



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

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**BETWEEN:**

**John Fleming**

**Applicant**

**-and-**

**The Corporation of the City of North Bay**

**Respondent**

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## DECISION

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**Adjudicator:** Ken Bhattacharjee  
**Date:** February 17, 2010  
**File Number:** 2008-00278-I  
**Citation:** 2010 HRTO 355  
**Indexed as:** **Fleming v. North Bay (City)**

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## INTRODUCTION

[1] The applicant, who was a fire fighter with the respondent municipality, filed an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”), on August 27, 2008, which alleged that the respondent discriminated against him with respect to employment because of his disability.

[2] Specifically, the applicant alleged that the respondent suspended him and then terminated his employment because of off-duty criminal misconduct that was related to his addiction to alcohol. He further alleged that the respondent failed to accommodate his needs related to his disability. He stated that prior to the termination taking effect he requested a leave of absence to receive treatment and counselling with respect to his addiction, but the respondent denied his request.

[3] The respondent filed a Response to the Application on October 9, 2008, which denied the allegations of discrimination. The respondent admitted that it suspended the applicant and then terminated his employment because of his off-duty criminal misconduct, but denied that it had any knowledge that the applicant was addicted to alcohol or that there was a nexus between the alleged disability and the misconduct.

[4] The respondent further stated that it was unable to accommodate the applicant in his employment because of his criminal record. Specifically, the applicant’s criminal misconduct caused reputational harm to the respondent, his inability to report to work for a lengthy period of time because of the criminal proceedings caused operational and financial hardship to the respondent, and there was a court order that prohibited him from having contact with a certain member of the public for any reason, which created a public safety risk if he was fighting a fire.

## BACKGROUND

[5] The North Bay Fire Department, which is part of the respondent municipality, employed the applicant as a full-time fire fighter from 1994 to 2007.

[6] The North Bay Professional Fire Fighters Association (the “union”) filed a grievance on the applicant’s behalf that raised the same issues as in this Application. The union withdrew the grievance after it received a legal opinion that the grievance was unlikely to succeed at arbitration and settlement discussions were unsuccessful. The applicant then filed his Application with this Tribunal.

[7] The hearing of the merits of the Application took place on June 1, 2 and 3, 2009. I heard the evidence of five witnesses: (1) the applicant, (2) Kathy-Lynne Jeanneault, a friend of the applicant, (3) Edward McCullough, the former Fire Chief of the North Bay Fire Department, (4) Dr. Philip Klassen, a psychiatrist; and (5) David Linkie, the Chief Administrative Officer of the respondent municipality.

## **PRELIMINARY ISSUES**

### **Record of Offences**

[8] In section 5 of his Application (“Grounds of Discrimination”), the applicant did not check off “record of offences” as a ground of discrimination, but in section 8 (“What Happened”) and Form 1-A (“Area of Discrimination”) he alleged that the respondent had harassed and discriminated against him because of his criminal record. However, he also indicated that he had not received a pardon with respect to his criminal convictions, which were for federal offences. At the beginning of the hearing, the applicant stated that he was not pursuing these allegations.

[9] I accepted the applicant’s withdrawal of these allegations. In any case, I would have dismissed them because they are not within the Tribunal’s jurisdiction. Specifically, “record of offences” is defined in subsection 10(1) of the *Code* as a conviction for an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or an offence in respect of any provincial enactment, but the applicant admitted that his criminal convictions were for federal offences for which he had not received a pardon.

## Expert Witness

[10] Rules 16 and 17 of the Tribunal's Rules of Procedure require the parties to deliver to each other and file with the Tribunal copies of all the documents that they intend to rely upon at the hearing, as well as a witness list with a brief statement summarizing the expected evidence of each witness. In the case at hand, the deadline for delivery and filing was April 17, 2009.

[11] As part of his disclosure of documents, the applicant included a report from his doctor that stated that there is a direct relationship between his addiction to alcohol and his criminal misconduct. However, he did not include his doctor on his witness list. The respondent, on the other hand, disclosed a witness list that included Dr. Klassen. The respondent's witness statement identified him as an expert witness who would testify, among other things, that there is no nexus between the applicant's alleged addiction to alcohol and his criminal misconduct.

[12] During his opening statement, the applicant requested, for the first time, that the Tribunal allow him to call his doctor as an expert witness to testify by teleconference about the nexus between his addiction to alcohol and his criminal misconduct. He stated that if his doctor's report was going to be challenged by the respondent, his doctor had a right to respond. He also stated that he had not included the doctor on his witness list because he could not afford to pay him to attend the hearing in person. The applicant did not provide any explanation as to why he waited until the hearing had already started to request that his doctor be allowed to testify by teleconference. He also admitted that he had not confirmed with his doctor whether he would be available to testify by teleconference.

[13] The respondent opposed the applicant's request on the basis that it would suffer substantial prejudice if the applicant was allowed to call an expert witness with little advance notice. The respondent's counsel submitted that the applicant's request failed to comply with the Tribunal's Rule on disclosure of witnesses, and that he had no excuse for making such a late request because he had known since April 17, 2009 that

the respondent would be calling Dr. Klassen as an expert witness to challenge his allegations.

[14] Rule 5.7 of the Tribunal's Rules provides that where a party seeks to present evidence or make submissions with respect to a fact or issue that was not raised in accordance with the Tribunal's Rules on disclosure of documents and witnesses, the Tribunal may refuse to allow the party to present evidence or make submissions about the fact or issue unless satisfied that there would be no substantial prejudice and no undue delay to the proceedings.

[15] I am mindful of the fact that the applicant is unrepresented and recognize the importance of expert witnesses in cases, such as this one, which involve the issue of an alleged addiction and its nexus to criminal misconduct. However, I denied the applicant's request because he did not comply with the Tribunal's Rules, he failed to provide a credible explanation why he had not made his request earlier, and when he made his request he had not even confirmed with his doctor that he would be available to testify by teleconference. In all the circumstances, the applicant did not satisfy me that there would be no substantial prejudice to the respondent and no undue delay to the proceeding if I granted his request.

## **EVIDENCE**

### **Education and Work Background**

[16] The applicant was born on November 11, 1963. He received a diploma in Fire Protection Engineering Technology from Seneca College in 1989. He started working as a fire fighter with the Scarborough Fire Department in 1991. In July 1994, he left the Scarborough Fire Department and started working as a fire fighter with the North Bay Fire Department.

### **1992 Criminal Conviction**

[17] In 1992, the applicant was convicted of assault causing bodily harm and sentenced to 30 days intermittent detention and nine months probation. Neither party provided any details about the facts leading to this conviction, but the applicant testified that it did not affect his employment with the Scarborough Fire Department.

### **1995 Criminal Conviction**

[18] In 1995, the applicant was convicted of driving under the influence of alcohol, fined \$600, and prohibited from driving for three months. The applicant's conviction was reported in the local media. Neither party provided any details about the facts leading to this conviction, but the prohibition on driving affected the applicant's employment because he was unable to drive a fire truck. Specifically, as part of his duties on a fire crew, the applicant was required to drive a fire truck  $\frac{1}{4}$  of the time. The North Bay Fire Department dealt with the situation by assigning another member of his crew to drive the truck when it was the applicant's turn.

### **2004 Criminal Convictions**

[19] On March 19, 2004 the applicant was charged with criminal harassment for watching the house of his ex-wife, and on March 21, he was charged with failing to comply with the conditions of his recognizance of bail, which prohibited him from communicating with his wife and children. On March 30, he was convicted and sentenced to 15 days intermittent detention and 18 months probation.

[20] As part of his probation, the applicant was required, among other things, to abstain from the consumption of alcoholic beverages, attend counselling as recommended by his probation officer, and not associate with his ex-wife except through counsel or a valid family court order to access his children.

[21] On April 5, 2004, the applicant met with the Fire Chief, Edward McCullough, to

discuss his convictions and probation order. Chief McCullough placed restrictions on his activities at work, reprimanded him for calling in sick when, in fact, he was in jail, and required him to validate all claims for sick leave with a doctor's note for the next six months. However, he also allowed the applicant to have a paid leave of absence and use lieu days and banked time to cover the days that he was off work because of the criminal proceedings.

[22] On May 17, 2004, the applicant was charged again with criminal harassment for watching the house of his ex-wife, and failing to comply with the conditions of his probation order. On May 19, the arrest and detention of the applicant and the charges that he faced were reported in the local media.

[23] On May 31, 2004, the applicant and his union representative met with Chief McCullough to discuss the newest charges. Chief McCullough reprimanded the applicant for calling in sick again when, in fact, he was in jail. He also gave the applicant the following written warning:

The original incident of March 20<sup>th</sup>, 2004 and this recent incident of May 17<sup>th</sup>, 2004 have been documented. *A further incident will be considered the final event and a recommendation to terminate your employment with the North Bay Fire Department will be made.* You acknowledged this at today's meeting and assured us there would not be a further incident. [Emphasis added.]

[24] On June 23, 2004 the applicant was convicted of the charges and sentenced to 70 days intermittent detention and 18 months probation. The probation order was somewhat different than the previous probation order. First, there was no requirement that he abstain from the consumption of alcohol. Second, he was required to participate in an assessment of, and counselling for, his obsessive behaviour connected to the criminal harassment. And third, he was prohibited from being in designated geographic areas of the city, where his ex-wife's home and place of employment were located.

[25] On July 20, 2004, the applicant met again with Chief McCullough to discuss his convictions and probation order. Chief McCullough placed further restrictions on his

activities at work, required him to validate all claims for sick leave with a doctor's note until the end of the calendar year, and warned him again in writing that any further incidents may lead to the termination of his employment. He also informed him that his supervisors at the fire station had been notified that he was prohibited from entering designated geographic areas of the city, except in an emergency.

[26] The applicant provided very few details of the facts leading to these convictions in either his testimony before me or the documents that he tendered as evidence. He testified that the convictions had to do with the breakdown of his family, restrictions on access to his children, and the fact that he went to the home of his ex-wife when he was intoxicated. He did not specify if all the incidents took place at the home of his ex-wife or if he was intoxicated during some or all of the incidents.

[27] Following one of the incidents, the applicant was arrested by the Ontario Provincial Police at the Ontario Fire College in Gravenhurst, where he was taking a course with members of other fire departments from across Ontario. The applicant admitted that the arrest was embarrassing for both himself and the North Bay Fire Department.

### **Ban from Municipal Arenas**

[28] On March 1, 2006, the Manager of Arenas and Facilities of the City of North Bay sent the applicant and the City Solicitor a letter, which stated that on February 1 the applicant had thrown his stick over the glass during a hockey game and narrowly missed hitting a staff person in the head. The letter also stated that he had refused to acknowledge the severity of the situation, and did not apologize to the staff person despite being asked to do so by his colleagues. The letter banned the applicant from all municipal arenas until April 21, except for fire fighting duties, and, because he was a City employee, was placed in his personnel file.

[29] The applicant testified before me that the letter was not accurate. He stated that he lost control of his stick and it went over the glass accidentally, and he apologized to

the Manager. In cross-examination, however, the applicant admitted that he did not appeal the ban. The applicant did not assert that he was drinking alcohol or was intoxicated during this incident.

### **2007 Criminal Convictions and Termination of Employment**

[30] On April 3, 2007, the applicant was arrested while on duty at his fire station, charged with criminal harassment and assault in relation to his ex-girlfriend, and detained. On April 5, the respondent suspended the applicant from duty pending the outcome of the criminal proceedings.

[31] The applicant testified that he started attending Alcoholics Anonymous (“AA”) meetings while he was in jail. He admitted that he did not inform the respondent of this, but assumed that his union had done so. Chief McCullough denied that the union informed the respondent that the applicant was attending AA meetings. I have reviewed the grievances that the applicant’s union filed on his behalf in May and June 2007, and noted that there is no mention of his attendance at AA meetings.

[32] On June 6, 2007, the applicant pled guilty to the charges and was released on bail while awaiting sentencing. His bail conditions required him to live in Sudbury, stay away from North Bay except for legal proceedings, abstain from consuming alcoholic beverages, and abstain from communicating with his ex-girlfriend and three other women, except through counsel.

[33] On June 8, 2007, David Linkie, the respondent’s Chief Administrative Officer, sent the applicant a termination of employment letter. The letter summarized the applicant’s criminal record and his ban from municipal arenas, and then provided the following reasons for the termination and its effective date:

The City of North Bay has a legal and moral obligation to protect the health and safety of its employees and the public we serve. Your propensity for violence as demonstrated by your record leaves us with grave concerns about your suitability as a Firefighter with the North Bay

Fire Service. Your actions are a matter of public record and are an embarrassment to the City. We have no confidence that other employees and members of the public will not be at risk if you are allowed to continue in your position.

You have not been available for duty since being removed from your shift on April 3, 2007, and continue not to be available. Your absences cause operational and financial hardship for the Fire Service.

You have previously been accommodated as a result of incarceration in 2004 but clearly you have not learned your lesson and I see no indication that we can expect improvements in the future.

For all the above reasons and your entire work record, you are hereby terminated from your employment with the City of North Bay effective Tuesday, June 19, 2007.

[34] Between June 12 and 21, 2007, the applicant attended several sessions at an addictions counselling and treatment agency. The agency completed an entry level assessment of the applicant, which found that his recognition level was low. Specifically, he denied that alcohol was causing serious problems, he rejected diagnostic labels such as “problem drinker”, and he did not express a desire for change. The applicant did not assert before me that he informed the respondent that he was attending counselling sessions and undergoing an assessment.

[35] On June 13, 2007, the applicant’s union sent Mr. Linkie a letter, which requested a hearing before City Council pursuant to Article 19 of the Collective Agreement:

#### **ARTICLE 19 DISCHARGE CLAUSE**

19:01 An employee shall not be discharged without being given at least seven (7) days notice in writing of the proposed discharge and the reasons therefore and may, before the expiry of the notice, require a hearing by delivering a notice in writing to that effect to the Chief Administrative Officer of the Municipality. The provisions of this Clause shall not apply to a Probationary Employee.

19.02 Where a notice requiring a hearing is delivered under Subsection 19.01, the Council or a Committee thereof shall hold a hearing, and the Employee may be represented at the hearing by Counsel.

19.03 Where an Employee requires a hearing under Subsection 19.02, the discharge shall not take effect before the hearing is disposed of.

[36] The letter also requested that the hearing be held in two to three weeks because of the applicant's "unique circumstances and the fact that he is in the process of obtaining medical evidence directly relevant to the hearing." There was no reference in the letter to the applicant having a drinking problem or an addiction to alcohol, or attending counselling and undergoing an assessment. Mr. Linkie scheduled the hearing for June 25, 2007.

[37] The applicant attended the City Council hearing with his union representative. Mr. Linkie was also present to answer questions from Council members. The applicant did not speak at the hearing. Instead, his union representative made submissions on his behalf, which stated that he was addicted to alcohol. Mr. Linkie testified before me that this was the first time that the respondent heard of the applicant's alleged addiction to alcohol. In cross-examination, the applicant admitted that he had no evidence that the respondent knew of his alleged addiction before that time.

[38] At the City Council hearing, the applicant's union representative also submitted that the applicant's criminal misconduct could be partly explained by his addiction, his addiction was a disability under the *Code*, and the respondent had a duty to accommodate the applicant's needs up to the point of undue hardship. The submissions also requested that the respondent allow the applicant to take a leave of absence without pay to participate in addiction counselling and treatment, and that he be allowed return to work when he provided expert evidence that his addiction was under control.

[39] Mr. Linkie testified before me that the union representative did not assert that the applicant was intoxicated when the criminal acts occurred, and did not make any attempt to explain how the applicant's criminal acts were related to his alleged alcoholism. Mr. Linkie also stated that he informed the Council members that the respondent had no evidence that the applicant's work performance was affected by alcohol abuse.

[40] The applicant testified that he did not submit any medical or other supporting evidence to the City Council because he was unable to find a doctor, who specialized in addictions, between the time he was released from prison and the time of the hearing. In cross-examination, he admitted that he was never intoxicated at work, but stated he sometimes came in hung over or called in sick because he was hung over. However, he also admitted that he never told his supervisors that he was hung over, and was never counselled or disciplined for being hung over or calling in sick because he was hung over.

[41] I have reviewed a written version of the union's submissions and noted that there is no assertion that the applicant was drinking or intoxicated when any of the criminal acts occurred. Furthermore, aside from a brief reference to "associated aggressive behaviour" resulting from his addiction, there is no explanation of the nexus between the criminal acts and the applicant's alleged addiction to alcohol. Finally, the submissions explicitly state that the applicant was never under the influence of alcohol at work and never acted inappropriately at work.

[42] The applicant did not assert before me that he was drinking alcohol or intoxicated when the 2007 criminal acts occurred.

[43] The City Council confirmed the termination of the applicant's employment.

### **Post-Termination of Employment Events**

[44] On June 27, 2007, two days after the City Council decision, the applicant's union representative sent him a letter on how to best position himself for arbitration. The letter recommended that he follow a number of steps, including the following:

Admit to your addiction to alcohol, and take responsibility for it. I note in the information from [the addictions counselling and treatment agency] that you scored low on recognizing the fact that alcohol is causing you serious problems, and that you are an alcoholic. If this was the evidence before an arbitrator, an arbitrator would not be inclined to reinstate you.

[45] The applicant testified that since the termination of his employment he has taken a number of steps to diagnose and treat his addiction to alcohol, including attending AA meetings two to three times per week, undergoing assessments by medical practitioners, and attending and completing inpatient and outpatient programs.

[46] On July 25, 2007, the applicant underwent an assessment by a certified psychologist and a physician at another addictions treatment centre. Following the assessment, the psychologist wrote a Psychological Assessment Report and the physician wrote a Safety Sensitive Examination Report. The reports indicated that the applicant self-identified as an alcoholic, had a history of alcoholism in his family, and engaged in binge drinking on weekends and days off. The physician's report also diagnosed the applicant as having the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") criteria for "alcohol dependency".

[47] On September 18, 2007, the addictions counselling and treatment agency where the applicant began participating in an outpatient program on June 12 provided him with a report, which stated, in part:

Upon entering the outpatient program, Mr. Fleming was assessed pertaining to recognition, ambivalence and taking steps directly pertaining to the disease of addiction, scoring low in recognition. Mr. Fleming was re-assessed and now shows increases in recognition scoring moderate to high levels.

[48] On October 11, 2007, the Ontario Court of Justice sentenced the applicant to nine months detention and 18 months probation. Although the Court stated that the applicant was either unwilling or unable to control his behaviour, and it took into account that he had engaged in some productive work with respect to his rehabilitation through counselling, it did not attribute any of his criminal misconduct to an addiction to alcohol. The Court found:

The accused has a high degree of responsibility for his conduct, having been down this road before and his culpability is significant.

[49] The Court's probation order required the applicant to attend and participate in counselling and rehabilitative programs as directed by his probation officer, not to communicate with his ex-girlfriend, her children and three other women because of his "compulsive behaviour", to remain away from his ex-girlfriend's place of work or education, and to retreat if he inadvertently found himself in the presence of his ex-girlfriend, even if he had a legitimate reason to be in that location.

[50] The Court gave the applicant a two-for-one credit for his two months of pre-trial incarceration, and ordered that he serve an additional five months in prison. He served his sentence and was released in February 2008.

[51] In March 2008, the applicant successfully completed a 20-day inpatient Chemical Dependency Program at an addiction treatment and rehabilitation facility to treat his addiction to alcohol, and in December 2008, he successfully completed a 12-day inpatient Family Program at the same facility to treat co-dependency behaviour related to his addiction to alcohol. In early 2009, the applicant enrolled in an outpatient program at a substance abuse treatment agency to continue treating his addiction to alcohol.

[52] The medical director of the addictions treatment and rehabilitation facility wrote a report dated March 29, 2009, which stated that the applicant had participated in regular urine drug screens from August 2008 to the present, and tested negative for all substances of abuse or addiction. The report also made the following findings:

*In my opinion, John Fleming's charges and convictions for criminal harassment and assault are directly related to his addiction to alcohol. Clearly at the time of both charges he was an alcoholic. He now realizes this. Once he realized that his primary problem was that of alcoholism, he voluntarily sought treatment and followed through with that treatment for the past 2 years.*

With regards to his progress in treatment, he has followed all of the recommended program suggestions... and clearly is in complete remission vis a vis his alcoholism. His prognosis is excellent as long as he continues with his program as he has for the last 2 years. [Emphasis added]

### **Applicant's Friend's Evidence**

[53] Kathy-Lynne Jeanneault, who is the applicant's friend, testified that she had known the applicant since November 2006, and observed that alcohol was a problem in his life. Specifically, his drinking affected his ability to cope with life, his personal life, and his relationships. In cross-examination, however, she admitted that she did not have any training in recognizing alcoholism. She stated that she is able to recognize alcoholism because she experienced it in her family when she was growing up.

### **Expert Witness Evidence**

[54] The respondent called Dr. Philip Klassen as an expert witness to testify about alcohol addiction, the impact of addiction to alcohol on the applicant's ability to control his behaviour, and the lack of nexus between the applicant's criminal behaviour and his addiction to alcohol, as well as to address any contrary opinions provided by the applicant's medical experts.

[55] Dr. Klassen testified that he qualified as a medical doctor in 1987 and as a forensic psychiatrist in 1992, and is currently the Deputy Clinical Director of the Law and Mental Health Program and the chief of forensic medical staff at the Centre for Mental Health and Addiction in Toronto. He stated that he is qualified to testify at the hearing on forensic psychiatry (psychiatry that deals with legal issues related to mental health) and substance abuse treatment.

[56] The respondent's counsel requested that the Tribunal certify Dr. Klassen as an expert on addiction, mental health, and matters related to criminal psychiatry. The applicant did not object to request. I granted the request based on Dr. Klassen's qualifications, the relevance of his proposed opinion evidence, the necessity of his evidence in assisting me to make findings of fact, and the absence of any reason to exclude his evidence.

[57] Dr. Klassen testified that in preparation for the hearing he reviewed the parties'

pleadings, the applicant's disclosure of documents, including medical/treatment reports, and correspondence between the applicant and his union, notes from counselling sessions that the applicant attended from 1997 to 2005, a Pre-Sentence Report by a probation and parole officer dated September 30, 2007, and the Ontario Court of Justice's Reason for Sentence dated October 11, 2007.

[58] In cross-examination, however, Dr. Klassen admitted that he had never met the applicant prior to the hearing. He also admitted that without seeing a full medical assessment of the applicant's alcohol problems, he was unable to provide definitive opinions about the applicant's diagnosis and the lack of nexus between his criminal acts and his addiction.

[59] Dr. Klassen testified that addiction to alcohol falls into one of two subsets: alcohol abuse disorder, which is most common, and alcohol dependence disorder, which is rare. The DSM criteria for alcohol abuse disorder are recurrent alcohol use leading to significant dysfunction in one or more of the following domains: (1) work, school or home, (2) social or interpersonal relationships, (3) physical health or safety, or (4) legal issues. The DSM criteria for alcohol dependence disorder, on the other hand, involve recurrent alcohol use leading to a significantly higher level of dysfunction, which normally includes lifestyle compromises, a loss of control over alcohol use, and physical and psychological dependence on alcohol.

[60] Dr. Klassen testified that he disagreed with the applicant's physician, who diagnosed him as meeting the DSM criteria for alcohol dependence disorder because none of the applicant's medical records set out exactly how the applicant met the DSM criteria for alcohol dependence disorder, the fact that the applicant was a binge drinker on weekends and days off was inconsistent with the DSM criteria for alcohol dependence disorder, and there was no evidence of physical or psychological dependence on alcohol in the medical reports.

[61] In Dr. Klassen's opinion, the applicant probably met the DSM criteria for alcohol abuse disorder, but not alcohol dependence disorder.

[62] Dr. Klassen also testified that he disagreed with the applicant's physician, who opined that the applicant's charges and convictions for criminal harassment and assault were directly related to his addiction to alcohol. First, the applicant's addiction could not have driven his criminal acts unless he was intoxicated when he committed them, but there is no evidence of intoxication. Most significantly, there is no reference to alcohol consumption or addiction to alcohol, or mitigation of sentence because of such, in the criminal court's Reason for Sentence in October 2007. Second, the notes from the counselling sessions that the applicant attended indicate that his personality and values with respect to male/female relationships, rather than alcohol consumption, drove his criminal behaviour in 2004.

[63] Dr. Klassen also testified the applicant's physician's report did not document the connection between the applicant's criminal behaviour and his addiction:

It is not enough to say that if a person has a drinking problem, it is related to criminal behaviour. You have to go step-by-step, and say how much it related to Act A or Act B. I don't agree that if a person has an addiction, particularly in this case where there is significant evidence of value problems with respect to male/female relations, that you can make a blanket statement that it caused the criminal behaviour.

[64] In Dr. Klassen's opinion, the applicant's criminal behaviour was most likely related to his personality and values, rather than an addiction to alcohol.

### **Accommodation and Undue Hardship**

[65] The applicant testified that the respondent failed to accommodate his needs related to his disability by refusing to allow him to take an unpaid leave of absence to receive treatment and counselling with respect to his addiction to alcohol. He stated that the respondent would not have suffered undue hardship by accommodating him because his unpaid leave would have saved, rather than cost, the respondent money.

[66] Chief McCullough testified that the respondent was unable to accommodate the applicant because his incarceration and bail and probation conditions prevented him

from returning to work for more than two years. He stated that if the respondent had retained the applicant as an employee during his absence, it would have been required to either assign other full-time fire fighters to his shifts at overtime pay, or leave his shifts unfilled and reduce the level of service to the public. He stated that neither practice is sustainable for such a lengthy period of time.

## ANALYSIS AND DECISION

[67] The Application relates to sections 5, 9 and 17 of the *Code*, which provide:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of... disability.

(...)

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

(...)

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[68] In a case such as this one that involves addiction to alcohol, discipline and termination of employment, the main issues that I am required to determine are whether the applicant has established that the respondent suspended him and then terminated his employment because of misconduct that was causally related to his addiction to alcohol, and if so, whether the respondent has established that it accommodated the applicant's needs related to his addiction up to the point of undue hardship: see *British Columbia (Public Service Agency) v. British Columbia Government and Service*

*Employees Union*, 2008 BCCA 357 (CanLII); *Ryan v. Canada Safeway and Ramponi (No. 2)*, 2008 BCHRT 12 (CanLII); *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, 2006 BCCA 57 (CanLII); *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58 (CanLII).

[69] The applicant has the onus of proving on a balance of probabilities that a violation of the *Code* has occurred. A balance of probabilities means that it is more likely than not a violation has occurred. For the reasons that follow, I have decided that the applicant has not proven that the respondent suspended him and then terminated his employment because of his disability.

[70] The parties agree that the applicant had an addiction to alcohol, but there was a dispute as to whether he had alcohol abuse disorder or alcohol dependence disorder. The latter is more debilitating. I find that the applicant had alcohol abuse disorder. The burden is on the applicant to prove that he had the more debilitating disorder and he failed to do so.

[71] To prove that he had alcohol dependence disorder, the applicant submitted a physician's report that diagnosed him as having the DSM criteria for alcohol dependency disorder, and a discharge sheet that showed that he had successfully completed an inpatient chemical dependency program at an addiction treatment and rehabilitation facility. The difficulty that I have with the report and the discharge sheet is that neither specifically explains how the applicant's symptoms met the DSM criteria for alcohol dependency disorder.

[72] Furthermore, although the respondent's expert witness, Dr. Klassen, never examined, assessed or treated the applicant, I accept his expert opinion that the fact that the applicant was a binge drinker on weekends and days off is inconsistent with the DSM criteria for alcohol dependence, and that the applicant's symptoms appear to be more consistent with the DSM criteria for alcohol abuse disorder. I also agree with Dr. Klassen that there is a lack of evidence of physical or psychological dependence on alcohol in the medical reports that the applicant submitted to the Tribunal.

[73] The next issue to consider is whether the respondent suspended the applicant and terminated his employment because of his addiction to alcohol. In cases involving an addiction, misconduct, and discipline and/or termination of employment because of the misconduct, it is well-established that in order to make out a case of discrimination the employee must prove that there was a causal relationship between the misconduct and the addiction or disability. In *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital)*, *supra*, the British Columbia Court of Appeal stated at para. 41:

It is important not to assume that addiction is always a causal factor in an addicted employee's misconduct..... To find *prima facie* discrimination, there must be evidence that the employee's misconduct was "caused by symptoms related to" the disability....

[74] There was a dispute between the parties as to when the respondent knew or ought to have known that the applicant had an addiction or a possible addiction to alcohol, and when the termination of employment took effect. In my view, the timing is not important because I find that the applicant did not prove that there was a causal relationship between his addiction to alcohol and the misconduct for which he was suspended and ultimately fired.

[75] The respondent suspended the applicant and subsequently terminated his employment because of off-duty criminal misconduct, specifically, eight criminal convictions between 1992 and 2007, including several involving threats or acts of violence against women, and because of an incident at a municipal arena in 1996 when he allegedly threw his stick over the glass during a hockey game and narrowly missed hitting a staff person in the head.

[76] To prove that there was a nexus between his addiction to alcohol and his criminal misconduct, the applicant submitted a medical report that opined that his charges and convictions for criminal harassment and assault in 2007 were directly related to his addiction to alcohol. The difficulty that I have with the applicant's evidence is its lack of detail and vagueness.

[77] In his oral testimony, aside from a brief reference to being intoxicated when he went to the home of his ex-wife in 2004, the applicant provided very few details about the facts leading to his criminal convictions, including whether or how he was impaired by his addiction to alcohol when he committed the criminal acts.

[78] Furthermore, the applicant did not present any medical evidence addressing the causal relationship between his addiction to alcohol and his pre-2007 criminal acts, and the medical report that addresses the 2007 criminal acts makes a bald statement about the causal relationship, but does not specifically explain how his criminal misconduct was causally related to his addiction to alcohol.

[79] I also find it telling that in its Reason for Sentence in October 2007, the criminal court found that the applicant had a high degree of responsibility for his conduct, and did not attribute any of his criminal misconduct to an addiction to alcohol.

[80] Finally, I accept Dr. Klassen's expert opinion, based on his review of medical/treatment reports, notes from counselling sessions, the Pre-Sentence Report, and the criminal court's Reason for Sentence, that the applicant's criminal behaviour was most likely related to his personality and values, particularly his values about male/female relations, rather than an addiction to alcohol.

[81] In view of my finding that the applicant has not proven that the respondent suspended him and terminated his employment because of misconduct that was causally related to his addiction to alcohol, it is not necessary to decide whether the respondent has proven that it accommodated the applicant's needs related to his addiction to alcohol up to the point of undue hardship.

**ORDER**

[82] The Application is dismissed.

Dated at Toronto, this 17<sup>th</sup> day of February, 2010.

*“Signed By”*

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Ken Bhattacharjee  
Vice-chair