CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4828

Heard in Edmonton, June 20, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Claim on behalf of J. Klippenstein.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On January 31, 2022 the grievor, Mr. J. Klippenstein, was served a Form 104 that stated the following:

This Discipline Letter is in connection because of the biological monitoring substance test performed on November 3, 2021 which showed a positive result for cocaine and alcohol in only your hair samples. You are hereby dismissed for violating:

- *Policy HR203 and Procedures HR 203.1 including but not limited to:*
  - *Violation of Section 4 of HR 203.*
  - *Violation of 28-Day Ban*
- *3.1.5 Canadian Rail Operating Rules (CROR) Rule G and*
- *Relapse Prevention Statement of Understanding agreement dated January 14, 2020*

The Union objected to this Company action and a grievance was filed on February 28, 2022.

The Union contends that:

1) The grievor was not using drugs and alcohol and underwent a number of independent tests that established such to be the case. The Company's hair follicle test on November 3, 2021 was false;

2) The Company has not met its burden of proof. The hair follicle test the grievor took on November 3, 2021 was (and is) a procedure that recent jurisprudence has found "is subject to many false positives";

3) The Relapse Prevention Statement of Understanding was never agreed to by the Union and therefore has no binding effect;

4) The Supplemental Investigation held on January 13, 2022 was not fair or impartial and was therefore in violation of section 15.1 and 15.2 of the collective agreement;

5) The discipline assessed the grievor was unfair and unwarranted.

The Union requests that, the Company be ordered to reinstated the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

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- 3.1.5 Canadian Rail Operating Rules (CROR) Rule G and
- Relapse Prevention Statement of Understanding agreement dated January 14, 2020

The Union Position:

The Union has filed their own Ex Parte Statement.

Preliminary Objection:

The Union has inappropriately expanded the scope of their grievance. Absent from the Step 2 correspondence submitted is any allegations regarding the Grievor's Relapse Prevention Statement of Understanding.

Within the Step 2 grievance, the Union clearly accepts the agreement as a part of the Grievor's continued employment.

This new argument at the doorstep of Arbitration is contrary to the Memorandum of Agreement Establishing the CROA&DR, specifically item 9. As such, the Arbitrator has no jurisdiction to address these issues.

Notwithstanding the aforementioned, the Company denies the Union's contentions and declines the Union's request.

The Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service, work history, and his past discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Union alleges that the Company's hair follicle test on November 3, 2021 was false, but the evidence provided, including what was entered by the Union and the Grievor, does not support such an allegation.

Throughout the investigative process, the burden of proof was met – the substantive evidence provided indicates that the Grievor was in violation of his January 14, 2020 Relapse Prevention Statement of Understanding and the Company's Drug and Alcohol Policies and Procedures.

The Company maintains there has been no violation of the Collective Agreement and that the discipline assessed was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the dismissal and requests that the Arbitrator dismiss the Union's grievance in its entirety.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Phillips	**(SGD.) L. McGinley**
General Chairperson	Assistant Director, Labour Relations

There appeared on behalf of the Company:
S. Oliver – Manager, Labour Relations, Calgary
F. Billings – Assistant Director, Labour Relations, Calgary
S. Scott – Manager, Labour Relations, Calgary (Observer)

And on behalf of the Union:
D. Brown – Counsel, Ottawa
W. Phillips – President, Ottawa
J. Klippenstein – Grievor

AWARD OF THE ARBITRATOR

1. The Grievor began his employment with CP in 2010. He was employed as Machine Operator Helper, which is a safety-sensitive position.

2. In June of 2018, the Grievor had a positive test for cocaine and was held out of service. On January 14, 2020, after attending rehabilitation treatment for a substance use disorder, the Grievor entered into an “Acknowledgement of Relapse Statement of Understanding” (“SOU”) with the Company to return to work. He agreed to abstain from all use of alcohol or drugs and to submit to unannounced biological monitoring testing.

3. The Grievor was dismissed on January 31, 2022, after testing positive for the presence of cocaine and alcohol through hair follicle testing. The Grievor had no discipline on his record, besides the dismissal which is at issue.

4. This Grievance was filed against that dismissal.

5. For the reasons which follow, the Grievance is dismissed. The Company’s decision to discharge the Grievor is upheld.

Summary of Arguments

6. The positions of the parties are as set out in the Statements of Issue each filed. The Union takes issue with the fairness of the Investigation; the accuracy of the test

results (as being “false positives”) and the enforceability of the SOU, as the Union was not a party to that document. It urged the SOU is therefore invalid and unenforceable and cannot be relied upon. The Company argued the Union did not raise any issue with the enforceability of the SOU in the grievance process and cannot do so now, due to the rules of this expedited arbitration process, as this is a separate substantive basis for the grievance, which was not raised in that process. It also urged it would be highly prejudicial to allow reliance on that argument on the facts of this case. The Company argued the test results it relied on were accurate; that the test results relied on by the Grievor are substantially different from those which led to his dismissal; and that is decision to discharge the Grievor was just, appropriate and reasonable.

<u>Facts</u>

7. Some background is necessary for context.

8. Under the SOU, the Grievor was required to abstain from the use of all drugs and alcohol; participate in the Company’s Relapse Prevention Program;; subject himself to unannounced biological testing (which included urine and/or hair follicle testing for alcohol and drugs); and immediately notify the Company of any relapse prior to that testing. The SOU was to be in force for two years, to January of 2022. If the Grievor breached the SOU, he could be found to have violated the Company’s Alcohol and Drug Policy and unfit to work.

9. The Union was not a party to the SOU. The Company explained this was because it considered there were privacy concerns with sharing the Grievor’s confidential medical information with the Union, at least at that time. However, the Union did subsequently become aware of the terms of the SOU, as in July of 202, the Grievor had also tested

positive for cocaine under the SOU. He was investigated for that use and had representation of the Union at that Investigation. The SOU was relied upon by the Company and entered into the Investigation record. The Grievor admitted to “slipping up” and using a gram of cocaine “four or five months” previously.

10. The Grievor was not disciplined for this relapse as the Company had timelines issues.

11. No grievance was filed by the Union after it became aware of the SOU in the summer of 2020. The Union did not allege that that time that the SOU was not enforceable against the Grievor as it was negotiated directly with him, without the involvement of the Union. Neither did the Grievor or his Union take issue with the Grievor’s ability to continue working under the terms of the SOU; its terms; its reliance on hair follicle testing as one biological measure of drug and alcohol use; the reliability of hair follicle testing; or with the positive result that had occurred from hair follicle testing in July of 2020.

12. The Grievor continued to be employed under the terms of the SOU after July of 2020, to the knowledge of the Union.

13. This “slip up” in July of 2020 is considered a “relapse”. Jurisprudence has accepted that relapses are part of the recovery process.

14. On August 3, 2021, the Grievor submitted to hair follicle testing under the terms of the SOU. That test was negative. The Grievor again continued his employment under the terms of the SOU. On November 3, 2021, the Grievor again provided hair samples for testing under the terms of the SOU. The Company chose to have segmented tests performed, so there were four tests performed, on different segment lengths of the

Grievor's hair. The laboratory information indicated the samples arrived "with Chain of Custody intact". I am satisfied that there is no evidence to support the Union's allegations regarding issues with the chain of custody.

15. All of the tests performed came back positive for the use of cocaine and alcohol, with varying results depending on which segment was tested.

16. The positive result for cocaine tested at between 3.46 ng/10mg and 15.7ng/10mg; and for BZE (a cocaine metabolite) at .74 ng/10 mg to 4.39 ng/10 mg. The Grievor was advised of this result on November 8, 2021. The Grievor's hair sample was also positive for ethyl glucuronide (EtG; alcohol) testing between 15 pg/mg and 37.7 pg/mg, depending on the segment. According to the medical evidence, a test result of over 30 pg/mg equated to "excessive" alcohol consumption - equivalent to daily consumption of 4 to 8 drinks for an extended period of time.

17. The Grievor was told this result on November 10, 2021. The Grievor called back to DriverCheck about 40 minutes after he was first notified of the result of the alcohol test and asked the individual he spoke to (not the MRO who gave him the result) if the level of alcohol was "high". He was told the cutoff was 2.0 pg/mg.

18. According to the Medical Review Officer ("MRO"), the Grievor had denied any use of drugs or alcohol. Regarding cocaine use, he suggested to the MRO that performing oral sex on his girlfriend who smoked cocaine perhaps explained his positive result. The MRO noted this would not be the case unless her genitals were sprinkled with cocaine.

19. Regarding the alcohol result, the notes of the MRO indicated the Grievor was "amazed" with the positive alcohol result, as he insisted he "never had alcohol" and "does not drink at all".

20. The Grievor was provided an opportunity by the MRO to have the sample retested but declined. The Grievor explained in an investigation interview that he did not take this opportunity, as the re-test would be performed by DriverCheck, and he felt it had already made an error in the first testing. The evidence established he also asked about the cost of the testing and would told he would have to pay the fee of $348.

21. Instead, the Grievor had several private tests completed between November 9, 2021 and December 20, 2021, which are further discussed below. One of those privately arranged tests was positive for the use of methamphetamines and marijuana.

22. On November 20, 2021, the Grievor asked the MRO about the possibility of "false positives". He was told that four segments had all come back positive, one for the entire segment and one for each of the three segments, which from the segment length indicated a period of use of over three to four months prior to the test. The Grievor maintained that the testing of November 3, 2021 resulted in "false positives", as he had not used alcohol or drugs in the past year.

23. Two Investigations followed. The first Investigation took place on December 10, 2021. After this first Investigation, the Grievor arranged further private tests, including from a lab where he had been tested by the Company the previous August (Windsor Park). The collection date for that test was December 13, 2021, more than five weeks after the collection on which his dismissal was based. It was a "fingernail" test for EtG

(alcohol). A "body hair" sample was collected on December 14, 2021. Those tests were negative.

24. The Grievor submitted those results to the Company and a Supplementary Investigation was held on January 13, 2022.

25. The Grievor and the Union were provided with various documentation in the two Investigation processes, including the SOU. For every result put to him in the Investigation, the Grievor indicated it was a false result, and that his own testing established this. During the Investigation, the Grievor noted he asked DriverCheck if "false positives" happen and that DriverCheck employees had indicated to him a "false positive" had occurred 2-3 times in fifteen (15) years, which in his interpretation meant that they were possible. The Grievor stated Dr. Snider-Adler's explanations of why the results were different were "just an opinion not a fact". He could not explain how he had 352 pg/mg of methamphetamines in his system, or .21 pg/mg of marijuana in his system, which were both noted by his own private test result.

26. The Grievor stated he had complied with everything the Company had asked regarding the SOU; he was doing well with his counselors and supports and was using the resources "more than expected". He was aware the samples were retested on November 16, 2021. He was:

> 100% confident and sure I have never relapsed in the past 14 months. I am 100% confident that these test results that came back from DriverCheck came back false and it's very tragic I'm going through this…Again this is tragic this is happening and hopefully my 2nd drug test proves to CP Rail that there are flaws in Drivercheck's testing".

27. On January 2, 2022 – prior to the second Investigation, Ms. Snider-Adler provided medical evidence to the Company, which evidence was provided to the Grievor in the Supplemental Investigation later that month and relied on at the hearing. Ms. Snider-Adler is the Chief MRO for DriverCheck, which conducts over 300,000 drug and alcohol tests annually. Her evidence is summarized, below.

28. The Union objected to the use of this evidence at the Investigation, as it felt it was evidence that would not normally be relied on in an Investigation. Its position was that neither the Union nor the Grievor were medical experts and so could not refute Dr. Snider-Adler's evidence. The Union stated that the opinion of a doctor had no place in an Investigation process, and that using that evidence in that process impacted whether it was a fair or impartial process. The Union stated the Investigation was not intended to be a judicial or quasi-judicial process that would require the Union to seek medical opinions to properly represent its member. The Union placed a number of objections into the record in the Investigation, as well as arguing on the record that the Company had not met its burden of proof to warrant any discipline and had ignored the private test results. It also stated the Grievor had not been provided a fair and impartial investigation, which appeared to be largely based on the fact the Company was relying on its own test results rather than the Grievor's.

29. Once again, the Union made several of its arguments on the record in this second Investigation, regarding the different tests.

30. Dr. Snider-Adler noted that hair testing was a form of testing used to "confirm abstinence" over a certain period of time. A segment of 3.9cm of head hair represents approximately three months (at p. 9). Her evidence was that "based on the length of hair

and where along the length the result is positive, a determination can be made regarding approximately when the use of the substance occurred". Dr. Snider-Adler noted that hair was described by the Society of Hair Testing" as a "strong, stable tissue less affected by adulterants or short-term abstinence", with the advantage of "being able to confirm long-term exposure to drugs over a period of weeks to months depending on the length of hair collected" (at p. 10). She also noted that hair is an "accurate test to determine the average use of a substance over the timeframe of that test" (at p. 10 of her report).

31. She noted that the Grievor's hair test for alcohol indicated use between 15 pg/mg and 37.7 pg/mg and that the highest figure represents an approximate timeline of use in August of 2021. The highest level of cocaine use – being 15.7ng/10mg was also noted to have occurred approximately in August of 2021.

32. Dr. Snider-Adler noted that the samples collected by DriverCheck were tested twice, using different sections of hair; that all sections were positive; and that the decreases noted each month were consistent with the heaviest use being in August of 2021. She noted those tests were "absolutely consistent with the use of alcohol prior to or in August of 2021, which use discontinued or significantly decreased after that time.

33. Dr. Snider-Adler's evidence was that the differences between the various private tests provided by the Grievor and those of the Company could be explained by the quantitative levels of the segmentation for both cocaine and alcohol; the timing of the tests being taken later than November of 2021 (with some tests taken almost six weeks later); the type of hair tested and the length of hair tests. She noted the samples taken by DriverCheck are tested twice, both in whole length and segments. The whole length and segments tested positive for cocaine. She held the testing competed by the lab used by

DriverCheck (Psychemedics) was “absolutely consistent with the use of cocaine prior to or in August that may have discontinued sometime in the month of September”; that it was tested twice, and that it was a “valid and reliable” result. She opined that the “segmented analysis is the most precise test and with cocaine and BZE (metabolite) found in all segments, there is no doubt that there was use of cocaine at sometime during the testing timeframe or prior to this” (at p. 11).

34. She also opined that a negative test “completed a few days later, testing an unknown location of hair and an unknown length does not in any way prove that there was no use of cocaine” (at p. 11).

35. Regarding the Grievor’s private positive tests for methamphetamine and THC (marijuana), Dr. Snider-Adler noted the methamphetamine result at 3.52 ng/10mg was below the cut-off levels used by the Company for methamphetamine, which is 5 ng/10mg, so it would not appear as positive in the Company’s test. Regarding THC, she noted that Psychemedics screens for THC at 10 pg/mg and confirms at 1 pg/10mg, so it was possible that a negative report could result for the Grievor, as that use would not have screened above the cut-off level and could be reported as negative by Psychemedics.

36. Regarding the private alcohol testing, she noted the USDTL collection was 6 weeks after the first collection and that the screening cut-off was 20 pg/mg; whereas the cut-off used by Psychemedics is 2 pg/mg. That cut-off impacts whether the test is read as positive or negative. She noted that a negative test conducted six weeks later, with a cut-off level of 10x that used by Psychemedics “does not in any way prove abstinence from the use of alcohol”.

37. She described segment analysis as the most “precise test”. She noted the positive result found in all segments meant there was “no doubt that there was use of alcohol at sometime during the testing timeframe or prior to this” (at pp. 12-13). She also noted the levels in August of 2021 were “very high”, and that Psychemedics states that above 30 pg/mg is defined as “excessive alcohol consumption”; “indicative of an average daily consumption of 4-6 drinks.

38. She also noted that for a fingernail test to show positive, there would need to be six or more episodes of binge drinking. She pointed out the private fingernail test was completed December 13, 2021, almost six weeks after the hair test for measuring alcohol and that it measured alcohol use over a different time (not including the month of August).

39. When Dr. Snider-Adler’s comments were put to the Grievor in the Investigation, he answered those questions with the same phrase of “I am sorry I have no knowledge in this field”. This was the case even for Q/A 10, which asked “Do you recognize that the cut-off levels done by DriverCheck and Absolute Testing are at different levels? Do you understand this?”. It is not necessary to have medical knowledge to understand that cut-off levels can differ and I find no issue with how that question was phrased, given the Grievor’s continuing “stock” answer to even self-evident questions.

40. The Union did not file any medical evidence on the record.

41. The Grievor was dismissed on January 31, 2022 for violating the Company’s Drug and Alcohol Policy; for violating Rule 3.1.5 of the Canadian Operating Rules (CROR) Rule G; and for violating the SOU. The Union filed this Grievance at Step 2, against that result.

42. In the Grievance procedure, the Union's position was the Grievor had abided by all the conditions in the SOU, including performing routine drug and alcohol testing and that the Grievor had provided tests which demonstrated the Company's results were "false positives" and he had complied with the terms of the SOU. The Union did not raise any issue in the grievance process with the enforceability of the SOU. Rather, that issue was raised for the first time in its *ex parte* Statement of Issue.

43. The Company filed a Preliminary Objection alleging that raising the issue of the enforceability of the SOU at this stage was in violation of the expedited process under which this arbitration is conducted.[1]

Assessment of Preliminary Objection

Arguments

44. The Union argued it is fundamental that the Company cannot make any agreement with the Grievor relating to his employment without the Union's involvement as the sole bargaining agent. Any attempt to do so would be void and unenforceable. It urged the SOU is therefore not enforceable or valid without its participation.

45. The Company urged the unenforceability of the SOU is a "new issue" that was not advanced in the grievance process, being raised at arbitration, which is not allowed in this expedited process. Even if that were not the case, the Company argued the Union cannot now argue the SOU is unenforceable. Even if so, the Company argued the SOU should

[1] Memorandum of Agreement Establishing the CROA&DR Canadian Railway Office of Arbitration & Dispute Resolution, as amended (latest amendment January 10, 2023);(referred to as the "CROA Agreement").

still be considered by the arbitrator as one piece of evidence when determining whether the Grievor's dismissal was just and reasonable.

The Requirements of the CROA Process

46. While I agree that it is a fundamental concept in labour relations that an employer cannot bargain directly with an employee (as noted in **CROA 4393**), the question in this case is not whether the Company has an ability to negotiate directly with an employee or not, but *whether the Union is foreclosed from even raising that argument* at this late stage in this process, as it is a new and substantive basis for allowing the grievance that should have been raised in the grievance process.

47. This case has placed in issue the interpretation of Articles 6, 9 and 14 of the CROA Agreement, which sets out the terms of the expedited arbitration process under which this Grievance is heard. Both the Company and the Union are signatories to the CROA Agreement.

48. By Article 6, an arbitrator of this Office is given jurisdiction over two types of disputes, one of which is determining whether an employee is unjustly disciplined or discharged. Article 9 provides that "no dispute" of the nature referred to in clause six may be referred to arbitration "until it has first been processed through the last step of the grievance procedure" as specified in the applicable collective agreement. Article 14 limits the decision of the arbitrator to the "disputes or questions" contained in the statements of issue (or joint statement, as the case may be).

49. As oral evidence is rare and the time to present a case is brief, it is accepted by arbitrators in this industry that two pre-arbitration procedures provide key support for

gathering facts and narrowing issues: the Investigation and the grievance procedure. It is the role of the grievance procedure that has been put into issue in this case.

50. In labour relations, it is not abnormal for a collective agreement to provide that a dispute must proceed through a grievance process before being arbitrated. In what I will call a “regular” arbitration process, the grievance document is very general and often broadly worded, so it is not unusual for the legal and factual issues to be “fleshed out” (often when legal counsel become involved), before an arbitration hearing begins, but after the grievance process has ended. While there are principles against expansion of grievances, an arbitrator generally gives a broad interpretation to what is at issue to ensure technicality does not trump substance, recognizing that such documents are often drafted by lay people and are somewhat cursory in nature.

51. However, the CROA Agreement has created a unique and expedited process that relies on certain realities to function as it was intended. First, under the CROA Agreement, the Union’s grievances are detailed, as noted by the grievance in this case. It is evident that much work and effort went into drafting that document and developing the Union’s position, at that early stage. This is not a “one liner” that the collective agreement has been breached as the grievor has been discharged, in contravention of a certain article number.

52. Second, the CROA expedited process is “not equipped to handle surprises” – whether from new issues or new documents not previously disclosed[2]. What this

[2] **AH825** at paras. 25 to 27; see also **CROA 4263. AH825** was decided under what I will describe as a “CROA akin” process whereby parties agree to an *ad hoc* process which runs outside of CROA but on the same or similar terms to the CROA Agreement.

practically means is that parties <u>must</u> crystallize all issues to be resolved in their dispute at an *early* stage in the grievance procedure - which may be before legal counsel is retained, who may see those facts in a different light. Be that as it may, there is simply no ability in this expedited process to launch a new substantive issue at the doorstep of arbitration: **CROA 3265**; **AH825.**

53. I accept that while the Union enjoys a representation right that is considered fundamental in collective relationships, the Union is able to compromise that right, should it choose to do so. The Union relied on **CROA 2712.** That case is distinguishable from this case. In that case, the unenforceability of the agreement <u>*was*</u> raised in the grievance process, so the issue raised in this case did not arise. **CROA 3203** is also distinguishable. In that case, *neither* the Grievor nor the Union signed the "agreement" referred to, so it could not hold the characterization of a "last chance" agreement at all. In **CROA 4393**, the reasoning is brief, but does not mention that the issue was not raised in the grievance procedure. That case is also therefore distinguishable.

54. The Union is a signatory to the CROA Agreement. Its terms have been interpreted as limiting the Union at arbitration to substantive issues it has first raised in the grievance process. Not having raised the issue of the enforceability of the SOU in that process, it cannot raise it now.

<u>Estoppel</u>

55. Even if that were not the case, I would have found the Union is estopped from relying on its right of representation to defeat the terms of the SOU, given the facts of this case.

56. The doctrine of estoppel recognizes that where a party has knowingly foregone a right "which it would otherwise enjoy under the collective agreement", it would be inequitable for it to later attempt to rely on that right.[3] The Company's argument that it would be highly prejudicial for the Union to rely on its rights of representation at this point raises the issue of estoppel.

57. I agree with the Company's position. In this case, the Union was aware of the SOU as early as the summer of July of 2020. The Union chose not to file any grievance the SOU was unenforceable against its member due to lack of its representation, even though it had that argument available to it, at that time.

58. Advancing to November of 2021, the Union then *acted consistently* with foregoing its right of representation, when it did not raise enforceability of the SOU in this grievance process. Rather, it argued the Grievor had *complied* with the terms of that SOU, as the test results were "false positive".

59. Neither did the Union raise any objection to the Grievor undergoing biological testing via hair follicle test under the SOU. If there was an issue with the reliability of hair follicle testing or concern with "false positives" that could occur with that form of testing generally – as was alleged in the grievance process – that would have been the opportunity to raise that issue and grieve the terms of the SOU, rather than after the Grievor had continued his employment under the terms of the SOU for a further fourteen (14) months after his relapse in July of 2020.

[3] Mitchnick and Etherington, *Canadian Labour Arbitration*,*3rd edition; 2018, at p. 510.* The leading case on the law of estoppel is the decision of the Supreme Court of Canada in *Maracle v. Travellers Indemnity* 1991 CanLII 58

60. It may well be that the Union did not raise issue with the SOU, as the fact the Company was willing to allow the Grievor to continue in his safety-sensitive position while fighting his addiction was considered by the Union to be a reasonable exchange for that testing. However, the Union cannot have it both ways. Either the SOU is considered by the Union to be unenforceable or it is not. It cannot “lie in the weeds” and allow the Grievor the benefit of the SOU when that document was working in his favour, then suggest it is unenforceable when it is not. That is exactly the type of position the concept of estoppel is designed to prevent.

<u>Was Termination Just and Reasonable?</u>

61. The leading decision of *Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*[4] requires an arbitrator to pose three questions in a discharge grievance: a) has the employee given just and reasonable cause for some form of discipline by the employer? If so b) was the employer’s decision to dismiss the employee an excessive response in all of the circumstances? ; and c) if so, what alternative measure should be substituted as just and reasonable?

62. However, when the issue involves a disability, an arbitrator’s review of a discharge is overlaid with the requirement that the employer must demonstrate it has accommodated that individual to the point of undue hardship.

63. Considering first the Investigation process, I have reviewed the entirety of both Investigation transcripts and all of the evidence filed. I cannot agree with the Union that the Investigation was unfair; that it was not impartial or that the Company had “stacked

[4] 1976 CarswellBC 518 (Weiler), at para. 11.

the deck" against the Grievor, by soliciting and then relying on a medical opinion, and putting the results of that opinion before the Grievor in the Investigation.

64. The Grievor maintained the tests were false positives – "critically flawed" – in the Union's words. It was alleged the Grievor's own test results demonstrated that fact. That issue was at the "core" of the Grievance. The Company was entitled to seek out a medical opinion to challenge that allegation. Under the CROA process, the Company was required to put that evidence before the Grievor for his response, if it intended to rely on it at the arbitration hearing. Had it not done so, the Union could have brought a preliminary objection the evidence should not be considered. There is nothing unfair about the Supplementary Investigation in this regard. In terms of the questions asked, for his part, the Grievor was not willing to concede even obvious and self-evident information, such as that there were different cut-off levels for testing by various laboratories. It is not unfair or impartial for the Investigator to ask the Grievor "do you understand this?" in reference to that difference, when the Grievor was giving a "stock" answer to each testing question. I am satisfied the Investigation contained the elements of a fair and impartial process, as noted in **CROA 3322.**

65. **AH717** is distinguishable. In that case, both the Union and Company filed expert medical evidence. I have no medical evidence or other evidence filed by the Union which would establish a high rate of false positives for hair follicle tests. While the Union provided an article on difficulties with finding cannabinoids in hair testing, THC was only one of the substances which tested positive. In July of 2020, the hair follicle test result that was taken *was* consistent with the Grievor's own admission of cocaine use. **AH717** is also distinguishable regarding the issue to be determined. That was a case involving

post-incident drug testing, and not random drug testing under a relapse prevention agreement following rehab treatment. While the arbitrator found that hair tests were not part of the "standard testing correlating drug measurement with impairment" (at p. 11), the question in the case before me is not whether the Grievor was "impaired". In this case, the Grievor was subject to testing *because* he was already determined to suffer from a substance use disorder, with the issues of relapses that accompany recovery.

66. The tests under this arrangement were for a different purpose than those which must prove impairment while working. Several of the Union's authorities can be distinguished on this basis. Jurisprudence which involves the impact of positive random testing post-treatment would be relevant to this question, rather than jurisprudence which relates to post-incident testing and its implications.

67. Regarding the Grievor's own test results, I am satisfied the evidence established that the Grievor providing his own negative tests taken later in time – using sometimes a different body part - such as a "fingernail" or "body hair" - do not support his claim of innocence at the time he was tested by the Company in November of 2021. I agree with the Company that this comparison is not "apples to apples" to use the vernacular. The Grievor chose not to have the samples *from November 3, 2021* retested, although he was offered that chance. That re-test would be the "apples to apples" comparator.

68. Upon review of the totality of the evidence before me, I am satisfied the private tests do not establish that the tests performed on November 3, 2021 were themselves inaccurate or "false positives".

69. I am satisfied from the explanations given by Dr. Snider-Adler that the different test results have various explanations, including the different time periods under which testing

occurred (up to 6 weeks after the Company's tests); differences in testing cut-off levels; whether the hair could be segmented (body hair cannot), and how those differences could account for the different results. I am further satisfied a different cut-off level could result in a change from a "positive" to a "negative" result. The Tamarack Recovery Centre tests results were not informative or helpful. Without information of the actual reading and the cut-off level for a "positive" or "negative" test by that Centre, I do not consider those "negative" test results demonstrate there was no drug or alcohol use by the Grievor.

70. In addition, the Grievor's own private result was positive for methamphetamines and marijuana, which itself calls into question the Grievor's protestations that he was abstaining from <u>any</u> use of drugs in compliance with the terms of the SOU. While the Union placed in evidence a letter from the Grievor's counsellor indicating that the amounts of methamphetamines and marijuana were "trace" amounts that could result from exposure to those substances in the environment, there was no information given regarding the credentials of that counselor to make that type of statement. I do not find that evidence convincing or even relevant without that background.

71. Considering all of the evidence and jurisprudence, and with due regard to all of the written submissions filed, I am satisfied that the test results from November 3, 2021 establish on a balance of probabilities that - sometime after his negative test in August of 2021 - the Grievor again relapsed using both cocaine and alcohol; and that his use of alcohol at that point was excessive. The November 3, 2021 tests for both cocaine and alcohol are consistent with each other that the time of heaviest ingestion was in August of 2021. It is highly improbable and frankly would be incredulous that both test results could be "false positive" in the same way – that is with the likelihood of the greatest

ingestion being in August of 2021 for both types of tests. On a balance of probabilities assessment, this evidence supports that it is more likely that a relapse occurred around that time period, rather than that a false positive result occurred.

72. I am also satisfied the SOU is evidence of what both parties considered to be appropriate accommodation for the Grievor's substance use disorder, given the lack of challenge by the Union with that SOU. The Grievor has breached those terms by his positive hair follicle test for cocaine and alcohol. The test results were reliable (and not "false positives").

73. The Grievor's adamant and vehement assurances that he was not using drugs or alcohol – which were maintained to the date of the hearing - were not credible. The Grievor has not been honest in protesting his innocence, which situation will be addressed more fully, below, in considering whether the point of undue hardship has been reached.

74. Broader human rights obligations are at play in determining the appropriateness of discharge for this relapse.

<u>Was the Grievor Accommodated to the Point of Undue Hardship?</u>

75. In this case, the Grievor suffers from a substance use disorder, which is a recognized disability. When an employee has a substance use disorder and has attended rehabilitation treatment, it is a common situation that they are required to enter into an arrangement with their employer for random testing, in exchange for resuming employment during the ongoing recovery process. That arrangement also often requires random testing for a period of time, as they pursue that recovery. That is one of the limited

circumstances under which drug and alcohol testing without some type of cause is allowed in this country.

76. However, even in cases where a positive test has occurred, an arbitrator retains an over-arching jurisdiction under *Canadian Human Rights Act*[5] to consider whether a discharge decision is just and reasonable and in particular whether the Company has accommodated the Grievor's disability to the point of undue hardship before that step is taken. This Office – and broader arbitral jurisprudence - has determined that the existence and terms of a document like this SOU - while accepted as evidence of an employer's accommodative efforts - is not by its own terms conclusive that the point of undue hardship has been reached with a positive test result. An arbitrator must bring independent judgment to bear on that question.[6]

77. As noted by this Office recently in **CROA 4829**:

> While CROA jurisprudence has provided considerable deference to last chance/relapse prevention agreements in cases of multiple relapses, arbitral jurisprudence – both broadly and in this industry – is also in line with the conclusion reached in *Re Canadian Waste Services Inc. and C.L.A.C. (McGee)[[7]]*, that such agreements are not immune from review by an arbitrator for compliance with fundamental statutory human rights obligations (at p. 11).

78. I am satisfied the Grievor relapsed, likely in August of 2021, after his last test was taken. This is not the Grievor's first relapse under this SOU; it was his second relapse since January of 2020.

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[5] R.S.C. 1985, c. H-6

[6] In addition to **CROA 4829**, see **CROA 3415** (and **CROA 3355** involving an earlier case with the same Grievor).

[7] 2000 CanLII 50101 (ON LA)

79. There are three aspects to this case that are particularly significant when considering whether the impact of this relapse and whether the point of undue hardship has now been reached.

80. First, the Grievor relapsed for both cocaine and alcohol. This is a more significant relapse than that which occurred in July of 2020, as it involved two substances. In addition, this was not simply one or two drinks. The test results indicate the use of alcohol was excessive and involved multiple drinks over multiple days.

81. Second, the timing of the heaviest ingestion is also significant – with the highest levels of consumption occurring in August of 2021, and then decreasing. The Grievor had a negative drug and alcohol test on August 3, 2021. The implication I have been drawn to on review of the totality of the evidence is that the Grievor took a calculated risk to use drugs and alcohol after his test early in August of 2021, with the hope that if he then reduced his use after that point, he would test clean on his next test. He had months to advise the Employer of his relapse but did not do so.

82. This leads to the third – and most significant – concern: The Grievor was dishonest. He remained insistent on the construct that the tests were "false positives" throughout the grievance process and this hearing. He continued to vigorously deny his use of alcohol and drugs, going as far as suggesting it was "tragic" how *he* was being treated *by the Company* through this process. Yet he had relapsed, creating a significant safety risk as he did so while employed.

83. The Grievor also expressed his disappointment with the Company's reliance on the "flawed" DriverCheck testing process. He continued to staunchly maintain he was "doing everything he should be"; and was "100% confident" that the tests were wrong.

This was the inexplicable when the Grievor's own privately obtained test also showed a positive result for drug use.

84. In July of 2020, the Grievor had been honest that he had relapsed. In November of 2021 he was not.

85. The Grievor did not demonstrate any insight nor accountability.

86. While relapses are accepted as part of recovery, the commitment to the recovery process can be demonstrated by the willingness of an addicted individual to be honest and forthright with his or her employer when a relapse does occur, prior to testing positive. This honesty and accountability in turn impacts whether the employer – and the arbitrator – believe an employee would be honest in future regarding further relapses, were he placed back to work. In this safety-sensitive industry, that determination takes on even greater significance. However, whether that acknowledgement occurs at the time of the positive tests or on further reflection, it is that recognition and insight by the grievor into the damaging effects of his addiction that leads to the eventual rebuilding of trust with the Company and provides a which provides a level of assurance a grievor is moving along the right path toward recovery. Reporting of a relapse *prior to* a positive test result, demonstrates there is a difference between insight and accountability on the one hand; and trying to game the system but "getting caught" on the other.

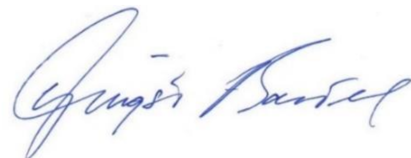
87. The Company's interests in maintaining a safe workplace for all of its employees in this highly safety sensitive industry must be appropriately balanced with its human rights obligations toward this Grievor. The Grievor's lack of honesty and forthrightness, combined with the fact this is a second relapse, is a significant and troubling factor at this stage in the Grievor's battle with his addiction.

88. As noted in **CROA 4829**, an employer's human rights obligations do not require endless tolerance of addiction and accompanying relapses. Each case must be carefully considered on its own merits.

89. Upon review of all of the evidence, arguments and jurisprudence placed before me, I am drawn to the conclusion the Company has taken all necessary and reasonable measures to accommodate the substance use disorder of the Grievor and that the point of undue hardship has been reached in this case. To answer the *Wm. Scott* questions in this case, the Company has demonstrated it had just cause to terminate the Grievor's employment. I am satisfied that decision was not excessive, unfair or unwarranted. I decline to exercise my discretion to interfere with that penalty, as harsh and final as it is.

90. The Grievance is dismissed.

91. I remain seized to address any issues with the implementation of this Award and to correct any errors or omissions to give it the intended effect.



July 19, 2023

CHERYL YINGST BARTEL
ARBITRATOR