statement of facts, the nurse covered up that she misappropriated the narcotics, including her falsifying the medical records to make it appear that the residents had received their full dosage when they had not. The consequence of fraudulent reporting is that the prescribing physicians when told their residents continue to suffer, will make future decisions about dosages based on false information.

The employer is bound by law to enforce the Bill of Rights for residents in long-term care. According to that Bill of Rights, what the nurse did is known as resident abuse and is generally grounds for termination of employment.

The nurse was a Team Leader. When caught, the employer terminated her employment. The nurse grieved and participated in a rehabilitation program. On completion of the program her prospects were said to be good that she would not relapse.

It is the mandate of the College of Nurses to regulate the nursing profession to protect the public. On discharge from the program, the nurse entered into an undertaking with the

College that she will not administer or have access to controlled substances in her nursing practice; her practice performance, and/or behavior can be directly observed at any given time; her assignment is subject to her addiction physician's limits on how much and when she can work; and her behaviour and mood is to be observed to check against relapse.

The nurse's union, the Ontario Nurses' Association, convinced the arbitrator that the nurse's addiction is a disease; that that disease was a factor in the nurse's improper actions and that it is unlawful under Ontario's Human Rights Code to discriminate in employment when a disease is a factor.

The arbitrator considered one line of cases in which addicted people go to jail for their unlawful acts against the competing view that addicts must be accommodated. He found for the latter.

The employer said that it cannot reasonably satisfy the requirements of the College of Nurses undertaking and noted that the residents' trust would be lost. The arbitrator found the employer could reassign duties to accommodate the nurse without imposing undue hardship; could meet the monitoring requirements of the College's Undertaking; and ordered that the nurse be reinstated, with compensation to be determined, including for loss of dignity.

In my opinion the arbitrator's analysis misses the point. The right to equal treatment without discrimination due to addiction is not absolute. The Code provides that the right to equal treatment is not infringed where an individual person refuses to

employ another for reasons of any prohibited ground of discrimination where the primary duty of the employment is attending to the medical or personal needs of the person. That is the nurse's job and she admitted that "it would 'be reasonable' to expect that residents and their families would no longer trust her, would worry about her relapsing and engaging in misconduct and that these concerns would not be healthy for them and not in their best interests." The Legislature's intent is that 1), the Employer is to ensure residents are treated with courtesy and with respect and 2), that the protection of the health and best interest of the residents trump the right of the addicted nurse who steals their narcotics and leaves them to suffer. Undue hardship is not just about rearranging the nurse's duties and monitoring the nurse but is additionally and fundamentally about protecting the residents.

In my opinion, this consequence of reinstatement constitutes undue hardship to the employer and the union's request and the arbitrator's decision to reinstate notwithstanding the negative impact on the residents is an act of resident abuse.

This decision treats the residents as incidental props who happen to live in the nurses' workplace; the reality is that the nurses work in the residents' homes. The residents' interests as

frail and vulnerable people should be the first to be protected. I know the arbitrator in this matter to be caring, thoughtful and smart and this is another decision that demonstrates that it is an incorrect assumption that the arbitral system which developed to resolve impasses on the factory floor can be applied in long-term care homes and produce the right results. In general arbitrators simply are not willing or able to understand the complexity and regulations for the operation of the homes and the timing and consequence of the funding model for long-term care. Yet two inquiries into the quality of long-term care—the Donner report about resident care and safety in long-term homes and the Wettlaufer enquiry about the ultimate resident abuse—both have determined that the reform of labour relations was not part of their mandate. Until such time as the monitoring of long-term care is managed by a special knowledgeable tribunal, we will continue to get results like the Waterloo decision in which the residents' interests are relegated to the lower tier. It would not be undue hardship for the government to finance a tribunal created to resolve labour impasses in the long-term care sector. The residents built the community we live in and deserve better.

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If you have questions about this please do not hesitate to contact Steven Wilson at swilson@mathewsdinsdale.com

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