

Accommodating Addiction: Best Practices

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Agenda

- Introduction
- Brief review of addiction
- Human Rights considerations
 - Duty to Inquire
 - Medical evidence
 - Duty to Accommodate
- Questions





Addiction is complex

- Alcohol and substance use dependence (or addiction), is a disability
 - Substance and alcohol abuse is not
- One of the most complex disabilities because:
 - We're still trying to understand it
 - Often co-occurring mental health problems or trauma
 - Relapses are common
 - Lingered moral issues





Complex area – raises several issues

- Discrimination
 - *Human Rights Code*
- Workplace safety
 - *Workers Compensation Act* and *OH&S Regulations*
- Privacy
 - *PIPA* and *FOIPAA*
- Stigma





Balancing act of duties, rights, responsibilities

- Employer, union and employees' duty to ensure the health and safety of employees
 - Impaired workers can be a hazard
- Employer's right to receive work for wages and manage the workplace
 - Manage non-attendance
 - Employees have a duty to be fit for work and free from impairment
 - Disabled employees must be accommodated short of undue hardship





Balanced with employee's rights

- Employee's rights under the collective agreement
- Employee's right to privacy
- Employee's right to employment free from discrimination



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Human Rights considerations

- Alcohol and substance-dependent employees are protected from discrimination in employment
 - Applies to hiring, during the term of employment, and on termination
- Duties and responsibilities:
 - Duty to inquire
 - Duty to accommodate





Discrimination

- *Prima facie* test for discrimination
 - Employee is disabled
 - Experienced adverse treatment
 - Adverse treatment was due, in part, to the person's disability





Defence to discrimination

- *Bona fide occupational requirement*
 - Standard was adopted for a purpose connected to job performance and adopted in good faith
 - The standard is reasonably necessary to meet the purpose
 - Includes accommodation short of undue hardship





Duty to Inquire

- Employers have a duty to inquire prior to imposing disciplinary consequences when they knew or should have known that an employee's disability is a factor in their misconduct
- “Ostrich” approach not okay





Duty to Inquire (continued)

- Duty to Inquire may also apply to the Union in its representation of the member, both in relation to the *Human Rights Code* and s. 12 of the *Labour Relations Code*
 - *Rezai v. University of Northern British Columbia*, 2011 BCHRT 118
 - *Ryan v. Canada Safeway Ltd.*, 2007 BCHRT 428





Medical Information

- Employer can seek medical information from employee in variety of circumstances:
 - Justifying a medical absence (consider collective agreement provisions)
 - Return to work from medical leave
 - Accommodation requests while actively working
 - Seeking benefits
 - Workplace incident, particularly in safety sensitive jobs





Medical information - content

- Types of information depends on circumstances
- May ask for information that discharges the duty to accommodate
- Employees/union have an obligation to cooperate in the accommodation process, including providing necessary information
- How much information is necessary in practice will be fact and case-specific





Medical information - content

- For addictions, most often require expert medical information which should include:
 - Diagnosis;
 - Prognosis;
 - Restrictions/limitations;
 - Treatment recommendations; and
 - Return to work recommendations





Diagnosis is important

- Differentiates between substance/alcohol abuse and dependence
- Leads to different outcomes
 - Dependence = accommodation short of undue hardship
 - Abuse = progressive discipline





How is medical provided?

- Initial information usually provided by employee/ union. May initially be from the employee's GP, but more specialized information is preferred.
- Employers will take the position that they have a right to clear, credible, and current medical information; also, that it is important for physician to have expertise in addictions
 - Unregulated – anyone can call themselves an “addiction specialist”





Provision of medical information

- If the Employer has a reasonable concern with the medical information that has been provided by the employee, there are circumstances in which it can seek additional information
- It cannot simply disregard medical information provided and substitute its own opinion: *Horrocks v. Northern Regional Health Authority*, 2015 MHRBAD 3
- How are disputes in the medical information dealt with?





Duty to Accommodate

- Triggered by request for accommodation or
- Where duty to inquire identifies misconduct is related to disability
- Must be individualized
 - Not cookie cutter





Accommodation duties

- In the unionized context, accommodation has been described as a 'tri-partite' responsibility
- Employer's duty to offer reasonable accommodation (short of undue hardship)
 - Based on medical information
- Union's duty to accommodate – what happens where the proposed accommodation affects collective agreement rights
- Employee's duties
 - To accept reasonable accommodation
 - Participate in the accommodation process





Employee's accommodation duties in the context of addiction

- Arbitrators and Tribunals have held that an employee has a duty to take steps to facilitate a lasting recovery and to minimize risks in the workplace: *Kemess Mines* (2006, BCCA)
- However, this does not mean the employee cannot raise concerns about aspects of proposed accommodations: see *Horrocks*





Common accommodations

- Time off to complete treatment
 - No obligation for employer to pay; however, cost-sharing is an option
- Time off work to attend counselling
- Non-safety sensitive work
- Return to work agreements
 - Last chance agreements
 - Ulysses agreements





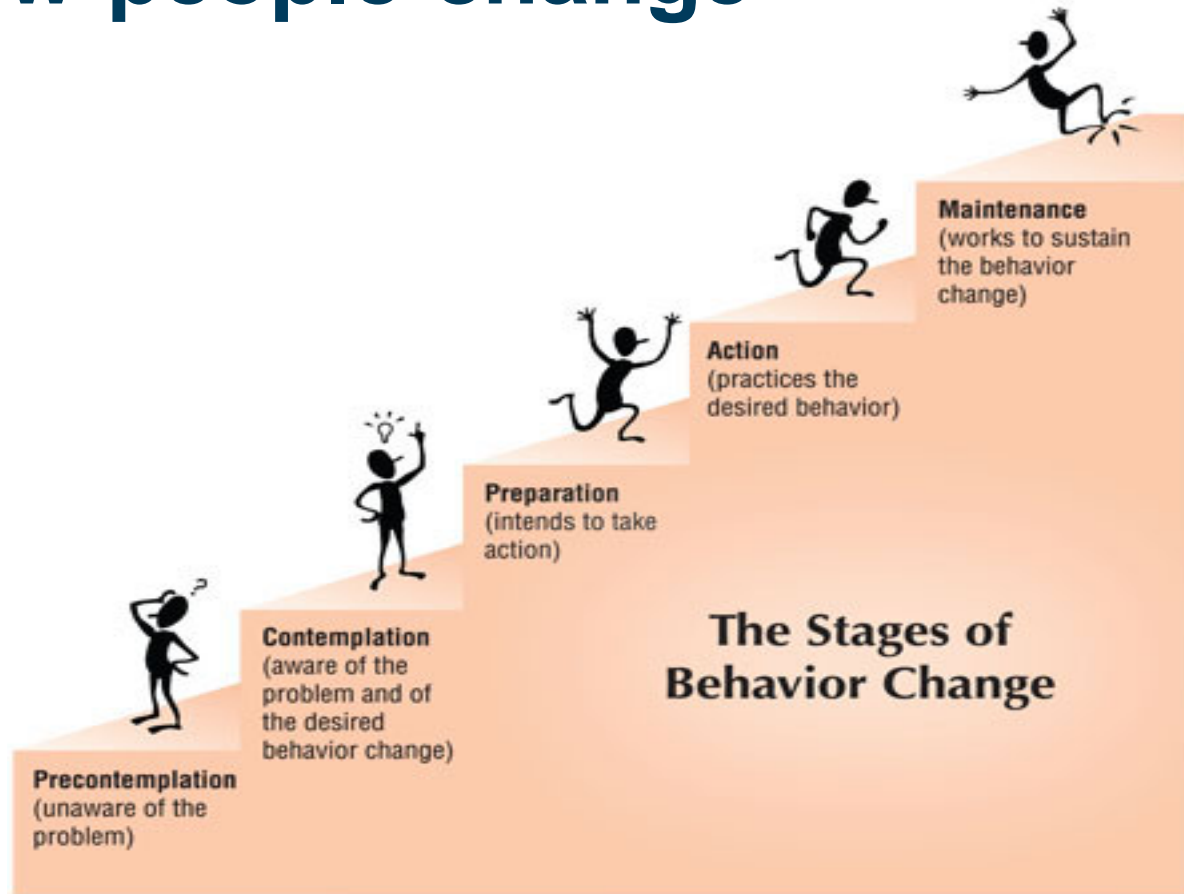
Relapses

- Relapses are expected and should be planned for and managed
 - Return to work agreements
 - Medical and/or other kinds of monitoring
 - Ulysses agreements





How people change



Sources: Grimley 1997 (75) and Prochaska 1992 (148)

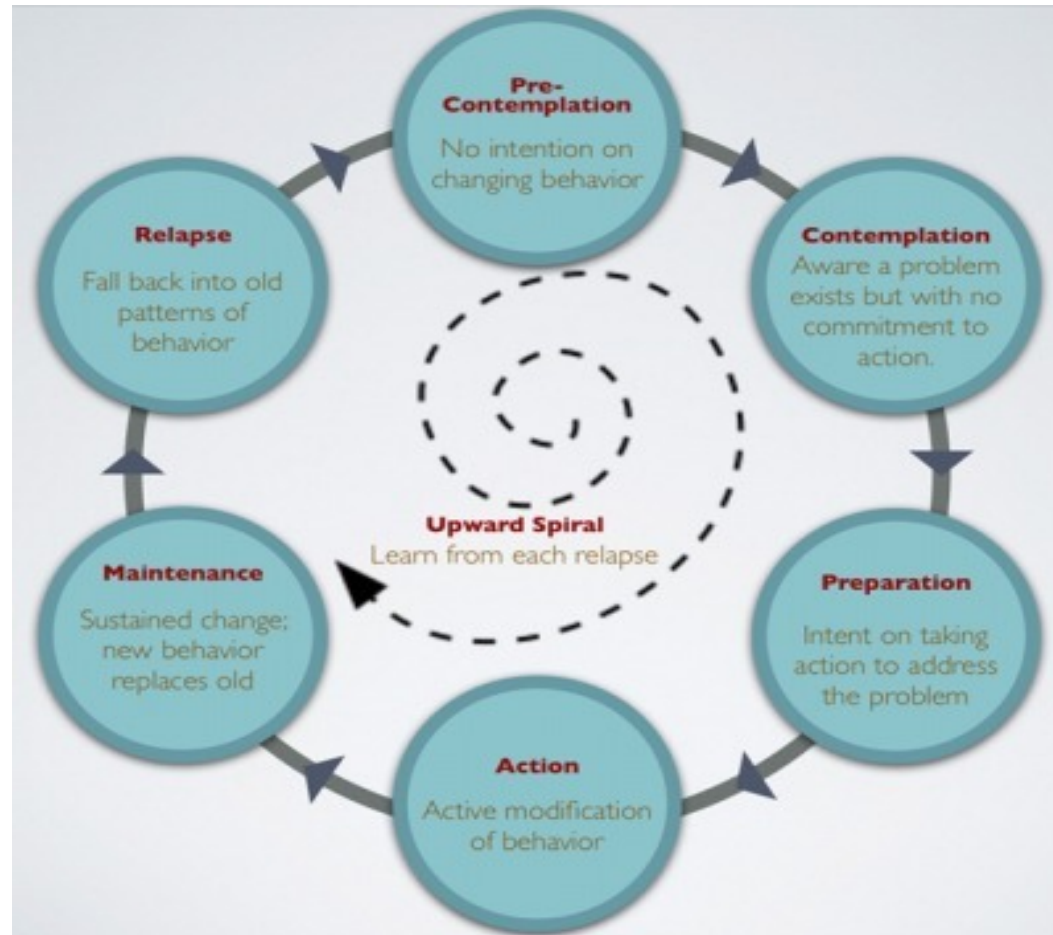


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How people really change





Return to work

- Your employee has completed treatment and is returning to work.
 - Drug testing permitted (return to work post-treatment)
 - Expert report with recommendations
 - Often medical monitoring 12 – 24 months
 - Return to work or accommodation agreement





Return to work agreements

- Return to work/Accommodation Agreements
 - Terms regarding treatment compliance
 - Based on expert's recommendations
 - Consequences for violations
- Last Chance Agreements
 - Used after several relapses
 - Strict terms based on expert recommendations
 - Termination for any breach





Considerations when drafting agreements

- Agreements are not bulletproof
 - Relapses are expected and should be managed
 - No magic line for when undue hardship is reached
- Employees can be:
 - Reinstated
 - Given another “last chance”
 - Provided with a different non-safety-sensitive position





Final Considerations

- Addictions are complex and the law is constantly changing
- Take context into consideration
 - One size does not fit all
- Update your policies yearly
- Get legal advice!



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Questions?

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