IN THE MATTER OF AN ARBITRATION UNDER THE
CANADA LABOUR CODE, R.S.C. 1985 c. L-2

BETWEEN:

SEASPAN ULC

(the "Employer")

AND:

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 400

(the "Union")

(Re: GH Grievance)

ARBITRATOR:	Stan Lanyon, Q.C.
COUNSEL:	Chris E. Leenheer for the Employer G. James Baugh for the Union
DATE AND PLACE OF HEARING:	June 25 & 26, 2014 Vancouver, B.C.
DATE OF AWARD:	September 16, 2014

Award

I. Introduction

[1] The Grievor, GH, while off work, tested positive for alcohol in a random test on August 1st, 2013. He was signatory to a Last Chance Agreement that required him to abstain from alcohol and drugs. As a result of the test, the Employer terminated him, relying on the express terms of the Last Chance Agreement. Further, the Employer argues that this arbitration board does not have the jurisdiction under Section 60(2) of the *Canada Labour Code* to vary the Grievor's termination.

[2] The Union replies that the termination of GH is contrary to the Collective Agreement, the *Canada Labour Code* and the *Canada Human Rights Act*. It says that Section 60(2) of the *Canada Labour Code* does not apply to the circumstances of this case.

[3] The historical facts in respect to the Grievor's addictions are derived from both his testimony and from past and current expert medical reports. (Dr. Donald G. Hedges' report of October 31, 2011 and Dr. Ocana's report of April 23, 2014.)

[4] In view of these medical issues I have anonymized the Grievor's identity.

II. Facts

[5] Seaspan is a marine transportation company. It operates tugboats and barges. It assists in the docking of vessels in ports throughout British Columbia. These tugboats operate in both rivers and in harbours.

[6] The Grievor began working at Seaspan in 2003 as a Cook/Deckhand. The Grievor's trips are usually two to three weeks in duration, followed by two to three weeks off. His duties include wheel watches, maintenance of the tugs and safety. There is no dispute that his work is safety sensitive.

[7] The Grievor is 57 years old. He has had a long history of alcohol and drug abuse. He states that he came from an "alcoholic home". He testified that he started using alcohol "frequently around 13 years old", and at age 14 he "grew up in logging camps and on

fishing boats". His abuse of alcohol and drugs was extensive in his 20's, drinking on some occasions as much as a case of beer and a 26 ounces of liquor daily. In addition, he compulsively used sedatives and opiates, and experimented with psychedelic drugs.

[8] Dr. Donald G. Hedges stated in his report of October 31, 2011 that the abuse of drugs and alcohol had the following consequences for the Grievor: "The negative spiritual and emotional consequences included anger, resentment, self pity, fear, anxiety, depression, feelings of helplessness and hopelessness, loneliness, remorse, despair, boredom, guilt, shame, paranoia, suicidal thoughts and reduced self esteem". In his testimony, the Grievor stated that "the older I got, I would go through periods of time where I was sad, depressed, angry and couldn't understand why". He later understood that he had suffered depression for "more than 30 years". It was during this difficult period that he first entered the Edgewood residential treatment program in Nanaimo for drug and alcohol abuse. After completion of this program, he testified that he abstained from alcohol and drugs for approximately 13 – 14 years. As well, during this period, he went through Interferon therapy for Hepatitis C for some 47 weeks, during which he said he got terribly sick and depressed; as a result, this treatment was "the hardest thing I ever had to do".

[9] As stated, he commenced employment with Seaspan in 2003. In 2005 – 2006 he became involved in a Union/Management initiative to establish a treatment addiction program. The program was called "Courage to Care". He stated that he was active in promoting the program, notwithstanding that there was a lot of resistance and "a lot of apprehension among Union members". He said this fear was based upon "people thinking it was a way to get rid of employees that were troublemakers". He explained that he "talked to the guys", telling them that the "Company doesn't want to get rid of you if you've got substance abuse [problem]". However, at the same time he was promoting the program he was having "a hard time; I was drinking". He decided, "I needed to go into it too". He said that he "wanted to show the guys it's not something to be scared of; it is going to help you if you have a problem".

[10] As a result, in January 2006, the Grievor self-disclosed his addiction to the Employer and entered this new residential program.

[11] Kim Skeath is the Manager of Workplace Health and Wellness for the Employer. Her duties include administering health plans, and acting as the Return to Work Coordinator. She also acts as the "gatekeeper of test results" in respect to the alcohol and drug testing. She was involved in implementing the Courage to Care Program. She confirmed the Grievor's testimony that he had self-disclosed in 2006. She recalls speaking to the Grievor about his addiction in 2006, and stated that he was "open about his recovery"; and that he was demonstrating to other employees what "active recovery was like". She said the Courage to Care Program is an abstinence based recovery program. It treats addiction "like a disease" and "encourages people to disclose substance abuse".

[12] Ms. Skeath stated that upon the release of the Grievor from the residential program, and prior to his returning to work, the Grievor signed two agreements. First, he signed a Chemical Dependency Return to Work Agreement, dated April 20, 2006, wherein he agreed to abstain from drugs and alcohol for 24 months. Further, the Employer had the right to require the Grievor to submit to testing should it reasonably conclude that the Grievor was impaired by drugs or alcohol. He was to follow a treatment plan established by his physician for a period of 24 months. Finally, if he should breach the agreement his employment relationship was to be automatically reviewed.

[13] The second document, dated June 12, 2006, entitled "A Contingency Monitored Recovery Agreement", was once again for a period of two years. A monitor was appointed who would administer random urine tests at least once a month. The Grievor was required to attend mutual support group meetings such as AA and NA. He was initially to check in with his monitor weekly, and then subsequently every two weeks. Finally, he was to follow a treatment plan in respect to his depression.

[14] The opening paragraph of the Contingency Monitored Recovery Agreement summarizes the purpose of the program:

> Knowing that addiction to alcohol and other psychoactive substances is a chronic, potentially fatal illness subject to relapse the parties enter this agreement to promote the recovery of the above mentioned employee. While the employee is not held responsible for the development of his/her illness, he/she

> is responsible for the ongoing consequences and accountable for his/her recovery. This agreement is intended to increase the likelihood of success during this phase of treatment through the requirement of documentation and reporting of compliance or non-compliance.

[15] The Grievor successfully completed the two year program, and during this period he never tested positive for any alcohol or drugs.

[16] In May 2009 the Grievor relapsed. Ms. Skeath stated that once again the Grievor self-disclosed. Dr. Sobey, who is cited in both Dr. Hedges medical report and Dr. Ocana's medical report, conducted a medical examination and concluded that the Grievor did not have to attend a residential treatment program; rather, he would continue a two year monitoring and counselling program. In particular, he was to attend counselling with Dr. Lum, a psychologist, and attend 12 step meetings.

[17] In February 2010 the Grievor relapsed again. He was off sick with pneumonia and self- medicated with marijuana cookies to deal with his depression and low appetite. He tested positive for marijuana on March 1, 2010. Dr. Sobey cleared the Grievor to return to work in a safety sensitive position as a Deckhand in June 2010. On June 7, 2010 the Grievor signed a Monitoring Agreement which committed him to a two year monitoring contract commencing June 7, 2010 and ending June 2012. The Grievor was to abstain from alcohol and drugs, attend support group meetings at least three times a week, undertake outpatient counselling in anger management, attend his Monitor's office weekly (Cory Wint) and undergo random urine and/or blood tests.

[18] However, once again, the Grievor relapsed in January 2011. While at a New Years Eve party he stated he ate a dessert at a buffet. When he woke up he was "spaced out". His sister stated to him that the cookies and cakes contained marijuana. He immediately reported this to his Monitor and tested positive for marijuana.

[19] Ms. Skeath testified that Dr. Sobey concluded that the Grievor was "treatment resistant" and unfit for safety sensitive work. The Employer considered placing the Grievor in "shoreside" positions – such as traffic coordinator or working in stores. In the meantime, the Grievor was relieved of his duties. The Union filed a grievance.

[20] On October 21, 2011 the parties reached a mediated Settlement Agreement (this arbitrator was involved in the mediation). The terms of this agreement is one of the central issues in this dispute. I therefore reproduce the Agreement in full:

> Settlement Agreement
>
> The parties agree as follows:
>
> 1. [GH] will undergo an Independent medical assessment by Dr. Donald Hedges. Dr. Hedges will be asked to provide his medical opinion on the following:
>
>   a. Is [GH] fit to perform safety sensitive employment at Seaspan, including work as a deckhand (jobs analysis for deckhands attached as Appendix "A" to this Settlement Agreement), now or in the future;
>   b. If not, is [GH] fit to perform other employment within Seaspan; and
>   c. If fit to perform any work, are there any further treatment or other recommendations that Dr. Hedges feels in his medical opinion are appropriate in the circumstances.
>
> 2. Dr. Hedges will perform an examination of [GH], for the number of visits Dr. Hedges deems necessary. In addition, the parties will provide Dr. Hedges a joint letter outlining the above request in paragraph 1, together with the following documents, which are attached as Appendix "B" to this Settlement Agreement:
>
>   i. Job descriptions and job analyses attached as Appendix "A".
>   ii. Letter of May 14, 2009 from Dr. Paul Sobey to Kim Skeath;
>   iii. Letter of August 17, 2009 from Dr. Paul Sobey to Zuhal Ghias;
>   iv. Letter of April 25, 2010 from Dr. Paul Sobey to Kim Skeath;
>   v. Letter of June 5, 2010 from Dr. Paul Sobey to Kim Skeath;
>   vi. Monitoring Agreement dated June 7, 2010, signed by [GH] and Cory Wint;
>   vii. Letter of January 31, 2011 from Dr. Paul Sobey to Kim Skeath; and

viii. Letter of June 22, 2011 from Dr. Anthony Ocana to Terry Engler.

3. [GH] hereby consents to the disclosure of any further information from the Employer, Dr. Sobey or Dr. Ocana, that Dr. Hedges deems necessary to provide his opinion in this matter.

4. If [GH] is deemed fit to perform any work by Dr. Hedges, he will be subject to a two year monitoring agreement which will include a requirement of complete abstinence from alcohol and any other mood/mind altering drugs or substances, and random biological testing, commencing October 24, 2011. Further details of the monitoring agreement, including any treatment or other recommendations, will be as determined by Dr. Hedges, which shall include whether a monitor and/or Medical Review Officer ("MRO") is necessary in the circumstances. Such recommendations may not decrease the duration of the two year monitoring required under this Settlement Agreement. Dr. Paul Sobey will not be named as the MRO.

5. The current monitor agreement with Cory Wint, will continue in place until the assessment and any recommendations by Dr. Hedges.

6. If [GH] is not deemed fit to return to his deckhand position, but is deemed fit to return to other employment at Seaspan, Seaspan will undergo an accommodation search to determine whether any other positions are available to accommodate [GH]. If there is a dispute about whether or not Seaspan is able to find suitable alternate employment for [GH], Stan Lanyon will remain seized and will undergo a binding investigation into the accommodation process and determine whether or not Seaspan is required to accommodate [GH]. Under no circumstances, however, will Seaspan be required to create a new position, or create new work, for [GH].

7. [GH]'s layday leave bank will be set to zero.

8. [GH] will not be entitled to any back pay or other damages resulting from him being kept off work from January 31, 2011 to his date of reinstatement.

9. If [GH] is returned to employment at Seaspan, any positive alcohol or drug test, or substantive breach of the monitoring agreement or treatment recommendations, will result in the immediate termination of [GH]'s employment. Use of drugs prescribed by a treating physician, in accordance with the prescription will not be considered a breach of the monitoring agreement or treatment recommendations, provided such are also deemed appropriate by the MRO, or if no MRO is named then by Dr. Hedges.

10. If [GH] is deemed unfit to return to any employment at Seaspan by Dr. Hedges, his employment will be terminated on a non-culpable basis.

11. It is agreed that this Settlement Agreement satisfies the duty of the Employer to accommodate [GH] to the point of undue hardship.

12. This Settlement Agreement is made without prejudice or precedent to either parties' position on the issues in dispute in this case, or for any future matters in dispute between the parties.

13. The Union and Grievor agree that the terms of this Settlement Agreement are strictly confidential and will not be disclosed to anyone at all, save and except their professional advisors, pursuant to a court order, or as required by law.

14. Stan Lanyon will remain seized of any issues arising from the interpretation or implementation of this Settlement Agreement.

(emphasis added)

[21] In summary, the Settlement (Last Chance) Agreement requires the Grievor to undergo an "Independent Medical Assessment (IME)" by Dr. Hedges; abstain from alcohol and drugs; and undergo monitoring for 27 months – beginning October 2011 and ending January, 2014. If Dr. Hedges' IME concluded that the Grievor was unfit for safety sensitive work, then the Employer was to undertake a review of other shoreside positions that were a suitable alternative for the Grievor. If a dispute arose about his placement, I was to undertake an investigation and determine whether or not such a position existed, and

whether it fulfilled the Employer's duty to accommodate. The Agreement also sets out certain legal obligations and promises which will later be reviewed in this Award.

[22] In his report of October 31, 2011, Dr. Hedges' diagnosis under the DSM IV is as follows:

> DIAGNOSTIC IMPRESSION: The diagnoses according to the *Diagnostic and Statistical Manual of Mental Disorders – IV TR* are as follows:
>
> | | | |
> |---|---|---|
> | Axis I: | 303.90 | Alcohol dependence, sustained remission. |
> | | 304.30 | Cannabis dependence, sustained remission. |
> | | 304.00 | Opiate dependence, sustained remission. |
> | | 305.40 | Sedative dependence, sustained remission. |
> | | 305.10 | Nicotine dependence, recent relapse after period of remission. |
> | Axis II: | 995 | Adult survivor of childhood abuse. |
> | Axis III: | 070.51 | Viral hepatitis C, probably active. |
> | | 250.0 | Diabetes mellitus, type II. |
> | | 401.9 | Essential hypertension, medically treated. |
> | | 272 | Hyperlipidemia, medically treated. |
> | Axis IV: | | Current stressors – occupational concerns. |
> | Axis V: | | GAF = 75 |

[23] The opening paragraph of his treatment recommendations read as follows:

> TREATMENT RECOMMENDATIONS: Substance dependence is a chronic, generally progressive and potentially fatal disease involving the physical symptom of the compulsive and destructive use of alcohol and/or other mood-altering drugs and important mental, emotional and social factors that must all be addressed consistently and indefinitely to prevent relapse and to facilitate comprehensive recovery. Although complete abstinence from alcohol and all other mood-altering drugs is not equivalent to full recovery from substance dependence it is an absolute precondition for recovery. [GH] needs to participate indefinitely in an abstinence-based recovery program. He seems fully aware of this fact and to have sufficient information about the nature of his substance dependence disorder and how to treat it successfully. He seems

> motivated to do so. If he complies with all treatment recommendations his prognosis for sustained recovery and successful return to work will be positive. My recommendations are as follows: ….

[24] This is followed by very similar recommendations as have been made in the past. The Grievor was required to maintain complete abstinence from alcohol and drugs; second, he had to attend AA/NA meetings weekly and have constant contact with his sponsor; third, he was required to undertake the 12 step programs; and fourth, he had to participate in "rigorous medical monitoring". This Monitor continued to be Cory Wint. Dr. Hedges then lays out a gradual return to work in respect to the Grievor's safety sensitive position as a Deckhand.

[25] In addition, the Grievor executed a Return to Work Agreement, dated November 7, 2011, which repeated the treatment recommendations made by Dr. Hedges for a period of 27 months (October 2011 to January 2014). This Agreement also stated that should the Grievor breach the terms of his Return to Work Agreement, "immediate termination" would follow. This reflects a similar clause in the Settlement Agreement.

[26] The Grievor testified that he attended on average five support group meetings a week, and talked to his sponsor daily. He complied with both the scheduled and random drug/alcohol testing.

[27] In March 2013 the Grievor suffered a knee injury while at work. He was off work for approximately five months until July 2013. During this period he continued with both regularly scheduled and random testing. However, on August 1, 2013, Monitor Cory Wint requested that he be tested. The result was that the Grievor tested positive for Ethyl Glucuronide. This test indicated that he had consumed alcohol.

[28] The Grievor returned to work as a Deckhand on August 4th for two weeks. It was during this trip, on August 13th, 2013, that he first learned that he had tested positive. He was told that he "needed to come in because you have tested positive"; further, that the Employer "was going to get me off the boat that day or the next morning". However, a

subsequent call from the Company informed him that they were having difficulty finding someone else to replace him; he therefore continued to work for another two or three days.

[29] The Grievor and the Union met with Ms. Skeath on August 19th, 2013 . The Grievor was told that he had tested positive. He was to be kept on the payroll until the results of the "B Sample" were confirmed. If the "B Sample" proved positive he would hear from the Employer's labour relations department.

[30] The Grievor stated that on August 28, 2013, his "B Sample" test results proved positive; further, "Gilbert told me about the results and told me I would be terminated".

[31] Gilbert Astorga, Manager, Labour Relations for the Employer, testified that he advised the Grievor on August 28, 2013 that he would be terminated. He said that the reasons for the termination were "mainly due to the Last Chance Agreement". He explained that it was the Employer's view that "any breach to the agreement would result in the dismissal of the Grievor". Moreover, he stated that, "The decision was made immediately upon receipt of Sample B".

[32] The termination letter, dated September 13, 2013 reads as follows:

> Further to the terms of a grievance Settlement Agreement dated October 21, 2011, you signed a Return to Work Agreement (the "Agreement") on November 7, 2011 that required you to, among other terms and conditions, abstain completely and indefinitely from alcohol and all other mood-altering drugs.
>
> Unfortunately, the Company was informed by your Monitor that your sample provided on August 2, 2013 tested positive for alcohol. As a result, we met with yourself and your Union Representative on August 19, 2013 at which time we informed you that further action may be taken subject to the results of a second test of your sample (i.e. "Sample B").
>
> On August 28, 2013 the Company was advised that your Sample B confirmed the original result as positive for alcohol and you were verbally advised by Mr. Gilbert Astorga, Manager of Labour Relations, that your employment with Seaspan was terminated as a result of your breach of the Agreement.

> Therefore, in accordance with the terms and conditions of the Agreement this letter will confirm that your employment relationship with Seaspan is terminated effective August 29, 2013.
>
> Your pay statement for any outstanding monies will be sent to you under separate cover.

[33] The Union filed a grievance stating that the Grievor's termination amounted to discrimination on "the basis of disability contrary to the *Canadian Human Rights Act*". On April 23, 2014, Dr. Ocana of the North Shore ADHD and Addiction Clinic, issued a "medical – legal opinion" as requested by the Union. This opinion was in response to a series of questions posed by the Union.

[34] Dr. Ocana's DSM-V Diagnostic Formulation of the Grievor reads as follows:

> DSM-V Diagnostic Formulation
>
> | | | |
> |---|---|---|
> | Axis I - | Substance Use Disorder (poly-substance abuse; in near remission) | 305.3 |
> | | Major Depressive Disorder (seasonal pattern) | 296.3 |
> | | Attention Deficit Disorder Mixed Subtype with Reward Deficit | 314 |
> | Axis II - | no diagnosis | |
> | Axis III - | Hypertension Non-insulin Dependent Diabetes Mellitus Hypercholesterolemia | |
> | Axis IV - | Severe stressors; financial, vocational | |
> | Axis V - | dysfunction; mild-moderate. GAF worst in last year = 61-65; GAF now = 71-80 | |

[35] Dr. Ocana had seen the Grievor eleven times between June 10, 2011 and April 17, 2014. He writes that he has read and considered both Dr. Sobey's and Dr. Hedge's prior reports. Dr. Ocana disagrees that the Grievor is "treatment resistant".

[36] Dr. Ocana writes that in June 2011 he diagnosed the Grievor with a Major Depressive Disorder. In addition, the Grievor also suffers from ADHD. His conclusion is that the Grievor will be better able to manage his alcohol and drug addiction if both his Major Depressive Disorder and his ADHD are addressed concurrently with his alcohol and drug addiction.

[37] Question 8 addresses the issue of future relapses and the effect they may have on safety sensitive work at Seaspan. He writes the following:

> [GH] may relapse again. Therefore, there is always the theoretical risk that a relapse would have an effect on his ability to perform his duties at Seaspan. However, all relapses are not created equal.
>
> Given that [GH] has complied with and responded to treatment, the risk of a significant relapse is certainly much lower than it would be without treatment.
>
> In order for a relapse to be considered significant, it must fulfill the following criteria:
>
> It is deemed that the positive test represents a significant loss of control over use. Specifically, it would require that [GH] be absent from work; or his workplace function be impaired by off-work use of alcohol or drugs.
>
> (emphasis added)

[38] In respect to the Grievor's ability to return to work he writes:

> Fitness for work is a complex determination that takes into consideration the worker's ability to meet the mental, physical and emotional demands of the workplace, the criteria for which include:
>
> Physical Capacity
> - Complete a regular shift
> - Work Overtime

> Cognitive Function
> - Stay on Task
> - State ideas clearly
> - Operate a vehicle/machinery

> Executive Function
> - Organize

Prioritize
Multitask
Follow Complex Instructions
Deal with Safety Hazards/React to Emergencies
Meet Deadlines
Work without supervision

Interpersonal Function
Interact/co-operate with clients and co-workers
Delegate tasks to others

Mood Stability
Manage emotions
Adjust to change

To my knowledge, no one has produced any evidence that [GH] is unable to meet these demands.

In Dr. Sobey's letter of March 14, 2011, he says, "further treatment for his substance dependence would not increase the likelihood of his attaining prolonged abstinence".

This is the crux of the matter. It seems to me that this was a rather pessimistic view.

The likelihood of his attaining prolonged abstinence may have increased, but no further treatment was offered. Residential addiction treatment has many benefits over individual or pharmacological treatments, but it is not the only tool in the toolbox.

In my mind, it was premature to write off [GH]'s chances of a more robust recovery. It was certainly premature to deem him unfit for safety sensitive work. And, there is no data that would support designating [GH] as unfit for any work at Seaspan.

When [GH]'s mental health was more comprehensively evaluated, he was found to have two co-morbid conditions. As these were treated, his mood and motivation improved, and with it, the likelihood of attaining prolonged abstinence has increased.

[GH] seems ready, willing and able to return to work, despite his disability. I don't see any reason why he should not be able to do so.

(emphasis added)

[39] Finally, the Grievor stated, and Dr. Ocana repeats in his report, that the Grievor has never reported to work while impaired by drugs or alcohol, that there is no evidence that he has ever used drugs or alcohol at work, and that there has never been any workplace incident in respect to the Grievor as a result of alcohol or drugs or impairment of any kind. Further, the Grievor states that he has always self-disclosed. The Employer does not dispute any of these facts.

III. Analysis and Decision

[40] The Employer argues that the Settlement/Last Chance Agreement ("the Agreement") provides for a specific remedy, namely termination, and therefore this arbitration board is without jurisdiction to vary that penalty. The sole purpose of this tribunal is to determine if there has been a breach of the Agreement, and if so, to enforce the penalty. The Employer relies on Section 60(2) of the *Canada Labour Code*, RSC 1985, c. L-2. In the alternative, the Employer argues that the Settlement Agreement should attract significant deference, except under exceptional circumstances, which do not exist in this matter. Finally, the Settlement/Last Chance Agreement fulfills the Employer's duty to accommodate the Grievor to the point of undue hardship.

[41] The Union replies that the Agreement does not fall within Sections 60(2) of the *Canada Labour Code.* This Arbitration Board therefore has the right to review the termination of the Grievor on a just cause basis. Second, under the *Canadian Human Rights Act,* RSC 1985 c.H-6, the Employer has failed to accommodate the Grievor to the point of undue hardship.

[42] There are several issues in dispute. First, is the interpretation and consequences of the Settlement/Last Chance Agreement. I will therefore examine the specific terms of the Agreement. Second, I will address the issue of this Agreement in respect to Section 60(2) of the *Canada Labour Code.* Third, I will examine the general arbitral approach to Settlement and Last Chance agreements. Fourth, I will review the Last Chance Agreement in respect to the *Canadian Human Rights Act*. Finally, I will review the facts of this matter in light of these legal conclusions.

Settlement/Last Chance Agreement

[43] I have set out the entire Agreement earlier in this Award. I will once again summarize the Agreement and reproduce certain provisions that are at issue in this matter. Although the Agreement in dispute is entitled a Settlement Agreement it also acts as a Last Chance Agreement. The first sentence of Article 9 reads as follows:

> If [GH] is returned to employment at Seaspan, any positive alcohol or drug tests, or substantive breach of the monitoring agreement or treatment recommendations, will result in the immediate termination of [GH]'s employment.
>
> (emphasis added)

[44] It is the automatic termination of the Grievor's employment should he breach the Agreement which makes it a Last Chance Agreement.

[45] The terms of this Agreement are fairly standard. It is a blend of behavioural and therapeutic requirements combined with legal obligations and consequences. The Grievor is required to undergo an Independent Medical Examination (IME) for the purpose of determining if he is fit to return to a safety sensitive position, or an alternative position. Dr. Hedges, a well- known addiction specialist, will have access to the Grievor's medical history and to job descriptions (clauses 1 – 3).

[46] Should the Grievor be deemed fit to return to any work at Seaspan he will be subject to a two year Monitoring agreement. He is required to report to a Monitor and is subject to random biological testing. Further, and most important, he is required to remain completely abstinent from alcohol and drugs. If the Grievor is not fit to return to a safety sensitive position (Deckhand) the Employer will undergo an "accommodation search" to determine if there are alternative positions available to the Grievor. If a dispute arises in respect to his accommodation and alternative positions, this Arbitrator would undergo a "binding investigation" to determine if such alternative positions exist. The Employer is not required to create a new position (Clauses 4 – 6). If the Grievor is unfit for any position at the Employer, his employment would be terminated on a non-culpable basis (Clause 10).

[47] Clause 11 states that the Settlement Agreement fulfills the Employer's duty to accommodate to the point of undue hardship:

> It is agreed this Settlement Agreement satisfies the duty of the Employer to accommodate [GH] to the point of undue hardship.

[48] Clauses 12 and 13 state that the Agreement is confidential, without prejudice and non-precedential. I reproduce Clauses 12 and 13:

> 12. This Settlement Agreement is made without prejudice or precedent to either parties' position on the issues in dispute in this case, or for any future matters in dispute between the parties.
>
> 13. The Union and Grievor agree that the terms of this Settlement Agreement are strictly confidential and will not be disclosed to anyone at all, save and except their professional advisors, pursuant to a court order, or as required by law.
>
> (emphasis added)

[49] The parties agreed to put the Agreement into evidence and argue its respective terms.

Section 60(2) of the *Canada Labour Code*

[50] The Employer argues that I have no jurisdiction to vary the penalty of the automatic termination of the Grievor. Therefore, it says, my task is simply one of determining whether or not a substantive breach of the Agreement has taken place. Section 60(2) of the *Canada Labour Code* reads as follows:

> 60(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.
>
> (emphasis added)

[51] Thus, if a collective agreement contains a specific penalty under Section 60(2) of the *Canada Labour Code,* an arbitrator would not have the authority to substitute a penalty that is just and reasonable.

[52] The Employer acknowledges that the collective agreement contains no list of specific offences with specific penalties attached to those offences. However, it says that the Settlement/Last Chance Agreement in this matter forms an actual part of the collective agreement. Thus, the result is that the Settlement/Last Chance Agreement falls under Section 60(2) of the *Canada Labour Code,* and this Board has no jurisdiction to vary the penalty of "immediate termination".

[53] The Employer relies upon the conclusion of Arbitrator Burkett, in *Canada Post Corporation,* [1996] C.L.A.D. No. 235, where he writes that a Last Chance Memorandum of Settlement formed a part of the parties collective agreement for the purposes of Section 60(2) of the *Canada Labour Code:*

> 14 Arbitrator Swan in Re: Canada Post Corporation and CUPW (Gauthier) 1990, 18 LAC (4th) 64, held that a "last chance" memorandum that stipulates that a breach of one of its conditions "…shall conclude in the discharge of Mr. Gauthier" does not alter the collective agreement or otherwise provide for a specific penalty within the meaning of Section 62 [sic] of the Canada Labour Code. He reasons that in order to amend the collective agreement "…there would have to be an express authorization signed by representatives of both parties at a national level who had power to amend the collective agreement". He concludes that he does not think it possible in such a document nor would the parties have intended to oust his statutory jurisdiction to substitute a penalty where justice so requires. Arbitrator Blasina in Re Canada Post and CUPW (Bauder) March 14, 1993 characterizes a "last chance" memorandum as a powerful circumstance of the case. With all due respect, I am of the view that a written memorandum of settlement entered into between the parties for the purposes of resolving a grievance between them constitutes an addition to the collective agreement that governs the parties as it relates to that particular matter.
>
> 15 There can only be one collective agreement between the parties; although it may be comprised of a number of

documents. Furthermore an arbitrator appointed under a collective agreement, as I have been, is limited in his/her authority to interpreting and/or applying that collective agreement. If the written memorandum of settlement signed by both parties does not constitute an addition to the collective agreement, therefore, an arbitrator appointed under the collective agreement would not have authority to enforce it. This is clearly an anomalous result that is not mandated by the statute, nor in accord with sound labour relations policy, nor intended by the parties. Whereas a broad based modification of the collective agreement would require the authorization of representatives at the national level with the necessary authority, the parties understand that individual grievances, as a necessary facet of the ongoing relationship, are to be resolved at a lower level with the resolution, whatever it might be, binding upon them and enforceable at arbitration. In this case representatives of the parties with the necessary authority resolved the prior grievance on the basis of the "last chance" memorandum that is before me. This memorandum constitutes more than "a powerful circumstance of the case". It also constitutes more than an ancillary document outside of the collective agreement. Rather, it constitutes an addition to the collective agreement that regulates the conduct of Mr. Martin and governs the parties in their treatment of him should he breach any of its terms.

16 This "last chance" memorandum provides for a specific penalty in the event that Mr. Martin breaches any of its terms and, therefore, removes the statutory authority that would otherwise exist substitute a lesser penalty under Section 60(2) of the Canada Labour Code. Further, by its express terms the parties have agreed that should I find that Mr. Martin has breached any of the terms of the memorandum, "…the discharge may not be amended without the agreement of the Corporation". The parties clearly intended that I not have authority to modify the penalty and pursuant to article 9.100 of the collective agreement I have been prohibited from modifying the provisions of the collective agreement; which includes the "last chance" memorandum dated September 9, 1995. Accordingly, if I find, on a purposive reading of its terms, that Mr. Martin breached the September 9, 1995 "last chance" memorandum, I am compelled to uphold the discharge.

(emphasis added)

[54] Arbitrator Burkett had before him an earlier Award of Arbitrator Swan in *Canada Post Corporation,* (1990) 18 L.A.C. 4th 64. Arbitrator Swan decided that a Last Chance memorandum did not provide for a specific penalty within the meaning of Section 60(2) of the *Canada Labour Code*. The relevant paragraphs of Arbitrator Swan's reasoning read as follows:

> 16 I was referred to certain cases by the parties, but in my view the answer to this question is to be found in the terms of the consent award and the collective agreement. I begin by observing that the collective agreement provides no specific penalty for the conduct of which the grievor is accused, and I do not think that the memorandum of settlement in any way purports to be an amendment of the collective agreement. Nor does making a consent award of an arbitrator appointed under the collective agreement incorporate a specific penalty into that document, since art. 9.40 of the collective agreement specifically prohibits arbitrators from modifying the provisions of the collective agreement, and in order to be able to do so by consent, there would have to be an express authorization signed by representatives of both parties at a national level who had power to amend the collective agreement.
>
> 17 Moreover, it is my view of the consent award that the intention was to set standards by which the grievor was to be judged, but to seize me of all issues arising from the administration of those terms and conditions.
>
> 18 Paragraph 6 of the minutes of settlement is very broad, and I think the only way in which it can be interpreted is that I remain seized generally of the grievance, subject to the settlement. What the parties have done is to put the grievor on a final warning and apply to him certain specific criteria against which to judge his further conduct, leaving me seized of the process of rehabilitation thus contemplated. I do not think it is possible in such a document, nor do I think it could have been the intention of the parties, to oust my statutory jurisdiction to substitute a penalty where justice so requires. They have, perhaps, admonished me as to what would be an appropriate penalty, but have not bound me to confirm that penalty without being faithful to my statutory obligation to consider all of the circumstances surrounding the invocation of that penalty.
>
> 19 In this regard, I do not think that I differ from the positions taken by arbitrator Christie in *Re Canada Post Corp. and L.C.U.C.*

> *(Stackhouse),* 83-1-6-4; L-9-83-01, November 10, 1983, or of arbitrator Norman in *Re Canada Post Corp and C.U.P.W. (Slobodian),* 86-1-3-2348; W-490-H-147, August 15, 1986. While both of those awards recognized the importance of giving deference to the freely negotiated settlement between the parties, neither of them suggest, in my reading, that the additional jurisdiction of arbitrator conferred by the *Canada Labour Code* is ousted by such a settlement. It may be that the decision of arbitrator Frankel in *Re Canada Post Corp. and L.C.U.C. (LaForge)* (1987), 32 L.A.C. (3d) 69, appears to be at odds with this conclusion, but arbitrator Frankel was dealing with a settlement which purported to remove any action taken by the corporation from the grievance and arbitration procedures under the collective agreement, and does not seem to have conferred any specific continuing jurisdiction on arbitrator Frankel in respect of the memorandum of settlement, the matter apparently having come before him on the basis of a fresh grievance.
>
> (emphasis added)

[55] I prefer the reasoning of Arbitrator Swan. Settlement/Last Chance Agreements do not constitute collective agreements in themselves, nor do they amount to amendments to a collective agreement. The express terms used in paragraphs 12 and 13, which are invariably a standard provision in all Settlement/Last Chance Agreements, is that the Agreement is confidential, without prejudice and non-precedential. As well, Clause 12 makes clear this particular Settlement Agreement is "made without prejudice or precedent to either party's position on the issues in dispute in this case or any future matters in dispute between the parties". Both parties were represented by the same counsel at the mediation as at the hearing of this matter.

[56] These provisions are vital to any settlement of grievances between the parties. If every grievance amounted to an amendment or an addition to the collective agreement the grievance process would soon come to a standstill. No local business agent or human resource manager has the ability to amend a collective agreement which has been ratified by the entire bargaining unit. Indeed, one only has to look at province wide bargaining units or in the case of the federal jurisdiction, nationwide bargaining units. The ability to negotiate

settlements depends entirely upon those settlements remaining confidential, without prejudice and non-precedential.

[57] Finally, it should be noted that in the Supreme Court of Canada's decision in *General Drivers, Warehousemen and Helpers Union, Local 979 vs. Brinks Canada Ltd.* [1983] 1 S.C.R. 382, Chief Justice Laskin narrowly restricted the predecessor provision to Section 60(2) (s.157(d)(ii)) stating:

> In my opinion, the employer's asserted unilateral right to impose a range of penalties for different infractions pursuant to its rule book cannot be said to contain a specific penalty since the penalty is not contained in the collective agreement. Nor can I agree that a penalty is specific where it can be chosen indiscriminately by the employer. To fall within s. 157(d)(ii) a specific penalty must be assigned to the particular infraction in the collective agreement.

[58] Indeed, I conclude that it would take express language in a Settlement/Last Chance Agreement, first, to declare that a particular settlement agreement formed a part of the parties' collective agreement as either an amendment or an addition to it; and second, in respect to the remedial authority of an arbitrator, I have serious doubts that a party could contract out of the statutory rights of employees unless there was express statutory language to that effect; for example, Section 60(2) of the *Canada Labour Code*. I therefore conclude that the Settlement/Last Chance Agreement in this matter does not oust my jurisdiction under Section 60(2) to substitute a lesser penalty on the grounds of what is just and reasonable. This leads directly to the next issue which is the general arbitral view of Last Chance Agreements.

Last Chance Agreements – General Arbitral View

[59] The general arbitral view of Last Chance Agreements is that they should be given contractual force unless there are *strong and compelling* reasons not to do so. Arbitrator Munroe in *Crestbrook Forest Industries Ltd. and I.W.S. – Canada, Loc. 1-405* (*Thomson*) (1996), 59 L.A.C. (4th) 237 writes:

> 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.
>
> (emphasis added)

[60] Commonly, unions will argue that a Last Chance Agreement is simply "a factor" in an arbitrator's consideration in respect to the issue of just cause, while the Employer will claim that such agreements are "determinative".

[61] In *Canada Post Corp.* (2010) 200 L.A.C. (4th) 168, I determined that the parties' Last Chance Agreement was subject to a just cause analysis. Further, a Settlement/Last Chance Agreement that provides for automatic termination, is not analogous or akin to a liquidated damages provision – a contractual provision that has determined in advance the measure of damages should a party breach the agreement; rather, such an agreement was subject to a just cause analysis under *Wm. Scott and Company,* [1977] 1 Can LRBR (Weiler), which requires a three step analysis:

1. Is there just and reasonable cause for discipline?
2. Was the discipline imposed excessive?
3. If excessive, what alternative measures should be substituted as just and equitable?

[62] However, in respect to this *Wm. Scott* analysis, Last Chance Agreements are "highly persuasive"; therefore, there must be strong and compelling reasons to vary the results that flow from them.

Canadian Human Rights Act R.S.C. 1985 c.H-6

[63] This third issue raises the Union's primary argument; that is, the Grievor's termination violates the *Canadian Human Rights Act* because the Employer failed to accommodate the Grievor to the point of undue hardship. The relevant provisions of the *Canadian Human Rights Act* are set below. First, Section 3(1) lists the prohibited grounds of discrimination:

> 3(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sec, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

[64] Section 7 relates specifically to employment:

> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

[65] Section 15 sets out the exceptions. Section 15(1)(a) deals with the BFOR exception:

> 15(1) It is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

[66] Section 15 deals with the duty to accommodate and undue hardship:

> 15(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[67] Section 25 deals with definitions, and sets out the definition of "disability" which includes dependence on alcohol or drugs:

> "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;

[68] The Canadian Human Rights Tribunal in *Milazzo v. Autocar and Connaisseur Inc.*, [2005] C.H.R.D. No. 3, January 28, 2005, concluded that Last Chance Agreements are "unenforceable" under the *Canadian Human Rights Act.* The tribunal relies on both Court decisions and arbitral awards that parties are not free to contract out of human rights legislation through the vehicle of Last Chance Agreements. Therefore, notwithstanding the automatic termination provisions contained in Last Chance Agreements, there is a statutory obligation to examine the Employer's duty to accommodate to the point of undue hardship in all circumstances. It is instructive to set out a number of paragraphs from the tribunal's reasoning:

> 26 The Ontario decision in Re: Ontario Human Rights Commission et al and Gaines Pet Foods Corp. et al (1993), 16 O.R. (3d) 290 sets out the basic law on this subject. <u>In that decision, a last chance agreement was considered illegal and unenforceable in the context of an employee coping with a disability on returning to the workplace.</u> There, the Court was concerned with an employee with cancer who was returning to the workplace after a lengthy absence due to her cancer treatment. Upon her return to work, the employer imposed a restrictive condition on her continued employment, which stated that she must maintain a level of attendance "equal to or better than the average for the hourly rated employees in the plant". Her failure to meet this standard at any time would result in the termination of her employment.

27 The Court concluded that "the proximity if not primary cause of the restrictive condition … arose directly from Ms. Black's absence due to her disability … the imposition of the restrictive condition was discriminatory, stemming as it did directly from her absence due to handicap … It was a condition not required of any other employee and it carried with it the sanction of immediate termination for non-compliance".

28 The Court further added that "even if it could be said that she agreed to the restrictive condition, such agreement would be unenforceable", as provided by the Supreme Court of Canada dictum in Ontario (Human Right Commission) v. Etobicoke, [1982] 1 S.C.R. 202 where the Supreme Court held that "[Human Rights legislation] has been enacted by the Legislature … for the benefit of the community at large and of its individual members and clearly falls within the category of enactment which may not be waived or varied by private contract …"

…

31 In Re: Canadian Pacific Railway Company and Canadian Counsel of Railway Operating Unions (United Transportation Union) (2002), C.R.O.A. Decisions No. 3269 (Picher), the arbitrator notes that while "last chance agreements" have an important role as an instrument in rehabilitation and in some circumstances as a form of accommodation for an addicted employee, the violation of such an agreement cannot lawfully result in automatic dismissal. Each case must be reviewed on its own merits and a finding of accommodation to the point of undue hardship must have been reached in order to justify termination of a disabled employee.

> Canadian jurisprudence does not, however, confirm that the violation of an agreement of the type which is the subject of this grievance must automatically result in an employee's termination. It is well established that each case must be reviewed on the merits of its own particular facts, and that in any event the application of any such agreement cannot be in violation of the duty of accommodation owed to an employee with a disability, in keeping with human rights codes such as the Canadian Human Rights Act (Re Toronto Transit Commission and Amalgamated Transit Union, Local 114, (1990) 75 L.A.C. (4th) 180 (Davie); Re Regional Municipality of Ottawa-Carleton and Ottawa-Carleton Public Employees Union, Local 503 (2000) 89 L.A.C.

(4th) 412 (Mitchnick); Re Camcar Textron Canada Ltd. and United Steelworkers of America, Local 3222 (2001) 99 L.A.C. (4th) 305 (Chapman).

As the jurisprudence reflects, in many cases arbitrators will conclude that the history of employees' treatment, culminating in a last chance agreement, reflects a sufficient degree of accommodation to support the conclusion that any further continuation of the employment relationship would be tantamount to undue hardship upon the employer. That is the analysis which has to be made in each case. The mere fact of a last chance agreement does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation of general application, legislation which the parties cannot contract out of as determined by the Supreme Court of Canada (Re Etobicoke (Borough) v. Ontario (Human Right Commission), [1982] 1 S.C.R. 2002 at p. 213.

…

33 The fact that the parties have agreed to a "last chance agreement" which states that they have decided that it would be unreasonable for the employer to further accommodate the employee beyond the first accommodation and that any further accommodation by the employer would be undue hardship under the Canadian Human Rights Act, "does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation of general application, legislation which the parties cannot contract out". (Re: Etobicoke (Borough) v. Ontario (Human Rights Commission), [1982] 1 S.C.R. 2002 at p. 213.

34 Accordingly, the "last chance agreement" is in the Tribunal's opinion unenforceable in regards to the Act. As the case law indicates, an analysis must be made in each case to determine whether or not it is impossible for the employer to accommodate the needs of the employee to the point of undue hardship. While it is certainly open to the Respondent to warn employees returning to work after rehabilitation that any relapse could result in termination of their employment, the imposition of a last chance agreement cannot serve to nullify the duty of accommodation established under human rights legislation.

(emphasis added)

[69] I am therefore bound to conduct a human rights analysis of the Grievor's circumstances. Thus, Article 11 of the Settlement/Last Chance Agreement is not determinative of this matter:

> It is agreed that this settlement agreement satisfies the duty of the employer to accommodate [GH] to the point of undue hardship.

[70] Such a clause, if left unexamined, would simply amount to a contracting out of the *Canadian Human Rights Code*.

[71] Indeed, implicit in the parties' drafting of Article 11 of the Settlement/Last Chance Agreement, is that the duty to accommodate does apply to the Grievor's circumstances. As stated by the British Columbia Court of Appeal in *Health Employers' Association of British Columbia v. British Columbia Nurses' Union,* [2006] B.C.C.A.A.A. No. 57; 264 D.L.R. (4th) 478, the duty to accommodate is not a freestanding duty and can only arise after a finding of *prima facie* discrimination:

> 37 In my view, the Board's reference to the "duty to accommodate" must mean that in hybrid cases, arbitrators must undertake a human rights analysis to assess the non-culpable aspects of the employee's conduct. Although the Board did not specifically state that this process involves a finding of prima facie discrimination, a duty to accommodate is not a free-standing duty and can only arise after such a finding. The Board's failure to expressly discuss the need to establish prima facie discrimination does not mean that arbitrators can find a duty to accommodate without first addressing the issue of prima facie discrimination. Arbitrators must apply human rights principles correctly, and in the context of accommodation, the correct approach is to first consider prima facie discrimination.

[72] The Court then described what is required to establish a *prima facie* case:

> 38 Discrimination is defined in s. 1 of the Human Rights Code to include conduct that offends s. 13(1)(1). A finding that there was a "refusal to continue to employ a person" on the basis of a prohibited ground is discrimination. Therefore, under s.

> 13(1)(a), to establish a prima facie case of discrimination, an employee must establish that he or she had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment: Martin v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile), [2001] B.C.H.R.T.D. No. 39, 2001 BCHRT 37 at para. 22, [Martin].

[73] As the Employer stated, the actual circumstances in this case are not in dispute.

[74] First, the Grievor has a disability – a drug and alcohol addiction. Second, the Grievor has been treated adversely – his employment has been terminated. Third, drug and alcohol addiction was not only a factor but the primary factor in the termination of his employment. He tested positive for alcohol. The Employer was forthright. It stated clearly that its termination of the Grievor flowed directly from its reliance on Clause 9 of the Settlement Agreement: that is "any substantive breach of the monetary agreement or treatment recommendations, will result in immediate termination of [GH]'s employment". Thus, having tested positive for alcohol the Grievor was terminated. Therefore, I conclude that *prima facie* discrimination has been established. It is now necessary to address the Employer's duty to accommodate.

[75] In the Supreme Court of Canada's decision *British Columbia (Public Service Employees' Relation Commission) v. British Columbia Government and Service Employees Union (Meiorin)*, [1993] 3 S.C.R. 3, the Court set out a three part test for determining whether a *prima facie* discriminatory standard is a BFOR (*bona fide* occupational requirement):

> [54] … An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrate that it is impossible to accommodate individual employees sharing the characteristic of the

> claimant without imposing undue hardship upon the employer.

[76] Accordingly, if an employer can demonstrate that its *prima facie* discriminatory standard is a *bona fide* occupational requirement that standard will be upheld. In order to do so it must meet this three part test. In respect to the first and second grounds - is the standard rationally connected to the performance of the job, and is there a good faith belief that this standard is necessary for a legitimate workplace related purpose - I will deal with both of these factors together.

[77] The Employer has implemented a workplace policy entitled "Seaspan Marine Corporation Substance Use Policy", dated February 2012. It has been in effect since June 2005.

[78] Article III sets out the core policy. It reads as follows:

> 1. The possession, use, sale or distribution of Alcoholic beverages or Drugs including Marijuana on Company Premises (including vessels) or during working hours, is prohibited. The use of medications prescribed by a qualified medical practitioner is permissible provided that the Employee's ability to perform his/her duties is not impaired and that the dosage instructions and cautions are adhered to.
>
> 2. No Employee or Service Provider shall report to, return to, or engage in any work for SMC under the influence of or affected by the use of Alcohol or Drugs.
>
> 3. Any Employee whose performance may be impaired for any reason, including the ingestion of prescription Drugs must notify their Supervisor.
>
> 4. All Employees or Service Providers shall cooperate with an investigation into any violation of this policy, which includes any request to participate in Substance Testing and evaluation for substance use/abuse/dependence when it is required under the terms of this policy.

[79] In essence, the purpose of the policy is a drug and alcohol free workplace.

[80] Further, under Article IV of the policy, employees are subject to mandatory drug and alcohol testing where there is reasonable cause; for example, post incident testing in respect to significant events (i.e. an accident) and mandatory searches where reasonable cause exists. Article V sets out mandatory disclosure of alcohol and drug dependency problems. Article VI sets out the Employer's duty to accommodate and states that alcohol and drug dependency problems are recognized as "treatable illnesses". In addition, these illnesses will be given the same consideration and assistance as is extended to other employees with other illnesses. Further, employees can seek assistance for counselling and treatment, and where appropriate, the Company may seek to impose conditions which include Monitoring and Independent Medical Examinations.

[81] The Settlement/Last Chance Agreement in this case incorporates different aspects of this policy. For example, Article 1 of this Agreement requires an Independent Medical Examination (by Dr. Hedges) to determine if the Grievor is fit to return to a safety sensitive position. He is required to undergo a two year Monitoring Agreement should he be reinstated. He is required to remain abstinent. The Employer's treatment program is an abstinence based recovery program. The expert medical reports require that abstinence is a fundamental condition to recovery. He is required to seek assessment and treatment. He is required to undergo random testing, report to a Monitor and attend a support group such as AA and NA.

[82] In addition, the Grievor was required to sign a Return to Work Agreement, dated November 7, 2011, which set out Dr. Hedges' treatment recommendations. Once again there are requirements of abstinence, monitoring, support group and sponsors for a period of 27 months.

[83] It is important to remember that this Settlement/Last Chance Agreement was within the context of the Grievor's initial self-disclosure in 2006 that he was addicted to alcohol and drugs, and further, that he was employed in a safety sensitive position. As a result, the Grievor had entered a residential treatment program implemented by the Employer. In addition, the Grievor had had prior relapses where he was subject to Independent Medical Examination, monitoring, random testing and the requirement to seek treatment. I

conclude therefore that the purpose stated in Article I of the Employer's Substance Use Policy, which is to provide a workplace that is drug and alcohol free in accordance with the law, and to provide guidance and treatment for those with alcohol and drug dependency problems, and to establish procedures for testing and monitoring employees in safety sensitive positions, are standards that have been adopted for a purpose that is rationally connected to the performance of the job, and have been adopted in an honest and good faith belief that these requirements are necessary for a legitimate work related purposes.

[84] The third criteria is the essential matter in dispute: whether the duty to accommodate to the point of undue hardship has been met by the Employer. Clause 11 of the Settlement/Last Chance Agreement states that the Employer has satisfied this duty. However, under the law, this claim, standing alone, does not satisfy the duty to accommodate. If that were not the case, such a declaration would be the simplest way to contract out of the statute.

[85] The Employer argues that it is entitled to rely on the Grievor's breach of this agreement - that a positive test result will result in his "immediate termination". The Grievor testified he understood the consequences of this provision. In effect, the Employer's position is that "a deal is a deal"; and that a last chance is actually a *last chance*.

[86] From the perspective of labour relations, it is important that parties be able to rely upon settlement agreements, including, of course, Last Chance agreements. The parties have fashioned their own resolution to sometimes difficult disputes, and if they cannot rely upon these agreements being enforced, they may well decide not to enter into them in the future. Moreover, it should be stated that agreements such as Last Chance agreements should not be viewed as presumptively discriminatory; for example, see *McGill University Health Centre,* [2007] 1 S.C.R. 161, in respect to an automatic termination provision regarding non culpable absenteeism. Further, Settlement/Last Chance Agreements, and Return to Work Agreements, are a combination of behavioural, and therapeutic as well as legal consequences. I conclude, therefore, that they can be an important part of the accommodation process itself.

[87] As we have seen, a deal is not always a deal should the matter involve a statutory duty such as the duty to accommodate. However, to be fair to the Employer, in addition to its reliance on the strict reading of the Settlement/Last Chance Agreement, it did argue the historical context of the Grievor's addiction to alcohol and drugs. Therefore, what is required in respect to the duty to accommodate to the point of undue hardship is a global examination of the Grievor's circumstances; all past efforts at accommodation as well as the Grievor's future prognosis.

[88] The Grievor's circumstances in respect to his addictions are not in dispute. He self-disclosed his addiction in 2006. Prior to this, he had entered a residential program and had been abstinent for approximately 14 years. When he left the residential program he was subject to a two year monitoring agreement which he successfully completed in June 2008.

[89] In February 2009 the Grievor relapsed. He was subject to the requirements of abstinence, monitoring and treatment.

[90] In February 2010 the Grievor relapsed again. He was likewise required to remain abstinent and was subject to monitoring and treatment.

[91] And in January 2011 the Grievor relapsed once more. However, this may have been inadvertent. The Last Chance Agreement, which is the subject of this arbitration, was agreed to in October, 2011. The Grievor was not entitled to any back pay upon his reinstatement.

[92] Finally, in August 2013 the Grievor once again relapsed. He was dismissed. It is this dismissal which is the subject of this arbitration.

[93] In the past four years the Grievor has accordingly relapsed four times. The Employer has accommodated three out of four times (and four out of five times if 2006 is included). It is this context that gives force to the Employer's claim that it has accommodated to the point of undue hardship.

[94] However, there are several significant factors in respect to the Grievor's relapses that are crucial to the issue of undue hardship and are not in dispute. First, the Grievor has self-

disclosed all instances of his relapses. Second, the Grievor has never reported to work while impaired by alcohol or drugs. Third, there is no evidence that the Grievor has used alcohol or drugs at work. Fourth, there has never been a workplace incident as a result of the Grievor's use of alcohol or drugs. In other words, there is no evidence of the Grievor being involved in any actual workplace misconduct as a result of his alcohol or drug use, or any risk to safety on the job. Fifth, Dr. Ocana writes that the Grievor drank "some alcohol in August 2013", but that there is "no evidence that the amount of alcohol consumed would impair his ability to work three days later".

[95] Moving from the past to the future, Dr. Ocana writes that the Grievor's more recent treatments address his Depression and ADHD (described as "co-morbid conditions"). As a result of this concurrent treatment plan, Dr. Ocana opines that "the likelihood of obtaining prolonged abstinence has increased". He further states that "[GH] seems ready, willing and able to return to work despite his disability. I don't see any reason why he should not be able to do so". He concludes that the Grievor would be able to meet the demands of his safety sensitive position.

[96] The Supreme Court of Canada in *Central Alberta Dairy Pool,* [1990] 2 S.C.R. 49 provided some guidelines as to what constitutes undue hardship:

> 62 I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar – financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.
>
> (emphasis added)

[97] The Employer's case has involved two factors – the Settlement/Last Chance Agreement combined with the four relapses in four years. In respect to the majority of the factors set out in *Central Alberta Dairy Pool, supra* - financial costs, disruption to collective agreement, problems of morale amongst other employees, interchangeability of workforce and facilities – no evidence was adduced. However, there is no dispute that the Grievor performs safety-sensitive work – the docking of vessels and their cargos in harbor and ports. The issue of safety is expressly set out in *Central Alberta Dairy Pool, supra* (as emphasized above). As well, Section 15(2) of the *Canada Human Rights Act* specifically set out the factors of "health, safety and costs" in respect to undue hardship; and certainly the issue of safety raises both the issues of health and costs.

[98] I conclude that four relapses in four years (since 2006, five relapses in seven years), in a safety-sensitive position, has satisfied the Employer's duty to accommodate to the point of undue hardship. An additional factor in my analysis of the duty to accommodate to the point of undue hardship has been the Settlement/Last Chance Agreement wherein all parties came to a similar conclusion.

[99] However, the parties had also considered in this same Agreement positions that were not safety sensitive should the Grievor not be fit to perform a safety sensitive position. It is at this point in respect to the duty to accommodate that I give significant weight to the circumstances of his past relapses – that he self-disclosed, that he never reported to work impaired, that there is no evidence of the use of alcohol or drugs at the workplace, and that there has been no workplace incident arising from drugs or alcohol. The Employer argues that these factors are "irrelevant". However, I have concluded that they are directly relevant to the issue of the duty to accommodate to the point of undue hardship. As Dr. Ocana noted, "All relapses are not created equal"; some have greater implications for the workplace and the process for recovery than do others. I also note Dr. Ocana's conclusion that the Grievor is now involved in a more comprehensive treatment plan – a plan that addresses his depression, his ADHD, and his addictions. Thus, in view of these *off-duty relapses,* which have not resulted in any workplace misconduct, I have determined that the Grievor is to be reinstated to a position that is not safety sensitive.

[100] The process and substantive rights arising under the duty to accommodate invariably involve a four step process in determining which position an employee may be fit to return. They are:

a) Can the employee return to their own job?
b) Can they return to their own job, if modified?
c) Can they return to a different job?
d) Can they return to a different job, if modified?

[101] The Settlement/Last Chance Agreement states that the Employer is not required to "create a new position, or create new work". I agree the Employer is not required to create an entirely new position. However, I do not understand the definition of "new work". It is clear that an Employer is not entitled to rely on the status quo or the status quo with minor modifications. Modifications to existing positions can require some hardship and impose some costs. However, if such a position, even if modified, is not available to the Grievor, than consistent with Clause 10 of the Settlement/Last Chance Agreement, the Grievor's employment will be "terminated on a non-culpable basis".

[102] Therefore, I reinstate the Grievor to a non-safety sensitive position. However, similar to the Settlement/Last Chance Agreement I have concluded there is to be no reimbursement for lost wages (Clause 8). I also conclude that this result is consistent with the just and reasonable provisions set out in Section 60(2).

[103] Finally, I must specify the terms of the Grievor's reinstatement.

[104] First, the Employer is entitled, if it so chooses, to require the Grievor to undergo an additional Independent Medical Examination to determine if he is fit to return to work. The parties will agree on the appointment of this doctor.

[105] Second, should a dispute arise in respect to the Grievor's ability to perform any other work, or the availability of any such work, then Clause 6 of the Settlement/Last Chance agreement (binding investigation) applies. However, the parties should agree on a third party investigator other than myself. The costs of the IME, and any potential binding investigation, shall be borne equally by the Union and the Employer.

[106] Third, should the Grievor be fit to return to work, and such work is available, he shall sign a Return to Work Agreement on the same terms as those set out in the Return to Work Agreement signed by all parties on November 7, 2011. This Agreement incorporated the treatment recommendations of Dr. Hedges in his Medical Report of October 31, 2011. These terms, Clauses 1 – 7, address standard provisions such as the requirement of abstinence, rigorous medical monitoring, the appointment of a Monitor, the attendance at NA/AA meetings and a Sponsor, the disclosure of all his health records, additional ad hoc testing if reasonable grounds exist, etc. The parties are, of course, free to replace any persons named in that Agreement with new appointments. Clause 7 ("immediate termination") may need to be amended. At the very least the parties understand its limitations.

[107] Finally, two matters of note. First, the Employers' policy of encouraging self-disclosure, with the goal of encouraging both the recovery of employees and safety in the workplace, is put at risk, if in the circumstances of this case, the Grievor's conduct attracts "immediate termination". Conversely, the Grievor must realize that the increasing frequency of his relapses indicate a greater potential risk of his addiction influencing his workplace conduct.

[108] Second, is the role of Settlement/Last Chance Agreements in the workplace. There is the crucial legal doctrine that Human Rights Legislation cannot be contracted out of. However, the Canadian Human Rights Tribunal concludes that this doctrine makes Last Chance Agreements "*unenforceable*". I do not read this to mean that such agreements are basically "*void*".

[109] A human rights tribunal, under its governing legislation, makes determinations in respect to the issues of discrimination. However, an arbitrator must make a determination not only in respect to discrimination, but also just cause; a determination that involves both the applicable human rights legislation and labour legislation. For example, the issues in respect to the Grievor in this case involve both the *Canadian Human Rights Act* and the *Canada Labour Code*. The British Columbia Court of Appeal in *Kemess Mines Ltd. and International Union of Operating Engineers, Local* 115, 2006 B.C.C.A. 58, stated that in respect

to hybrid conduct – a mix of culpable and non-culpable conduct – that also involves a prohibited ground of discrimination under the *Human Rights Act,* such as addiction, the human rights analysis must be kept separate from a just cause analysis.

> It is important to recall that when applying a hybrid analysis, arbitrators are asked to keep the culpable and non-culpable analyses separate. In Fording Coal, supra, Madam Justice Huddart said:
>
> > [80] … the principles of just and reasonable cause and the duty to accommodate can be analyzed most effectively by being kept separate conceptually. A separate consideration of the two concepts permits a focus on the decision, rule, or conduct alleged to be discriminatory and the response of the employer, union, or complainant to that conduct. It is to be recalled that the duty to accommodate arises only where there has been discrimination.
>
> Keeping the analyses separate helps that all the factors necessary for a full human rights analysis are considered. Of course, as the Labour Relations Board said in Fraser Lake Sawmills the remedy ordered may well blend the culpable and non-culpable elements.
>
> (para. 49 and 50)

[110] The just cause analysis is incorporated into most Provincial Labour Relations Codes. But, as stated, arbitrators are also required to apply their applicable human rights legislation because such legislation has now been incorporated into all collective agreements (*Parry Sound District Social Services Administration Board v. O.P.S.E.U., Local 324* [2003] 2 S.C.R. 157).

[111] I have followed this analytical approach. I have determined that prima facie discrimination existed and, thus, a duty to accommodate arose. Therefore, the "immediate termination" clause set out in the Settlement/Last Chance Agreement was unenforceable. Further, I have determined that in respect to safety sensitive work the Employer has reached the point of undue hardship. However, in respect in non-safety sensitive work the duty to accommodate to the point of undue hardship had not been reached.

[112] Further, I have concluded that the just and reasonable requirement set out in Section 60(2) of the *Canada Labour Code* is applicable. As a result the terms of the Settlement/Last

Chance Agreement do not oust the jurisdiction of this Board to review the "immediate termination" of the Grievor. Moreover, in the absence of a human rights analysis, there must be strong and compelling reasons to depart from the outcomes set out in such agreements. Finally, I have concluded that the Grievor's reinstatement to a non-safety sensitive position, modified if necessary, and if not available, then non-culpable termination, is consistent with the just and reasonable requirement set out in Section 60(2) of the *Canada Labour Code*.

[113] Finally, Settlement/Last Chance Agreements combine legal rights and obligations with behavioural and therapeutic terms and conditions. They must be seen in the context of any additional documents that are direct products of them – such as Return to Work Agreements. Thus, these Agreements not only play an essential role in the accommodation process itself but may also assist in making a determination in respect to the duty to accommodate to the point of undue hardship.

[114] It is so Awarded.

[115] I remain seized in respect to both the interpretation and implementation of this Award.

[116] Dated in the City of New Westminster in the Province of British Columbia this 16th day of September, 2014.

Stan Lanyon, Q.C.