

FINDINGS AND DECISION

IN A DISPUTE

between

THE IRON ORE COMPANY OF CANADA (IOC)

(the Employer)

and

THE UNITED STEELWORKERS (USW), 5795

(the Union)

Grievor: Mr. Cory Keating

APPEARANCES:

For the Union

Presenter: Mr. Tom Harris, Internal Representative USW Local 5795

Advisor: Mr. George Kean, President USW 5735

Witnesses: Mr. Cory Keating, the Grievor

Mr. George Kean, President USW 5735

Observers: Mr. Ron Thomas, Vice President USW 5795

Mr. Daryl McGrath, Grievance Ctte Co-Chair

Mr. Colin Hertson, Grievance Ctte Co-Chair

Mr. Terry Vardy, Grievance Ctte Co-Chair

Mr. Roger Norman, Grievance Ctte Co-Chair

For the Employer

Presenter: Mr. Darren Stratton, LLB

Advisor: Ms. Tracy Dumaresque, Supervisor of Employee Relations

Witnesses: Mr. Rudy Tucker, Superintendent of Mine Operations

Ms. Dumaresque

Observer: Ms. Wilma Doucet, HR Advisor

Arbitrator: Mr. John A. Scott

The Grievance reads: "I have been discharged for as my infraction report reads, 'Failure to adhere to the conditions of your return to work agreement of July 27, 2008.'" Articles of the Collective Agreement violated: 3, 7, 10, and any other relevant articles or letters."

Settlement Sought: "To be reinstated and to get the help that I need."

The hearing took place on January 25, 2010 in Labrador City, Newfoundland.

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were properly observed or are waived;
- there are no points to be raised as to arbitrability or other preliminary objections;
- issues of quantum, if any, would be considered separately and if the Parties do not reach agreement the issues will be referred to the Arbitrator for resolution within sixty (60) calendar days after publication of the Award;
- the Arbitrator will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise.

DOCUMENTS TAKEN INTO EVIDENCE:

Consent	#1	Collective Agreement between the parties terminating February 29, 2012
"	#2	Infraction Report dated November 25, 2009
"	#3	Statement of Disciplinary Action dated November 30, 2009
"	#4	Grievance Form, Grievance #6-9493
RT	#1	Letter dated June 27, 2008 to the United Steelworker's attention Mr. Ron Thomas, Vice President from Mr. Rudy Tucker, Superintendent Primary Ore Operations, "The Return to Work Agreement."
TD	#1	Handwritten notes of investigation meeting, November 26, 2009
"	#2	Discipline Record of Grievor
GK	#1	Photocopy of Express Post envelope, 2008/02/19
"	#2	Letter, Mr. Kean to Mr. Keating, January 16, 2008
"	#3	Grievor's June 2008, Memo to Mr. Kean

LEGISLATION CONSIDERED

AN ACT RESPECTING THE PROTECTION OF HUMAN RIGHTS

RSNL1990 CHAPTER H-14 HUMAN RIGHTS CODE

Discrimination in employment

9. (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of

(a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability...

COLLECTIVE AGREEMENT ARTICLES REFERENCED

ARTICLE III MANAGEMENT RIGHTS

3.01 - The Union recognizes the right of the Company to operate and manage its business in all respects and in accordance with its commitments and responsibilities. Subject to terms of this Agreement, such rights include but are not limited to the following rights to: a) hire, manage, promote, determine qualifications and competencies, demote, discipline for just cause, transfer, assign and direct employees...

ARTICLE VIII ARBITRATION

8.01 - Both parties to this Agreement agree that the provisions specified in this Agreement are the sole source of any rights the Union might assert in arbitration and only those management rights that are abridged by specific provision of this Agreement are arbitrable. Any dispute or grievance concerning the interpretation or alleged violation of this Agreement, which has been properly carried through all the steps of the grievance procedure outlined in Article VII or Article X and which has not been settled, will be referred to an arbitrator at the request of either of the parties hereto.

8.03 b) (ii) A decision will be rendered by an arbitrator who will also give the reasons in writing within thirty (30) calendar days following the end of the hearing, unless this time limit is extended with the agreement of the parties.

8.04 - The decision of the arbitrator shall be binding on both parties

8.05 - The arbitrator shall have jurisdiction and authority only to interpret and apply the provisions of this Agreement so far as shall be necessary to the determination of the grievance and shall not have any power to alter or change in any way the provisions of this Agreement or to substitute any new provisions for any existing provisions, nor to give any decision inconsistent with the terms and provisions of this Agreement; nor shall any past practices or customs become binding unless they are in writing between the Company and the Union. Where the arbitrator determines that an employee has been disciplined for just cause, he/she may review and modify the penalty imposed.

8.08 - Discharge cases shall have preference over other cases submitted to arbitration.

8.09 - The Company and Union representatives for the arbitration will co-operate in the exchange of information to be introduced at the hearing as early as possible prior to commencement of the hearing.

OPENING STATEMENTS

FOR THE UNION, Mr. Harris pointed out that the issue is a disciplinary discharge of the Grievor after he had violated a last chance agreement. The Grievor, who has a drug problem, has taken a rehabilitation program. He was at work up to the time of termination.

In the Union's submission, the drug problem constitutes a disability, on the basis of which the Grievor should be accommodated by the Company up to the point of financial hardship. The Iron Ore Company of Canada is a big employer with over 1100 employees. There is no financial burden on the Company. At the time of termination, Mr. Keating was performing his duties well.

In the Union's view, last chance agreements are important in getting workers back to work, but it is generally recognized by companies, unions, and experts in the field that "last chance agreements" can accommodate more than one lapse. The jurisprudence confirms this.

Mr. Keating has had treatment and has asked for help. He is looking now for help in working through his day-to-day life. Since the relapse, Mr. Keating has been free of drugs and will take a test today if the Employer requires it.

The Union asks the Arbitrator to sustain the grievance and order the Company to accommodate Mr. Keating.

FOR THE EMPLOYER, Mr. Stratton confirmed that the hearing relates to Mr. Keating's termination on November 30, 2009 and grieved by the Union on Mr. Keating's behalf. In Mr. Stratton's view, the basic elements of the Employer's position can be stated under three headings: cause, consequences, and context.

The cause of the termination is a clear breach of the conditions set out in the return to work agreement signed by the Union and the Company in June, 2008. The return to work conditions were breached.

Therefore, the consequences are clear. The return to work agreement specifies that any failure to observe the agreement will result in termination. The termination is the consequence.

The context is the issue of the Employer's duty to accommodate, and that needs to be examined. The IOC and the Union have both fully complied with the requirement to accommodate Mr. Keating's medical condition. But there is a limit, and that limit is undue hardship; not just undue "*financial*" hardship as the Union suggests, but simply undue hardship. It should be noted that this return to work agreement was the latest of several second chances that the Company had already provided in Mr. Keating's case.

The contextual analysis will show that the Grievor has failed to keep his end of the bargain. His conduct was culpable and warranted discipline. The termination should be upheld.

EVIDENCE

FIRST EMPLOYER WITNESS was Mr. Rudy Tucker, currently Superintendent of Mine Operations. Mr. Tucker described the scope of his responsibilities, which includes supervision of approximately 350 employees. He was first employed with IOC in August 1996, and has been in his current position for approximately three years. Mr. Tucker also described his earlier positions, including as Superintendent of Mines and as Senior Advisor Performance Support. He was also a Pit Coordinator "for two to three years". Mr. Tucker is familiar with the Grievor, whom he first met in August 2005 "when the Company was recruiting for employees... We met at a site interview process." The Grievor's hire date as a Haulage Operator is August 15, 2005. He said:

I was involved in the interview process as one of many, and he went through induction under the IOC process, and was assigned to report to two team leaders. The team leader reports to myself.

Asked whether there had been any issues with the Grievor's performance Mr. Tucker said:

Yes. My first awareness was in February of 2007. I was not his Supervisor at the time. I was not directly involved, but was aware of some "respectful workplace" issues between Mr. Keating and a team leader... A 28 day suspension was imposed as a result, which was then reduced to a 14 day suspension.

A further incident occurred on June 11, 2007. This involved the Grievor's failure to give information concerning the loss of his driver's licence. This was in disregard of safety requirements. All operators need a valid licence at the time of their hire, and they need to meet the endorsements, including air brakes and trailer. ... His licence was suspended and not valid, and he had not reported it to the Company ... He was discharged at the time, and then through the grievance procedure and further information from the parties, it was reduced to a 21 day suspension... I was involved with that myself, yes."

There was a further incident on December 21, 2007 when Mr. Keating had missed shifts without permission. Again, I was involved with that matter. The discipline imposed was 7 days, and was not grieved.

Mr. Tucker confirmed that Consent #2 is an infraction report citing Mr. Keating for "failure to adhere to the conditions of your Return to work agreement..." , and Consent #4 is the grievance form (# 6-9493) grieving the discharge (Consent #3) that followed that infraction. He also identified, as RT #1, the June 27, 2008 return to work agreement signed by the Grievor and by Mr. Ron Thomas, Vice President of Local 5795, and by Mr. Gerry Nichols for IOC Human Resources. Asked if there was more than one return to work agreement on the Grievor's file, Mr.

Tucker answered, "No there is not." he then described events leading up to RT #1.

On December 31, 2007 it became clear that Mr. Keating had not shown up for three consecutive shifts, so that triggered a self-termination. The language is in our Collective Agreement. So, effectively, on December 31, 2007 Mr. Keating self-terminated. A letter was sent out by HR early in January to him, referencing his self-termination in effect.

Asked if this was grieved, Mr. Tucker said:

No it was not. To my recollection, a fair amount of time passed before we heard anything back from anyone concerning Mr. Keating's self-termination. To the best of my recollection... I got a call from my HR Rep., Gerry Nichols, saying that the Union executive wanted to meet about Mr. Keating's self-termination. I was a bit reluctant to entertain discussion. First, because he only started in 2005, and in less than two years his behaviour was not what we'd expect: including the respectful workplace issue, and the failure to report his license, and absenteeism: things that were quite worrisome. And this was an old self-termination, three or four months old. All this was in less than two years of a potential thirty year career. I was not comfortable that we wanted such an employee.

However I did, after some discussion, agree to meet with the Union to listen to their concerns and what they were asking. I recall there was a meeting with Ron Thomas, George Kean, Tom Hand, and Gerry Nichols and myself... There may have been someone else there... The discussion included the Union's acknowledgement that they understood the process and the three shifts leading to self-termination, but they felt that he was in a state where he could not call into work... He was having some severe personal issues, and these were having an impact on his life. There were some personal financial issues and relationship issues and also some drug and alcohol issues... That was it, basically. I said I would consider the Union's representation and get back to them...

I recall a second meeting... Mr. Nichols and I had a number of discussions. I was still reluctant. The second meeting was about a week after the first meeting. Mr. Keating was present. I recall Mr. Hand, Mr. Thomas and Mr. Kean and Gerry Nichols and myself. It was similar to the first meeting except that Mr. Keating was present. We asked him some questions about why he did not call in back in December, and he said that his life was turned upside down. There was real hardship in a relationship and financially, and his alcohol and drug problem. He was pleading to IOC to take him back and help him... He was quite emotional and displayed signs of severe problems. His emotions were running high, and he was having a difficult time, there's no doubt.

The IOC position was, You made some choices. The record was not clean. We left that meeting and the Union had made its case, which was essentially that the drugs and other problems had simply prevented him calling in. There were a number of discussions between myself and Mr. Nichols and with Mr. Thomas and Mr. Kean following the second meeting with Mr. Keating present. We considered

the fact of the self-termination and that a lot of time had elapsed since January. From my point of view IOC had no responsibility to bring him back. The Union felt we did. IOC proposed a return to work agreement to try to help him, and that was agreed and signed on June 27, 2008 (RT #1).

Asked if RT #1 was the final form of the agreement, or if any changes had been incorporated, Mr. Tucker said:

We drafted this, and there were discussions between myself and Mr. Nichols and between Mr. Nichols and the Union before it became final. We did prepare a draft copy for the Union prior to signing, and to my recollection the item in the agreement that was most scrutinised was #6, which reads:

"Mr. Keating must abstain from using any illegal drugs or the consumption of alcohol. After reinstatement to active work, Mr. Keating will participate in a random alcohol and drug testing program. Furthermore, should the Company have reasonable grounds to suspect Mr. Keating of consuming illegal drugs or alcohol, he will be taken immediately for testing. Failure to comply with such testing will be deemed as a failed test by Mr. Keating and subject him to immediate termination of employment. This testing program will be reviewed by the parties after a 12 month period from the date of his return to work."...

This was the final version of the agreement; and it included a suspension recorded for the period from December 31, 2007 to June 26, 2008 in paragraph #1. Also, paragraph #2 provides that the Grievor be placed on medical leave from June 27, 2008 for a period of two months. And, under para. #4 says that medical leave is conditional on appropriate medical clearance stating "he has successfully completed any required treatment program(s) and is fit to return to work."

Mr. Tucker testified that Mr. Keating returned to work in the Dewatering Department as a Pit Attendant: "basically labouring type work. He self-terminated from the same department."

Mr. Tucker explained that the Grievor had moved from his Haulage Truck Operator position to the Dewatering Plant as a result of his driver's license suspension. He had spent from June until December 2007 in the Dewatering Plant, and that is where he returned in March 2009. Asked if he had any subsequent dealings with Mr. Keating before November of 2009, Mr. Tucker said:

Because Mr. Keating was off for a long time, he had a new induction involving the Health & Safety Program. Sometime after that induction I did have a brief conversation with him... He had just come back to work, and it was... "Keep up with it, and you can be a good employee"... That is my role, to help them be the best they can be. But they also need to have some vested interest... That was when he was putting up his best. He was excited about returning to work and

trying to get his life back on track... He came back on March 25th, and in May he was absent without permission, and he got a verbal warning. To be honest with you, I was thinking of more severe discipline based on his earlier self-termination, and this was just two months after his return after the extensive medical attention ... However, a verbal warning is on the record as far as this hearing is concerned.

Just before the shutdown (in 2009) we were to do a random testing. I contacted HR and discussed whether there was a warrant to set up a substance abuse test according to the return to work agreement. This was after the May 2009 discipline. The test was administered on July 1st. I understand it came back negative.

Mr. Tucker said that the verbal warning was not grieved.

The shutdown, as a result of economic downturn, was from July 7th 'til August 10th. Then, after the August 10th return, we made sure that all employees were re-familiarized with safety and so on, and also re-familiarized with the pit to refocus them on the workplace as each shift returned to work. The focus was on the energy situation, reporting protocols, reporting for work, safety issues, traffic patterns. All the employees returning to work would have got this information.

Asked how things worked out after the shutdown, Mr. Tucker answered:

In October 2009 he missed shifts. There was a failure to report. On this particular occasion he was off and missed shifts, and it was not possible to locate him. He was suspended for 8 days. Again, this was not grieved. There was a meeting, Mr. Keating was present and during the meeting he said he had a severe 'flu. H1N1 was the hot topic. Mr. Keating said that he had a real bad 'flu and had taken a prescription – off the shelf medication – and he had taken a significant amount of it, trying to kick the 'flu, he said. The amount he had taken ... when he lay down he slept through and never woke up the next day. I asked him why he did not call in when he did wake up, and he said, the day was pretty well done, and he saw no point, and went back to bed again to try to kick the 'flu.

My concerns dated back to the December 31 self-termination: the trends of his alcohol and drug dependency. Taking that much medication is a concern, whether it was prescribed or not. I said I was disappointed with his missed shifts and the trends showing up again. The 8 day suspension was not grieved.

After that 8 day suspension – so from March 25th on – he had two or three incidents which suggested that all was not right. So I contacted HR and asked for another drug test to be set up. In HR it was Ms. Wilma Doucet... I was on vacation on the date of the test. It was set for November 25th. Mr. Keating refused... and did not comply with the test...

When I'm on vacation we have people who move up and fill in for me. Mr. Walter Standing was the Senior Team Leader. He acts for me when I'm on vacation or on Company business. So, before and after, we do a handover and whatever needs to be clearly understood is dealt with. Mr. Standing was aware of that test, and that he may have to be involved in the process...

I returned to work on Monday, November 30th and that's when Mr. Standing reviewed the previous weeks' happenings. That's when Mr. Keating's drug test was discussed. He brought me up to speed on what had happened. The drug test was set for a prescribed time, 4:30 on November 25th, and an independent agency was to do the test. Mr. Keating was summoned to take the test, and he refused. He did not comply with the test. The reason he gave was that he had smoked marijuana and it would be "just an embarrassment to go through the test." ... Mr. Standing knew this because he had a report from the HR Department, Ms. Tracy Dumaresque, and he'd have done the investigation as a result of Mr. Keating not complying with the test.

Asked what he had done as a result of this information, Mr. Tucker said:

Now there was a severe breach of the return to work agreement. I followed up with the HR Department, and made the decision to terminate Mr. Keating.

Asked what provision in the Return to work agreement (RT #1) was breached, Mr. Tucker said:

Item #6 specifically... that was mentioned. Particularly, abstinence from using any drugs, participation in the random testing, the reference to failure to comply constituting a failed test, and, finally, the provision that there would be an immediate termination in these circumstances.

Asked to comment on the grievance's claim for reinstatement, Mr. Tucker responded:

I would deny it. My view is that from August 15, 2005 – in the less than five years since then – his behaviour traits and self-termination. IOC did help; the Company did go out of our way. There was no grievance filed, yet we did return him to work under certain terms. We were working in good faith....We did try to help him more than once. His failure to report shows the exact same traits as prior to the self-termination. He refused to comply with the agreed conditions specified as to the testing.

Acknowledging that the grievance also refers to the Grievor's seeking help, Mr. Tucker said:

We've done a lot to help him. The final thing was his failure to comply under paragraph #6. He admitted doing recreational drugs – a person with a drug problem. I am responsible for 350 people. Safety is key to my job. I can't afford having such a person who is casual about drugs working with this Company.

ON CROSS EXAMINATION, he was asked about provision #3 of RT #1, which reads:

"During his medical leave of absence and upon his return to active work, as applicable, Mr. Keating will fully and successfully participate in any rehabilitation, counselling or treatment programs(s) recommended by the company physician, following consultation with his personal physician. He is required to continue his attendance and successful participation in such programs and give his consent to a release of information to the Company physician confirming same from time to

time. This will included the services of the company's Employee and Family Assistance Program."

Asked whether he had spoken with the Company physician, Mr. Tucker answered:

No, I did not; but I was aware that he was supposed to have a program at the institutes with followup and a personal physician and backup with the EAP program. All I am aware of was Mr. Keating's saying that he pulled out of the program because he felt he could do it on his own.

Asked if he had spoken to Mr. Keating about his absences in May and October, Mr. Tucker said: "I can't recall specifically at that time, other than at an investigation or discipline meeting." Mr. Tucker also confirmed that the Grievor had passed the July drug test. Asked whether other tests had been administered, Mr. Tucker said:

I know of one in July that he complied with. The second was the one he refused. I know that in the July test there were several attempts to get it done.

Mr. Tucker testified that the Dewatering crew

... has a total of 14 people, seven on each side, doing 12 hour shifts over a 7 day period. That's a budgeted number, but fluctuates for medical or vacation reasons.

Asked if overtime is a normal occurrence, and if he would agree there is no financial hardship on the Company from the Grievor working in Dewatering department, Mr. Tucker said:

The only financial hardship would be that the absenteeism would be filled in with overtime... We normally budget a certain amount of overtime for backfill for vacation and leaves of absence. Approximately 8% of the work is budgeted as overtime. Overtime is insurance for building and rebuilding; so yes it's normal.

Mr. Tucker also answered questions concerning the actual recruiting process through which Mr. Keating was hired, and confirmed that, as a result of this process, he had been deemed suitable for employment at that time.

ON REDIRECT EXAMINATION, Mr. Tucker was asked to explain his reference to Mr. Keating's having said that he had "pulled out of the program." Mr. Tucker answered:

Mr. Keating said that he was in a program related to his return to work agreement, and felt pretty good after the treatment session he had had, and he said that he probably should not have pulled out. That was during a conversation we had after the grievance was filed at Stage 2 of the process.

THE SECOND EMPLOYER WITNESS was Ms. Tracy Dumaresque, Supervisor of Employee Relations since 2006. Ms. Dumaresque started work with IOC in July of 1999, and has served in

the HR Department since then. Before taking up her supervisory role, Ms. Dumaresque had been an Advisor with HR as an HR specialist. As Supervisor of Employee Relations she has responsibility for management of Collective Agreement issues as they arise, including interpretation and general employee management issues.

Ms. Dumaresque confirmed that HR maintains a record of employee discipline on a separate data base for unionized personnel, and explained her own familiarity with the issues leading up to the instant grievance.

My involvement is relatively short. I was not involved in earlier disciplines, just the latest. Ms. Wilma Doucet, the HR Advisor, was actually involved in organising the latest testing in late November. She was called out of town unexpectedly. She had been using an independent service provider to do the testing. The testing was set up for Mr. Cory Keating. During this time, she had set up the test but had not informed Mr. Keating of this. It was supposed to be random, so therefore Mr. Keating was not given advance notice.

On November 25th I arranged with Mr. Keating's Supervisor that Mr. Keating would call me at a certain time of day, and that I wanted a discussion with him. I asked the Supervisor to have him call me, and he did call me at shortly after 3:00 that day. I explained who I was and that we had scheduled a test in accordance with the return to work agreement for him to take at our Occupational Health offices from an external service provider. I also told him that, if he needed transportation, his team leader would provide it, and that I'd had a conversation with the team leader... Mr. Keating's response to me on the phone was, That was no issue. He had his own vehicle, and he'd most likely drive himself.

The next was a member of the Health Services, an OT nurse, came to my office shortly after the test was to be conducted to tell me that the external service provider who was to do the collection had informed her that Mr. Keating had refused the test, and that he had returned to the work site. I then contacted Walter Standing, who was acting in Mr. Tucker's capacity, and advised him what had happened, and we agreed that Mr. Keating should be suspended pending an investigation meeting. I then contacted the team leader.

Asked why Mr. Keating was suspended, Ms. Dumaresque answered:

Our general practice at IOC, when a serious concern arises, is to suspend pending investigation. The individual is removed from site because of any emotional issues, and then we sit with the employee to get the employee's side before making a decision about what is to happen... In my view there was a serious concern for us. He was on a return to work agreement and, in my interpretation, the refusal to test was a breach of that agreement: serious in my view...

I contacted Cliff Hand, Mr. Keating's Supervisor that day, and advised him that Mr. Keating should be suspended pending investigation, and that he should

advise Mr. Keating to contact the Union and they would make arrangements with the Company to have a meeting...

Following that conversation with Mr. Hand, I called Ron Thomas at the Union centre and told him what had transpired. That was a standard procedure: to put in such a call to the Union so they're not taken off guard. Mr. Thomas said that he had spoken with Cory earlier that day, and knew of my request to do the test between 3:00 and 4:30. That was all on Wednesday, November 25th...

On the following day I had a meeting with Ron Thomas about setting up the investigation meeting. At that point he had not yet spoken to Mr. Keating. I gave them the time of 1:30, which was after lunch, and asked him to get back to me about a suitable time, and then spoke to him about one hour later. He said he had still not reached Mr. Keating, and that (Ron) would call me back. Within half an hour later he called back to say that he spoke with Mr. Keating and they would be there for a 1:15 or 1:30 meeting...

Walter Standing and I were there, and, for the Union, Mr. Thomas, Mr. Keating, and Mr. Roger Norman. Mr. Norman is one of the grievance co-chairs for the mines division. Mr. Standing began the meeting. The Supervisor normally does. He said we were here because the test was refused, and he read out Section 6 of RT #1 and asked Cory to talk to us about what had happened.

Cory indicated then that he had not submitted... We all knew that... The reason was he knew he would fail the test and he wanted to save himself and the sample taker the embarrassment of making what he knew would be a positive test.

Asked whether the Grievor had said, at this meeting, why he knew he would fail the test,

Ms. Dumaresque answered:

Yes. He said that he had used marijuana recreationally a few times since returning from rehab. He said that, since rehab., he believes that he has kicked the harder drugs, but has used marijuana recreationally a few times. He said he had been on a counselling program following his return from rehab., and that he had voluntarily withdrawn from that program because he felt he was strong enough to manage it on his own. He also talked about needing help, and told us that he did not believe he needed to go back to rehab., but just to restart the counselling.

Asked if she recalls anything else about the meeting, Ms. Dumaresque said:

There were Union representatives there for the meeting, as usual; after the employee had told us his side, his reps. had an opportunity to make comments as well.

Asked if she knows of any other support he could access during the period after rehab., she said:

Not that I'm aware of, but he did talk about counselling. It is possible that he did something with EAP as well, but I am not aware of that. He said he just needed counselling. I assume he was speaking of Mental Health and Addiction Services counselling here at the hospital in Lab City.

Ms. Dumaresque confirmed she had taken notes of this meeting, and identified, as TD #1, a photocopy of the handwritten notes. She testified that Mr. Keating had not explained what "recreationally" meant when he spoke of his using "marijuana recreationally", and had not indicated frequency or amounts used. She also confirmed that he had said, (as noted on TD #1, p. 3), he had "never done it at work or been on it at work."

Ms. Dumaresque explained what she understood Mr. Keating to mean by saying that he would have passed the "swab test", but would have failed the "hair follicle test" (TD #1, p. 3).

The Company has two different tests; one is an oral swab, and the other is provided by a hair follicle. The oral swab is generally used to test usage of the drugs over a matter of hours prior to the test, as recently as 30 minutes prior to the test and up to 24 hours prior, depending on the drug. The swab is then sent to the lab for drug identification and determination of volume and concentration. The second drug test is the hair follicle, which shows the history for a longer duration.

The person administering the test would have explained this to him. I understood him to mean that he had not used marijuana within the last couple of days, so it would not have been detected by the swab test.

Asked what point there would have been to take him up on his offer to do the test if the Company wanted, Ms. Dumaresque answered:

We could have done it. The hair follicle would not have been affected, but the swab would have been affected by the passage of time.

Asked to describe Mr. Keating's demeanour during this meeting, and her own involvement after that investigation meeting, she said:

He was somewhat fidgety, moving quite a lot in his chair, somewhat casual in his discussion about what was happening: his having a relapse. He wasn't particularly emotional in having the discussion... Mr. Tucker returned on November 30th from vacation. I had a discussion with him about what happened at the investigation meeting, about how to proceed, and finally his decision was to discharge Mr. Keating. I prepared the paperwork and had it delivered to Mr. Keating's residence by our security people... Yes, Consent #s 2 & 3: they were both prepared by me and signed by Mr. Tucker, and both were delivered to Mr. Keating at his residence by the security office.

Asked to explain as what she understood was involved in a return to work agreement, Ms. Dumaresque answered:

Anytime the Company enters into a return to work agreement, it's after a thorough investigation and a review. In this case, we did agree with the Union and the

Grievor that there would be random drug tests. We had gone out on a significant limb, and we wanted a commitment by the employee and the Union. By requiring testing as part of that agreement, we were ensuring the employee knew how serious we were about his staying clear. The incentive to him is the random test.

Second, we wanted assurance in writing ourselves that the agreement was being upheld, and we were not doing it on blind trust. There were measures that had to be met for this to work.

Asked whether she sees any impact in having agreements that lack a random drug test component, Ms. Dumaresque answered:

Yes. Had we not included (random drug testing) in this case, we'd have had no evidence; and this would present a serious risk to us and to the employee.

Ms. Dumaresque identified TD #2 as the ...

copy of the disciplinary record for Mr. Cory Keating as it resides on our master data base with Employee Relations at HR IOC, and it corresponds with the testimony provided at the hearing.

ON CROSS EXAMINATION, Ms. Dumaresque was asked about "any rehabilitation, counseling or treatment programs(s) recommended by the company physician" as specified in provision #3 in RT #1. She answered that she knows "only that the Grievor met twice with the doctor", but has no further information. There were no conditions, so far as she knows, about a "program".

Ms. Dumaresque also explained the exchange recorded at the bottom of TD #1 dealing with an issue of lateness for work on November 25th. "Mr. Keating explained he had to get a H1N1 shot." She also confirmed that, as recorded on on TD #1 (at p. 2), Mr. Standing had noted receiving "good feedback from team leaders" about Mr. Keating.

ON REDIRECT EXAMINATION, Ms. Dumaresque testified there was no specific "program" outlined as part of the return to work agreement, but pointed out that, provision #4 of the return to work agreement (RT #1) requires medical clearance prior to the Grievor's return to work.

THE FIRST UNION WITNESS was the Grievor. Mr. Keating is a resident of Labrador City, and was formerly employed by IOC where his hire date, as a Haulage Truck Operator, is August 15, 2005. He was terminated from his position with the IOC Dewatering Department. He said that there is a "world of difference" between the Operator position and the Dewatering position. The latter is "more a labouring job." He confirmed that he was the subject of a last chance agreement (RT #1) with the Employer, and described what lead up to the current situation.

It all comes down to my dependency, drug and alcohol. I got fired because of it... December 2007, yes that's when the bottom fell out. The problem started months before that... I violated the Company's self-termination clause. The state I was in, it was inevitable. Self-termination was not on my list. I was not coherent. Even when it happened, I couldn't even react. I contacted Ron (Thomas) and George (Kean). Those guys... pulled me out of the gutter. The guys worked with me. When I was secluded in my house, they came around. In February and March I was barely staying alive.

(Between February and June) I had not done any work at all. They do not have a detox facility here. I called a friend. I was down to 160 pounds, down from 200. They detoxed me here for fifteen days. I was on my death bed. They renourished me and kept me alive. They saved my life.

Asked what conditions he understood were put in place in the June 2008 agreement, he said:

Number 6 was the real one, 'refrain from alcohol and drugs'... and to 'check in with the doctor.' In the period between June 27th and returning to work, I had attended the Humberwood Centre in Corner Brook for a six week period, but I can't recall the exact dates when I went there... I had to get a doctor's clearance once, and get a drug test and the clearance. I saw him once and he wanted a meeting thirty days later... There was no program, but I did see him thirty days after I was back to work.

Asked whether there was any program in place, Mr. Keating answered:

Not other than what the letter said. The only thing was the test was imposed and that was in the letter... I was called on November 25th and told about the drug test, and I called the Union and let Ron know. I talked to the foreman, and went to do the test; and, rather than do the test, I think it was better to let the Company know that I had marijuana in my system. Some weeks before I had done marijuana. At the time, I did know of what the agreement said... On November 26th it was down to the Union Centre to discuss the situation with Ron and George and the Union members to find out what the situation was.

Mr. Keating confirmed as accurate the report of the November 26 investigation meeting (TD #1), and also confirmed that he had made a comment, there reported, (p.2) that he "should have continued with the counselling" and that "On(c)e I stopped the prog. I fell off the wagon and started using weed." He added:

That counselling was done on my own. There was no Company program put in place. All the Company required was the detox, but there was no program when I got back... Kim Blake is her name, my counsellor. I just called her up.

Asked why he had stopped seeing her, Mr. Keating answered:

In my case, all was going well. I was feeling so good. I guess I felt I was cured and

clear for six to eight months. So it slipped from biweekly to monthly, and then stopped. Basically I felt that I did not need it anymore, so I stopped.

Asked to describe the circumstances surrounding the respectful workplace policy issue as it appears in the disciplinary record (TD #2, p 2), Mr. Keating said:

This was one of the first times I had trouble with the Company about discipline. Most of the team had problems with some of these guys. I had my turn for a run in... Next day I'm sitting home, and here's my foreman at the door to deliver me the infraction report. I was still upset. I told my team leader to get off my property, and then it came back as a respectful workplace violation.

[Counsel for the Employer objected to this line of questioning, since the Arbitrator is not seized of these disciplinary matters which, in any case, were never grieved. The Arbitrator ruled the matter was already in evidence and subject, therefore, to cross examination. The Arbitrator also directed the Union to focus questions on issues relevant to the instant grievance.]

Mr. Keating testified that his dismissal in June of 2007, as recorded in the disciplinary record (TD #2), related to the fact that he had moved from Alberta, where he had been issued his Alberta driving license, but failed to meet the time limit required to convert back to a Newfoundland license after returning here.

Time passed. It was up to me to get it reinstated. I got put off and the Company changed it to a suspension.

Mr. Keating said he had not taken a drug test since November 26th, and also testified that he had not used drugs since that time. Asked how often he had used drugs after the return to work agreement had been put into effect, Mr. Keating answered:

It was two or three times. Once is too much. It showed me I've got to get clean.

Asked whether he wants his job back, Mr. Keating answered:

It means the world to me. It means the world to me. Yes.

ON CROSS EXAMINATION, Mr. Keating testified he is aware of the incidents recorded in TD #2, and agreed that the record also accurately shows the final disposition of all the incidents except the matter here grieved. Asked to describe the issue that led to the December 2007 self-termination event, Mr. Keating said,

The rough time started in February 2007. First it was a separation; that was pretty rough. And my drugs and alcohol behaviour was a coping mechanism. And then came the disease addiction... I was treated for cocaine abuse and alcohol abuse.

Mr. Keating testified that, since he had returned to work in 2009, he had not used cocaine or alcohol. Asked to explain his use of marijuana in the weeks prior to the November 25th test, and how often he had used marijuana in that period, Mr. Keating said:

I'll say four times, and it was in late October or early November, yes.

Asked whether he has a dependency on marijuana, Mr. Keating answered:

No, sir. I have a dependency on illicit drugs. Cocaine was a leading... but in the detox they treated me for drugs, including prescription drugs and barbiturates, *etc.*

Asked if there is such a thing as "recreational" drugs, and why he had used the term during the November 26th investigation meeting, Mr. Keating said:

No, not so far as I'm concerned. Society calls marijuana a 'recreational drug', but I don't think it's right to call illegal drugs 'recreational'. I used it as a stereotype ... as society uses the term.

Asked if he has a dependency on marijuana, or did have when he was using it in October or November 2009, Mr. Keating answered:

No. My life does not revolve around using marijuana... No, I have a dependency on illicit drugs. I am a drug addict; but the specific one that I was addicted to was not marijuana, and it is not marijuana now.

Asked how he had found Ms. Blake, the Counsellor he worked with for some time, he said:

Her name was given to me... It was something I took on myself. That was at the mental health department... before I went to Humberwood.

Asked how long he maintained contact with Ms. Blake since February of 2008, the Grievor said:

Humberwood needed a reference, so I went to the hospital and they referred me to Ms. Blake, and she referred me to Humberwood... I don't know when I stopped seeing her. I'm currently seeing her again now. I had one yesterday, and this morning, and again on February 10th.

The Grievor confirmed that "yesterday" was the first session with a Counsellor since he stopped going. Asked why he hadn't begun counselling before "yesterday" (January 24, 2010), he said:

The whole reason for seeing her was that I felt I was on my way to recovery. Then, with the holidays and so on, it was up to yesterday to get it done.

Mr. Keating confirmed that during the investigation meeting on November 26, 2009, he had acknowledged it was a mistake to stop counselling. Asked whether he had chosen to return to counselling because the Arbitration hearing was set for today (January 25, 2010), he said:

I returned to counselling because I have a problem, and I need help.

Asked whether his answer, therefore, is "No"? The Grievor agreed: "My answer is, No." The Grievor also confirmed that he was seeing Ms. Blake for counselling when he returned to work in March 2009, and added: "Probably June or July of 2009 was the last visit." Asked what other support mechanisms he has, Mr. Keating answered:

My Union brothers are my biggest support. There's not much support from family or relationships. The Union support has been amazing... I also have support from the doctor, a new one since the previous one moved away... And the outpatient facility at the hospital is also available.

The Grievor agreed that his use of marijuana was a breach of the return to work agreement. He also agreed that his refusal to take the test breached the return to work agreement. Asked whether he would agree that inclusion of the requirement for random testing was an incentive to sustain the agreement, Mr. Keating said, "Yes, I do agree."

ON REDIRECT EXAMINATION, Mr. Keating testified that he had not informed the Company about his ongoing sessions with Ms. Blake.

No. I met the Company's requirements. Nothing else was required. There was no follow-up.

Responding to a question from the Arbitrator as to why he wants to return to work at the IOC, Mr. Keating answered: "It's a great Company. They have been here for me."

THE SECOND UNION WITNESS was Mr. George Kean, President of the Union Local for twenty-two years. Mr. Kean is familiar with the Grievor and the grievance. Asked if he has had several similar cases, Mr. Kean answered:

Unfortunately, yes. We have an Employee Assistance Program, put together by myself and others responsible and with the Employer back in the 1990s. We started up the EAP to address depression and other issues.

Asked if he had been concerned about the Grievor prior to 2008, Mr. Kean said:

Yes I was. I was concerned. He was an excellent worker. Yes we were involved with him. I went to his home: snow up to the door. We knew he was in there. I sent a registered letter to him about the missed shifts. I made a call to the police that I was really concerned for him. The letter was returned.

Mr. Kean identified GK #1 as a photocopy of the envelope of the returned letter.

We sent that from the Union centre and the letter, itself, (GK #2) was in it, dated January 16, 2008.... He was a wreck. I saw him. He was a wreck. He told us he was in depression. I've seen it before. He did not realize it himself. Those in it do not. Cory was at near rock bottom as can be. His relationships had broken down. The loan for the house renovation, cocaine and probably other drugs... Yes we knew about the self-termination issue with the Company. We had trouble getting him treatment... AA is here. In any return to work agreement there should be follow-up required with AA. One is never the end.

Asked if he had signed the back to work agreement (RT #1) Mr. Kean said:

No. Ron (Thomas) and I asked Cory not to sign it. Anyone in Cory's situation is going to do anything to get his job back. I did not want him to sign that letter because of how bad he was. I knew how it was going to be... He had to go to EAP biweekly. They think they're cured but they're not. There must be a follow-up.

Mr. Kean identified, as GK #3, a letter dated "June 2008" addressed to "Dear Brother Kean", and signed by the Grievor. The letter reads:

"June,, 2008

Dear Brother Kean

I appreciate the efforts of the union in getting my employer to re-instate me back to work following my termination as result of being absent from work. I acknowledge admitting to the employer my alcohol & drug dependency and as condition of my returning to work I must agree to random drug & alcohol testing. In addition I must agree to abstain from using illegal drugs and consumption of alcohol.

I realize that although the union does not feel comfortable co-signing this agreement, Ron Thomas, Vice-President of local 5795 & Chair of Grievance Committee must also sign this agreement in-order for me to return to work.

I am hereby requesting Ron Thomas to sign this agreement and will not hold him or local 5795 liable for any future issues that may arise as result of this agreement.

Yours in solidarity

Cory Keating

Witness"

Mr. Kean said:

I did this letter up myself. I was so sure Cory would re-offend. There's no place on earth that can cure you in six weeks. I have a lot of experience... not so bad as Cory. For us to sign that (return to work agreement), would be to put us in a liability situation. Cory put us in a bad situation because we had to comply. So I did this up, and he agreed to sign it. It was acknowledging that this was against our advice. We felt that we had to get this security.

Mr. Kean referred to

... other employees who had relapsed, some for the second time and even oftener to keep to last chance agreements. Sometime we agree with the Company to give a person a fright. They often lie to me: lie to the grievance committee. They say there's no need for follow-up. We have to ensure that they see the addictions counsellor... In every situation he had lost. He'd lost his home. Most people need help, but he was depressed at the same time. That's why we did GK #3. We had to sit down and be real.

ON CROSS EXAMINATION, Mr. Stratton noted that the Union had spoken of other situations in which last chance agreements had turned out actually not to be final, and that some employees had, in fact, even been taken back more than once. He asked whether Mr. Kean would agree that in certain circumstances it is appropriate to treat individual cases differently. Mr. Kean answered, "Oh definitely!"

Mr. Kean also acknowledged that he is not a medical expert, and was not offering a medical judgement on Mr. Keating's capacity to sign a document like the return to work agreement that he signed in June of 2009. He went on to say:

However, Cory was under duress: a drug addiction. He was not himself. We told him he probably would relapse. He said, he did not care. I've seen it so often. He was saying that he'd do anything to get his job back, so he needed us. But I had the feeling he would relapse.... I tried to explain it to him, but he was desperate.

Mr. Stratton asked whether Mr. Kean is suggesting that the Company should not rely on good faith agreements. Mr. Kean answered:

I'm sure he was hoping to work, and not to relapse; but he was on an emotional roller coaster... Yes, I told the Grievor all of this, and he nonetheless signed the document ... yes, to get his job back.

Mr. Kean said he had explained the effect of GK #3 to the Grievor and, when asked whether he thought the document (GK #3) could be challenged, he said:

I needed it so we could be protected... Yes, I guess it could... I felt that he would relapse and lose his job and perhaps then, when he lost his job, he would come after us for co-signing the document. It was a small hope, but sometimes people have to go two or three times.

Asked if he or the Union had informed the Company of the existence of GK #3, Mr. Kean answered, "No." Asked why not, Mr. Kean answered, "That was our internal document." Asked whether Mr. Ron Thomas signed the return to work agreement (RT #1) as Vice-President of the Union, Mr. Kean answered, "Yes." Asked whether he had advised the Company that they felt

that the relapse was likely, Mr. Kean answered:

The Company knows the statistics – 75% relapse; but they all hope. We did not want those conditions in the letter. We did not want a letter at all. We wanted him taken back.

When it was pointed out to Mr. Kean that the Union had not insisted that there should be mandatory follow-up, Mr. Kean answered, "There was nothing here until last month." Asked whether he had asked the HR Director, Mr. Nichols, to strengthen the letter, Mr. Kean said:

No. We wanted him to be taken back without the letter. In hindsight we probably should have. In future we probably should.

Asked if he stands behind GK #1, Mr. Kean answered:

What do you mean, "stand behind"? Ron Thomas did sign that for the Union. We did not want to, but we signed it to get the man his job back... And yes, at the same time, we also got GK #3 to protect the Union.

ON REDIRECT EXAMINATION, Mr. Kean acknowledged that there had been previous last chance situations which turned out not to be final:

Yes, a lot of time you get last chance agreements. Yes. We also knew that you need follow-up for the rest of your life. We knew that there was no follow-up available at the time... That's right, not at that time.

ARGUMENT

FOR THE EMPLOYER, Mr. Stratton summarised the evidence in light of the three themes that he had initially used: cause, context and consequences.

There is no question that the Company had terminated the Grievor and why. The decision was caused by the fact that the Grievor had refused the drug test; the clear condition set out in the return to work agreement was violated. The Grievor acknowledges that the breach was set out as such in RT #1.

The context must take into account the Grievor's employment record. It is a short and rocky road of four years and three months from the date of hiring to the date of termination. From that total, nine months must be subtracted to cover the medical leave. This brings the total employment history to three and a half years. Then if one reckons in the periods of (ungrieved) suspension that appear on the record, accumulating to another approximately eight months, the total employment record reduces to two years and ten months. He is a short service employee.

Yet, despite the fact that this is a short service employee, the Company has worked with the Union to help and has been remarkably accommodating. It is quite clear that the Employer was not required to take him back after the self-termination. The time limits had long expired and, in fact, there was no grievance filed on the matter. There was no requirement based in the Collective Agreement for the Company to act as it did. Nonetheless, the Company did accommodate the Grievor. But that accommodation, culminating in the June 2008 return to work agreement, was the pivotal point in the Grievor's employment record.

The Arbitrator should also note that this is in the context of other accommodations that the Employer had already provided for this employee. There were reduced suspensions on two occasions, even though they were not grieved, and there was a further reduction in the Company's discipline over the driver's license issue. And even after the Grievor returned to work in 2009, there was a verbal warning instead of a more substantial penalty that might have been imposed. And then in October there was another suspension. The evidence as to context reveals a very moderate response from the Employer, all of it pivoting on the self-termination in late 2007 and the return to work agreement that was struck.

Mr. Tucker testified that the Company proposal of return to work conditions set out in RT #1 was clearly laid out for the employee, and its expectations were unambiguous. This document was signed by Mr. Keating himself and by Mr. Ron Thomas for the Union. It should be noted that item #10 of RT #1 spells out, and acknowledges, that it is at the Union's request that the Company has agreed to enter into this agreement.

The Company was clearly relying on an undertaking from the Union and the Grievor. The Return to work agreement specifies, at item #9, that dismissal is the "appropriate and agreed upon penalty." RT #1 was a solution tailor-made for Mr. Keating's individual situation. It addressed his disability, and provided a twelve-month action plan.

Mr. Stratton addressed the evidence set out in Mr. Keating's note to Mr. Kean (GK #3), and described it as an attempt of the Union to distance itself from the consequences of another Union officer's having signed the letter.

The Union's evidence suggests that in the Union's view, duress or lack of capacity may have influenced the Grievor at the moment of signing the return to work agreement (RT #1).

However, in the Company's submission, this should not enter into the Arbitrator's considerations. This matter was not put to Mr. Keating in his examination or cross examination, and he did not, in his own testimony, repudiate his own signature on the return to work agreement (RT #1). It is not clear whether the Union thought itself under duress in signing the document. That is not clear from Mr. Kean's testimony, but that is moot, in any case. Mr. Thomas did not testify and the issue has no weight. In the Employer's view, the Union should be estopped from attempting to deny that it is bound by the return to work agreement.

The Employer invited the Arbitrator to consider *Mitchnick and Etherington, Labour Arbitration in Canada*, Lancaster House, 2006 at p.290 which deals with "Arbitral Jurisdiction and the Elements of Estoppel" (16.5.2). Clearly, estoppel is relevant if one party has raised an expectation intending to affect the other party. All three elements of estoppel are present in this situation. If the Union is arguing that they are not bound by the return to work agreement, they must be estopped.

The Grievor clearly a drug dependency, and that is why the Company did take him back to work. The Company recognises that the issue of disability creates a live issue for an Arbitrator to determine whether further accommodation is required. The fact is, however, that the record shows how extensively the Company has already accommodated this Grievor.

The Company also recognizes the enormous impact of the loss of work on the Grievor. But this does not constitute the full story. The issue of culpability must also be recognised as a live one. The Grievor refused the testing and, by his own admission, was not free of drugs during the preceding four to six weeks. So the Grievor's culpability is a serious factor. If a hybrid approach is applied in the instant case, it must take into account the fact that the Employer has already made extensive accommodations of the Grievor's disability.

He discontinued the counselling. That was his own responsibility. His very recent return to counselling is, in the Company's view, not persuasive when considered against the fact that he was terminated in November of 2009. The consequences of this evidence is that the termination must be upheld. The grievance must be denied, in the Employer's view.

Mr. Stratton then reviewed the following cases drawn from the jurisprudence: *Fording Coal Limited & United Steelworkers of America, Local 7884*, 62 C.L.A.S. 257, Hope, British

Columbia, 2000; *Re Kimberly-Clark Forest Products Inc. & Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 7-0665*, 115 L.A.C. (4th) 344, Ontario, R.L. Levinson, 2003; *Re Kemess Mines Ltd. & International Union of Operating Engineers, Local 115*, 139 L.A.C. (4th) 305, 2005 CLB 11168, 81 C.L.A.S. 154, British Columbia, D.R. Munroe, Q.C. , 2005; *Re United Steelworkers of America, Local 3257 & the Steel Equipment Co. Ltd.*, 14 L.A.C. 356, R. W. Reville, C.C.J., E. Park, A. A. White, 1964; *re Canadian Pacific Ltd. & United Transportation Union*, 31 L.A.C. (3d) 179, M.G. Picher, 1987.

It is the Employer's conclusion that the conditions of the return to work agreement have been violated and the grounds for further accommodation do not exist. If the Arbitrator were to determine that non-culpable conduct requires further accommodation, the further return to work protocol should also contain an obligation to enforce testing.

No reinstatement is warranted except until after a very lengthy suspension.

FOR THE UNION, Mr. Harris acknowledged that the discharge was imposed after a last chance agreement. The Union argues that the grievance must be sustained because the Employer has an obligation to accommodate the Grievor's illness.

The last chance agreement was a Company-imposed document. No "programs" such as those implicit in the document, itself, were actually put in place. There was no follow-up. The document was designed to prompt the Grievor to fail.

It should be noted that there were two drug tests that the Grievor passed: one at his return to work and one in July. The final drug test, the one he refused, was set up because of certain observed behaviour traits. The Grievor refused the test because he knew that he would fail it, at least in part. There are no issues with the Grievor's work performance. This was explicitly recognized in the November 26th meeting, (TD #1) in Mr. Standing's comment. There are no issues with the Grievor's work.

Counselling, as *InfoFacts* Sept. 2009, "Treatment Approaches for Drug Addiction", U.S. Department of Health & Human Services, makes clear (on p 1), is the preferred management / treatment choice. Despite the provisions of the return to work agreement, until recently there was no AA or NA available in Labrador City. Narcotics Anonymous is now available.

Relapses are, according to the statistics, to be expected, and counselling is central to an

addict's sustained recovery. *InfoFacts* June 2008, "Understanding Drug Abuse and Addiction", makes this clear (at page 2), where we learn that, as with ...

"other chronic relapsing diseases, such as diabetes, asthma, or heart disease, drug addiction can be managed successfully. And, as with other chronic diseases, it is not uncommon for a person to relapse and begin abusing drugs again. Relapse, however, does not signal failure – rather, it indicates that treatment should be reinstated, adjusted, or that alternative treatment is needed to help the individual regain control and recover."

It is clear that the Company has accommodated the Grievor's disability. But it is also clear that it has not done so *fully*. The Company is required to accommodate the Grievor up to the point of undue hardship, which, in the Union's view, has not been reached in the Grievor case.

Mr. Harris pointed to the following authorities and arbitral jurisprudence: *InfoFacts* June 2008, "Understanding Drug Abuse and Addiction", *NIDA* (National Institute on Drug Abuse), U.S. Department of Health & Human Services; *InfoFacts* Sept. 2009, "Treatment Approaches for Drug Addiction", *NIDA* (National Institute on Drug Abuse) U.S. Department of Health & Human Services; *Slocan Group - Mackenzie Operations and Pulp, Paper and Woodworkers of Canada, Local 18*, Mackenzie, B.C. 2001; *Skeena Cellulose Inc., & Pulp, Paper and Woodworkers Union of Canada, Local 4*, R.K. McDonald 2001; *Re Castlegar & District Hospital & British Columbia Nurses' Union*, British Columbia, D.L. Larson, 2000.

It is the Union's submission that there is no undue hardship in evidence, and therefore the Grievor should therefore be sustained.

IN REBUTTAL ARGUMENT, Mr. Stratton distinguished various elements of the Employer's arbitral jurisprudence from the particulars of the instant matter.

In the Employer's view, the Union's argument that the return to work agreement was bound to fail must be rejected. The question is, Whose responsibility is it to do the follow-up? The Union appears to want the Employer to exercise a paternalistic approach, and to decide what health management regime is appropriate for the Grievor. That misses the fact that it is the responsibility of the Union and the Grievor if they thought that the agreement was flawed. Ultimately it is the refusal to take the test that is the key.

In the Employer's view the grievance must be dismissed.

CONSIDERATIONS

Powers of the Arbitrator & Scope of Review:

Article 8.05 the Collective Agreement reads:

The arbitrator shall have jurisdiction and authority only to interpret and apply the provisions of this Agreement so far as shall be necessary to the determination of the grievance and shall not have any power to alter or change in any way the provisions of this Agreement or to substitute any new provisions for any existing provisions, nor to give any decision inconsistent with the terms and provisions of this Agreement; nor shall any past practices or customs become binding unless they are in writing between the Company and the Union. Where the arbitrator determines that an employee has been disciplined for just cause, he/she may review and modify the penalty imposed...

In this context, I note that Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 7:4100 "Scope of Review" reads in part:

Deference is also the rule for arbitrators where the parties have mutually agreed to a set of penalties for particular offences or in specific cases. In some jurisdictions, arbitrators are precluded by statute from altering a specific penalty established by the parties and, even in those situations where the legislation gives arbitrators a discretion to fashion their own solutions, the presumption is not to interfere. Thus, where, in a collective agreement or minutes of settlement, the parties agree on a specific penalty for absenteeism, theft, use of drugs or alcohol, vandalism, harassment and intimidation, insubordination, or incompetence, and it has been established that the employee misconducted himself or herself in such a way, arbitrators will almost always defer to the parties' agreement in the absence of exceptional circumstances. In such cases, arbitrators typically limit the scope of review to determining whether a further incident occurred and/or whether the terms of the agreement or settlement were breached.

Even in these latter circumstances, however, an arbitrator may substitute a lighter penalty than the parties have agreed to if he or she is convinced that the employer did not carry out the terms of the settlement in good faith, that the employee did not fully understand its consequences, or that the employee's misbehaviour was innocent, trivial and/or outside the scope of the settlement agreement. As well, arbitrators are obliged to ensure that the terms of any settlement or last-chance agreement are compatible with the requirements of human rights and labour relations legislation...

From the same paragraph I also note that :

... it is now generally accepted that unless the collective agreement or relevant legislation provides otherwise, an arbitrator's remedial powers to assess the appropriateness of whatever disciplinary sanctions were imposed are broad and

largely unfettered. The purpose of their review is to determine for themselves that a sanction is just and reasonable in all the circumstances – that the penalty "fits the crime"...

I also note a pertinent comment at (*idem*) para. 1:5300 "Jurisdictional Error":

... providing a remedy that is neither customary nor provided for by the collective agreement may be seen as a "jurisdictional error": for example, where an arbitrator, in devising a mandatory order, imposes a condition or *modus operandi* for carrying out a competition for a job which the agreement did not contemplate ...

At issue between the Parties is a grievance seeking the Grievor's reinstatement after disciplinary termination for failure "to adhere to the conditions of" his "return to work agreement..."

The Union claims that the Employer's acknowledged past accommodations of the Grievor's disability have not fully discharged its responsibilities under the *Human Rights Code* of Newfoundland & Labrador (RSNL 1990 Chapter H-14) S.9(1)(a). In the Union's view, the Grievor should be reinstated.

The Employer argues it has provided several accommodations to a relatively short service employee, who was bound by a return to work (or "last chance") agreement that the Parties had negotiated in good faith, and that the Grievor had violated in at least two ways, but particularly by refusing to take a drug test required under that agreement.

Disability as common ground between the Parties: The evidence established that the Grievor suffers from addiction to illegal drugs, and it was not contested that this is a "disability" as that term appears in S.9(1)(a) of the *Code*. In this context, I note the following helpful comment in *Brown and Beatty Canadian Labour Arbitration* (4th ed.) para. 7:6100 "Disabled Employees".

It is a long-standing and well-accepted principle of arbitration law that an employee who is absent from work owing to some bona fide illness or injury cannot properly be disciplined by his employer. Similarly, if an employee, though able to report for work on a regular basis, is unable to perform all the tasks that are required of him either because of some debilitating physical condition ... he may not be sanctioned in a disciplinary way by his employer. In both of these circumstances, arbitrators have reasoned that in the absence of fault or dereliction of duty on the part of the employee, it is not appropriate for the employer to invoke its disciplinary powers... Similarly, because of the non-punitive nature of these cases, warnings, suspensions, demerit systems and attendance programs which fail to distinguish culpable and non-culpable absences and have disciplinary connotations, are generally not considered to be appropriate forms of employer response. Nor is ordering an employee to attend a medical interview

under the threat of discipline permissible. The Supreme Court of Canada has ruled that the termination of a disabled worker pursuant to a deemed-termination clause will be regarded as discriminatory if it imposes a period of recovery that is shorter than that which an employee would be entitled to under the relevant human rights legislation. According to the court, an employer cannot rely on an automatic termination clause without considering the specific circumstances of each employee. As well, the procedural requirements linked to disciplinary sanctions have been held not to apply to the termination of an employee in these circumstances.

Employers can, of course, discipline employees who are disabled and incapacitated when they misconduct themselves in ways that warrant blame and censure. Arbitrators have frequently sustained the termination of employees who are unable to report for work on a regular basis, where their absenteeism is determined not to have been completely blameless or beyond their control. Illustrations of behaviour which may impugn the innocence of the absenteeism record include such dereliction on the employee's part as malingering, receiving disability benefits and deliberately avoiding contact with the employer while working at another business, failing to notify the employer of one or more instances of absence, or failing to adduce adequate medical evidence to support an absence. Similarly, where the injuries giving rise to the employee's absence are related to off-duty behaviour wholly within the employee's control (e.g. , motorcycle riding), it could not be said that such absenteeism was entirely blameless or innocent. By contrast, absenteeism and incapacity caused by alcoholism and drug abuse is usually treated as being 'innocent' and blameless, even though both are conditions which are perceived as having an element of volition associated with them. Where, however, it can be shown that the employee's record could not be attributed entirely to his addiction and was, at least in part within his control, some disciplinary response, including discharge, may be appropriate.

When employers are faced with employees who, as a result of some infirmity or incapacity, are unable either to report for work on a consistent and regular basis or to perform the tasks expected of them, arbitrators have not left them without any remedy. To the contrary, in the absence of any limitations in the collective agreement, they have recognized the employer's right to insist on the benefit of its bargain and to require the employee to render those services which the agreement anticipates she will perform in return for her remuneration. Most fundamentally, where it can be established that (i) an employee's record of past absences is excessive and (ii) that there is no reasonable expectation that it will improve in the future then, unless the employer has waived its rights, and so long as it will not deprive those who are handicapped of their rights to sickness, disability and related benefits more than others, nor of their right not to be discriminated against that is guaranteed in both the Constitution and human rights legislation, employers can terminate their services on the grounds of innocent, non-culpable absenteeism. As well, in addition to dismissal, arbitrators have recognized that in appropriate circumstances, and depending on the language of the

agreement, it will be permissible, and in some cases required, for employers to warn, counsel, transfer, lay off, place on long-term disability or employee assistance or attendance/performance program or on a medical leave, reject on probation, demote, make part-time, put on a modified work program, or retire employees who are incapable of reasonably regular attendance or executing the tasks which they are expected to perform. In such circumstances, it has been recognized that without such options, employers would be required to bear the costs associated with employees who were unable adequately to discharge their employment obligations. Arbitrators have insisted that the rights of employees who are incapable of discharging their employment responsibilities in a consistent and adequate manner cannot be settled without considering the legitimate interests of their employers. One arbitrator has summarized this balancing of the respective interests of the employer and employee in the following terms:

The first basic principle is that innocent absenteeism cannot be grounds for discipline, in the sense of punishment for blameworthy conduct. It is obviously unfair to punish someone for conduct that is beyond his control and thus not his fault. However, arbitrators have agreed that, in certain very serious situations, extremely excessive absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. Because the relationship is contractual, and the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter. If an employee cannot report to work for reasons that are not his fault, he imposes losses on an employer who is also not at fault. To a certain extent, these kinds of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached, the accommodation of the legitimate interests of both employer and employee requires a power of justifiable termination in the former.

Statute, arbitral jurisprudence, and the other relevant authorities cited make it clear, therefore, that as Arbitrator I am bound to determine whether the Grievor's admitted "failure to adhere to the conditions of your return to work agreement..." (Consent #s 2 & 4) was culpable in the circumstances, and whether disciplinary termination was appropriate as a response. As will be clear in the immediately following considerations, I will explore, among other issues, whether specifically the Grievor's refusal to submit to a "random", or unannounced, drug test (one of the "conditions of (his) return to work agreement") was culpable and subject to discipline.

The evidence & arbitral jurisprudence:

The evidence shows that the Grievor's records service and of discipline (TD #2) with the

Company are, at best, mixed. As summarised by Company Counsel, in the approximately 49 month period from the Grievor's hire date (August 15, 2005) until his termination (November 30, 2009), only 34 months were free of suspensions or other interruptions.

The Company argues that, by its repeated reduction of (ungrieved) disciplines imposed for missed shifts and its decision to sign a last chance agreement after Mr. Keating's self-termination (also ungrieved), it has clearly accommodated the Grievor's disability. In the end, the Employer argues, the termination responded to blameworthy acts that could not reasonably be shielded from their disciplinary consequences either by statute or jurisprudence.

In the Employer's view, the Grievor violated the return to work ("last chance") agreement (RT #1) he had made, and to which both the Union and the Company committed themselves in good faith. He admitted using marijuana on several occasions in the weeks preceding termination in direct contravention of RT #1 at Condition # 6, which rendered him subject to immediate termination under the same Condition # 6 and Condition # 8.

The Company also pointed particularly to the fact that the Grievor had refused the drug test which he had been ordered to undergo on November 25, 2009. This refusal not only rendered him subject to immediate termination under the RT #1 Conditions # 6 & 8, but was, additionally, a serious act of insubordination, which invited disciplinary termination, in the Employer's view.

The Employer also argued that the return to work ("last chance") agreement, with its "random" or unannounced drug testing conditions and related sanctions, were crucial to its decision to return the Grievor to work in June 2008 after his self-termination. The Company needed the security of that undertaking and its sanctions in taking what it saw as a risk. Employer Counsel pointed out that even the Grievor himself agreed that the unannounced testing component of RT #1 was an incentive to abide by the agreement. (*Cf., Re Kimberly-Clark Forest Products Inc. & Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 7-0665*, 115 L.A.C. (4th) 344, Ontario, R.L. Levinson, 2003 at para 28.)

I must consider, therefore whether the Company had discharged its obligation to accommodate the Grievor, and his "failure to adhere to the conditions of (the) return to work agreement ..." were blameworthy acts to which discipline was an appropriate response.

I note that Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 7:6120 "Duty

to accommodate" offers the following commentary:

Before an arbitrator will rule in favour of an employer's decision to terminate a disabled employee, he or she must not only make a ruling about the latter's medical condition but must also be satisfied that the statutory duty to accommodate that person's needs has been met. The Supreme Court of Canada has ruled that a collective agreement's termination-of-employment clause which provides a disabled employee with less than that which he or she is entitled to under human rights legislation will have no effect. Although at one time some arbitrators doubted whether they had jurisdiction to enforce such legislation, that is no longer the case. It is now recognized that, in reconciling the interests of employers and employees who are afflicted with an illness or disability (or an analogous condition like being pregnant) that inhibits their ability to do their jobs, arbitrators must have regard to those provisions in human rights legislation that prohibit discrimination in employment because of a physical or mental disability. To avoid a finding of discrimination, an employer must show that, prior to terminating an employee whose poor attendance or work performance is caused by an illness or injury that falls within the legislative definition of "disability" ..., it has done everything that could reasonably be expected of it in trying to accommodate that person's needs. Following the courts and human rights tribunals, most arbitrators have adopted a very liberal interpretation of what qualifies... , and have ruled that alcohol and drug addiction, migraine headaches, sleep apnea, sensitivity to cigarette smoke, hypertension, extreme sensitivity to noise, colour-blindness, chronic fatigue and pain, depression and anxiety, and personality disorders even if only temporary and transient (but not tonsillitis or the flu), fall within the scope of the legislation.

In general terms, the duty has come to mean that employers can terminate the services of employees who suffer handicaps that interfere with the ability to do their work only if all other possible ways of retaining them would constitute "undue hardship". The duty does not, in the words of one arbitrator, ask employers to bear burdens that are "excessive or disproportionate". In practical terms, however, the obligation is not insubstantial. The Supreme Court of Canada has categorically rejected the American rule which excuses employers from the duty to accommodate even when the costs are minimal. The court has said that in all cases where discrimination is alleged, whether it is intentional (direct) or unintentional (indirect), the employer must establish that the standards it has set for the job are "bona fide occupational qualifications" ("BFOQ"s); and that the disability constitutes an actual, functional limitation on the person's ability to do the job, in addition to demonstrating the disproportionate burden it would bear if it were not allowed to exercise its powers of termination. In deciding whether retaining a disabled employee would impose undue hardship on an employer, the court has highlighted a number of factors arbitrators should consider, including financial costs, disruption of the collective agreement, problems of morale among other employees, interchangeability of the workforce and facilities, the size of employer's operation, as well as whether anyone's health and/or safety would be put at risk.

Within these guidelines set by the Supreme Court... arbitrators have generally frowned on policies that purport to deal with everyone who suffers a particular medical condition in exactly the same way, without any consideration of their actual fitness for the job. As well, it is generally expected that employers will be supportive towards alcoholics and employees who abuse other drugs, in helping them overcome their addictions....

To satisfy its duty to accommodate, employers are not expected to have to bear excessive financial costs or expose other workers or members of the public, or even the disabled employee, to unacceptable levels of risk to their health, safety and general well-being. Nor are arbitrators inclined to order accommodations that will anger, frustrate or demoralize other employees. There is also a reluctance to require employers to retain disabled workers in active employment if it entails ignoring or overriding seniority rights or the displacement of able-bodied employees.

The idea underlying the duty to accommodate is not that an employer should be put in the position of having to substitute one form of discrimination for another. Nor is the duty meant to shield disabled employees who have committed major employment offences from having to take responsibility for their behaviour.

From the arbitrator's perspective, the duty entails looking very carefully at how a proposed course of action will affect the interests of everyone involved and seeing how they compare. Whether an arbitrator concludes that the point has been reached when retaining a disabled employee, even on a leave of absence, constitutes undue hardship invariably depends on the facts of each case. Although there have been numerous awards in which arbitrators have ruled that an employer has not done everything it was reasonably expected to do, there are just as many that have found employers have lived up to their legal obligations.

The Grievor's "medical condition, as noted above, is not in dispute. He has a disability.

Accommodation:

The Company's "statutory duty", therefore, becomes the focus of my attention. It is clear that I must determine whether the Company has met its duty "to accommodate" the disabled employee's medical condition.

The Company argued that it has met its duty in this respect. In fact, I note that Mr. Tucker, the person most directly responsible for the termination decision, testified that, even prior to the June 2008 decision to conclude a return to work (or "last chance") agreement, it was his view that "IOC had no responsibility to bring him back." The evidence clearly shows that the Company had made several meaningful modifications to disciplines imposed, (though I note that the evidence does not show that any or all of these modifications actually related to the Grievor's disability). The Union does not dispute this, but argues the Company has not fully met its duty under the law.

The Union argues that the Company has not demonstrated that "it has done everything that could reasonably be expected of it in trying to accommodate" the Grievor's condition, and specifically that it has not demonstrated "undue hardship"

I note that Brown and Beatty para. 7:6120 (quoted, in part, above) elaborates on the question of what constitutes "undue hardship":

"... the court has highlighted a number of factors arbitrators should consider, including financial costs, disruption of the collective agreement, problems of morale among other employees, interchangeability of the workforce and facilities, the size of employer's operation, as well as whether anyone's health and/or safety."

"*Financial costs*" & "*size of... operation*": I note that, when asked if overtime is a normal occurrence, and if he would agree there is no financial hardship for the Company from the Grievor's working in the Dewatering department, Mr. Tucker said:

The only financial hardship would be that the absenteeism would be filled in with overtime... We normally budget a certain amount of overtime for backfill for vacation and leaves of absence. Approximately 8% of the work is budgeted as overtime. Overtime is my insurance for building and rebuilding, so yes it's normal.

I conclude from this evidence that any financial overtime costs involved in the Grievor's absences can not properly be defined as amounting in themselves to "undue" financial "hardship".

"*Disruption of the collective agreement*" I note that the Company argued that it had acted in good faith in entering into the return to work (or "last chance") agreement, and that it needed the security provided by that agreement and by the good faith of the Grievor and the Union both of whom signed it. The question is, When is an agreement not an agreement?

I note that the arbitral jurisprudence as reported by Brown and Beatty (above) does recognise "disruption to the collective agreement" as a potential source of "undue hardship". The Company has a right to effective recognition under Article III in the instant Collective Agreement. In this context I should note that the Company insisted that, the Union should be estopped if it were now attempting to repudiate its commitments under that Collective Agreement, on which commitments the Company has relied in its acting as it did.

The Union made it clear that it was not repudiating its commitments under the return to work agreement. It was arguing, rather, that the Parties must adhere to the *Code* in interpreting and applying that "last chance" agreement. I accept the Union's position, and do not find that the

question of estoppel is alive in the matter before me. But, as noted above,

".. arbitrators are obliged to ensure that the terms of any settlement or last-chance agreement are compatible with the requirements of human rights and labour relations legislation."

In answer, therefore, to the question asked above, it is clear that the Supreme Court has ruled that any such agreement must conform to the *Code*, and that any such agreement that is interpreted or implemented in a way that does not conform to the *Code* can not stand.

"*Health and/or safety*" I note that Mr. Tucker testified he is ...

"responsible for 350 people. Safety is key to my job. I can't afford having such a person who is casual about drugs working with this Company."

I note also, however, that the Company did not demonstrate any specific safety concerns relating to the Grievor's work in the Dewatering department. I further note that the Company did not challenge testimony, and written evidence (TD #1), that the Grievor had "never done it at work or been on it at work." Further, the Union's unchallenged claim that the Grievor's work was satisfactory was somewhat supported by the evidence (TD #1 p.2) of Mr. Standing's "... good feedback ... " comment at the investigation meeting, which comment Ms. Dumaresque confirmed in her testimony. Finally, I note that the return to work agreement under which the Grievor was at work at the time of the termination required (at provision #5) that he would...

"not be assigned to the operation of any mobile equipment considered to be of a safety sensitive role for a period of at least one (1) year from the date of his return to active work."

Thus, I do not find that there is evidence that would support a claim that the Company faces "undue hardship" in accommodating the Grievor's disability in context of "health and/or safety" concerns.

I find, on the basis of these considerations, that the Company's disciplinary termination of the Grievor can not be sustained specifically or exclusively on the ground that it faced "undue" financial or contractual or safety related "hardship" in accommodating his disability.

"*Coercion*"?

I should also note that, Brown and Beatty at para. 7:4100 "Scope of Review" reads, in part:

... an arbitrator may substitute a lighter penalty than the parties have agreed to if he

or she is convinced that the employer did not carry out the terms of the settlement in good faith, that the employee did not fully understand its consequences ...

I note that, in his testimony, Mr. Kean spoke of the Union's concerns at the time when the return to work (or "last chance") agreement was being negotiated in 2008. Mr. Kean testified, as long-time President of the Union, to his own familiarity with the statistics relating to lapses and relapses among those suffering drug addiction disabilities.

The Union directed the Arbitrator's attention to two "*InfoFacts*" documents published by the U.S. Department of Health & Human Services dealing with related issues. In the June 2008 number, I note the following:

"... as with other chronic diseases, it is not uncommon for a person to relapse and begin abusing drugs again. Relapse, however, does not signal failure – rather, it indicates that treatment should be reinstated, adjusted, or that alternative treatment is needed."

Mr. Kean testified that he was, in fact, so convinced of the Grievor's likelihood to relapse that he had, in June 2008, secured from the Grievor a letter (GK #3) that was designed to protect the Union's interests in the event of a relapse on the Grievor's part and possible liabilities flowing from the Grievor's vulnerability to the sanctions set out in the return to work agreement.

Mr. Kean testified that the Grievor was so desperate to get his job back that he was in effect coerced by the circumstances, and had begged the Union to sign the return to work agreement despite the Union's warnings and strong advice that it was unwise for him to do so. (*Cf., Re Kemess Mines Ltd. and International Union of Operating Engineers, Local 115*, 139 L.A.C. (4th) 305, 2005 CLB 11168, 81 C.L.A.S. 154, British Columbia, D.R. Munroe, Q.C. , 2005)

I find Mr. Kean's testimony, and GK #3 itself, persuasive evidence that in the eyes of at least one of those working most closely with him at the time the return to work (or "last chance") agreement was negotiated and signed, the Grievor did not fully understand its consequences. The Union's understanding, by comparison, was fuller, and more justified as events have revealed. As a consequence, if any culpability is revealed through applying a hybrid analysis (see below) the arbitral jurisprudence shows that "an arbitrator may substitute a lighter penalty than the parties have agreed to."

Varying the penalty?

The arbitral jurisprudence is clear that "discipline" is not appropriate response to non-

culpable behaviour where disability is the issue. However, the Employer argued that the instant case invites a "hybrid" analysis, since there are culpable and non-culpable elements in his acts.

Therefore, should it turn out that this matter must be viewed through a hybrid lens, I must ask if some other discipline might appropriately substituted, if any discipline should be found to apply in the instant case.

Hybrid approach: Insubordination?

Re Kemess Mines Ltd. and International Union of Operating Engineers, Local 115, 139 L.A.C. (4th) 305, C.L.A.S. 154, British Columbia, D.R. Munroe, Q.C., 2005 provides, (at pp 330 ff.) a valuable review of the "hybrid" approach. Quoting extensively from the Labour Relations Board in *re Fraser Lake Sawmills Ltd. and I.W.A.- Canada*, Loc. 1-424 (2002), 2003 C.L.L.C. 220-041, I note that his award (at p. 20 of 29) endorses the view that:

A basic premise of the culpable, non-culpable paradigm is that discipline has no place where there is no blameworthy conduct. The object of discipline is to bring inadequacies in work performance or conduct to an employee's attention so as to correct or prevent its recurrence. That object cannot be achieved, nor is it consistent with basic notions of justice, for discipline to be imposed when the conduct at issue is beyond or outside the control of the employee....

In the context of issues involving addiction and workplace misconduct, a review of the arbitration cases reveals a spectrum of facts and issues. At one end of the spectrum, the addiction compels or drives the grievor's behaviour to the extent of the grievor in effect having no control (at least control that should attract discipline) over his or her actions. At the other end of the spectrum, there is addiction, but it is found to not have a causal link to the workplace misconduct.

In between these two ends of the spectrum are what could be terms (*sic.*) Hybrid facts and cases. In the hybrid context, there is addiction which is clearly related to or has causal connection to workplace misconduct by the employee, but the addiction is not of such a nature as to remove the grievor's control or exercise of choice in respect to the misconduct. In this hybrid context, there is thus a mix of causes, a mix of addiction driven conduct, (i.e., non-culpable conduct) and voluntary conduct (i.e., culpable conduct).

At p 21-22 (of 29) I note that *Kemess Mines* also quotes *Fraser Lake Sawmills* with approval, as follows:

"In this context, an arbitrator should not be required to precisely parse out what percentage of conduct should assigned culpability and what percentage should be assigned non-culpability. It would, in fact, be very difficult, if not impossible, for an arbitrator to determine with any certainty after the fact, the degree of impairment at the time an employment offence is committed... It is for the arbitrator to determine

the appropriate remedial response having regard to all the circumstances of the case. Whatever remedial response is ordered, it must also be within the labour relations principles and policies in the Code and consistent with the general law."

The Employer argued that it was justified in terminating the Grievor on culpable grounds. In the Employer's view, the Grievor was guilty of clear insubordination in his refusal to take the drug test on November 25, 2009.

The Grievor acknowledged refusing a drug test that he had been ordered to take. According to Ms. Dumaresque, she had instructed him to undergo the test in accordance with "the return to work agreement." I note that the Grievor explained his refusal on the grounds that the result might have caused embarrassment, and that in refusing, he was aware of the requirements of the return to work (or "last chance") agreement.

I note that Ms. Dumaresque's evidence shows the instruction was in terms of the return to work agreement. I can not, therefore, logically or factually, regard that instruction as independent of that agreement. I note that according to the Grievor's unchallenged testimony, he was no longer taking counselling on November 25, and had, again on his own admission, used marijuana some weeks prior to refusing the test. I conclude that the disability continued.

I am disturbed not only by the Grievor's relapse, but also and in particular, by his refusal. That refusal denied the Employer insight it felt it needed, and felt itself entitled by the return to work agreement, in order to sustain confidence in the Grievor's level of commitment and to assess the nature of any work-place misconduct with safety implications. Sensitivity to embarrassment that might have been caused to himself or anyone else is not relevant to the Grievor's action. His refusal denied the Employer time-sensitive access to information about his state while at work on November 25 that the swab might have provided and that it felt it had a right to secure. Parties within an employment relationship, where 'obey first and grieve later' is the norm, owe each other access to the truth in respect of those health and safety issues that affect all. To refuse the test did, at least formally, lay the Grievor open to a charge of insubordination.

I offer no comment on whether such a charge might be sustained, however, since insubordination was not among the grounds cited in the dismissal.

I am also aware, as noted above, that the instruction to take the test was framed in terms of the return to work (or "last chance") agreement which, as found above, the Grievor had signed

without fully understanding its consequences. There is reasonable doubt in my mind, given his admitted relapse, that the Grievor would have had significantly better understanding of the consequences of this agreement on November 25, 2009 than he had in June of 2008.

I conclude, first, that in these circumstances it is not possible or fruitful or required of the Arbitrator "to precisely parse out what percentage of conduct should assigned culpability and what percentage should be assigned non-culpability" (see *Kemess Mines* above). Second, however, I also conclude that, even when viewed through a hybrid lens that takes potential culpability into consideration, the Employer's decision to terminate the Grievor was not an appropriate response in the circumstances. To sustain disciplinary termination on the basis of the Grievor's refusal in these circumstances, would, in effect, improperly thwart the force of the *Code*.

Appropriate Remedial Response?

I am required therefore to consider and appropriate remedial response. I note that evidence shows that no specific "programs" such as those referenced in RT #1, itself, were actually in place. The evidence also shows that some services ("Narcotics Anonymous") that might provide some such follow-up actually became available in Labrador City only very recently. The Grievor had, on his own initiative, undergone counselling (with the Counsellor through whom he had arranged a referral to Humberwood treatment centre) for some months before discontinuing. The Grievor testified that he should not have discontinued counselling, and the Union provided authoritative support (*InfoFacts*) for the proposition that on-going follow-up counselling is an essential component in successful addictions treatment. I also note that, when Mr. Kean was asked whether he had asked the HR Director, Mr. Nichols, to strengthen the wording of the return to work (or "last chance") agreement in terms of follow-up requirements, he answered, in part:

"In hindsight we probably should have. In future we probably should."

I note too that the Grievor himself testified there is value to having an incentive (drug testing) to sustain commitment in battling such a disabling addiction, a position supported in at least some of the arbitral jurisprudence (*cf.*, *Re Kimberly-Clark Forest Products Inc. & Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 7-0665, 115 L.A.C. (4th) 344, Ontario, R.L. Levinson, 2003 at para 28.*).

DECISION

In view of the foregoing considerations I find, therefore, that:

The grievance is sustained and the disciplinary termination set aside as failing to meet the just-cause standard when reviewed in light of the Employer's duty to accommodate, and taking hybrid circumstances into account. I order that:

1. The Grievor is reinstated effective March 8, 2010 subject to compliance with the conditions set out below.

2. The period of the Grievor's absence from work between November 30, 2009 and March 8, 2010 will be recorded as a suspension without pay.

Between March 8, 2010 and the Grievor's actual return to work, he will be placed on a medical leave of absence, during which time he is to suffer no loss of seniority or any other benefits to which an employee absent due to illness may be entitled under the Collective Agreement. (Cf., Article 17.01a)

3. The Grievor's actual return to continuing employment under the provisions of the Collective Agreement is contingent on his observing the following conditions:

3.1 The Grievor shall abstain from consuming alcohol and the use of illegal drugs.

3.2 During his medical leave of absence, and following his return to active work, the Grievor shall fully and successfully participate in a program of assessment(s) and treatment(s) and ongoing counselling organised through the Employee and Family Assistance Program and planned in consultation with the Grievor's personal physician, the Company Physician, and locally available Mental Health /Addictions Services.

3.3 This program shall include regular follow-up counselling, in which the Grievor must agree to participate according to an attendance schedule that is to be determined and monitored by the Counsellor. Before the end of his final shift each month, the Grievor shall submit to the Company physician, for his or her professional attention, his record of attendance at counselling for each month, signed by the Counsellor. The Company Physician shall destroy the attendance reports after one year.

3.4 At the end of the first year of the Grievor's return to active work the Company and Union will jointly review the program required under 3.2 and described in 3.3 above and renew, modify, or discontinue it.

3.5 The Grievor's reinstatement to continuing employment following medical leave is conditional on appropriate medical clearance from his personal physician confirming his successful continuing participation in the program required under 3.2 above, and his readiness to return to work subject to continuing participation in regular follow-up counselling (as required under 3.3 above).

3.6 Mr. Keating will not be assigned to the operation of any mobile equipment considered to be of a safety sensitive role for a period of at least one (1) year from the date of his return to active work.

3.7 The Grievor shall attend Alcoholics Anonymous (or similar recognised addictions anonymous organisation) at least twice a week from March 15, 2010 onward for at least the first year after his return to active work.

I remain seised, as agreed at the commencement of the hearing, for a period of sixty (60) calendar days after publication of the award to deal with matters of quantum or interpretation, should they arise.

Respectfully submitted as the decision of the Arbitrator.

**John A Scott, Ph.D.
Arbitrator**

March 8, 2010