SHP 729

IN THE MATTER OF AN ARBITRATION

BETWEEN:

AMRESH ANAND

(the “Grievor”)

-and-

UNIFOR

(the “Union”)

-and-

VIA RAIL CANADA INC.

(the “Corporation”)

ARBITRATOR:	FAZAL BHIMJI
APPEARING FOR THE UNION:	BRIAN STEVENS
APPEARING FOR THE COMPANY:	WILLIAM HLIBCHUK
DATE OF DECISION:	MARCH 16, 2017

HEARING BEGAN ON NOVEMBER 21, 2016 IN VANCOUVER, BRITISH COLUMBIA
AND CONCLUDED BY WRITTEN SUBMISSIONS ENDING ON JANUARY 16, 2017

[1] This is an Arbitration under the Canada Labour Code, Part 1 to determine a grievance filed by Unifor and its Local 100 (the "Union"), on behalf of one of their members Amresh Anand (the "grievor") against a decision made by VIA Rail Canada Inc. (the "Corporation") to terminate Mr. Anand's employment after an alleged violation of a Return to Work Agreement (RTWA). The Grievance is filed under Agreement 3 which governs Shopcraft Workers employed by the Corporation and who are represented by the Union. The Grievance alleges the Corporation violated Rules 27.1, 27.6 and Appendix XIII of the Collective Agreement which deal with investigations of disciplinary matters and accommodation, did not follow its own Alcohol and Drug Policy, violated Section 7 of the Canadian Human Rights Act and provisions of the Return to Work Agreement.

[2] At the outset of the hearing the parties confirmed there were no objections to my jurisdiction to decide the matter and the hearing began with some preliminary opening remarks from both sides.

[3] This hearing was held in Vancouver, British Columbia on November 21 and 22, 2016 followed by written argument and reply received on December 9, 2016, December 30, 2016 and January 16, 2017.

THE EVIDENCE

[4] I will present a broad narrative of the evidence before me in order to simplify the evidence presented by all parties.

[5] The grievor, was hired as a General Worker on May 7, 1996. He began his apprenticeship in March 2001 as a Rail Car Technician and upon completion, remained working at the Vancouver Maintenance Centre (VMC).

[6] Following a workplace incident and investigation on February 21, 2014, the Company, the grievor and the Union agreed to a Return to Work Agreement (RTWA) dated June 11, 2014 which was signed the following day.

[7] The terms of the RTWA included provisions that would subject the grievor to random (unannounced) testing for drugs and alcohol use as determined by the Corporation's Chief Medical Officer (CMO). Among other conditions, it also contained a requirement to maintain complete abstinence from drugs and alcohol, except as properly prescribed by his physician. In the event that the grievor failed to pass a drug and alcohol test, he would be subject to an investigation and risk having his employment terminated.

[8] Sometime prior to June 21, 2015 the grievor's wife and the RCMP both contacted the Corporation asking about his whereabouts. Upon reporting to work on June 21, 2015, the grievor was subjected to an unannounced drug and alcohol test. The breath sample (BAC) returned as "negative" for alcohol and the Point of Collection Test (POCT) reported "non-negative" for amphetamines and marijuana. As a result of the non-negative results and consistent with the Corporation's policy, an oral swab (saliva) sample was also taken from the grievor, which was sent to a lab for secondary testing and analysis. As a result of

the POCT "non-negative" test result, the grievor was removed from active service on June 21, 2015, pending the results of the lab tests.

[9] The lab results for the urine sample were reported out by DriverCheck Medical Review Officer (MRO) as *"invalid"* and a recommendation for unannounced and immediate re-testing was made. The lab results of the saliva sample returned "negative" for all drugs, including amphetamines and marijuana.

[10] Subsequently, on June 26, 2015 the grievor underwent the same breathalyzer and urine testing as he had undergone on June 21, 2015 which this time resulted in a negative test for drugs but a positive BAC result. Following an interview with the grievor and his Union, the Corporation dismissed the grievor on July 29, 2015 for allegedly violating his RTWA, commonly in labour relations terms referred to as a "Last Chance Agreement" or LCA. The letter of termination states in part:

> "On June 26, 2015 you tested positive for alcohol during a breathalyzer test administered under the terms of your Return to Work Agreement. During the investigation held on July 3 and the supplemental investigation held on July 10, you failed to provide an adequate explanation for this positive breath alcohol result.
>
> As you know, the terms of this agreement include complete abstinence from drugs and alcohol and random testing for the same. Your positive breath alcohol result on June 26th is a clear violation of this agreement. Therefore be advised that your employment with VIA Rail Canada is terminated as of the date of this letter."

Testimony of Dr. Iris Greenwald

[11] Dr. Greenwald graduated from the University of Toronto Faculty of Medicine in 1995 and completed a two-year residency in 1997. Following her training she worked in the area of addictions for seven years and received her accreditation in 2007. Since 2011, she has worked in the area of opiate agonist treatment and has experience working with people who have methadone and other dependencies. Although the Union had no objection to her giving testimony as an expert, the parties were clear that she was not testifying before me as an expert but as the Medical Review Officer (MRO) for a Company called DriverCheck.

[12] DriverCheck operates five clinics all over Ontario and provides drug and alcohol testing. For safety-sensitive occupations they follow the model used in the United States. The role of the MRO is to rule out any medical reasons for non-negative test results and to identify safety concerns for other people interacting with the worker being tested. Dr. Greenwald testified as MRO, she reviews drug tests but does not review alcohol tests because, while there may be medical reasons why a drug test may produce a non-negative

result, the only reason an alcohol test would produce a non-negative result would be because the subject consumed alcohol.

[13] Dr. Greenwald described different types of testing such as screening, confirmation and point of care testing (POCT). She stated that the Corporation uses POCT where samples are screened onsite. In this type of testing if the sample tests negative, then there is no need for further action. If, however, the sample tests as "non-negative" then the sample is sent to the lab for confirmation. A sample is not considered "positive" unless it is confirmed through secondary testing.

[14] Normally the type of test is determined by the Corporation's requirements. In this case the grievor was tested on June 21, 2015 using a 5-panel test which screens for Opiates, Amphetamines, Phencyclidine, Cocaine and Marijuana.

[15] She also described the person testing the sample in a POCT situation will also check the Ph and specific gravity of urine samples to see if it is a normal sample or if any oxidants are present. She stated certain oxidants are available and could be used to "clean out" samples in order to beat the drug test.

[16] She became involved in this case on June 26, 2015 after the sample was deemed invalid by the lab and the POCT technician had noted some oxidant activity in it. The MRO does not get involved while a non-negative sample is being tested by the lab. She would only become involved after a sample is deemed to be positive and then her role is to look for medical explanations for why the sample may have returned a positive result. In this type of case where there are nitrites present she asks the subject questions about what medications they are on as well as about any tampering of the sample. She acknowledged that medications such as nitroglycerine and those used to treat urinary tract infections may present higher levels of nitrite in a sample.

[17] She referred me to notes transcribed contemporaneously by an assistant which support Dr. Greenwald's testimony that she spoke by phone with the grievor on June 26, 2015. She stated she began the phone call by confirming the grievor's identity, then she advised him she was calling with questions about the sample the grievor had provided for testing and that his responses may be shared with his employer. She explained to him that she was doing validity testing on the sample and was dealing with the issue of drug use. She asked him if he had tampered with the sample and he denied doing so. She then asked him about what medical conditions he had. He denied having any urinary infections but advised he was on indomethacin for gout. She advised him that would not affect the test and asked him if he had any questions which he did not. She testified these calls usually take five to ten minutes.

[18] The MRO testified that when no medical reason is discovered for a positive or invalid result then the invalid test is cancelled and a recommendation is made to immediately recollect a sample for drug testing.

That is what she said occurred here and there was no other evidence or information provided about other medication that the grievor was using at that time. The Corporation was then notified of the status of the testing.

[19] The MRO also confirmed that she later responded to a query from the Corporation about the impact of cough syrups on alcohol testing. In evidence was a letter from her dated July 27, 2015 to the Corporation's Senior Advisor of Employee Relations which states in part:

> "The proper use of commercially available and prescribed cough/cold medications that contain alcohol will not cause a confirmed positive breath alcohol result. I understand that the employee in question was taking Co-Actifed prescribed by his physician. I did check with the manufacturer, and confirmed that Co-Actifed syrup is, in fact, alcohol free. I did review the provided list of medications prescribed to this employee, none of which would contribute to a confirmed positive breath alcohol result."

[20] The MRO testified that she did not have the list of medications at the time the decision was made to seek a second sample, but did have it when she wrote the letter on July 27, 2015. She confirmed that Co-Actifed cough syrup does contain codeine and would result in a positive drug test but would not result in a positive test for alcohol. She reiterated in her oral testimony that other than consumption of alcohol, as long as the testing is done appropriately, she was not aware of any medication that may cause a positive breathalyzer test for alcohol.

[21] Under cross examination the MRO gave information about the window of detection for marijuana (days to weeks), amphetamines (3-5 days), opiates (days) and nitrites (depending on the cause they may still be there for days). When asked if a person whose blood alcohol count (BAC) was 0.145 would show signs of impairment, she stated that they could but not necessarily, because it would depend on the individual's ability to process alcohol and their tolerance for it. She confirmed based on the BAC readings taken on June 26 at the grievor's home that he would already have reached his peak and be on his way down.

Testimony of Sean Terry

[22] Mr. Terry is the manager of the West Coast Express Maintenance Centre which is responsible for the maintenance schedule for TransLink equipment. TransLink is separate from VIA Rail and operates commuter trains in the lower mainland of British Columbia. Mr. Terry manages a staff of roughly 60 people.

[23] He testified that he has known the grievor since about 2002 or 2003 and worked with him as a colleague until 2010 when Mr. Terry became a relief supervisor. He confirmed he had socialized with the grievor outside of work, and on occasion that included drinking with him. He stated that he was not

normally the grievor's supervisor or manager but after 2012 he had been his manager on and off.

[24] At this point, there were some questions from counsel for the employer about an investigation done in 2014 which ultimately led to the tri-partite return to work agreement that is the subject of this arbitration. The Union objected to me hearing this evidence because it was not tested through the grievance process or arbitration and according to them pre-dates other events such as the prevention program undertaken by the grievor.

[25] I agree that while that evidence may give some context to the matter before me, the details are not determinative of the issues before me and I have placed no weight on the questions and answers from that investigation.

[26] Mr. Terry went on to explain his involvement with the material events beginning on June 26, 2015. That day, he received a phone call at his office from Stephen Sylvester asking him to attend at the grievor's home to be a witness to substance testing. He stated Mr. Sylvester informed him he was to meet Mr. Browning who would conduct the test at the grievor's home because the grievor did not want to attend at the maintenance centre for testing. He arrived at the grievor's home at approximately 2pm and met Mr. Browning on the street. He stated that he knocked on the grievor's door and was informed by the grievor that the Union would not permit him to be tested at his home. He then called Mr. Sylvester who advised him that it was part of the return to work agreement and when he advised the grievor of this, the grievor agreed to be tested in the garage of his home.

[27] Mr. Browning prepared the testing equipment and conducted the test in the grievor's garage. After a few minutes the results indicated positive for alcohol. He described the grievor's demeanor as agitated and nervous and interpreted this as being due to the fact that the test was being done at the grievor's home.

[28] He said when the first test was done indicating positive for alcohol, Mr. Browning asked the grievor if he had had anything to drink that day which the grievor denied. Mr. Browning informed the grievor that the breathalyzer indicated that he had been drinking to which the grievor asked how that was possible and how he could be sure. Mr. Browning then shared the reading with the grievor. Mr. Browning informed the grievor that he would be conducting a second test in fifteen minutes. While they were waiting, the grievor's wife came in to the garage to ask what was going on. The grievor informed her that he had failed the test and that they were waiting to conduct it again. Mr. Terry stated the grievor's wife asked the grievor if he had been drinking that day to which he replied he had not. She questioned how the machine would produce a positive result to which the grievor said he did not know and then the two of them spoke in a language not understood by Mr. Terry.

[29] Mr. Terry described her as questioning him about his integrity. I note that such a conclusion is dubious at best if Mr. Terry is not familiar with the cultural norms of the grievor and does not understand the content of the

communication between the grievor and his wife so I have placed no weight on his assessment of her behaviour or his characterization of this conversation.

[30] Mr. Terry stated that she said the grievor should be free to do what he wants at his house. At that point the grievor went into the main part of the house.

[31] Mr. Browning told Mr. Terry that he would expect the second reading to drop by one or two points if the grievor had been drinking alcohol, otherwise the drop would be sporadic. When the second test was administered, the drop was as discussed, consistent with someone who had consumed alcohol and peaked.

[32] Mr. Terry testified that both the grievor and his wife questioned the validity of the machine's results and asked about getting another test done. He stated that Mr. Browning advised that a second test would likely not be considered valid because it was not being done at the same time, then he packed up his equipment and left. Mr. Terry stayed for a while and when he was asked if the grievor would be fired he told him he did not know what would happen.

[33] During cross examination, the Union emphasized that Mr. Terry's recollection of events was sometimes hazy. In particular, under cross examination he conceded that he most likely arrived at the grievor's home about 15 minutes prior to what he testified. He confirmed that the memo he prepared on July 1, 2015 describing the events of June 26, 2015 was written after the events it describes at the request of the Senior Manager, Diego Mendez.

Testimony of Peter Browning

[34] Mr. Browning is retired and for three years has been working on a part-time on-call basis for a Corporation called Work-Docs. He stated he had been trained through written and oral means delivered via online and Skype to collect samples of urine, breath, saliva and hair for drug and alcohol testing.

[35] He estimated he typically collects thirty to thirty-five samples a month so he estimated he has collected between 300 and 350 samples during his tenure. He described the process of collecting breath samples as being automatic because he takes the sample and, the Alco Sensor IV – Black Dot breath analyzer he uses does the rest automatically. The machine takes less than five minutes to set up. He stated that he has tested clients in many different places. He generally tests them in a boardroom but while it is not common, he has also tested people in their homes.

[36] He testified that he does a calibration check once a month or before and after a positive test result. Prior to administering the test, he asks the client if they have eaten or drunk anything by mouth. If they have had alcohol then the procedure is to wait for half an hour, if it is something else then they wait

ten to fifteen minutes. When the machine is ready, it reads “test-test-test”, then the client is required to blow a strong steady breath into the mouthpiece until it goes “click”. Then one must wait for the results. Once the results are available, the machine locks out the operator for fifteen minutes before a second test can be administered.

[37] Mr. Browning testified that prior to June 26, 2015 he had met the grievor on 2 or maybe 3 occasions to collect samples for drug and alcohol testing. He described him as generally happy and upbeat during those encounters. On June 26, 2015, he arrived at the grievor’s address around 13:20 and waited in his car for the supervisor to arrive. He stated that he accompanied the supervisor to the door and the grievor answered the door. The grievor did not want to allow them in to the house but relented after about 7 or 8 minutes. After that they went into the garage which he described as having sofas and a television. He testified that he told the grievor why they were there, set up the machine and went through the process. He described the grievor’s demeanor as “agitated and not happy to see me”.

[38] He described the process of opening a new mouth piece followed by taking a diagnostic reading, then when he got the “test-test-test” indication he asked the grievor to blow into the machine until he heard a click. This was followed by a readout of 0.147 at 13:55. He advised the grievor that the result was over 0.08 and another test would be required in 15 minutes. He confirmed what Mr. Terry testified to, that the grievor’s wife came to the garage between those two tests and it was her opinion that it was not proper to test him in his own home where he should be allowed to drink. I note that she may be expressing her own opinion here which may not be the opinion of the grievor, so have not put any weight on this.

[39] He then installed a new mouthpiece and took a new blank reading which showed 0.000 which indicates that the machine had properly voided the previous sample and it was ready to collect the second sample. This time the reading was 0.145. He testified that he was not surprised, he did not say anything to the grievor or ask him if he had been drinking because he did not see it as his place to judge. He then advised the grievor that he would have to send in the results as he had no choice in the matter, he collected a urine sample from the grievor and after consulting with the supervisor (Mr. Terry) left with his equipment. He disagreed with the grievor’s wife’s contention that the reading was faulty because he had tested the machine before the test was administered and offered that he had no reason to doubt the proper functioning of the machine. That same day after the test he returned to his office and at 14:57, he used the calibration solution provided by the manufacturer of the machine to check the calibration and obtained a reading of 0.037 which is within the acceptable range of 0.040 plus or minus 0.005.

[40] Mr. Browning took us through the printout from the breathalyzer. Each instance of testing is noted by an assigned test record number. He confirmed the evidence tape was from his machine. The test record numbered 00998 shows a reading of 0.000 for an “air blank” recorded at 13:55 followed by a reading of 0.147 at 13:55. The test record numbered 00999 shows an air blank reading of 0.000 taken at 14:11 and then a

reading of 0.145 also taken at 14:11. Test Record 01000 shows an air blank reading of 0.000 done at 14:57 and a "calibration check" reading of 0.037 at 14:57. When asked if he had any reason to doubt the functioning of the machine, he replied "none whatsoever".

[41] I note that each of these three readings also shows the serial number of the machine used and the number is identical. I also note that test records 00995 and 0986 from the same machine were administered to the grievor on June 21, 2015 and on May 31, 2015, and both the air blank and actual readings for these two tests show 0.000. The evidence included results of another five tests conducted by a different technician between October 2014 and May 2015 using a machine with a different serial number all of which resulted in a reading of 0.000.

[42] Mr. Browning concluded his evidence denying that he advised the grievor not to go for alternate testing elsewhere but added that most doctors aren't equipped to do such testing and it usually takes two days to get a test done. By that time alcohol would naturally be out of one's system.

[43] Under cross examination Mr. Browning confirmed that DriverCheck, the company he works for needs to get a requisition each time a sample is to be collected. He also confirmed that while he does an accuracy check once a month on his machine and also after a positive result, calibrations are done by the factory every 5 years.

Testimony of Steve Sylvester

[44] Since March of 2016 Mr. Sylvester is the Senior Manager, Equipment Maintenance Western Canada for the Corporation. His duties include looking after the West Coast Express contract. He started with VIA Rail in May 2011 and was a supervisor for one and a half years before becoming the manager for West Coast Express for 3 years.

[45] Mr. Sylvester has known the grievor since May 2011 because he would sometimes get assigned as a vacation relief supervisor and met the grievor in Mission, BC during one such assignment. He described their relationship as "fine". He stated that he was working as an investigations officer for Diego Mendez the previous Senior Manager, Equipment Maintenance West and at the time of the grievor's termination, the grievor reported directly to Mr. Sylvester who was involved in the decision to terminate him.

[46] The Union objected to questions posed to Mr. Sylvester about the grievor's past performance and whether that was considered in the decision to terminate him. The Union stated that those issues had been addressed by the employer and a deal was reached without testing the issue through the grievance process or arbitration. The Union expressed a concern that the evidence being presented should be limited to what is relevant and material in deciding the grievance rather than being allowed to use subjective information available only to the Corporation as a way to attack the grievor's character. Counsel for the Corporation emphasized that the grievor's character was assessed in making the decision to terminate and

the evidence was being provided by the very person who was involved in making that decision, therefore it should be permitted.

[47] I accept that I do not need to hear about and make conclusions about all the issues that predated the parties entering into a return to work agreement. However, information that confirms that parties entered into such an agreement voluntarily and to avoid a different conclusion to the original issues is helpful to me to determine that the agreement is sound and whether on that basis the terms contained within it should be enforced. I therefore don't need to hear the specifics about the behaviours the parties have already resolved, but have only allowed evidence that the employer and the Union felt a RTWA was a reasonable way to address the issues that they were trying to resolve. Although I have not relied on evidence about what led to the RTWA, I find no reason to exclude such evidence unless the RTWA specifies that matters which led to the parties entering into the RTWA cannot be relied on in future disciplinary actions. That is also different than allowing settlement discussions which led to the agreement which I would be reluctant to admit.

[48] Mr. Sylvester testified that on February 28, 2014 he considered the grievor to be in denial of his alcohol dependency but agreed that it would be good to give him a second chance by way of a RTWA. I note the Union's objection that it is normal for an alcoholic to be in denial about the problem. If the Corporation had dismissed the grievor knowing that he had such a problem and not having offered some assistance, that objection would be something that would carry some weight. However, in this case such an objection is moot as the Corporation chose ultimately to seek help for the grievor. I do not need to delve into the details of the interview that led to the RTWA as long as I know that all three parties entered into this form of accommodation willingly. Denials prior to receiving counselling and treatment carry less weight than denials the grievor may make following such offers of assistance.

[49] Mr. Sylvester stated that he became aware of the contents of the RTWA after it was signed. He also stated he had heard that the grievor had "failed out" of the treatment centre where he began treatment because he was continuing to drink and that he had begun attending at an alternate facility. I note that this is hearsay on the part of this witness. Even thought there was evidence that he was working as an assistant to Mr. Mendez, the witness acknowledged that he became aware of the details of the issue after the RTWA was signed. Therefore; I have not given this evidence any weight.

[50] Mr. Sylvester acknowledged the agreement contained provisions for the grievor to be tested and on a couple of occasions he had personally driven the grievor to CITA Health for testing. He stated that Mr. Mendez would be notified when it was time for the grievor to be tested and then arrangements would be made for testing with DriverCheck. Mr. Sylvester estimated it took ten hours a month to manage obligations related to the testing process including making arrangements and taking the grievor to testing. The Union objected to this line of testimony as not being relevant. The Corporation replied it was relevant when looking at the issue of how onerous the

accommodation was and would be relevant to remedy. Therefore; I have allowed this testimony to form part of the record.

[51] Mr. Sylvester testified the grievor's days off were Friday June 19th and Saturday June 20th, 2015. He stated he became aware after the fact that the grievor's wife had reported him missing during the grievor's days off and that the RCMP had contacted the Corporation to gather any information that may help locate him. He had also been made aware of text messages she sent to Mr. Mendez expressing concern about the grievor's whereabouts. Since the grievor's normal schedule started on Sunday June 21, 2015 and he was scheduled to commence work at 7am, a drug test was arranged for June 21st. He found out later from Mr. Mendez, that the result of the test was a non-negative for marijuana and ecstasy. There was some confusion about the grievor's status regarding whether he could work or not. However, he was aware that he could not work until the matter was resolved and did not work between June 21 and June 26. He understood that the results had been sent to the lab for verification and on June 26, 2015 (Friday) he found out the results were inconclusive and that the sample was cancelled. Mr. Sylvester was instructed to arrange for another sample to be collected as soon as possible. He contacted the grievor by phone and text and advised him that he was required to come in to give a sample. Mr. Sylvester testified that the grievor stated it was his day off and that he was with his family so he could come in the next day. Mr. Sylvester was inexperienced with these issues and wanted to consult with Mr. Mendez, with Labour Relations and with the testing companies. After discussions with various parties Mr. Sylvester and Mr. Mendez contacted the grievor via speaker phone and told him that they needed him to come in and provide a sample for testing, alternatively arrangements could be made for him to go to CITA, use DriverCheck or to go to any location he was comfortable with but that it needed to happen. When the grievor stated he was with his family at a picnic in White Rock, Mr. Mendez reminded him that this was an opportunity for him to clear his name, that he was under a RTWA and that the Corporation would make any arrangements he was comfortable with. The grievor then agreed to be tested at his home and DriverCheck was dispatched to meet him there.

[52] Subsequent to the testing and positive result on the breathalyzer test, on July 3, 2015, Mr. Sylvester conducted an investigative interview with the grievor with his Union representative also present.

[53] During the interview the grievor explained that he had spoken to his doctor who offered that the result of the tests could be due to various medications and perhaps the cough syrup he was taking reacted with something in his body. Mr. Sylvester testified that he hoped this was true and that there was something to this statement from the grievor. He opined that employees are given a RTWA in order to give them an opportunity to succeed and that the Corporation did supplemental testing and felt they owed the grievor an obligation to follow due process. Even though he didn't feel it entirely explained the breathalyzer reading, it was something that should be explored because the grievor referred to not just the cough medicine but "various medications".

[54] Mr. Sylvester referred to the minutes of the meeting and testified that at this point there was a fifteen-minute recess in the meeting and then the grievor came back and read from notes he had prepared, the following:

> "I have been tested numerous times at work and every time, I passed. I have never violated the drug and alcohol policy and have always refrained from drinking and using after signing the drug and alcohol contract. I was not sure that the testing was to be done when I am not on duty. My medication could have played a part in my testing being non-negative. My reason for being agitated was because I did not want to be tested in my home. I thought that was a violation of my rights."

[55] Mr. Sylvester stated that he thought, of course the grievor knew the agreement required complete abstinence and involved random testing and, he had been privy to a conversation where the grievor chose the location for testing at his home and he is currently off work. However, given the grievor's assertion that the reading could have been a result of the various medications including cough syrup, the employer decided to look deeper into that aspect of the investigation by conducting a supplemental investigation and giving the grievor another opportunity to be transparent.

[56] The supplemental investigation occurred on July 10th, 2015. During that investigation, the grievor was asked specifics about what medications he was taking that may have impacted the test results. The grievor chose not to disclose the specific medications citing reasons of privacy. He was therefore given an opportunity to provide the information directly to the Corporation Chief Medical Officer (CMO) and signed a release allowing the CMO to speak directly with his personal physician. Mr. Sylvester testified the grievor offered that he believed the information from his doctor would provide an explanation for the non-negative urine test on June 21, 2015 as well as the positive breathalyzer test on June 26. Ultimately Mr. Sylvester heard that the list of medications supplied by the grievor would not have caused him to fail either test on June 21 or 26.

[57] Mr. Sylvester described the grievor's job as a rail car technician. He stated people who perform this job are trusted to complete work on their own including safety inspections and assuring the safety of brakes and wheels. Some of the work is done with a partner who relies on the worker for their safety. He also stated that the Corporation and the travelling public rely on rail car technicians to do their jobs so that safety is maintained.

[58] Mr. Sylvester noted that there are two other employees on similar RTWAs as the grievor. While there may be some differences in the agreements regarding the type of testing to be done they all involve a treatment plan and complete abstinence for two years. He stated the Corporation and he personally enter into these agreements because of the belief they have in their people and the desire to give them one last chance. It is a way to support and help people who need it, by giving them an

opportunity to complete their employment. He stated if there is an agreement then employees need to be trustworthy and honest. He stated the tri-partite agreement provides the structure for success but the employee must maintain sobriety and must be completely honest if that is not the case. He testified that the final decision to terminate the grievor was made by him, Mr. Mendez and the Senior Labour Relations Advisor.

[59] Mr. Sylvester stated following verification, he had lost all trust in the grievor which he requires from all who work for him. He felt the RTWA in this case was not worth the paper it was written on. He also stated the LCA was not only a way to help someone maintain sobriety but also something that allows their supervisor to do their job and gives their partner confidence that they will have a safe day.

[60] Under cross examination Mr. Sylvester stated he started employment with VIA Rail in 2011 and had no trades experience and had not apprenticed in the trades. His previous managerial experience was as a general manager for a metal recycling company and prior to that he worked for Loblaws as a transportation supervisor.

[61] He also stated that he relied on his memory to recall events related to this case. He confirmed that he was notified by the Senior Labour Relations Advisor on June 26 that the sample from June 21 was inconclusive and that she had heard from DriverCheck.

[62] He admitted that the ten hours a month he testified were required to manage someone on a RTWA was an estimate and that the VIA Rail Policy required supervisors to accompany anyone that is tested off site. He also agreed that the Corporation has a moral and legal obligation to support employees in these circumstances. He also conceded that the grievor had been open with his confidential medical information and that he signed a release to provide the employer's doctor with access to it.

Testimony of Amresh Anand

[63] The grievor was born in Fiji and moved to Canada in 1991. He was married in 1995 and has 3 sons. He started with the Corporation in May of 1996 as a general worker and at the time of his dismissal was employed as a Railway Car Technician or Carman.

[64] He testified that he had problems in the past which he dealt with by attending at Creekside Centre and upon completion of his program he entered into a tri-partite return to work agreement in June 2014 with the Corporation and the Union also as signatories. He maintains that he has adhered to the agreement. Over the years, he has been subjected to many random tests at work where he has had to provide samples of breath, urine and hair.

[65] He explained that his doctor had prescribed cough syrup for him in April of 2015 but he had not filled the prescription until July 2, 2015 because he still had some remaining from a previous prescription.

[66] He described the days leading up to the test which ultimately led to his dismissal. He stated that after working a 6am to 2pm shift on June 18, 2015 he went home and got into an argument with his wife then drove off and spent about two hours with his in-laws. During his absence, his wife called his cell phone several times. He told her he would be home later and then did not answer some of the calls from her. He went back home and the argument escalated so he left again. Before he left home the second time, she threw his phone on the pavement and broke it because he had ignored her calls. He stated that night he slept in his car at a park near his house. The following day he went home because he knew his wife would be at work, said hello to his children who were going to school and waited for his wife to return home. She returned at 4pm. When they continued to argue, he left again and went back to the park where he spent a second night in his car.

[67] It was now Saturday, June 20th, 2015. He went home around 10am or noon and his wife had calmed down somewhat. They went shopping and had dinner out and returned home. He went to bed early because he knew he had to work early the next morning. She told him she had been worried about him and that she had called everywhere looking for him including other family members, the RCMP and his work. He informed her that his phone had been broken after she threw it on the driveway. He stated that the argument with his wife was related to the fact that he was still mourning the loss of his mother who passed away in August of 2011. His mother lived in the basement of their home and her body was found by his eldest son. This understandably was a traumatic memory.

[68] The next day, Sunday the 21st was Father's Day, he went to work. Mr. Browning was ahead of him at the entrance gate so he let him in, it was just before 6am. After the supervisor arrived he was told that he and another employee would be tested. The four of them entered a boardroom where he blew into a breathalyzer which read 0.000, then a urine sample was collected. When Mr. Browning tested the urine sample he was unable to get a reading, he picked it up and shook it and decided he would take a swab. He put a swab in the grievor's mouth for two minutes and it was then analyzed in a test-tube. Mr. Browning told the grievor there was an indication of drugs. The supervisor told him that if he failed then he is suspended pending an investigation. He was told to change and leave so he did that. He drove his own vehicle off the parking lot and instead of going directly home, he went to the park and thought about how he would break the news to his wife who he told later the same day. His wife was not angry but she was surprised.

[69] Before he went home he called the supervisor and was informed that the test indicated THC and MDMA (Ecstasy) which he found strange because he has never done those drugs. The employer never asked him where he had been during the time his wife reported him missing and there was no RCMP waiting for him.

[70] Between Sunday, June 21 and Friday June 26 he stayed home, watched television and did yard work. On the morning of June 26th, he got a call from Montreal and the person on the other end of the call asked him to confirm his identity, asked him where he worked and then informed him that the urinalysis result from June 21 was invalid. He responded to her questions by informing her that he was not using any cleansing agents and that he was on medication for gout there was no discussion at that time about a breathalyzer test. He assumed he would be tested again very soon. He then got out of bed, woke up the kids and decided to take them to the beach because it was a nice day. He left the house around 10:15 and arrived at crescent beach around 10:50 or 11am. At 11:11 he received a text message from Steve Sylvester asking him to call as soon as possible. He called back right away and was informed that he had to be tested the same day due to the invalid result. He explained he was at the beach with his children. Mr. Sylvester insisted the test had to be done the same day so he asked to first consult with the Union. Mr. Sylvester reminded him that he was still an employee even though he was suspended and was obliged to agree. The Union advised him that if the Corporation was asking for the test then he should go ahead with it.

[71] He then called Mr. Sylvester back who was with Mr. Mendez. They put him on a speaker phone and explained that if he couldn't come in then someone would come to him. He stated "It was agreed to meet at my house the same day.". They had agreed on a time of 2pm to meet at the grievor's house. He returned home at about 1:15 or 1:30. He recalled seeing Mr. Terry arrive around 1:45 through his window so he went outside to greet him. Mr. Terry confirmed the test was still going ahead. The grievor suggested they do the test in the garage so that it would not be conducted in front of his children. The grievor said he went out to meet Mr. Terry and Mr. Browning because he did not want the children to be aware of what was going on. I note that the testimony from the Company's witnesses was that they knocked on the door but draw no conclusion from this apparent contradiction.

[72] The three of them accessed the garage from the outside using a keypad to open the garage door. Mr. Browning prepared the machine and the printer, the garage door was closed for privacy. The grievor blew into the machine until he heard three beeps as Mr. Terry watched. Mr. Browning seemed surprised and asked if the grievor had been drinking then showed him the reading. They waited mostly in silence for 15 minutes and a second reading was done. Then Mr. Browning followed the grievor into the house to obtain a urine sample for testing. He waited outside the bathroom then took the sample. At this point the grievor's wife came into the garage and asked what was going on. The grievor explained that the reading was positive. Mr. Browning packed up and left but Mr. Terry accompanied the couple into the family room. When they discussed the possibility of getting another sample, Mr. Terry suggested that they do so right away. The grievor and his wife went to the RCMP in Guildford and waited ten minutes to see an officer. When they requested a breathalyzer test he refused to do it saying he got in trouble the last time he did that. The Officer suggested the next best thing is a blood test at the local hospital so they drove to Surrey Memorial Hospital.

His wife dropped him off there and told him to let her know when he was done so she could pick him up. After about an hour or hour and a half when he was seen by the nurse she explained she would not do a blood test without a requisition. So, he called his wife to pick him up and they went home.

[73] The grievor explained that he was not agitated or nervous about the testing but he was concerned that his children should not see what was going on which is why he suggested the testing should be done in the garage. I accept this explanation. In my view, something like this occurring at your residence in close proximity to your family would be upsetting and drawing any conclusions about guilt would be dubious.

[74] He stated that since June 2014 he has maintained sobriety because he knew he had signed a contract which if he did not adhere to, he risked being terminated. Throughout this process, he has had support from his counselor, through his church, friends and family who have helped him a lot. He confirmed he has never talked to the Corporation Chief Medical Officer (CMO), Dr. Pigeon.

[75] Under cross examination the grievor emphasized he has maintained sobriety since 2014 even after he was dismissed and up until this day. He confirmed that on the morning of June 26 he was woken up by a phone call. He confirmed the person identified herself as the MRO and explained her role was to determine if he had taken any drugs and to assess the validity of the test. He confirmed that he was not surprised by the call but it woke him up. He explained that initially he didn't understand her question about cleansing agents but acknowledged that after it was explained that they are used to flush illegal drugs from your system he said he had not used them. He recalled being asked about medications he was taking but not about bladder infections or being told that the medication for gout would not affect the test. He also recalled being told that the Corporation would be notified the result was invalid.

[76] He acknowledged that during this call he did not share the fact that he was on cough syrup adding that it did not cross his mind because he thought of medications as pills not syrup. He acknowledged that it was a prescribed syrup and this was a material oversight. He answered the cough syrup regimen was 5-10 mls to be taken three times a day. He confirmed that his wife also sometimes takes it and confirmed that the previous prescription for the cough syrup was filled in April 2015 some three months earlier and that it came in different sizes.

[77] In response to questions about the interview on July 3rd, 2015 the grievor stated he discussed the cough syrup he was taking with his physician who wasn't sure if it contained alcohol but stated it had properties of alcohol. At the time the grievor was not aware the syrup contained codeine. When the Company's counsel put it to him that the company that manufactures the syrup had confirmed to the MRO there was no alcohol in the syrup, that there's now no other explanation for a positive result, the grievor stated he was baffled by the positive reading because he has

maintained sobriety and the only explanation is the machine itself (malfunctioned). He went on to deny ever using ecstasy. The grievor was asked if he ingested cough syrup on the date of the breathalyzer test and he responded that he had taken the syrup the whole month. He estimated he had taken 10mls of cough syrup on June 26th between the time he woke up and was tested. He stated it was around 10am before he left for the beach.

[78] The grievor confirmed he understood the return to work agreement required complete abstinence from drugs and alcohol even when he was not at work and was at home and that he had told his wife that and acknowledged that he could be tested at home.

[79] He acknowledged there were other employees on similar agreements as he was.

[80] He stated that his church and counselling had helped him maintain sobriety. He denied having any relapses between June 2015 and the date of the hearing.

ARGUMENT FOR THE CORPORATION

[81] The Corporation submits that the grievance ought to be dismissed, given that the grievor was dismissed with just cause. The Corporation submits they accommodated the grievor to the point of undue hardship by entering into a return to work agreement and administering the same for approximately one year before he breached the agreement and frustrated the accommodation process by lying to the Company.

[82] The Corporation asks that if I determine that they did not have just cause to dismiss the grievor, that I should find reinstating him in the circumstances would amount to undue hardship on the Employer.

Just Cause

[83] The Corporation argues that the grievor worked in a position that required a high degree of trust, which he breached by violating his return to work agreement and lying about the said violation. That the grievor's pattern of denial and dishonesty has shown that he cannot be trusted and that he not only lied to the Corporation but that he lied under oath at the hearing.

[84] The Corporation submits that although the grievor has put forth a theory that he was the victim of circumstance and a faulty breathalyzer device, the facts simply do not support his claim.

[85] Both of the grievor's prescribed cough syrups contained codeine, had he taken either of them on June 26, 2015, he would have failed his drug test that he actually passed. This is also the case for the June 21, 2015 drug test, which also showed a negative result for opiates (codeine), despite the fact that the grievor testified that he had been taking the cough syrup for one to two months prior to June 26, 2015.

[86] The only explanation for the positive breathalyzer was consumption of alcohol, which the grievor has denied to this day, including during testimony under oath.

[87] Moreover, the grievor's story is simply not credible and is self-serving. Why did he not advance all of these material elements (dispute with wife, attempts to test at RCMP, hospital) at some time prior to his dismissal? Or even thereafter?

[88] The Corporation therefore believes that the bond of trust between Employer and Employee is irreparably broken.

Accommodation

[89] The grievor and his Union agreed to the terms of a return to work agreement on June 11, 2014. The agreement called for complete abstinence, which was recommended by the medical and care professionals consulted by the grievor.

[90] Both Mr. Sylvester and other managers have devoted significant time and energy to drive the grievor to testing and to otherwise administer the agreement and its terms.

[91] By lying to the Corporation and holding back relevant and material information, the grievor frustrated the accommodation process to which he, the Company, and his Union had bound themselves.

Undue Hardship

[92] The grievor admitted he is aware that his two colleagues are "in the program," to use his own words.

[93] Although Mr. Sylvester testified that VIA "transports people, not grain", it is this people-driven business that the Corporation conducts that must be considered carefully in order to determine a remedy should it be found that there was no just cause to dismiss the grievor. Mr. Sylvester also pointed out the potential consequences of reading down the covenant contained in his RTWA, which consequences would extend not only to other employees in similar situations to the grievor, but also to the supervisors who devote extra time and energy (in addition to operational tasks) to assist such employees.

[94] Although the Corporation does respect its obligations to accommodate employees who require it (and who respect their own obligations to participate in the accommodation offered), it does not have unlimited resources to run a "program" containing an ambiguous standard of successive "tries" for an employee to stay clean and sober.

[95] Moreover, the lack of transparency and dishonesty demonstrated by the grievor would place the Corporation in an untenable position of having to tailor an even more restrictive program than the one it already had in place, which involved the highest standard of complete abstinence with random testing.

[96] Finally, to set aside the current agreement would clearly have an impact on the Company's attempts to address issues of substance abuse in its workplace if its agreements are not worth the paper they are written on.

Legal Submissions

Enforceability of Last Chance/Return to Work Agreements

[97] The authors Brown and Beatty provide the following synopsis relating to the legal context of last chance or return to work agreements:

> "Last Chance" agreements…typically…provide that non-compliance will result in dismissal, and arbitral review is limited by the terms of the agreement. Generally speaking, arbitrators will enforce such agreements in accordance with their terms, except where the agreements are contrary to legislation, as may be the case where the circumstances in question are governed by human rights legislation. Thus, upon finding non-compliance with the conditions of continued employment, unless there is an agreed-upon right to arbitral review in the settlement agreement, such review is required by legislation, the Union had not been involved in the developing and approving it, or there is a mutual mistake concerning the agreement rendering it void *ab initio*, arbitrators have held that they have no choice but to affirm the agreed-upon discipline or termination by dismissing the grievance. Where the settlement is contrary to the terms of the collective agreement, however, while binding in the particular circumstance, it will not preclude a subsequent reversion to the agreement. [at 2:3232-"'Last-Chance' agreements"]

They also state:

> Last-chance agreements with disabled employees are, however, much more problematic and will not be enforced if they are found to derogate from an employer's obligations under human rights legislation and in particular its duty to accommodate.[4] For example, many arbitrators have ruled that last-chance agreements that purport to deny disabled employees the opportunity to challenge the reasonableness of the employer's decision to terminate them before an arbitrator,[5] hold them to attendance standards that are discriminatory (either because they are more stringent than those other employees have to meet or because they fail to make allowances for absences that are caused by their disabilities),[6] or were developed without the involvement of the union,[7] are inconsistent with human rights and labour legislation and so are unlawful. "Deeming clauses" that purport to strip employees of their seniority and subject them to automatic termination for excessive absences and chronic incapacity may be found to offend human rights legislation and have suffered a similar fate.[8] The logic of the position taken by most (but not all)[9] arbitrators seems to be that regardless of what the parties have

> agreed, they must determine that the employer has met its statutory duty of doing everything it could reasonably do to accommodate the needs of the disabled, short of options that would entail excessive hardship and cost.[10] Of course, where the arbitrator finds that an employer has met its statutory obligations and accommodated the needs of a disabled employee to the point of undue hardship, its decision to terminate pursuant to a last-chance agreement will be confirmed.[11] [at 7 :6122 – Last-chance agreements]
>
> (Corporation emphasis)

[98] In ***Crestbrook Forest Industries Ltd. V IWA-Canada, Local 1-405 (Thomson)*** [(1996), 59 LAC (4th) 237 (BC Arb) (Munroe)], arbitrator Munroe cited the following expansion on the reasons behind this general arbitral view:

> The general arbitral approach to such agreements, often referred to as 'last chance' agreements, is to require strong and compelling reasons in order to vary the result which flows from a breach of the agreement. The reason behind such an approach is quite evident. If the arbitrator used his power to mitigate the penalty flowing from the breach of the agreement without regard to the terms of the agreement, the likely long-term effect would be that such agreements would not be used to settle disciplinary disputes. Employers would simply refuse to give employees a 'last chance' if, at the end of the day, the agreement has little or no effect in the arbitrator's deliberations when considering whether to mitigate a penalty. It is obvious that it is desirable to encourage parties to enter settlement agreements such as the one in question. The employee receives another chance to retain his job and the parties know what standard of conduct is required in the future. The expense of arbitration proceedings may be avoided. [at paragraph 17 citing *Re O-Pee-Chee Co. and Glass Molders, Pottery, Plastics and Allied Workers International Union*, Local 49 (McDonald), July 13, 1995 (Rayner), at 4-5]
>
> (Corporation emphasis)

Arbitrators have upheld discharge where grievors have breached last chance agreements while lying about their substance abuse.

[99] In ***Molson Canada v Brewery, Winery & Distillery Workers' Union, Local 300*****, 2007 Carswell BC 3804 (Ready),** the grievor, a 27 year employee, was terminated for breach of a last chance agreement and dishonesty after he tested positive for drug use. He had previously been AWOL as a result of personal problems related to his cocaine addiction. On March 7, 2006, the grievor signed a last chance agreement. As part of the agreement, the grievor agreed to undergo a drug test "at a time to be determined by the Corporation before his return to work after providing proof of successful completion at the

Treatment Centre to the Company. Should he be found to have consumed illicit drugs, his employment would be terminated." (**para 8**). On or about October 6, 2006, the grievor took a drug test, after drinking beer and using cocaine. The drug test came back positive. In a meeting on October 17, 2006, the grievor admitted to the employer that he used cocaine on the night of October 6, 2006, but stated that he had not used it since.

[100] The arbitrator relied on case-law setting out that last chance agreements should only be modified where there are strong and compelling reasons to do so (**para 34/35**). He found that there were no compelling reasons not to uphold the content of the last chance agreement. It was signed by the employer, Union and the grievor (**para 36**). The agreement not to use illicit drugs was the most important and fundamental commitment contained in the agreement (**para 36**).

[101] With respect to the duty to accommodate, the arbitrator noted that the grievor was: (i) provided with a last chance agreement; (ii) provided with company-funded rehabilitation; and (iii) permitted to withdraw from and switch to a new rehabilitation program, at the employer's expense (**para 40**). The arbitrator considered whether the grievor had a reasonable prognosis for recovery (i.e. should be given another chance). The arbitrator relied on the grievor's dishonesty and his continued avoidance of responsibility, coupled with the attempts at accommodation, in order to determine that the employer accommodated to the point of undue hardship (**para 42**). The grievance was dismissed.

[102] In ***Vancouver (City) Board of Parks and Recreation v. Canadian Union of Public Employees, Local 1004 (DG Grievance), [2011] B.C.C.A.A.A. No. 149, No. A-104/11 (Thorne)***, the grievor, a 14 year employee who occupied a safety-sensitive position was terminated in December 2007 after the Employer was advised that the results of an assessment to verify compliance with his return to work agreement showed he had a relapse. The grievor was suspended and his discharge was confirmed a few days later. The arbitrator enforced the agreement:

> **153** I am directed by the Board to consider the Return to Work Agreement as a key circumstance in determining whether the Employer's decision to discharge the Grievor is an excessive response in all of the circumstances of this case. The Board requires that I be convinced that there are strong and compelling reasons If I am to vary or mitigate the Employer's discharge decision that flows directly from the Grievor's breach of the Agreement that the Grievor and the Union accepted.
>
> **154** It is clear on the face of the Return to Work Agreement that the Grievor and the Union both explicitly accepted that the Grievor's behavior on July 22, 2005 were worthy of discharge. And, they both explicitly accepted that discharge would result if the Grievor breached the Agreement.

> […]
>
> **164** The arbitral authorities are clear that the Grievor was legally required to participate in and take responsibility for his rehabilitation program. He failed to do so when he was found in gross non-compliance with his Return to Work Agreement.
>
> **165** After considering all of the circumstances of this case, I am unable to answer the second *William Scott* question in the affirmative - the Employer's discharge of the Grievor is not an excessive disciplinary response in all of the circumstances.
>
> **166** I am unable to find, in all of the circumstances, the required strong and compelling reasons to vary/mitigate the Employer's discharge decision, which the Grievor and the Union agreed upon in the Return to Work Agreement.

[103] In ***Kingston General Hospital v. Ontario Nurses Association (Unjust Discharge Grievance), [2010] O.L.A.S. no. 226 (Swan)***, the arbitrator dismissed the grievance filed by a nurse discharged for violation of a last-chance agreement when she relapsed. The grievance was pursued by the Union on behalf of the estate of the grievor who had died tragically before the hearing was held. The agreement was signed after the grievor had been caught stealing morphine. The arbitrator concluded that the agreement was not discriminatory that the situation had reached the level of undue hardship particularly since the grievor had relapsed on more than one occasion.

> 85 Based on what it knew at the time of the discharge, the Employer was entitled to conclude that the accommodation which it had offered had failed, although the two year period of the original last chance agreement was almost over, and the grievor had undergone considerable treatment. It was also entitled to conclude that the institutional cost of maintaining the employment relationship with a nurse who had failed to respond to treatment had reached the level of undue hardship. I am satisfied that, either based on the knowledge it had at the time, or on the evidence which subsequently became available, the Employer was justified in discharging the grievor.
>
> 86 I recognize that the Employer's decision has had unfortunate implications for the grievor's estate, but it would be wrong to take such compassionate considerations into account. If the Employer had just cause for the discharge, that decision should not be set aside. Every discharge has economic implications both for the affected employee and that employee's family.

> 87 In the result, with great regret, I must dismiss the grievance.

[104] In ***International Forest Products Ltd. v. United Steelworkers of America local 1-3567 (Sall Grievance), [2005] B.C.A.A.A. no. 184***, arbitrator Blasina dismissed the grievance filed by a quad saw operator with over thirty years of seniority who was discharged for reporting to work under the influence in violation of a last chance agreement:

> 39 Alcoholism is an illness; and, there is no dispute that Mr. Sall is an alcoholic. He suffers the disability of addiction to alcohol - a disability of particular complexity. Once established, the disability is latent and ever-present. When an employee who works in a dangerous environment succumbs to the pressure of this addiction, he undermines production, and he poses a most serious threat to himself and his fellow employees.
>
> 40 The employer has a duty to accommodate, and the employee has a duty to facilitate accommodation. The employer's duty is to a point "short of undue hardship". In Board of School Trustees of School District No. 23 (Central Okanagan) v. Renaud, [1992] 2 S.C.R. 970, Sopinka J. described "undue hardship" at p. 984 (cited at [paragraph] 161 of Handfield v. North Thompson School District No. 26, [1995] B.C.C.H.R.D. No. 4 (H.P. Mahil)):
>
> > ... The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of un-due hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.
>
> I would think that a similar standard of reasonableness would also apply to the employee's duty to facilitate accommodation. An employee need not facilitate an employer's unreasonably feeble effort to accommodate; and, an employer need not tolerate an employee's unreasonably feeble effort to facilitate. These obligations - to accommodate, and to facilitate - are not an equation, but a formula. Their purpose is the protection of the disabled employee from unreasonable discrimination. In this case, that

> protection would be the reasonable enablement of the continued employment of an alcoholic.
>
> […]
>
> 55 A "last chance agreement" is one where the employer, union, and employee agree that a further infraction will result in the discharge of the employee. Sometimes these agreements contain wording which would preclude the employee from grieving. These agreements are usually arrived at in settlement of a preceding discharge or a contemplated discharge. A "last chance agreement" cannot block an ensuing arbitration because the grievor always has the right to challenge the propriety of the discharge. Also, the arbitrariness of a "last chance agreement" makes less sense in non-disciplinary situations where the duty to accommodate principles would have precedence.
>
> 56 In the case of alcoholism, the employee must be given to understand the consequences of his continued drinking, lest he not take seriously the conditions of his continued employment, and particularly the requirement to abstain. This is tantamount to a "last chance agreement", as would be appropriate and commonplace in this type of case. The "last chance agreement" that the Union would seek in remedial relief has, in this context, already been given.
>
> […]
>
> 63 In summary, the Employer accommodated Mr. Sall by sending him for a medical assessment, and enabling him to obtain residential treatment and to follow a monitoring and treatment program, while maintaining his employment in a safety sensitive environment. Mr. Sall was obliged to follow the monitoring and treatment program, and to abstain from further consumption of alcohol. The abstinence was critical. Relapses can occur, but given the evidence presented here, Mr. Sall's latest relapse was not excusable. Mr. Sall had not overcome his addiction. He therefore presented an extraordinary safety risk to himself and his fellow employees, and he proved himself unsuitable for continued employment. To the degree that post-discharge evidence many (sic) be relevant to the propriety of the Employer's decision, one would still conclude that Mr. Sall's condition rendered him unsuitable. To require the Employer to reinstate Mr. Sall after the latest relapse would be an unreasonable imposition, i.e. an undue hardship.

[105] Based on the foregoing, the Corporation submits that this Arbitration Board ought to dismiss the grievance. Alternatively, should the Arbitrator determine that VIA did not have just cause to dismiss the grievor, he should not be reinstated and that a damage award be rendered in lieu of reinstatement.

ARGUMENT FOR THE UNION

[106] The union submits, none of their members occupy safety sensitive or safety critical positions.

[107] The Union contends the grievor was told by the Corporation that if he refused the follow up testing he would be in violation of the Return to Work Agreement. Although the test which was invalid was the urine test which is used to determine drug use, the DriverCheck representative conducted the MRO's requested second urine test, and without prompting, also conducted an alcohol breath test. The grievor's POCT urine test returned as negative for any drugs however the AlcoSensor IV BAC test reported 0.147% and 0.145%.

[108] The Union seeks reinstatement of the grievor with full redress.

Objections

[109] At the commencement of the hearing on November 21, 2015, the Union raised objections with regards to materials contained in *VIA Rail's Exhibit Book* at TAB 2 and TAB 10.

TAB 2 – February 28, 2014 Employee Statement

[110] VIA Rail has submitted materials which were *part of* an investigation conducted by the Corporation in February 2014. More than a year prior to the instant grievance. The Union submits that the Corporation is barred from relying on the materials presented at Tab 2 on two fronts.

[111] Firstly, the time limits specified in Rule 27.5 of the Agreement upon which the Corporation may rely on the information has long passed and there exists no agreement to extend any time limit.

27.5 An employee will not be held out of service unnecessarily pending the rendering of a decision. The decision will be rendered as soon as possible but not later than twenty-one (21) calendar days from the date the investigation is completed. In the event that the decision results in employee discharge, the Local President will be provided a copy of the "Disciplinary Measures" form as soon as possible. The time limit provided herein may be extended by agreement between the respective parties.

[112] The grievor is significantly prejudiced as the materials contain statements from Corporation representatives that would, had the Corporation issued a *decision* that lead to the imposition of discipline, have presented an opportunity for the grievor (and union) to test the veracity of those statements through the grievance procedure and eventually at arbitration. Additionally, the Union had raised four (4) objections inside that Statement that remain outstanding to this

day. This would also go to the heart of the mandatory requirement of the Corporation to conduct a "fair and impartial" investigation. In the absence of that ability to test the materials and to review the entirety of the Company's "fair and impartial investigation", the materials found at TAB 2 of *VIA Rail's Exhibit Book,* cannot be accepted as reliable and must be declared inadmissible.

[113] Secondly, it would be highly improper, and not in keeping with the requirements of conducting a "fair and impartial investigation" if it were left open to the Corporation to stockpile and warehouse employee statements for the purpose of data mining them at a later date.

[114] On that basis, the Union requests that the arbitrator find and declare that the materials contained at Tab 2 of *VIA Rail's Exhibit Book* as inadmissible.

TAB 10 – Substance Abuse Assessments and Reports

[115] The Union contends that the materials located at Tab 10 of *VIA Rail's Exhibit Book* are clearly materials that are of a personal, private and confidential nature and would most certainly require a signed authorization to release by the grievor, in order for medical and non-medical service employees of VIA Rail to have access, or the ability to rely on any of the materials.

[116] The Union also contends that the grievor signed forms related to the substance abuse program and his signature has the effect of limiting who can receive information and what information they can receive. The information can only be received to the Referral Contact and not as has occurred here, to labour relations, supervisors and others. This scope of records, the Union contends, is consistent with the Authorized Release of Information paragraph contained in the Return to Work Agreement (RTWA) signed on June 12, 2014.

By signing below, you authorize the assessor, treatment providers, and the Human Resources Department to release information to each other regarding your participation in, attendance at and compliance with the program, the after plan and the return to duty letter recommendations, as well as your progress or treatment in any programs and to release information as to whether or not you are following these programs.

[117] At its most generous interpretation, these documents and the RTWA the Referral Contact would ONLY be in receipt of the Post-Treatment Report/Closure Report at pages 167 and 168 of the *Via Rail Exhibit Book.*

[118] Having said that, the Referral Contact would still not have the authorization to release those materials to Labour Relations, Supervisors or others without the express signed consent of the grievor.

[119] And finally, it must be noted, in any event, that the authorization is clearly limited to a period of 1 year from date of consent, in the instant case up to March 5, 2015.

[120] The Union respectfully submits that the materials contained at Tab 10 of *VIA Rail's Exhibit Book* are materials of a personal, private and confidential

nature. Moreover, the records were maintained under the authority of VIA Rail's Alcohol and Drug Policy Implementation Procedures which contains a confidentiality statement limiting the access and use of all records and information gathered.

[121] Clearly, presenting the records at TAB 10 of *VIA Rail's Exhibit Book* without a clear signed consent from the grievor, is a significant breach of the grievor's dignity and right to keep records of a personal, private and confidential nature, confidential. These documents should be declared inadmissible and removed from the record.

Submissions on Merits of Grievance

Termination

[122] Arbitrators generally require employers to justify the sanctions they impose on the same grounds they refer to when they actually discipline an employee. Brown and Beatty at 7:2200 chronicles the decision;

In Aerocide Dispensers Ltd., Professor Bora Laskin (later Chief Justice of Canada) first advanced the principle that employers should be held "fairly strictly to the grounds upon which (they have) chosen to act" and that arbitrators should "not . . . permit an assigned cause to be reformed into one different from it merely because the evidence does not support the assigned cause but rather something like it". It was his view that an employer should not be allowed either to enlarge the grounds by adding new allegations, or to change how it characterized the same set of facts.
Over the years, Chief Justice Laskin's approach has met with a good deal of sympathy from other arbitrators. Altering the grounds on which disciplinary action is defended is widely seen as raising questions about the employer's bona fides and the fairness of the disciplinary procedure. Following Laskin's lead, arbitrators have refused to permit employers to introduce evidence of events that are not closely related to those initially communicated to the employee, or to turn the incident that precipitated the case into a different offence.

[123] In the instant grievance, Mr. Anand was terminated specifically for;

As you know, the terms of this [Return to Work] agreement include complete abstinence from drugs and alcohol and random testing for same. Your positive breath alcohol result on June 26th is a clear violation of this agreement. Therefore be advised that your employment with VIA Rail Canada is terminated as of the date of this letter.

[124] That, and that alone is the basis of the termination and not the alleged misconducts of "lying", "denial and dishonesty", "cannot be trusted", "frustrated the accommodation process", "lack of transparency and dishonesty", "poor work performance" or that similar return to work agreements might be viewed as "not worth the paper they are written on". While those descriptors add to the colour of the narrative being crafted by the Company, they were not misconducts (which are denied by the grievor) that were presented to the grievor at his statements

on July 3 or July 10, 2015. The Union stated they would make brief submissions on some of those allegations, and not to exhaustion as they are not reflected in the grounds for termination contained in the Termination Letter.

Return to Work Agreement

[125] The Return to Work Agreement (RTWA) by any measure cannot be said to be a "last chance" agreement as suggested by the VIA Rail in their submissions or as offered by Manager Stephen Sylvester in his testimony. The RTWA establishes the framework agreement between the workplace parties and the grievor in regards to his continuing employment into active service with the corporation.

[126] The RTWA does contain a provision whereby;
In the event that you fail to attend the SRPP program and recommended treatment, the latter can be grounds for termination of employment with the Corporation.

[127] However there is no suggestion that the grievor did not meet that expectation. Nor is there any suggestion that the employer is relying on this paragraph as the basis on which they ground their decision to terminate the grievor.

[128] The RTWA also contains a provision that allows for unannounced testing for drugs and alcohol a period of two (2) years as determined by *VIA's Chief Medical Officer* and states;
In the event that you fail to pass the drugs and alcohol testing, you will be subject to investigation and you risk having your employment terminated.

[129] The structure of the RTWA is consistent with similar return to work agreements within the industry, where drug and/or alcohol abuse or dependency is present. For the most part, automatic termination for a positive drug or alcohol test is not a foundation of RTWA's.

[130] Experts in the field of substance abuse acknowledge that relapse is the rule rather than the exception and often acts as a powerful negative reinforcement making it less likely to happen again. A relapse is an important part of the process of extinction and while not so boldly stated in the instant grievance, the RTWA does provide for an inquiry process and not automatic termination. A reasoned approach and one consistent with the arbitral jurisprudence.

[131] **According to Castlegar & District Hospital v. B.C.N.U, 59 C.L.A.S. 138, 86 L.A.C. (4th) 81**, there is a two-part test. Is there clear and cogent evidence that there was a violation of the RTWA? If so, does the resulting termination meet the "just cause" test?"

[132] By any measure, the Company's evidence is far from clear and that upon close scrutiny, follows a narrative that is not supported by facts but rather strung together with threads of suspicion and creativity.

Fair and Impartial

[133] When the Corporation is investigating any alleged misconduct of employees, it must conduct a fair and impartial investigation (Rule 27.1 of Agreement). The parties to the Agreement have fashioned a provision which requires not only that fairness and impartiality be done, but that they manifestly must be seen to be done. In our respectful submission, on the basis of the record, the Company's conduct and our submissions, we believe the investigation falls well short of that standard.

[134] The agreement also contains a substantive right of the grievor (and union) to have the opportunity to hear all of the evidence submitted and given an opportunity through the presiding officer to ask questions of the witnesses whose evidence may have a bearing on their involvement. Additionally where witnesses cannot be present, arrangements will be made to permit them to be questioned upon request, where practicable.

27.4 (a) If the Corporation intends to present documentary or physical evidence during the investigation, such evidence will be provided to the employee and his or her authorized representative twenty four (24) hours prior to the commencement of the investigation to review the evidence provided by the Corporation. The employee and the authorized representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses whose evidence may have a bearing on their involvement. Where witnesses cannot be present, arrangements will be made to permit them to be questioned upon request, where practicable. The questions and answers will be recorded and the employee and the authorized representative will be furnished with a copy of statements and all other evidence taken.

[135] It is unchallenged, that prior to the commencement of the employee statement, the Union notified the Corporation in writing, that the Union is requesting that VIA Rail make available Supervisor Sean Terry, reasoning that he was an eyewitness who could attest to whether Mr. Anand may have shown any signs of being intoxicated on June 26, 2015.

[136] During the July 3, 2015 statement of the grievor, the Union made a number of clear requests, with explanations as to why they were desirous of having Mr. Terry present himself for some questions by the Union. Minutes from the July 3, 2015 statement confirm this statement. Specifically questions 28 and 29:

> *28. Zoltan, Are there any other relevant questions you would like us to ask?*
>
> *Yes*
>
> *Zoltan – Before the union asks questions for Mr. Anand, the union would like to request the Corporation make available supervisor Sean Terry who was an eye witness as to the condition of Mr. Anand at the time of testing on June 26th at 2pm. The union previously notified the*

corporation of our intent to call Sean Terry as a witness and at this time would like to enter the following letter for the record as exhibit "I". Is Sean Terry available for questioning? (question directed at Stephen Sylvester)

Steve-Sean Terry is not available at this time. However, we do have his statement submitted as an exhibit. Sean's presence on June 26th was requirement of Driver Check that they have a Corporation representative be there when they do the testing, not as an expert as to Amresh Anand's condition.

29. Are VIA supervisors trained to recognize signs of impairment and or drug and alcohol influence when they perform reasonable cause testing under VIA's drug and alcohol testing in the workplace?

Steve- This was not reasonable cause testing. This was a required follow-up from Driver Check for invalid testing results. Sean was not asked to perform any kind of reasonable cause testing on Amresh Anand. His purpose was only to be present while the test results were completed and I believe his statement provides the relevant information to the events of June 26th.

Zoltan -The union maintains that he is an eyewitness as to the condition of Mr. Anand on that day. Our purpose to ask him questions is not whether he had reasonable cause to test nor are we expecting him to give testimony as an expert witness. Only as the sole eyewitness to Mr. Anand's condition that a reasonable person could recognize whether he was or was not under the influence to the extent that the breathalyser sample would suggest.

[137] The Corporation refused to make available Mr. Terry during the grievor's statement on July 3, 2015, and thereafter made no arrangements for the grievor and Union to have the opportunity to ask questions of Mr. Terry who was, without question, a witness of much interest.

[138] The segregation of an eyewitness such as Mr. Terry can only be viewed as an attempt by the Corporation to withhold evidence, which may be exculpatory to the evidence presented by the Corporation during the formal investigation. The requirement to conduct a fair and impartial investigation must include *all evidence* as outlined by the collective agreement. Furthermore, this refusal by the employer to make Mr. Terry available to the grievor and Union, is further aggravated with his presence and testimony at the arbitration hearing where he provided *further evidence* (which evidence is denied by the grievor) that was not placed before the grievor during his statement or contained within Mr. Terry's memo introduced by the Corporation on July 3. 2015.

[139] This failure to meet the standard of conducting a "fair and impartial investigation" is compounded with the *additional evidence* presented by Manager

Stephen Sylvester, MRO Dr. Iris Greenwald (including documents at page 66, 67, 77, 78, 79, 80 and 81 of VIA's Exhibit book), and the evidence of Mr. Browning.

[140] The Company's failure to allow the Union an opportunity to question the witness(es) at the statement or soon thereafter, and their failure to *provide all evidence in advance of the statement,* and *to provide all other evidence* at the close of the statement, must be considered as a fatal flaw to the requirement to conduct a fair and impartial investigation.

[141] **In CROA 3061 (See also CROA 1561, 1597, 1734 and 2041.) Arbitrator Picher stated the following:**

As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Corporation's disciplinary investigation. As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ab initio.

[142] As early as July 11, 2016, a full four (4) months in advance of the yet scheduled hearing, the Union wrote to the Corporation seeking particulars, including the names of any witnesses and the gist of their evidence, as well as all documents which may be arguably relevant to the matters at hand or upon which the Corporation intended to rely. The grievor and the Union were significantly prejudiced by their refusal to respond positively to that request and then, at the hearing, marshal viva voce and documentary evidence (some of which was only provided 3 days prior to the commencement of the hearing) which they relied upon in making their decision to establish the grievor's responsibility in the alleged misconduct, which had not been presented to the grievor and Union as required in Rule 27.4 of the Agreement. How can it be said that the Company's investigation was conducted in a fair and impartial manner, when the grievor (and union) are not provided with the opportunity to ask questions through the presiding officer of the witnesses, let alone the ability to know who their witness(es) may be and what the gist of their evidence is, in order that the grievor and Union may be in a position to ask that *"arrangements will be made to permit them to be questioned upon request, where practicable."*

[143] The shielding of the identities of the witnesses and their evidence for more than 18 months, denied the grievor and Union any ability to make any such request to have arrangements made to receive all of the evidence and to question the Company's witnesses as provided for in the Agreement. The Company's conduct can only be seen as a deliberate withholding of evidence and witnesses, denying the grievor his substantive contractual right to a "fair and impartial investigation".

[144] In a 2010 Court of Queen's Bench of Alberta decision Chapell v CP Rail, wherein a fourth generation railroader, Mr. Paul Chapell was terminated, according to CP Rail, for just cause because he had submitted expense accounts between 1997 and 1999 containing duplicate line items. At trial, Honourable Madam Justice E.C. Erb found that Mr. Chapell was wrongfully dismissed and determined that he did not intend to defraud CP Rail but, in fact, erroneously submitted duplicate expenses.

[145] The Madam Justice chastised the manner in which CP Rail conducted their investigation into the matter, suggesting that the investigation was "…clearly case building" and that it failed "… to consider the total picture and turning a blind eye to any kind of context or surrounding circumstances was unfair to say the least".

[146] For the foregoing reasons, the Union contends that the significant irregularities in the conduct of the Company's investigation, is a fatal flaw when measured against the standards of conducting a "fair and impartial investigation". Such a fatal flaw cannot be rectified by the simple exclusion of evidence, it can only be rectified by declaring the discipline that flows from the sullied investigations, as void ab initio.

Corporation Narrative

[147] The Corporation's theory belies the evidence when assembled in its entirety. Clearly the Corporation's approach is one of case building and where the evidence (although not entirely factual) evolves over time in order to align itself with their narrative. It is abundantly clear that the genesis of this grievance began with a phone call/text from the grievor's wife and the RCMP inquiring if they knew the whereabouts of the grievor. The date and time of the call were not specified by the Corporation, other than to speculate it was sometime on June 19 or 20, 2015. The first reaction of the Corporation was not one of concern for the grievor, rather it was to promptly arrange for a drug and alcohol test to be conducted under the auspices of the RTWA, immediately upon the grievor reporting to work on his first day following his assigned rest days, that being Sunday June 21, 2015.

[148] The conclusion had already been drawn by them, that the grievor had likely relapsed and had disappeared into a drunken drug induced abyss and that they now "had him" and could rid themselves of this alleged time consuming responsibility that is required to manage the accommodation and RTWA.

[149] The June 21, 2015 breath test was negative, which simply added more fuel to the Corporation's belief that the grievor, following a period of more than 12 months of sobriety, had relapsed.

[150] Notwithstanding the June 21st negative BAC test and the negative 5 panel Saliva test, the Labour Relation's department became obsessed at the prospect that they had the grievor in their termination sights that they lost objectivity, creating a reasonable apprehension of bias in the days that followed.

[151] The speed at which the Corporation re-engaged the services of DriverCheck to conduct a follow up test, literally within hours of the June 26, 2015 discussion between Labour Relations and the MRO is more indicative of the Company's target fixation, than it was in wanting to learn more from the test results before springing into action.

[152] The most reasonable first step, would have been to engage the knowledge, professionalism and leadership of VIA's CMO Dr. Pigeon, but for reasons known only to VIA Labour Relations, that was not a step they would ever take during the entirety of these matters involving Mr. Anand.

Was the Corporation Case-Building?

[153] The Company's actions and in-actions do lead one to the conclusion that they were on a case building exercise and knowingly refused to consider the total picture. The Corporation turned a blind eye to any kind of context or surrounding circumstances that led them on their journey of inquisition and that the termination of the grievor was a foregone conclusion the moment the grievor's wife called the Corporation and RCMP to try and locate the grievor's whereabouts.

Medical Review Officer Evidence – Dr. Iris Greenwald

[154] The Medical Review Officer's (MRO) evidence cannot be said to support the grounds for termination relied upon by the Corporation because:

a. At no time did the MRO have any conversation with VIA Rail's Chief Medical Officer (CMO) Dr. Pigeon in regards to any of the grievor's test results conducted under the RTWA.
b. The MRO confirmed that the ETG hair sample testing that was conducted on the grievor is a useful method to ascertain alcohol abstinence and has a detection window of some 3 months. Clearly, for a significant measure of time since the inception of the RTWA, these tests verified the abstinence of the grievor from alcohol use.
c. The MRO confirmed that at no time prior to or on June 26, 2015 did she see, review or take into consideration the June 21, 2015 Saliva test results which reported *Negative* for all drugs, when reviewing the less reliable table top Point of Collection Test (POCT) that reported non-negative results for amphetamines and marijuana. A similar factor that weighed heavily against CP Rail when they terminated an employee who was reinstated at arbitration.
d. The MRO confirmed that nitrates are contained in certain cured meats, however her evidence is void of any inquiry of the grievor during her June 26, 2015 telephone interview whether he regularly consumes cured meats.
   (I note that this question was not put to the MRO and there may be an explanation why this is not relevant which the Corporation was prevented from addressing. Nor was the question asked of the grievor, so I have not given it any weight.)
e. The MRO does not reconcile in her report or in her testimony that the June 21, 2015 POCT urine sample Custody and Control Form – Step 5a Drug Screening Test Results reports within normal range;

i. PH – YES
ii. Specific Gravity – YES
iii. Are Oxidant's Present – NO

Yet the Primary Laboratory results (3rd page) states in the remarks "oxidant active > 200 mcg/mL nitrate equivalent"

f. The MRO does not provide any insight as to the basis to declare the tests "invalid" other than to say that there is no medical reason for the results. Moreover, the MRO did not solidly shut the door on the possibility that the specimen had been adulterated in some fashion. This indecision further fueled the Company's suggested narrative of suspicion.
g. The MRO initially overlooked the admission by the grievor that he was prescribed and taking indomethicin, which can cause GCMS interference, a common reason for a specimen to be invalid, which undoubtedly led to further confusion of the Corporation.

[155] The Corporation jumped to the conclusion that the grievor lied about the use of cough syrup, (which may or may not have contained codeine depending on which syrup he may have used) as the codeine did not present itself during any drug testing as positive for opiates as suggested by the evidence of the MRO. Interestingly though the MRO failed to mention that in 1998, the threshold defining a positive screen for urine morphine and codeine was raised from 300 to 2000 ng/mL to reduce spurious reports of opiate-positive tests. There is no certainty that the cough syrup would have triggered a positive test on any testing date. (**I note that the issue of the change in threshold for the test was not put to the MRO**.)

Medication Correspondence

[156] The MRO confirmed that she had no knowledge of the June 26, 2015 BAC results when she spoke with VIA Labour Relations on July 27, 2015. The purpose of the conversation was specifically in regards to the urine test results of June 21, 2015. The MRO does mention in her Additional MRO Notes that she was asked about a BAC false positive and reviewed the results to make sure the process was done correctly. The MRO also confirmed in her testimony that she is not a Certified Breath Technician.

[157] It is on common ground that the MRO made no personal observations of the grievor on Friday June 26, 2015 and was in no position to offer opinion (expert) testimony as to whether or not the grievor was showing any signs of impairment.

Work-Doc's Technician – Peter Browning

[158] On the other hand, Mr. Browning's testimony provided some insight and information into the functioning of the Alco Sensor IV.

[159] He has used the Alco Sensor IV since becoming qualified and has never had it calibrated. He testified that to his knowledge, the Alco Sensor IV is to be returned to the factory for servicing once every five (5) years.

[160] He recalls that the grievor was agitated and not happy to see him. However Mr. Browning offers no other recollections of the grievor's demeanor over the duration of the testing, including no signs of impairment in speech, balance, eyes, skin, awareness, odor of alcohol, shaking or trembling. He recalls the grievor's wife questioning whether or not the device could be faulty. He recalls conducting an accuracy check (not a calibration – which can only occur when instrument temperature is between 23 and 27 degrees Celsius) only after leaving the grievor's home.

Supervisor Sean Terry

[161] Mr. Terry's evidence appears to have evolved to a crisper recollection some 18 months after his attendance at the grievor's home on June 26, 2014. Mr. Terry provided more information, much of which leans to supporting the Corporation's narrative, than the content of his July 1, 2015 email memorandum.

[162] Mr. Terry, without explanation recalls that Mr. Browning asked the grievor after the first BAC Test, "Oh, did you have anything to drink today? Mr. Terry without explanation recalls that the grievor stated after being told that the ASD recorded a failed BAC test "How can that be? I didn't have anything to drink. How can that be? " Mr. Terry, without explanation recalls that the grievor asked Mr. Browning "How high is the number?" referring to the first BAC test. Mr. Terry, without explanation recalls that the grievor's wife enters the garage and asks the grievor "You weren't drinking today were you?" Mr. Terry, without explanation recalls that the grievor's wife began to talk "Hindu or something he didn't understand. That she was demonstrative, appearing to interrogate him but he did not know what about" Mr. Terry, without explanation recalls that the garage had a couch, a TV, some carpet and although he did not recall everything, other than that, there was room for them to sit. Mr. Terry, without explanation recalls that both the grievor and his wife inquired whether the grievor would be fired. Mr. Terry, in his memo (Union Book of Documents TAB 4 page 18) and his testimony, reports that the grievor was agitated and nervous and didn't appear to want to be tested, and that nothing else stood out for him. Mr. Terry offers no other recollections of the grievor's demeanor over the duration of the testing, including no signs of impairment in speech, balance, eyes, skin, awareness, odor of alcohol, shaking or trembling.

Mr. Terry v Mr. Browning – just how accurate is their memory?

[163] Then there is the matter of conflicting viva voce evidence between that of Mr. Sean Terry and Mr. Peter Browning.

[164] Mr. Browning contends that he, Mr. Terry and the grievor walked through the house in order to enter the garage. Mr. Terry and the grievor testified that they met in front of house and walked directly into garage.

[165] Mr. Browning contends that the grievor's wife stated that " *[grievor] should be allowed to drink in his own home"* , while Mr. Terry makes no mention of any such statement.

[166] Mr. Terry contends that the grievor asked Mr. Browning how high was the BAC number, Mr. Browning has no recollection of the grievor making any such inquiry but does recall telling the grievor the BAC was “over”.

[167] Mr. Terry contends that Mr. Browning stated “Oh, did you have anything to drink today” while Mr. Browning testified that he “did not ask if [grievor] had been drinking, It’s not up to me to judge”

[168] It is widely accepted that our memory of events become less reliable as time, even when measured by days, pass. There is a natural tendency for recall to evolve over time as additional information, or wanted outcomes begin to take prominence.

[169] In the instant grievance, while it may be that the evolution of evidence is not done so by deliberate design, but it is fair to say, that recall of events that occurred some 18 months earlier, without the ability to review notes made in a contemporaneous fashion, cannot be relied upon as best evidence and should be viewed with a grain of salt (as they say).

Senior Manager Stephen Sylvester

[170] Mr. Sylvester offers the best insight into the formation of the Company’s narrative and as the individual who lead the decision making leading to the termination of the grievor, was in the position to see it carried through.

[171] Mr. Sylvester is a relative new comer to VIA Rail joining in May 2011 and he advises that he is not a tradesperson nor has he any experience in the railway. Mr. Sylvester proudly and profoundly stated that he joined VIA Rail in a management function with “zero” credentials.

[172] For reasons known only to Mr. Sylvester, he purposely misrepresents the grievor’s Rail Car Technician position, as a Safety Sensitive position which for reasons he then explains, establishes a higher standard of responsibility and a need for a greater bond of trust. The fact of the matter is, that the Company’s own policy does identify Safety-Sensitive positions and within the Equipment Maintenance Department, only the Locomotive Attendants and any employee performing the duties of a Locomotive Attendant are considered Safety Sensitive. Mr. Anand does not hold a safety sensitive position nor does he perform safety sensitive or safety critical tasks or work. The work of inspecting and repairing wheels, undercarriages, brakes are done to a maintenance standard, not a safety standard.

[173] Mr. Sylvester testified that he believed the grievor was being dishonest and that he had “failed out of Pacifica” for alleged drinking while claiming he had consumed Red Bull. When Mr. Sylvester was asked about the source of this information, Mr. Sylvester advised that “you hear things, after the fact” Mr. Sylvester considered the grievor’s work performance to be a significant factor, however while the grievor had some prior discipline history, there were no recorded instances of poor work performance since the inception of the RTWA in June 2014.

[174] Mr. Sylvester formed an opinion, far in advance of the June 26, 2015 drug and alcohol test results, that he considered the grievor to be untrustworthy, was not being honest, a liar, a burden to management's time and energy, unreliable and in denial. This bias came through in a question that Mr. Sylvester puts to the grievor which can best be described as illogical.

> Q12 Can you give any explanation for why your urine sample would have been invalid that was a question that even the MRO, who declared the test as invalid, was having difficulty answering.

[175] Mr. Sylvester provided testimony as to the time and energy that is required to manage continuing employment agreements, that the burden was often at the point of undue hardship. While Mr. Sylvester testified that he believed it to be the right thing to do, to give "them" a chance to turn themselves around, what Mr. Sylvester refused to acknowledge during his testimony was the existence of a legal obligation that the Corporation has to carry out in its duty to accommodate, up to undue hardship. Mr. Sylvester did not testify to the existence of the Company's very own policy acknowledging that it will fulfill its legal duty to accommodate. This, the Corporation would do regardless of what time and energy might be required of Mr. Sylvester. In claiming the reported burden of time and energy, Mr. Sylvester never pointed to any real evidence to support even one instance where either he or other managers drove the grievor to a testing centre. Evidence from the grievor was that the testing generally occurred in the workplace and took no more than a few minutes to do.

[176] By any measure, the evidence provided by Mr. Sylvester and his conduct during the statements of the grievor, demonstrate a reasonable apprehension of bias (of the "decider") that prejudices the grievor, leading to an unjust outcome.

[177] Mr. Sylvester's disingenuous statements as it relates to safety sensitive and safety critical work, the veiled message that VIA "transports people, not grain" and the outward expression of disdain towards the grievor, raises negative prospects that the grievor's investigation would ever be conducted in a "fair and impartial" manner.

[178] It can reasonably be concluded that the Corporation was on a case building exercise, that they had target fixation and were not open to consider any information that may have provided a wider picture, a picture that would take into consideration all of the evidence available.

[179] The Corporation made no inquiries of the grievor himself at either Statements as to why the grievor's wife was making inquiries on his whereabouts. The Corporation trivializes the grievor's genuine concern about being subjected to the indignity of a drug and alcohol test in his own home with his three children nearby implying that his agitation, nervousness and/or un-happiness were indicators of suspicion. The nearly matching recollection by both Supervisor Sean Terry and Work Doc's Technician Peter Browning that the grievor's garage resembled a "man cave" with "sofas and TV" is embarrassing. With no mention of a stand up bar, beer fridge and stacks of empty beer cases, could it simply have been any garage, in any city, in any province, where 18, 16 and 11 year old boys might just hang out in? During the July 3 statement of the grievor, Manager Stephen Sylvester makes no inquiry of the grievor in respect to

having a second test performed by the RCMP or blood test at a hospital. Yet at paragraph 21 of the *Corporation Argument,* the Corporation characterizes the grievor as not credible and self-serving because he did not offer up an answer to a question that was never asked by the Company.

[180] The Company's suggestion that the grievor as "lying" and has "lied" are unfounded and simply mere suspicion. Had the Corporation complied with the production requirements of Rule 27.4 of the Agreement, the questions and evidence that was sprung on the grievor at the arbitration (e.g. Cough syrup containing codeine, alcohol or perhaps neither) would have been best suited to be asked in a contemporaneous fashion at either of the Statements, or presented in a timely manner to the grievor and Union with "all other evidence taken" and not left to suggestive suspicion by the MRO who was as confused about the invalid test results as anyone.

[181] There is no evidence that the administration of the RTWA brushed up against the Company's legal obligations to accommodate up to undue hardship, nor that any reinstatement of the grievor flowing from this grievance arbitration would cause undue hardship to this Federal Crown Corporation.

[182] At no time did any VIA Rail official involved in these matters ever consult with VIA Rail's Chief Medical Officer (CMO), Dr. Pigeon who was charged with determining the scope of unannounced drug and alcohol testing as stipulated in the RTWA. Further evidence that Labour Relations and local management were fixated on jettisoning every RTWA employee in the VMC without the involvement of VIA Rail's CMO.

[183] Dr. Iris Greenwald, MRO communicated often with VIA Labour Relations representative Melanie Martens, but testified that at no time did she ever communicate with VIA Rail's CMO Dr. Pigeon, in regards to the grievor's test results obtained under the RTWA.

[184] And sadly, VIA Rail's CMO Dr. Pigeon never once spoke with the grievor at any time during the life of the RTWA.

Compliance with RTWA

[185] For all the consternation, ambushing, sheltering of witnesses and other irregularities initiated by the Company, the manner and commitment Mr. Anand displayed since the inception of the RTWA cannot be overlooked.

[186] During that period of time, from June 2014 through to June 2015, the grievor was not presented with any discipline of any kind. No Caution, no written warning, no demerits, no suspensions. There were no complaints about timekeeping, no complaints about productivity, no issues regarding attendance or conduct. During that period of time, up to June 21, 2014 Mr. Anand took part in;

7 BAC Tests all of which reported as Negative for alcohol
5 Urine Tests 4 of which reported as Negative for drugs, and 1 was declared invalid and retested as Negative for drugs.
2 Hair tests, all of which reported as Negative for drugs and EtG
1 Oral Fluid, which reported out as Negative

[187] It should be noted that the hair sample test not only tested for the presence of drugs, but also for Ethyl Glucuronide (EtG). EtG is a metabolite of ethanol which is formed in the body by glucuronidation following exposure to ethanol, usually from drinking alcoholic beverages and is often used as a biomarker to test for ethanol use and to monitor and document alcohol abstinence. The window of detection is, as Dr. Iris Greenwald testified, up to 3 months.

[188] Notwithstanding the Company's suspicions that the grievor had relapsed, there are no indications given the number of unannounced tests and the variation of same, that he had done so.

[189] Mr. Anand had surrounded himself with a supportive family and extended family network. He had immersed himself into his church and attended services regularly. He also took and participated willingly in counselling which all aided him on his path of sobriety.

[190] The grievor stood by his answer's in both the July 3 and July 10 Statements and provided information that was not asked by the Corporation during their investigations into the matters leading to his termination;

[191] The grievor testified that VIA Rail's CMO Dr. Pigeon had never had any conversation with the grievor at any time prior to or since signing the RTWA.

Are The Alco Sensor IV Results Of June 26, 2015 Reliable?

[192] There exists a significant amount of evidence, by way of the B.C. Superintendent's Report on Approved Screening Devices (ASD) and Supreme Court of British Columbia decisions that constrain the reliability of the Alco Sensor IV device.

[193] The B.C. Superintendent's Report outlines requirements that ASD's such as the Alco Sensor IV used in the breath test of the grievor, are to be checked for accuracy by a "qualified ASD calibrator" once every four weeks. Furthermore, the ASD are to be serviced on an annual basis by the manufacturer.

[194] In Buhr v BC (Superintendent of Motor Vehicles), in quashing a driving prohibition order, the Honourable Mr. Justice R.B.T. Goepel recognized the B.C. Superintendent's report and stated at paragraph [32] that:

> *"…While the Adjudicator may have been entitled to prefer the ASD report over the manual, she could not ignore the manual in its entirety. In finding that there was no evidence that the functionality of the approved screening device was impacted by temperature, she clearly failed to give consideration to the evidence before her. Her conclusion is clearly unreasonable as a result. "*

[195] In Robbins v BC (Superintendent of Motor Vehicles) the Honourable Mr. Justice W.F. Ehrcke, in quashing the Review Decision that confirmed a driving prohibition, stated at paragraph [22]:

> *"Since there is no evidence that the instruments were calibrated by a person qualified to do so, the results of the ASD tests cannot reasonably be considered reliable."*

[196] In light of the decisions above, including the Superintendent's Report on ASD's and the evidence provided by Technician Peter Browning that the Alco Sensor IV has never been calibrated nor is he qualified to calibrate the device, and that the ASD has never been serviced by the manufacture since receiving the device in 2013, aside of the monthly accuracy checks, can it be said with certainty that the Alco Sensor IV reports produced on June 26, 2015 are reliable?

The road to 0.147% BAC

[197] Below is a timeline as derived from the evidence submitted at the time the statements of the grievor were taken along with evidence derived at the first two days of hearings.

[198] MRO Dr. Iris Greenwald confirmed that the human body begins to metabolize alcohol almost immediately upon consumption and that the metabolism occurs at a very predictable rate of 0.015% every hour.

[199] So working backwards from 0.147% BAC, the Alco Sensor IV results would suggest that Mr. Anand (at 200 pounds), had he been drinking alcohol on the morning of June 26, 2015 (which is denied by the grievor), and stopped drinking at 11:20 a.m. when he consented to the drug and alcohol test, what would it take for him to be at 0.147%, 2.5 hours later at 1:55 pm:

1:55 pm 0.147%
12:55 pm +0.015% 0.162%
11:55 am +0.015% 0.177%
11:20 am +0.007% 0.184%

[200] Using the generally accepted absorption rate of 0.015% BAC per hour, referenced by MRO Dr. Iris Greenwald, the grievor would have had to consume 10 drinks between the hours of 10:20 a.m. and 11:20 a.m. to achieve that peak BAC of 0.184%. For that to be true, the grievor, who up until the morning of Friday June 26th, had passed every unannounced BAC test and EtG test, would have had to have one hand on the steering wheel and the other on a mickey of liquor all the while driving his sons to Crescent Beach on a hot busy Friday morning.

[201] The suggestion that the grievor would have been functional to operate a motor vehicle at over twice the legal limit of 0.08% BAC, in both directions is simply unimaginable.

[202] More so when taking into consideration that the grievor, having recently concluded a telephone conversation with the MRO where he was advised that the drug test would be reported back as invalid, was aware of the likelihood that another test would be forthcoming in the immediate future.

[203] Given that neither Mr. Terry nor Mr. Browning made note of any signs of impairment. There was no reporting of Mr. Anand slurring his words during any conversation with them. No reporting of instability walking down the steps at the front of the house, walking into the garage, walking up the narrow steps from the garage into the house or navigating through the laundry room into the bathroom. No reporting of bloodshot eyes. No reporting of any odor of alcohol on his person or on his breath. No reporting of his being combative, loud or boisterous. There is clearly a disconnect between that evidence and the ASD report of 0.147%.

[204] How can it be that both Mr. Terry and Mr. Browning recall a sofa, a TV in a garage some 18 months later, but make no notice of any signs of impairment in any memo, report or note of their attendance that day at the home of Mr. Anand. Their sole and exclusive purpose for their attendance at Mr. Anand's home was to conduct a drug and alcohol test, surely they both could not have been out of touch with their surroundings. It can only be, because there were no signs of impairment. Might it be, as that the maintenance requirements set out in the B.C. Superintendent's Report on ASD to ensure reliability are equally applicable to the Alco Sensor IV in a civilian setting as it is in a justice setting.

[205] There is the real possibility as the grievor suggests, that something was out of sorts in the heat of Friday June 26 that lead to an unreliable ASD reading. The Company, in their haste to rid themselves of "one of them" workers, blindly accepts what the B.C. Superintendent's Report and courts have rejected. Unquestioning acceptance of every ASD report.

[206] It must be said that based on the entirety of the materials and evidence presented, the Corporation does not present itself at this grievance arbitration with clean hands. The Union contends that it is not the grievor who has frustrated the process but rather it is the Corporation who has, with their withholding of documents and other evidence, the shielding of witness identity and the gist of their evidence, barring the grievor and Union the opportunity to make arrangements to question the witness on their evidence, in a fair manner and not following an ambush at arbitration.

[207] The pattern of mischievousness of holding back relevant materials and information by the Corporation might play well to when retelling stories of union/management skirmishes to industry cohorts, however it is, as Honourable Madam Justice E.C. Erb put it, "unfair to say the least".

> ***122. See Keeping Grievance Hearings on the Rails - Union Book of Authorities and Reference Materials TAB #1***
> ***123. See Ad-hoc Arbitration on Canadian Railways - Union Book of Authorities and Reference Materials TAB # 2***

[208] Continuing employment agreements and RTWA's are a meaningful tool to assist employees who are battling with addiction or substance abuse issues and automatic termination for a breach of the agreement is not a recommended feature.

[209] There is no real uncontested evidence, that would convincingly conclude that the grievor was not complying with the terms of his RTWA on June 26, 2015 that led to his unjustified termination. All indicators point to the Corporation refusing to comply with the RTWA, more specifically, the evidence reveals that it was left to Labour Relations' Melanie Martens and Manager Diego Mendez to make determinations to the un-announced drug and alcohol tests with no evidence of any involvement by VIA's Chief Medical Officer (CMO) as specified in the RTWA.

[210] When measured against the recommended schedule of testing laid out by DriverCheck in their email correspondence to VIA Rail, it is clear that VIA Rail Labour Relations and the VMC management group were on their own mission of accelerated testing regime to match their target fixation narrative.

[211] The Alco Sensor IV used to conduct the BAC test on June 26, 2015 had never been serviced by the manufacturer or calibrated by a Qualified ASD Calibrator since Work-Doc's Technician Peter Browning opened the box from the factory in 2013.

[212] Work Doc's Technician Peter Browning stated that he performed an "accuracy check" test following the positive BAC reports on June 26, 2015 however there is no evidence submitted by the Technician that would confirm that an "accuracy check" (although the ASD had never been calibrated since first use) was performed in advance of Mr. Anand's positive BAC Test in his garage. There is no independent evidence, including from either of Mr. Terry or Mr. Browning that would indicate in even the remotest fashion that in the afternoon of June 26, 2015 that Mr. Anand was in any way intoxicated in a fashion normally associated with an individual who's BAC is near twice the legal limit of 0.08% BAC. In the absence of any such indicators of intoxication or alcohol use, the unchallenged evidence of Mr. Anand that he and his children spent the late morning at Crescent Beach and returned home only minutes before Mr. Terry and Mr. Browning's arrived, and the requirement to achieve a peak BAC of 0.184% at the time Mr. Anand consented to the drug and alcohol test at him home would amount to a near incomprehensible set of circumstances, that cast doubt on the reliability of the ASD BAC readings.

[213] The evidence supports the grievor's claim of abstinence including his continuing attendance to counselling sessions, his work with his church and his supportive family and extended family.

Attestation Letters – Union Book of Documents TAB #18

[214] What has been lost on the Corporation during these events, are the opportunities that Mr. Anand could have simply ignored the Company's demands to subject himself to testing;

a. June 21, 2015 the grievor recognizes Technician Peter Browning waiting at the gate to the VMC. If Mr. Anand had any doubts about his sobriety that morning, he could have simply put his vehicle in reverse and driven away. He didn't! He facilitated Mr. Browning's entry into the VMC parking lot and joined him in the walk into the building.

b. June 26, 2015, the grievor noticing the text message from Mr. Sylvester, could have chosen to simply ignore it, leave his phone locked in the glove box of his car and spend the delightfully hot day with this grown boys at the beach. He didn't! The grievor reached out to Mr. Sylvester and engaged him in a discussion, attempting to find a solution that would satisfy his children's pent up desire for a day at the beach, and facilitate the arrangement for a drug and alcohol test the following day, when he was not already engaged in his personal life miles away from the workplace. Mr. Anand did not once hit the "ignore" icon on his cell phone when Mr. Sylvester called or when Manager Diego Mendez called.

[215] The Union respectfully submits that the termination of the grievor as a result of a contested Alco Sensor IV BAC result is unjustified and in any event excessive and that his termination be nullified and the grievor be reinstated and made whole.

[216] For all the foregoing reasons we respectfully request that you uphold the grievance and order the following:

a. That the materials found at TAB 2 and Tab 10 of VIA's Book of Documents be declared inadmissible and removed from the record.
b. That the investigations conducted by the Corporation were not done to the expressed standard of "fair and impartial" and that the discipline by way of termination that flowed from the flawed process be declared void ab initio and that the grievor be returned to service forthwith.
c. That the evidence presented by the Corporation does not meet the test of the clear and cogent standard that would be necessary to sustain the termination of the grievor. While the narrative presented by the Corporation may be compelling it lacks in real evidence and therefore the discipline must be overturned and the employee returned to service forthwith, with full redress.
d. Finally, If it is determined that the Corporation was in violation Section 239 of the *Code* (via Section 7 of the CHRA) and discriminated against the grievor in their conclusion that the imposition of discipline and subsequent terminations was a proper response, we ask that you exercise your jurisdiction under Section 60 (1) (a1) of the *Code* and that you give relief to the grievor in accordance with Section 53 (2) (3) and (4) of the *Canadian Human Rights Act.*

[217] We are prepared to make further submissions at your directions and request that you retain jurisdiction on any decision that may be reached on these matters. All of which is respectfully submitted.

REASONS FOR DECISION

[218] The Company, the grievor, and the Union all entered into a two year "Return to Work Agreement" on June 11, 2014. There is no contention that the agreement is not valid, was illegally obtained or that any of the parties were not involved in discussions which led to the signing of this agreement. While there were objections from the Union about evidence related to the

investigations and events which led up to the signing of the agreement the validity of the agreement itself was not in question.

[219] The Union objected to the admittance of an interview record at Tab 2 of the Employer's book of evidence. Specifically, this is an employee statement from a meeting on February 28, 2014 and deals with events which ultimately led to the RTWA. While I empathize with the Union's concerns that employee statements should not become a tool to stockpile and cherry pick information when alternatively, relevant evidence about those events can be submitted through oral testimony and cross examined, I am not aware of any prohibition or foul if information gathered during a disciplinary investigation or interview is used to make a case at arbitration. Where the water gets muddy is if those discussions are part of reaching a settlement, in which case they would almost certainly be discussions undertaken without prejudice. It is my understanding that there is a practice of using these statements in expedited arbitrations between these parties. In any event, I find there is sufficient evidence available to me to make a decision without referring to this information. For that reason, I have not admitted the contents of that employee statement, however, I have taken into account the testimony provided at the arbitration from both parties that events discussed in this meeting ultimately led to the parties entering in to a RTWA.

[220] For the purposes of my deliberation on this matter I have relied only on the fact that a valid agreement was in place which was agreed to by all parties the terms of which included "complete abstinence from drugs and alcohol" and "in the event that you fail to pass random drugs and alcohol testing you will be subject to investigation and you risk having your employment terminated." I don't feel it is necessary for me to delve fully into the details of all of the events which led to that agreement. The evidence from all parties was that the grievor had a previous dependency issue which led to the agreement being implemented.

[221] This type of agreement is commonly referred to as a last chance agreement (LCA) and as was the case here, is entered into so that someone who is on the brink of termination or who has crossed that line is given one last opportunity to retain employment and to prove themselves worthy of the trust that an employer places in the employee and on the employment relationship. The consequences of any future breach would be well known to all of the parties before and after the signing of such an agreement. Mr. Anand testified that he understood in accordance with that agreement that he could be tested at any time without prior notice even if he was not at work.

[222] The Union argues that this is not a Last Chance Agreement but a Return to Work Agreement which provides for random drug and alcohol testing. However, a close reading of the agreement indicates that a "breach could lead to an investigation and subsequently to termination". The Union also emphasizes that there is no automatic termination for breaches and that an investigation is a feature of the agreement.

[223] I agree that the agreement does not contemplate an automatic termination without an investigation and an opportunity for the grievor to explain the situation from his perspective. In my view, there is still a role for an arbitrator to decide whether the agreement is valid, satisfies obligations the parties have under Human Rights legislation and whether the actions flowing from a breach of the RTWA are consistent with labour relations principles such as just cause and due process. However, clearly the parties contemplated termination could occur if there was an unacceptable breach of the agreement which lacked a proper explanation.

[224] Arbitrators have upheld terminations where they have found breaches of last chance agreements where individuals have not been honest about their relapses. I adopt this line of reasoning. The Corporation provided several cases to illustrate this point such as:
Molson Canada v Brewery, Winery & Distillery Workers' Union, Local 300*, 2007 Carswell BC 3804 (Ready)** and, ***Vancouver (City) Board of Parks and Recreation v. Canadian Union of Public Employees, Local 1004 (DG Grievance), [2011] B.C.C.A.A.A. No. 149, No. A-104/11 (Thorne).

[225] I note that in some of these cases the employee had a long tenure with the employer. I accept that LCAs are a useful tool for employers to give employees who are struggling with addictions and dependencies one more chance to rebuild trust with the employer and as such are enforceable as valid contracts. I find they come with obligations for all parties, the employer has to provide opportunity for the employee to succeed and the employee has to do their part by maintaining sobriety and facilitate the building of that trust by adhering to the restrictions in the contract. As noted by other arbitrators, the LCA is a legitimate tool and contains a formula for success. LCAs with automatic termination provisions may not meet the requirements of Human Rights legislation and may also not comply with the concept of just cause if they do not provide for an assessment of the specific circumstances on a case by case basis and an independent review. But, it is also less likely that an individual's case will carry much weight if there are no compelling reasons to explain why a relapse has occurred.

[226] In this case, there was no argument about a relapse having occurred due to any extraordinary circumstances. The grievor has been steadfast in denying any relapse occurred.

[227] With respect to the Union's objection to the materials at the Employer's book of documents at Tab 10 which pertain to a referral to a Substance Abuse Program. I share the Union's concern that this was information provided for the purposes of referral to a program, and that the consent was only for a period of 1 year. However, I do not agree with the Union that the information was only to be distributed to the Referral Contact and could only be shared upon the express signed consent of the grievor with Labour Relations, Supervisors or others. I note on the bottom of the referral form it states that the consent is valid for one year, however the secondary referral contact is clearly identified as the Senior Advisor Labour Relations. So, it was clearly indicated that labour relations would be privy to the terms of the

agreement, and would be updated on the grievor's progress and would be given recommendations for follow up. The Union stated that at best I could admit the last two pages of this document which specify what sessions were attended by the grievor. I do not feel it is necessary for me to cherry pick what portions of the document to admit and given that consent has expired I have not relied on this document.

Fairness of the Investigation

[228] The Union maintains that the hearing was not conducted fairly because the employer failed to make available Mr. Terry, "a key witness", for questioning. The Union referred me to Rule 27.4 of the collective agreement which provides that no employee shall be disciplined or discharged until they've had a fair and impartial investigation where their responsibility has been established.

[229] The Union also presented written evidence that they had requested an opportunity to question Mr. Terry who was a material witness and had attended at the grievor's residence on June 26, 2015 when drug testing was conducted.

[230] The minutes of the meeting on July 3, 2015 where the grievor gave a statement about the results of the testing from June 26, 2015 show that the Union once again requested an opportunity to question Mr. Terry. The employer responded that Mr. Terry was not available at that time but a statement from him was available. The Union further explained that their purpose in wanting to pose questions to him was to ascertain what Mr. Terry, as an eyewitness and a reasonable person, observed about the grievor's condition and whether he was or was not under the influence of alcohol to the extent the breathalyzer sample suggested. The Union states that the failure of the employer to produce Mr. Terry is a fundamental flaw in this case worthy of me declaring that the investigation was not fair and that the discipline which flowed from it should be declared void ab initio.

[231] The Corporation maintains that the Union and the grievor knew exactly the reasons why he was being dismissed and that no evidence was withheld from them. They also point out that Mr. Terry was available at the arbitration hearing for cross examination. With respect to the evidence of Mr. Terry, the Corporation points out that no witnesses gave any testimony that the grievor appeared intoxicated and this is not something that the Corporation considers necessary to prove their case or have it refuted. The Corporation points out that this evidence is irrelevant and in any case the MRO pointed out that alcoholics can consume large amounts of alcohol without appearing intoxicated.

[232] In the context of an expedited arbitration such as is often utilized in the railroads and where witnesses often are not called to testify I would have some sympathy for the Union's arguments about not having an ability to question a key witness during the time that the grievor is providing a statement. However, in the context of this hearing where the same witness is giving testimony and available for cross examination it is a different

matter. Any information that the Union wanted to extract from Mr. Terry at the July 3, 2015 meeting could have been extracted at the hearing or through pre-hearing motions and orders for discovery or production.

[233] The Union stressing that they needed to question Mr. Terry about any signs of impairment displayed by the grievor has limited value. Logically, the only valid observation that Mr. Terry would have been able to provide would be to confirm if the grievor appeared intoxicated. If Mr. Terry did not find the grievor to be intoxicated, it would not necessarily mean that the grievor had not consumed alcohol. The grievor's commitment to the employer was not to avoid impairment as specified in the Corporation's Drug and Alcohol Policy, but according to the RTWA he signed, it was to maintain sobriety. The breathalyzer therefore is a much more reliable way to measure adherence to that commitment than the evidence of a non-expert supervisor. Additionally, in light of the evidence presented by the MRO that depending on one's ability to process alcohol and one's tolerance to it, it may not be possible to evaluate how much someone had ingested just by observation, I agree with counsel for the Corporation that this evidence would be largely irrelevant and unreliable.

[234] I note there are no submissions from the Union about any lack of fairness about the specific questions posed to the grievor during the statement provided on July 3. The grievor and the Union were given opportunities to share information at the meeting and were apprised of the Company's case. When they requested an opportunity to speak with Mr. Terry, the record shows they were told that he was not currently available but that he had provided a written statement which they could look at.

[235] In my view the employer has an obligation under Rule 27.1 to ensure a fair and impartial investigative process which includes the grievor and the Union.

[236] Rule 27.4 of the collective agreement states:

> *(a) If the Corporation intends to present documentary or physical evidence during the investigation, such evidence will be provided to the employee and his or her authorized representative twenty four (24) hours prior to the commencement of the investigation to review the evidence provided by the Corporation. The employee and the authorized representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses whose evidence may have a bearing on their involvement.* ***Where witnesses cannot be present, arrangements will be made to permit them to be questioned upon request, where practicable.*** *The questions and answers will be recorded and the employee and the authorized representative will be furnished with a copy of statements and all other evidence taken.*
>
> **[Emphasis Mine]**

[237] However, the requirement to produce witnesses whose evidence will be relied on is not absolute and is qualified in the language by the words "where practicable". I have not been provided with any evidence as to why Mr.

Terry was not available on July 3, 2015 or subsequent to that date, only that he was not available.

[238] Was this an attempt to hide information or as the Union may look at it as an attempt to surprise them with new evidence at arbitration? I think not. I have reviewed the July 1, 2015 memo prepared by Mr. Terry and compared it to the evidence he gave at arbitration and find, that with some minor discrepancies explainable by the passing of time, any relevant testimony that he gave at arbitration is contained in the July 1, 2015 memo and there has been no substantial compromise of the integrity of the record.

[239] The Union referred me to a case referred to as **CROA 3061** in which Arbitrator Picher stated the following:

> *As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Corporation's disciplinary investigation. As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ab initio.*

[240] CROA 3061 in my analysis can be distinguished because the main and sole witness prepared the report, was presiding over the investigation and not allowing any questioning. Since that was also following the CROA process where evidence is entered by written submissions without oral testimony, it makes sense that the case would have been decided as it was, against the employer as there would be no opportunity for the grievor or the Union to test the evidence being presented.

[241] The present case is different in at least three ways; first Mr. Terry while not physically available at the time had provided a written statement which the Union could have pursued either by written questions, arranging for oral questioning at a later date or through discoveries ordered by myself. Secondly, Mr. Terry was giving oral testimony and so was available for cross examination because this was not an expedited style or CROA style arbitration. Thirdly the only line of questioning the Union stated it was hoping to pursue had to do with the demeanor and level of intoxication observable of the grievor. In light of the MRO's statements I am not convinced that Mr. Terry would have been able to provide a reliable opinion other than if the grievor was definitely showing signs of intoxication. Mr. Terry is not an expert in these matters; his role was to be a witness to fulfill a policy requirement that DriverCheck has to have a Corporation official present during sample collection. Mr. Terry's opinion, in my mind, would not carry more weight than the breathalyzer readings unless he had information which brought into question the functioning of the breathalyzer itself, nor would his observations carry more weight than the testimony of the MRO.

Additionally, as I stated earlier his testimony was largely congruent with the written statement which was made available to the grievor and the Union on July 3, 2015 and he was available to be cross examined.

[242] In the 2010 Court of Queens Bench of Alberta decision, Chapell v CP Rail the facts show that the employer clearly focused only on the evidence that supported their case and ignored what Mr. Chapell was saying was an error, and not willful or intentional conduct. In the current case, issues raised by the grievor such as the possibility of erroneous readings due to consumption of cough syrups was investigated and responded to, not ignored. The issue about the rate of alcohol absorption as far as I know was not raised until this hearing and was submitted in argument and not through an expert.

[243] The grievor was given every opportunity to explain himself during the July 3 statement and when he raised an issue about the cough syrup as a possible reason for the positive breathalyzer readings, the employer took that issue seriously and scheduled another date to gather information about that particular possibility even though it had doubts about the validity of the issue. Mr. Sylvester testified he did not dismiss the possibility and in fact hoped that it would explain the readings.

[244] The grievor chose not to share the information about why he had been reported as missing by his wife which the employer tries to point to as an attempt to hide or hold back information. I do not see it the same way, the grievor has a right to maintain privacy for such personal issues. If the grievor was arguing that he had a relapse, then that information would be much more relevant than his current argument that this is simply a case of a malfunctioning breathalyzer.

[245] Both parties may have heard new information or a different presentation of the existing information at the arbitration hearing. This happens at nearly all hearings. Neither side was prevented from responding to that information or disadvantaged in how they responded to it. Nor did I note any entirely new information in the testimony of any witnesses which would have changed the outcome of the investigation had it been available earlier.

[246] In my mind, it may not have been a perfect investigation, but it was certainly fair and impartial. The grievor and the Union were apprised of the allegations, were given an opportunity to explain and answer questions, their concerns about the impact of cough syrups on the test results were considered and explored. The only issue is that of the availability of Mr. Terry which as I have addressed earlier could have been arranged prior to this hearing, and would not likely have served to provide evidence which I would place enough weight on to change the outcome of this case. I note Mr. Terry was available at the hearing for cross examination by the Union and would be available to present a more complete story in support of or to contradict the facts already known to the parties. Having him available for cross examination at this hearing to me provides a concrete method of getting the facts of the events of June 26, 2015.

[247] The Union also pointed out to me that some of the documents referring to information about alcohol content of cough syrups which the employer submitted as evidence at the arbitration was acquired long after the employee statement leading to discipline was given. The Union therefore infers that this was an unfair investigation because they were not made aware of this information until just before the hearing and were not given an opportunity to respond to it. I note that this was information gathered by the employer to respond to and confirm statements made by the grievor at the investigation meeting. This information was also not the basis upon which the employer's decision was made, it merely supports it. It was not available at the time of the investigation, was gathered to verify statements made by the grievor and is necessary to properly defend the Company's case. I find no basis for the Union's argument that this somehow led to an unfair investigation or hearing nor do I agree that it negates the decision the employer made to terminate the grievor's employment.

Corporation Narrative and Case Building

[248] The Union accuses the Corporation of having a narrative which presupposed the grievor was guilty of violating the RTWA and that their subsequent actions were biased toward proving this supposition and case building. They cite the fact that testing was arranged for and conducted on June 21, 2015, the first day the grievor returned to work after his wife reported him missing. I prefer the company's explanation that any reasonable employer would require a test under those circumstances. In my mind testing for that possibility is not only reasonable but prudent. The fact that the POCT that day was non-negative led to a further examination by a laboratory and the collection of a saliva sample are also prudent and do not prove any bias or predisposition. Rather than accept the results of the non-negative POCT on June 21, 2015 as definitive, the process required that the sample be sent to a lab for confirmation testing. That does not in my mind mean that the employer has a bias or predisposition of any kind, it is simply following a process which is stipulated for everyone and known in advance. If the process had not been followed as provided I suppose I would be hearing about how that was also part of a biased employer narrative and this would likely give me more concern than the fact that they followed the set procedure.

[249] The grievor knew that he was subject to random testing and knew that his employer was aware that he had been reported missing. Under those circumstances, he ought to have known, if he did not, that he would be subject to testing upon his return to work. I do not accept that at this point the employer turned a blind eye to the context of what was happening; the grievor had not shared any reason about why he had been missing with the company so there was nothing to turn a blind eye to.

[250] The Union submits the Corporation engaged in case building and implies that this was some concerted effort because it finds fault with the employer for not enquiring with the RCMP about the grievor's whereabouts during the time he was missing, claims that the MRO failed in how she reviewed and handled this case because she did not speak with the

Corporation Chief Medical Officer (CMO), Dr. Pigeon. I cannot agree that this contention is anything more than conjecture. Merely pointing fingers and finding fault with the actions of all of the Corporation's witnesses to bolster this argument is not proof that anything prejudicial was taking place in this case.

[251] In my mind this is a lot of speculation with not a lot of evidence. The MRO and Mr. Browning do not even work for the Corporation and I found both of them to be credible and forthright in their testimony. The MRO cannot be expected to communicate with the Corporation CMO if he is not the regular contact for administering testing requests and was not the one who sent a request for testing the grievor. While the CMO may be named as the person under whose authority the drug testing and accommodation process is administered, it does not necessarily directly translate that in a large corporation he must be intimately and tactically involved in every case or that he cannot delegate this responsibility.

The Testing and Results

[252] The MRO's involvement is really limited to the assessment of the samples which are used to detect drug use. Criticizing her procedures does not address the real issue here, which is the positive results from the breathalyzer. As she stated in her testimony, while she has knowledge about breathalyzers, it was not her responsibility to interpret the breathalyzer results obtained from the grievor because a positive result would only be as a result of alcohol consumption and no medical reason for the result need be explored.

[253] Much of the hearing focused on the drug testing. While this evidence helps set a stage for why testing of the grievor occurred at his home on June 26, 2015, it does not deal with the crux of the issue which is that the termination was based on the results of the BAC. The main defence of the grievor and the Union is that the Alco Sensor IV – Black Dot breath analyzer must have malfunctioned because; the readings suggest the grievor would have had to consume a large amount of alcohol after he was made aware he would be retested that same day, would not reasonably be in a condition to operate a motor vehicle, and would have shown visible signs that he had been drinking. Signs which the employer witnesses did not testify to or record therefore, the Union asserts this proves the grievor's innocence.

[254] I have already addressed the fact that the grievor knew or ought to have known that he could be tested anywhere and at any time because the RTWA called for random testing and required abstinence all the time. Something he acknowledged in his testimony.

[255] I have also addressed the testimony of the MRO that people are different and that someone who has a history of alcoholism may not display signs of having consumed alcohol as readily as someone who does not regularly consume alcohol. Mr. Terry is not an expert trained to assess how much alcohol an individual can consume without showing signs that they are under the influence of alcohol.

[256] In my mind, much of this case rests on whether or not the Alco Sensor IV breathalyzer was functioning and used properly, this is the best evidence available to determine this case.

[257] The Union submitted a number of cases to establish that maintenance and calibration of this device should be conducted on a more frequent schedule than that adopted by DriverCheck. I find it difficult to accept that the maintenance and calibration procedures included in the B.C. Superintendent's Report on Approved Screening Devices (ASD) and Supreme Court of British Columbia decisions have any application in a labour arbitration. We already have a parallel where the burden of proof in labour arbitration is different than in criminal cases, and that rules of evidence are similar but not as strictly applied in labour cases. We also know that while a driver is considered over the limit at 0.08 BAC, the Corporation standard in this type of case is 0.02 as testified to by Mr. Browning. The evidence presented was that the device is maintained and calibrated in accordance with the manufacturer's directions and, for the purpose of this arbitration I find that to be sufficient. If anything, I note in one of those cases, Buhr v BC (Superintendent of Motor Vehicles), there is mention of the breathalyzer manual and mention that the operating range for the Alco Sensor IV breathalyzer device is between 10-40 degrees Celsius. The superintendent's report goes on to state that if the breathalyzer is operated outside of this range, that the readings may be too low. I note that the BAC readout also shows the temperature was not outside of the operating range of 10-40 degrees.

[258] Mr. Browning's testimony and description of the process he followed was largely uncontested. He described in detail how he conducted the breathalyzer testing on June 26, 2015. The only thing the Union has brought forward is that the breathalyzer should have been calibrated on a different schedule as required in cases before the Supreme Court of BC, that the temperature that day may have been too high and that the machine obviously malfunctioned because the grievor would have had to consume a very large volume of alcohol to register the levels indicated by the testing. I find it difficult to reconcile all these theories against the facts of what occurred and how the breathalyzer was administered and performed.

[259] Mr. Browning stated according to the manufacturer's directions, the Alco Sensor IV requires re-calibration at the factory every five years. The machine therefore was not yet due for a re-calibration. He stated that he does a monthly calibration (accuracy) check to ensure the machine is within the manufacturer's tolerances.

[260] Mr. Browning stated on the day in question he began by installing a new mouthpiece and took a blank reading which showed 0.000 indicating there was no alcohol detected and the machine was ready for use.

[261] I note that after the grievor blew into the device in accordance with the procedure, the initial reading was 0.147. Then, the machine locked out the operator for fifteen minutes after which a new blank reading was obtained

which showed 0.000 indicating that the machine had properly voided the previous sample and it was ready to collect the second sample. Once again, a new mouthpiece was installed and this time the reading was 0.145 which is consistent with someone whose blood alcohol level has peaked and whose body is breaking down the alcohol. Absent a specific reasoned explanation from the Union, I find it difficult to accept that the only time the breathalyzer malfunctioned was when the grievor blew into it, not before he started when it registered 0.000, not when the chamber was cleared between samples when it registered 0.000, but precisely only when the grievor provided samples. Nor did it malfunction after testing when the calibration was checked and found to be 0.037 plus or minus 0.005 which is within the manufacturer's acceptable range of 0.040. Mr. Browning, who is trained in the use of this equipment, testified he had no reason to believe the breathalyzer was not functioning properly.

[262] The grievor had been tested with this very same device previously and no such errors had been noted. The facts in the form of actual readings far outweigh any theories about malfunctions which are not accompanied by proof or even plausible explanations. It is not sufficient to just cast aspersions on the breathalyzer readout and deny the readings as faulty. Once those readings have been registered, it is incumbent on the grievor and Union to provide a plausible explanation for the readings. The grievor was given an opportunity to do that at the meetings on July 3 and July 10 and failed to provide any cogent explanation.

[263] The Union implied that the employer was case building and once they had a positive reading (which the Union claims is erroneous) they stopped looking at other methods to get to the truth such as requiring a hair sample to be tested for alcohol which they believe would show that the grievor was innocent. In my view, it was entirely reasonable to stop testing once the positive results from the breathalyzer were obtained. If anything, the onus shifts to the grievor and the Union to now prove the readings are faulty and to provide an alternate explanation or at least cast doubt on the breathalyzer. The same could be said to them by the Company; why did they not go ahead and acquire a hair sample test if their attempts to obtain blood tests from the RCMP and the hospital had failed?

[264] The testimony from the grievor that perhaps alcohol in the cough syrup he was taking may have played a part in this was nullified at the hearing when the MRO explained she had contacted the manufacturer of the cough syrup and had been informed there is no alcohol in the syrup. The grievor's physician may have stated that it had similar properties as alcohol or that it contained alcohol but he was not called as a witness to explain this and so I cannot put more weight on his evidence such that it can override the evidence of the MRO. If anything, the MRO's testimony and suggestions by the employer's counsel that if the grievor had indeed consumed the amount of cough syrup on a regular basis as the grievor testified to, should have produced a positive in the drug test for opioids indicate that the grievor may indeed have latched on to his doctor's explanation of the impact of the cough syrup as being true and delivering hope that he could explain the results of the breathalyzer. Based on the evidence however, one would

expect that after consumption of the cough syrup which had no alcohol but did have codeine, that the breathalyzer would not have registered a reading and that the urine test would have indicated positive for drugs (opiates). The opposite is what was true and the only reasonable conclusion is that the grievor's testimony is not entirely reliable. If one is to believe that the BAC was impacted by any alcohol in the cough syrup, then why is there no indication of codeine which was confirmed to be in the syrup? The grievor confirmed under cross examination that, even the second type of cough syrup he was prescribed contained codeine.

[265] The Union's argument included tables from the internet which estimate how quickly a normal person would break down alcohol in their system as a function of their body weight. Data from these tables is extrapolated to argue that the grievor could not possibly have consumed that much alcohol so as to obtain the readings captured by the breathalyzer. Unfortunately, that is a nice theory but does not negate the results derived from the breathalyzer or its accuracy. The sample readings decreased in a manner consistent with someone who has peaked and not just random errors. Nor does it address the specific issues related to the grievor's physiology as someone who has had a long relationship with alcohol. Finally, this evidence was not properly introduced at hearing through an expert who would be subject to cross-examination. In my mind it is clear that the grievor had alcohol in his system. There was no other evidence he was able to provide which may have explained how it got there. He continued to deny that he had been drinking.

[266] Arbitrators have reinstated people on a LCA where there is a compelling reason to explain why a relapse has occurred, and they have upheld discipline incurred because of violations of LCAs where there is deceit or denial by the grievor that a relapse occurred.

[267] I accept the Union's contention that the grievor was tested many times during the life of the RTWA and each time the tests were negative. Unfortunately, that is not proof that this time was the same.

[268] There was some argument from the parties about whether a Carman is a safety sensitive occupation. I accept the Company's argument that this is only relevant in the context of random testing which the grievor was already subject to for other reasons. With respect to any obligation to report to duty in a state fit to do your job and not pose a threat to your own safety or the safety of others, (not the least of which would be the travelling public), the Corporation policy on drug and alcohol use is clear that it is everyone's responsibility. Even if one accepts that the job is not safety sensitive in a legal sense, it does have components such as inspection of brakes which have safety implications. I also note that while the drug and alcohol policy does not specify Carman as a safety sensitive occupation for the purposes of the policy, it also specifies that the list of occupations considered safety sensitive is not exhaustive.

[269] The POCT testing is set up to give the sample provider the benefit of the doubt. If the test is inconclusive, there is a requirement for secondary

testing. Then if the test shows signs that there are drugs in the system, an explanation is sought. Only if there is no medical explanation provided is the test considered a fail.

[270] In this case though, the breathalyzer test is what is key. The MRO determined the breathalyzer test was not impacted by any of the medications the grievor shared he was taking, leaving the only plausible explanation to be that alcohol had been consumed. She also testified that unlike drug tests where false positives may be caused by medical factors or medication, breathalyzers only show positive results when subjects have alcohol in their system.

[271] The evidence is clear and cogent that the RTWA had been breached by the grievor and this is also the reason the Corporation cited for terminating the grievor's employment. There is no other reasonable conclusion based on the facts before me. The grievor's ongoing denial of this does nothing to bolster the Company's trust in the employment relationship. The denial alone in the face of the breathalyzer results is sufficient in my mind to find that the Corporation had cause to terminate the employment relationship. The evidence of Mr. Sylvester shows that all evidence available was considered in deciding that cause for termination was established.

[272] Additionally, as other arbitrators have noted, there is a shared responsibility including on the grievor to make the RTWA work.

[273] While there is no automatic termination clause in the RTWA there is also no automatic and unspecified number of second chances. Where extenuating circumstances exist, which lead to a relapse, perhaps an argument can be successful for reinstatement, but where there is denial of a relapse in the face of clear evidence to the contrary, the options are limited. The grievor had already been afforded a chance when the Corporation provided accommodation and agreed to enter into a RTWA allowing the grievor to enter a treatment plan before returning to work. Additionally, without any admission that this may be a relapse of some sort, the employer has already met any obligations they had under human rights by having provided the grievor an opportunity to seek help with his addiction and continue his employment until the trust between employer and employee no longer could be sustained.

[274] I find that in this case, the provisions of the RTWA were clear and known to all parties. A breach of the RTWA was established when the grievor was unable to provide a reasonable and believable explanation for a positive BAC result at the enquiry which followed testing. This was a breach of a key term of the RTWA.

[275] Couple this with a lack of acknowledgement, a lack of assurance and certainty that this will not recur, and finally given the implications to the future relationship of the employer and its employees, there is only one conclusion here, that the employer had cogent evidence and just cause to terminate the grievor's employment.

[276] It is true that these cases are not easy to decide and illnesses where people struggle with dependencies are even more difficult to contend with for them and those who are close to them. I can only hope that the supports which the grievor testified he has around him can serve him to deal with the illness and the outcome of this hearing.

[277] Given that I have concluded the Employer had cause to dismiss the grievor, I am not going to comment on the issue of undue hardship at this time other than to acknowledge the Company's argument that others who are under similar agreements should not get the wrong message about how many second chances they can have and thereby lose an incentive to remain abstinent, nor should decisions which ignore the purpose of LCAs create disincentives for parties to enter into agreements like this which may benefit someone who is struggling with addiction. These are compelling arguments for undue hardship and for what makes "labour relations sense" to assist those who are inflicted with issues of addiction.

AWARD

[278] I have carefully considered all of the evidence before me even if it is not specifically addressed in my reasons for this decision.

[279] The Grievance is dismissed.

Dated at Delta, British Columbia this 16th day of March 2017.

Fazal Bhimji, CMed CArb