IN FACT AND IN LAW

Labour and Employment

**December 2007**

# Can Last Chance Agreements

## and the Duty to Accommodate Live Side-by-side?

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*A last chance agreement is an arrangement entered into between an employer, an employee with serious and persistent behavioral problems and, where applicable, the union, that gives the employee a final chance. Such an agreement imposes strict conditions to be met by the employee in order to maintain the employment relationship and may even provide that a breach of its terms will result in dismissal.*

*There is more and more case law on this issue and last chance agreements are increasingly being used as a management tool in problematic situations.*

### Survival of the duty of reasonable accommodation despite the last chance agreement

A last chance agreement does not prevent an arbitrator adjudicating a grievance from verifying if the employer has fulfilled its duty to accommodate. Moreover, the Supreme Court [1] has held that the rights and obligations provided for in human rights legislation and other legislation pertaining to employment are impliedly incorporated in every collective agreement and that the grievance arbitrator has jurisdiction to apply them.

It must be borne in mind that drug addiction and alcoholism are considered as handicaps within the meaning of the Charter and an employer may not discriminate on the basis of a handicap in deciding to dismiss an employee [2]. The employer must therefore prove that it has taken the necessary measures to accommodate the employee, to the extent that doing so does not cause it undue hardship [3]. It should be noted that a relapse may be regarded as a foreseeable consequence of an alcoholic employee's rehabilitation [4].

For example, in *Commission scolaire English-Montréal* [5], the complainant, who was an alcoholic, was dismissed for having contravened his last chance agreement by coming to work inebriated. The arbitrator replaced the dismissal with a suspension of four (4) months without pay. The arbitrator stated that absence from work was justifiable where the employee makes efforts to control his addiction but has difficulties in that regard, provided that his absence does not cause the employer undue hardship [6].

1 *Parry Sound (District), Social Services Administration Board v. O.P. S. E. U. Local 324*, [2003] 2 S.C.R. 157.

2 *Union des employés et employées de service, section locale 800 (FTQ) and Commission scolaire English-Montréal*, D.T.E. 2005T-310 (T.A.).

3 *Supra*, note 2, p. 87.

4 *Ibid.*, p. 91.

5 *Supra*, note 3.

6 *Supra*, note 3, para. 30.

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In another recent decision, the *Goodyear Canada* case[7], the employer dismissed the employee for persistent lateness. Informed of the employee's drinking and drug addiction problems, the employer agreed to sign a last chance agreement stipulating that the employee promised to comply with the company's attendance policies, failing which he would be automatically dismissed. Following his return to work after a detoxification cure paid for by the employer, the employee was dismissed for failing to use his clock card on a regular basis, thus breaching his undertaking in the last chance agreement. The arbitrator held that the employer could not ignore the complainant's drug addiction problems and apply the consequence for breach stipulated in the agreement without a more considered examination. The employer was obliged to assist the complainant by providing supervision and support so that he could comply with his undertakings to the best of his abilities. Unless doing so would cause the employer undue hardship, it must always accommodate the complainant. By failing to investigate in order to determine if the complainant's breaches were related to his drug addiction problems and by automatically applying the sanction stipulated in the agreement, the employer had breached its duty to accommodate. The arbitrator therefore allowed the grievance.

In the *Premier Horticulture* case[8] the complainant suffered from panic attacks. After several absences leading to the first dismissal of the employee, the parties entered into a last chance agreement stipulating that the complainant was required to justify any absence with appropriate written medical evidence and that any breach of that condition would lead to dismissal. The complainant was subsequently absent due to a panic attack, and was late in providing medical evidence, which, in any event, did not justify his absence on that particular day. The result was that the employer terminated his employment. The arbitrator allowed the grievance and held that, given that the absence was handicap-related, the employer had a duty to provide accommodation measures provided that they were feasible and did not constitute undue hardship for the employer. He also stated that the employer had to prove that it had complied with its obligations in that regard[9]. Lastly, it should be noted the arbitrator made the interesting comment that a last chance agreement can, in itself, constitute a reasonable accommodation measure within the meaning of the *Charter*.

While a last chance agreement does not exempt an employer from its obligation to accommodate an employee suffering from a handicap within the meaning of the *Charter*, the employee must, however, participate in his employer's accommodation efforts and take the necessary measures to remedy his problem. Thus, dismissal could be upheld if the employer proves that the employee resisted the accommodation or would not participate in it.

In the *Québec (Ministère du Revenu)* case[10], the arbitrator upheld the dismissal given that, before resorting to that step, the employer had, on many occasions, tried to accommodate the employee who was struggling with a drinking problem. The last chance agreement did not stipulate that the complainant would be dismissed upon his first unauthorized absence, and the employer gave him several chances after his initial reinstatement. Nevertheless, the employee continued to have repeated alcohol-related absences, thereby proving that he was not seriously committed to his rehabilitation, lacked motivation and was not making the necessary effort[11].

In short, an employer cannot simply apply the sanction stipulated in a last chance agreement without first considering whether it has fulfilled its obligation to accommodate the employee suffering from a handicap within the meaning of the Charter. However, dismissal could be justified where the employee has been provided with all possible accommodation measures or accommodation of the employee would constitute undue hardship for the employer.

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7 *Syndicat canadien des communications, de l'énergie et du papier, section locale 143 and Goodyear Canada inc.*, D.T.E. 2007T-585 (T.A.).

8 *Fraternité nationale des forestiers et travailleurs d'usines (section locale 299) v. Premier Horticulture ltée and Steve Thibault*, D.T.E. 2007T 411 (T.A.).

9 *Ibid., para. 67.*

10 *Syndicat de la fonction publique du Québec et Québec (Ministère du Revenu)*, D.T.E. 2007T-72 (T.A.). To the same effect, see *Syndicat canadien des communications, de l'énergie et du papier, section locale 576-Q (SCEP-CTC) and Canlyte, compagnie de Genlyte Thomas Group*, D.T.E. 2007T-193 (T.A.).

11 *Ibid.*, para. 56.

## The grievance arbitrator's power to decide if the employee has breached the conditions of the last chance agreement

Lastly, it should be emphasized that, before applying such an agreement, the grievance arbitrator always retains the power to interpret its terms in order to determine whether the employee has breached the obligations stipulated in the agreement. Case law is to the effect that adjudicators must interpret such an agreement narrowly, because of the serious consequences of non-performance thereof and because it amounts to a modification of the collective agreement. Therefore, in drafting such an agreement, the employer must ensure that its terms and conditions are detailed and clear, so that any contravention thereof is readily identifiable, minimizing the room for interpretation.

In the *Emballages Mitchel-Lincoln* case[12], a last chance agreement prohibited the employee from working under the influence of drugs or being absent for reasons related to drug use. Moreover, the agreement stipulated that the employer could require that the employee undergo a screening test where it had reasonable grounds to believe that the employee was working under the influence of such substances. A complaint alleging that the complainant was selling drugs in the workplace compelled the employer to insist that the employee undergo a drug-screening test. As the results proved the presence of illegal substances, the employer dismissed the employee. A grievance was filed. The arbitration panel was of the view that as the agreement modified the collective agreement in relation to the complainant, it must therefore be narrowly interpreted. Although management thought that the agreement meant that the complainant *could* never be under the influence of a drug, the agreement could not be interpreted as being [translation:] "broader in scope than the reasons for which it was entered into nor can it be have consequences not stipulated by the parties"[13]. The agreement did not stipulate that the employer could require that the employee undergo screening tests where it had reasonable ground to believe that he was *selling* drugs at work, but only where it had grounds to believe that he was *working* under their influence. That was the sole reason for which the parties stipulated that clause and the agreement did not constitute a "broad waiver by the complainant of his fundamental rights under the *Charter*"[14]. The arbitrator held that the evidence did not prove that the complainant had worked under the influence of drugs and, therefore, held that the employer's insistence that the employee undergo screening was illegal. The grievance was allowed and the dismissal quashed.

## Conclusion

The case law and doctrine on last chance agreements provide us with certain guidelines. Firstly, they cannot be applied automatically to employees suffering from a handicap as that term is defined by the courts. The employer must always make reasonable efforts to accommodate the employee before applying the last chance agreement and imposing the stipulated consequences for non-compliance on the employee. Moreover, such agreements must be drafted in clear and detailed terms so that a contravention thereof is readily identifiable. In short, while last chance agreements are a valuable tool for settling disputes, enforcing compliance with such agreements may be difficult.

[12] *Emballages Mitchel-Lincoln ltée, division Drummondville and Syndicat des salaries d'Emballages Mitchel-Lincoln ltée, division Drummondville*, D.T.E. 2005T-933 (T.A.).

[13] *Ibid.*, para. 12.

[14] *Ibid.*, paras 23, 24 and 34.

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