Date Issued: November 14, 2008

Indexed as: Merrick v. Ipsco and United Steel, Local 5890

IN THE MATTER of
The Saskatchewan Human Rights Code, S.S.1979, C. S-24.1 (as amended)

AND IN THE MATTER of a Complaint before
the Saskatchewan Human Rights Tribunal

BETWEEN:

DALE MERRICK

COMPLAINANT

AND:

IPSCO SASKATCHEWAN INC.

RESPONDENT

AND:

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 5890

RESPONDENT

REASONS FOR DECISION

Tribunal Member:	Roger J.F. Lepage
Counsel for the complainant:	self-represented
Counsel for the Respondent (Ipsco):	Milton C. Woodard, Q.C.
Counsel for the Respondent (United Steel):	Peter J. Barnacle
Counsel for the SHRC:	Janice E. Gingell

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I. JURISDICTION

1. On December 6, 2006, the Tribunal was appointed to conduct an inquiry pursuant to s. 28(2) of *The Saskatchewan Human Rights Code* ("*Code*") into the complaint filed by Dale Merrick ("Merrick")

II. PROCEEDINGS TO DATE

2. Subsequent to several pre-hearing conferences, issues arose regarding the disclosure of medical and counselling information regarding Merrick and the claim of privilege that was advanced. Motions were heard regarding these issues and decisions were rendered for the disclosure of relevant medical and counselling records with conditions to balance the interests between the right to make full answer and defence and the right to keep private aspects that were irrelevant to the issues in the case. I reviewed the records and issued decisions on August 16, 2007 and August 29, 2007 regarding the Motion for Disclosure of Medical and Counselling Records from the Pine Lodge Treatment Centre, the medical records from Merrick's family physician, Dr. J. G. Michel, and the counselling records from Ken Hardy at Par Consultants. In order to address these issues the hearing was adjourned at the request of the parties from June until October 2007.

3. The hearing was held in Regina on October 9-12, 15-17 and December 10-14, 2007 for a total of 12 days of testimony including half a day to view the Ipsco Saskatchewan Inc. ("IPSCO") work site. This was done with the consent of the parties after considering the jurisprudence regarding the use of evidence gleaned from a viewing.[1]

[1] The Tribunal considered Rule 281 of *The Queen's Bench Rules of Saskatchewan* for guidance as well as *Sunnyside Nursing Homes v. Builders Contract Management*, [1999] 3 W.W.R. 721 and *Saskatchewan (Department of Labour) and University of Regina* (1975), 62 D.L.R. (3d) 717. See Lester, "Tendering a View and a Demonstration on a View in Evidence" (1997) 19 Advocates' Q 345.

4. Briefs of Law and Argument were filed by February 15, 2008 and the hearing was reconvened February 28, 2008 for a thirteenth day to hear oral argument from the parties. The final written submissions were received March 17, 2008.

III. THE COMPLAINT

5. Merrick filed a complaint November 19, 2004 at the Saskatchewan Human Rights Commission ("SHRC") under s. 27 of the *Code* alleging the respondents violated ss. 16 and 18 regarding discrimination in employment on the basis of the disability of addiction to alcohol and drugs. The relevant parts of the complaint, as amended at the hearing, (Ex. P-1) are as follows:

> I have a disability, drug and alcohol addiction. I was employed as a Caster Runout Operator by Ipsco Saskatchewan Inc. from May 5, 1980 until September 23, 2004. During my employment I was a member of the United Steelworkers of America Local 5890. In or about September 2003 I requested help from the company EAP. My employer required me to sign a Last Chance Agreement and get rehabilitation. Once that was over to come back to work. I did not comply with all the terms of the Agreement and I was terminated on or about September 23, 2004. My union refused to take my issue to arbitration. I believe that my employer could have accommodated my disability and refused to continue to employ me because of my disability…

IV. THE EVIDENCE

A. Dale Merrick

6. Merrick testified that he commenced work at Ipsco on May 5, 1980 in Regina when he was approximately 21 years of age. He was terminated September 23, 2004, after having worked 24 years. At the time of the hearing, Merrick was 49 years of age and had a grade 10 education along with other skills training taken at work and some limited courses taken in Winnipeg prior to his employment at Ipsco.

7. Ipsco is a steel manufacturing company located in North Regina. It uses scrap metal to make molten steel that is then poured into metal slabs. Various alloys and other additives are used to make product suitable for a wide range of clients. For example, the slabs can be used to make coils of iron used in the manufacture of pipe for the oil industry. It can also be used to make structural steel for buildings and to manufacture agricultural equipment. Ipsco operates year round, 24 hours per day, using two 12-hour shifts.

8. Merrick started his career, as most Ipsco employees, cutting scrap metal in the yard. Over time he obtained other postings working with the furnace on the brick crew, in the Melt Shop, then in the rolling mill as a greaser. He worked to pour the molten metal in the molds as a ladle controller and also as the store counterman handing out parts needed by the various departments. In the last 10 years he became a caster runout operator and crane operator to make and move 9.5 m slabs of finished product, load it onto a rail car to have it taken to the rolling mill in an adjacent building.

9. Merrick took extra training at work and enjoyed taking charge in the safety area. He had training to use forklifts and cranes. He had confined space, first aid and first responder training. He also participated in the Stop for Safety Program to observe the work habits of employees to identify ways of doing jobs in the safest way possible.

10. Merrick had been working in the caster runout area when he was terminated. There are two basic jobs in the runout area. One employee works in the enclosed cabin (the “pulpit”) observing the lengths of steel being pulled down the drive rolls and then cutting through the steel to make the 9.5 m slabs. The second employee inspects and marks the slabs and operates the crane to lift the slabs onto the rail car. If the employees wish, they can switch from one job to the other during the shift.

11. At the time of his termination, there were only 150 other employees with more seniority than him at Ipsco. There were 750 employees in the steel division and 500 in the rolling mill division.

12. Merrick testified about his history with alcohol and drugs. His father was an alcoholic and one uncle had died from an overdose. When he arrived in Regina from Winnipeg to work at Ipsco, he knew noone. As a result, he socialized with his work mates at Ipsco. There was a lot of drinking; it was the thing to do to belong. He described how in the early 80's mostly everyone drank at Ipsco. It was common practice for people to drink directly on the site and to also have tail gate drinking going on in the parking lot. It was part and parcel of being a steelworker. There was a management club on site open 24 hours per day available for management and employees to drink.

13. In the 1980s, he would work seven, eight hour shifts and drink every day at the end of the shift. Later, the shifts were changed to 12-hour shift as follows:

2 day shifts (5:30 a.m. to 5:30 p.m.)
24 hours off
2 night shifts (5:30 p.m. to 5:30 a.m.)
4 days off

He would drink three to four times during his four days off but he testified that it never affected his performance. Over time he observed a change of attitude regarding consumption of alcohol and drugs at Ipsco. Tail gate drinking in the parking lot was stopped and no liquor was allowed on the plant site. As a result, Merrick and work mates would drink in bars and at home. Merrick described that his alcohol consumption increased gradually. By 1998, he was drinking more heavily but by 2002-2003 he had slowed down but became more involved with drugs.

14. Before 2003 he would attend first responder supper meetings at the Turvey Centre and consume alcohol and not know when to quit. He would continue at the bar after the supper.

15. Despite his alcohol and drug consumption, he described his job as being very special for him. He did a lot of overtime and was rarely absent from work and would not come to work impaired. In 24 years of employment he only had one note for being absent for a shift without prior notice. He was viewed as an excellent employee.

16. With respect to drug consumption, Merrick testified to smoking pot with follow employees after work. Even though he did not enjoy it because "it made him think differently" he did it to fit in. Over time he tried hashish, speed, LSD and other drugs obtained from work mates at Ispco.

17. He snorted cocaine in Vancouver in 1998 at a rave. In 1999 he did cocaine in Regina. He would get his cocaine from people at work; these employees worked different shifts. He would buy from them and he knew who was doing cocaine in various departments. He testified to seeing drugs used at work.

18. Merrick experienced a significant change in his drug consumption around Christmas 2002. He met a person outside of work with whom he smoked cocaine. He described it as free basing and quickly became addicted. On January 1, 2003 he stayed at this fellow's house and smoked cocaine for 12 hours until the supply and money were gone. He described the effect of the drug as debilitating. He could not get off his chair or leave the house. Though he described not liking the effect it had on him, he wanted to do it again. At the end of January 2003 the fellow got more and called Merrick. He tried to stay away but the drug had a powerful effect. In February and March he went on four cocaine binges. As soon as the follow called him he would go over and be hooked for 24 hours. Merrick would hand over his bank card and the dealer would come back with more drugs. By April 2003, Merrick knew he was in trouble; he was addicted to the drug but at the time he blamed the supplier for making him use.

19. In April 2003, Merrick saw a counsellor and described that he could no longer say no to the drug; he had lost control. The counsellor referred him to Roger Ives at

Alcohol and Drug Services ("ADS") for an intake assessment. Merrick did not think he was an addict but the counsellor referred him to a 12-step group.

20. Merrick attended 30 days of the 12-step group meetings. He screened his phone calls and stopped answering the phone to stay away from the supplier. Later the supplier would knock on his door, so he would refuse to answer the door. He began isolating and would just leave the house for work purposes. He was terrified that he would use again. He attended daily 12-step group meetings after work and they seemed to work but he did not know why. He stayed clean in April 2003.

21. During the summer 2003, Merrick started doing drugs again with other people who worked at Ipsco. He described being "pretty distressed at work". Shifts were changed around, jobs were combined, new people were working and an employee died at work. He would argue with another run out operator. He had been asked by management to become involved in the Stop for Safety Program. He would observe other employees and then comment on safety issues. Though the program was confidential and meant to assist everyone to do their jobs more safely, he was accused by fellow employees of being a spy and corporate scab.

22. One day fellow employees urgently called him as a first responder when a fellow employee was sitting at a table not moving. He took charge and administered CPR but despite all the health services administered, the employee died. The employee was one of Merrick's friends and he blamed himself, thinking he may have been able to do more. He left work and rather than going on a planned holiday, he did cocaine for 36 hours non stop. Around this same time, Merrick's roommate was also demanding that things change because people were constantly phoning and coming over to the house looking for Merrick.

23. On the September Labour Day weekend of 2003, Merrick went on a holiday to Ontario in order to once again distance himself from his drug consumption. He returned, having "come to terms with his life". He wanted to stop consuming drugs.

Upon his return, the supplier kept calling him. The guy even called him at work. In order to make it stop, he agreed to come over to the fellow's place at the end of his first day shift. He did so and as a last resort to get the follow to stop supplying drugs to him, Merrick phoned the police and when they arrived he showed them where the drugs were and the supplier was arrested. Merrick was also arrested but released the next day without charges proceeding against him. Merrick said he had taken two puffs of cocaine that night.

24. Merrick was to be at work the following day at 5:30 a.m. Contrary to the work rules he did not phone two hours in advance to advise that he would not be at work. (Ex. R-2) At the time, he was in jail and was only released in the afternoon. He missed work and his employer did not know why nor where he was. It was unclear from the evidence if he would have been allowed to phone his employer while he was in jail.

25. Upon his release, Merrick phoned Jane Deters ("Deters") whom he described as Ipsco's corporate registered nurse and the head of the Employee Assistance Program ("EAP"). He knew he had to do something about his problem so he asked her for an offsite meeting, wanting to keep things confidential. Deters met him at a Smitty's Restaurant and told him his shift supervisor and Mike Carr ("Carr"), head of human resources, had phoned worried about him.

26. Merrick testified that he told Deters what had happened the night before and that he had called the police and been arrested. He thought it would be all over the news and he did not want Ipsco to know about it. He told her he had a problem saying no to drugs though he did not consider himself an alcoholic or a drug addict and that it was just a problem with one drug. Deters told him she would phone Carr – he would know what to do.

27. Merrick said that he did not know his issue would be going to human resources. He knew of other people at work who had "gone through the ringer" with a drug problem and he wanted to avoid it.

28. Merrick described immediately proceeding to Ipsco with Deters to meet Mike Carr in his office. He explained to Carr his incarceration and being unable to phone in. He described being unable to say no to drugs. He asked if Carr knew what he could do. Carr and Merrick discussed the perils of drugs, right and wrong and Merrick testified to not fully understanding Carr because he had not slept since the day before. Carr told him to go home and Ipsco would get him some help. He became aware of an EAP brochure (Ex. P-2). Merrick believed that something was going to save him.

29. Several days later Merrick was directed to attend on Ken Hardy ("Hardy") at Par Consultants for an assessment and eventually a referral to a treatment facility.

30. From September 22, 2003 he remained at home and followed counselling, not knowing when he would be allowed to return to work. He attended weekly on Hardy as an addictions counsellor. He described Hardy as being a consultant for Ipsco. He obtained a date to attend the Pine Lodge Treatment facility in Indian Head, Saskatchewan. Prior to admission Merrick was assaulted for having called the police on the drug supplier. He attended at the emergency department of the hospital for medical care and was released. He delayed his admission to the treatment facility believing his injuries would prevent him from fully participating.

31. Merrick was admitted to Pine Lodge on November 7, 2003 and self discharged on November 25, 2003 prior to the completion of the program (18 days instead of 28 days). (see Ex. P-3 and P-4) He believed the program was for alcohol addiction while he was looking for answers on how to say no to cocaine. Merrick testified that he was in denial of being an alcoholic during his first admission. He went to Pine Lodge to find the key on how to say no to cocaine. He found the program was an alcohol based program and he could not understand how it could be relevant to a cocaine addiction. He would participate in group meetings but would give counselling to fellow participants rather than focus on his illness. He was in denial and minimized his alcohol consumption and its effects on him. He would make excuses and blame others for his consumption. He rationalized that he had an inexperienced counsellor assigned to him.

During family week his ex-roommate sent a letter to explain the impact of the addiction. Merrick perceived it as an attack on him. According to Merrick his counsellor said "Maybe you should go". As a result, he was discharged and returned to Regina on November 25, 2003.

32. Merrick phoned Deters to tell her that "he had graduated" and that he thought he could "do it on his own". He then phoned Carr to inquire about returning to work. Carr advised him there would need to be a meeting to discuss it. He had been cut off weekly indemnity ("WI") benefits effective November 25, 2003 when he left Pine Lodge.

33. A meeting occurred December 5, 2003 between Carr, Deters, Hardy, Jeff Kallichuk ("Kallichuk") from the Union and Merrick to determine if Ipsco would allow him to return to work. According to Merrick, Carr was concerned that he would be unable to stay clean. Hardy expressed the opinion that Merrick should be able to stay clean by continuing counselling and attending 12-step programs. As a result, Carr agreed to Merrick's return as long as he signed a Conditional Reinstatement Agreement ("CRA"). Kallichuk and Merrick reviewed a draft CRA used by Carr in other situations. Merrick asked that some wording be changed. The wording "abhorrent behaviour" was removed because Merrick believed he suffered from a disease and not from abhorrent behaviour. He also asked that the phrase "you will follow every safety rule" be deleted because he was concerned that if he walked past a yellow line on the floor, he could be automatically terminated. Carr made the requested changes and Merrick and Kallichuk returned later that day to sign the CRA. (Ex. P-5) According to Merrick, the only statement Kallichuk made about signing the CRA was "Don't worry, Ipsco won't hold you to it; sign it and go to work." Essentially, the CRA imposes the condition that Merrick abstain from the use of illegal narcotics and that if he violates any of the conditions, he will be immediately terminated for just cause. Further, if a grievance is filed about the violation, the jurisdiction of the arbitrator is limited to determining whether the conditions were breached.

34. Merrick returned to work as a Caster Helper where he had been working prior to treatment. He no longer socialized with his work mates at bars or at their residences. He attended on his counsellor and AA and NA meetings regularly. On his days off he would attend 3 to 5 such meetings per day. He had been advised to attend 90 meetings in 90 days but he attended 120 meetings in 90 days. Though he was keeping clean, he realized that he was still isolating rather than reaching out for help. The CRA only required he abstain from illegal narcotics but he realized that alcohol was also a problem and that it could lead to narcotics. He chose not to consume alcohol either. He obtained a sponsor and worked the 12 steps of the program. Through the process he realized that though he was sober he was not finding recovery. He felt depressed and upset at work. He realized that people with whom he did drugs in the past were not happy with him.

35. Merrick said he would see Deters weekly on day shift. He would tell her his problems as required by the CRA. He was not happy at this point at Ipsco. One employee had threatened to throw him over a railing and yet they both got a warning. Peter Susa from the Union told him to shut up and do his job. Merrick testified that he was crying and falling apart at this point in his recovery. He would go to NA and AA and the counsellor but he felt forced to do it because it was a condition of the CRA.

36. Merrick called Kallichuk from the Union. He also spoke to Deters about trouble he was having with part of the CRA. He did not like going to NA meetings because he felt it exposed him to drug use. According to him, Deters said he should just go to AA meetings instead. However, he continued attending NA because the CRA had it as a condition of employment. He spoke to his AA sponsor Gabriel about the problems he was experiencing. He became more depressed and felt he was spiralling downhill though outwardly he pretended he was happy. Prior to his addiction he described himself as the guy everyone came to see to fix things and to take charge. He liked the feeling of importance that came with it. Now he had dropped his friends and his social life and the relationship with his work mates was not pleasant.

37. On June 8, 2004 Merrick used cocaine again. He had attended an NA meeting. He had made friends in NA and helped people by driving them home and giving them cigarettes. That night he drove one guy home and started discussing problems he was experiencing. The guy said to stop his vehicle because he was picking up some drugs and "I think you need something too". Merrick used and the following day felt guilt, remorse and shame. At the time he blamed the guy for wrecking his life and kicked him out of his house and started isolating again.

38. Merrick returned to work and on his first day back, Friday, June 11, 2004 he was called out for a random drug test as allowed by the CRA. He said he went through it knowing he would fail it. Yet, he testified that he did not tell Deters and Hardy because under the CRA he would lose his job. Merrick said he knew about the Alcohol and Drug Screening and Treatment Program Protocol ("Protocol") at work. (Ex. R-7) He acknowledged receiving a letter dated June 17, 2004 from Carr advising him that because of the positive drug screen he was on indefinite suspension pending a review of his employment. (Ex. P-6)

39. A meeting was held June 24, 2004 where Merrick met with Monty Clifford, Jeff Bruch and Dave Grant, on behalf of the Union, and James Asante and Mike Carr for Ipsco. (Ex. P-13) Merrick was asked about the positive drug test. Rather than admitting immediately he phoned Deters to obtain the test results and he was advised he tested positive for cocaine. Carr and Asante questioned if he could ever be trusted again. "For example, if there is a wallet on the table and you are sober, I can trust you will not steal it but can I trust you if you are not sober?" Asante asked him if it was a relapse or a slip. The Union representatives did not participate in the conversation. Merrick was asked about his sponsor and counsellor. He advised Carr he was depressed and that his family physician had prescribed anti-depressants. He recalls Carr saying "you are an addict – throw those pills away". As a result, he testified that he did that. He was advised that Ipsco would no longer pay for his counselling with Hardy, and that Ipsco would leave the door open a crack for him to possibly return when he was fit.

40. After the meeting, Merrick continued to see Hardy at his expense. He was advised that this was the catalyst he needed to return into treatment. He was readmitted to Pine Lodge for a second time on August 13, 2004 and he completed the 28-day program. He had a better grasp of the disease and of the program. He addressed the issues that made him use again. He filed as evidence the Pine Lodge assessment and discharge summaries. (Ex. P-7 and P-8)

41. On September 10, 2004 Merrick was discharged from Pine Lodge. He followed through on his after care plan. He met his AA and NA sponsors and established home groups for both programs. He paid for continuing counselling with Hardy. He returned to Pine Lodge for follow-up visits at 21 days, 90 days and 18 months. He returns to Pine Lodge once per month to chair NA meetings. He also goes into jails, treatment centres and schools to chair NA meetings and speak on addictions.

42. He testified that by completing the second Pine Lodge program he obtained relapse prevention skills. He now believed he had not been ready for recovery the first time in Pine Lodge.

43. Based on his belief that he should not have been cut off WI benefits from November 25, 2003 to December 5, 2003 and from June 17, 2004 until his return to work, Merrick completed the necessary forms for WI benefits. He spoke to the Union about this and believed the Union was supportive.

44. After being discharged from Pine Lodge, Merrick met Carr with physician forms to establish he was fit to return to work. Carr advised him Ispco had already decided to terminate him and he should contact the Union to arrange for a meeting. Merrick argued with Carr that the CRA had been thrown out and that a new agreement had been put in place when he told him he was leaving the door open a crack to decide his future employment. Carr disagreed that a new agreement existed.

45. Merrick enlisted the help of the Union to return to work. Further, he now believed Deters had breached the confidentiality of his addiction when she involved Carr on September 22, 2003. The Union investigated the allegation but concluded otherwise.

46. A meeting between Ipsco, the Union and Merrick was held September 23, 2004 at which time Ipsco terminated Merrick's employment. The termination letter confirmed he was terminated for having breached the CRA of December 5, 2003. (Ex. P-9) Merrick testified that the Union representatives remained silent during the meeting but that after the meeting David Grant, the Union president, told him that at a third stage grievance hearing there is no way the termination would stand.

47. The Union asked Merrick to supply them with documents to establish the nature of his treatment. He maintains he contacted his counsellor, Bob Cody at Pine Lodge and the proper documentation was sent to the Union.

48. Merrick testified that since his slip in June 2004 he saw Hardy weekly, attended NA and AA meetings, completed the Pine Lodge 28-day treatment, and maintained contact with his sponsors. Since unemployed he attended NA and AA meetings daily and sometimes twice per day.

49. Merrick had been a full-time employee and his income tax returns from 1999 to 2006 (Ex. P-11) establish he earned between $67,000 and $79,000 annually depending upon overtime. After his termination, he commenced withdrawing his RRSPs to live.

50. To mitigate his damages, Merrick had the Union file a grievance and helped the Union obtain his re-instatement. He went to the Employment Insurance Office and searched for alternate employment in newspapers. He looked for work in the steel industry and in warehouses driving forklifts and cranes. He left resumes at many places. He is in good health but as of the date of the hearing he was still unemployed.

51. He testified that in 2005 he filed an application at the Labour Relations Board ("LRB") alleging unfair representation against the Union for having dropped the grievance. From September 2005 to the present he testified that he was looking for jobs in the paper and the internet and applying for forklift jobs in Regina where he wanted to stay since he owned a house and had his recovery network and wanted to return to Ipsco.

52. He testified about his efforts to convince the Union to proceed with the grievance for wrongful termination. He attended at the Union hall to meet with officials. On one occasion the Union representative did not recognize him and started discussing another case. On other occasions the Union officials would tell him he had to provide more information. He signed the necessary authorizations to disclose reports. In November 2004 he learnt that the Union would not proceed with his grievance but rather reached a settlement based on a payment of WI benefits for the four weeks he was in Pine Lodge the second time. He challenged the Union's decision and attended a Union members' meeting in January 2005 to explain his drug addiction and requested the Union proceed with the grievance. The Union refused to reverse its decision.

53. Merrick acknowledged that a lot of the jobs at Ipsco are safety sensitive but he opined that there were many jobs that were less safety sensitive and that Ipsco had been able to accommodate employees with disabilities in the past. His previous job running the crane was safety sensitive but the job in the pulpit is less safety sensitive. He acknowledged that the positions that involved carrying molten steel were safety sensitive. However, cutting scrap metal in the yard and being on the brick crew building ladles is less safety sensitive. He gave examples of employees who were removed from positions as a result of positive drug screens. They were simply placed in less safety sensitive positions:

D – from driving the crane in the melt shop, an employee was accommodated by moving him to build tundishes.

C – from driving the crane, an employee was accommodated to become the third helper on the floor.

B – from operating the tap crane handling molten steel, an employee was accommodated to the brick crew.

A – from driving the train, an employee was accommodated to a janitor position.

(Letters rather than names are used to protect the confidentiality of the individuals.)

Other employees were accommodated for other forms of disabilities:

Monty Clifford – physical injury at home was accommodated by moving him to work in the pulpit.

Bill Edwards – neck injury was accommodated by moving him to work in the pulpit.

employee on crane – heart problem was accommodated by working in the office until cleared as safe by physician.

He testified that working in the stores department as a shipper or the Office and Technical ("O & T") department was less safety sensitive. Ipsco had three departments – steel, pipe and O & T and could therefore move an employee from one department to the other to accommodate. He also commented about the Job Safety Analysis ("JSA") document that classifies job postings based on the level of safety required. He filed a document entitled Regina Steel Mill Job Description and Classification record (Ex. P-22) that described various positions and rated the relative level of safety and hazard involved in each position.

54. Merrick filed the notes taken by Ipsco and the Union during the meeting of June 24, 2004 where the positive drug test and the facts surrounding his use of cocaine on June 8, 2004 were discussed. (Ex. P-12 to P-14) He filed the notes of the termination meeting of September 23, 2004. These documents will be discussed in more detail later.

55. After Merrick pleaded his case at the January 2005 membership meeting, an addictions expert was to speak to the members about relapses but that did not happen. Merrick believed that the Union officials did not understand nor believe that he had an addiction to alcohol and drugs. He perceived that the Union characterized his addiction as a moral issue rather than a disability. He referred to Asante's comment in the June 24, 2004 meeting to show that Ipsco held the same view: "If someone puts money on the table and you are sober, I know you wouldn't take it. You were easily persuaded in this case." DM – "I am no thief, I wouldn't take it". (Ex. P-13) Merrick testified that the Union went along with Ipsco's view that use of the CRA was an appropriate accommodation for an addiction and because he re-used once that it was appropriate that he be terminated.

56. As a remedy, Merrick wants to be re-instated and be compensated for wage loss, loss of Ipsco shares, pension and seniority benefits and cashed in RRSPs. But for the wrongful termination, he would have 27 years of seniority and would be four years away from retirement. He left his pension with Ipsco and wants to finish his career at Ipsco.

57. Regarding injured feelings his loss of employment has led to a loss of identity and sense of self-worth from doing a job that he really enjoyed. He drew a lot of enjoyment from being a first responder and being involved in all the safety programs at Ipsco.

B. Cross-examination of Merrick

58. Merrick was cross-examined by counsel regarding the inconsistencies in his disclosures regarding the extent of his alcohol and drug consumption over time and especially his cocaine consumption. Merrick admitted that at first he tried to minimize his actual usage and that he learnt that this is the denial part of the disease. He admitted to minimizing his usage even the first time in Pine Lodge. Counsel questioned him on the following documents that discussed the extent of his addictions:

Exhibit P-3: first admission to Pine Lodge, November 7 to 21, 2003;
Exhibit P-4: Discharge Summary from Pine Lodge;
Exhibit P-7: second admission to Pine Lodge, August 13 to September 10, 2004;
Exhibit P-19: file of Ken Hardy, Merrick's counsellor;
Exhibit R-1: letter of Merrick to Mike Carr regarding first attendance at Pine Lodge; and
Exhibit R-15: Mike Carr's notes of discussions with Merrick.

Merrick stated he would also do cocaine with guys from work and would occasionally obtain it from guys at work. When asked to provide names, counsel objected on the basis of relevance since all parties had admitted Merrick was addicted and that the addiction was a disability. On that basis the tribunal ruled Merrick did not have to disclose names. Merrick admitted to using a wide array of drugs for many years, with the tolerance increasing progressively as well as the amount of consumption. Through the benefit of being in recovery he could now admit that he has been addicted a long time. Regarding alcohol, at first he would drink five to six bottles of beer at the bar on weekends. Over time it was drinking ten daily. Then it also included whisky, cocktails and wine. He would go through stages thinking he was controlling his drinking by changing the type of liquor.

59. Regarding cocaine, he admitted to spending sometimes $1,000 in one night. He would do 20 hits over 10-12 hours. He went on approximately 20 “benders” where he lost all control. The worse was January, February and March 2003. He abstained in April 2003 knowing he was in trouble. In May 2003 he went on another cocaine bender when Steve Dorosh passed away at work.

60. He described cocaine as giving him a rush and then quickly coming down. He would snort it, free base it and in August 2003 he injected it. He said it had a debilitating effect. Merrick admitted to trying to minimize the extent of his addiction to Carr in the letter preceding the meeting of December 5, 2003 when he wanted to return to work. (Ex. R-1)

61. He admitted it was not true that he had never done many drugs before. Merrick admitted to doing drugs again in November 2003, prior to being admitted at Pine Lodge on November 7, 2003. He could not recall if it was pot or cocaine. (Ex. R-15, p. 273, “Last used marijuana November 3, 2003”) However, the following day at the hearing he corrected his testimony and said he used cocaine on November 3, 2003. He acknowledged buying cocaine from people who worked at Ipsco about once per month in 2002 and 2003. There were four people from Ipsco with whom he did drugs.

62. He acknowledged that after a new president and CEO came on board at Ipsco there was no longer tolerance for alcohol and drugs at work and safety issues became high on the agenda.

63. Regarding Merrick’s meeting with Deters, after his release from jail in September, 2003, he reiterated that he wanted the meeting away from Ipsco’s premises because he wanted his cocaine addiction to remain confidential and he was seeking treatment for his addiction. He said that he asked Deters to help him find treatment. According to Merrick, Deters replied that Carr would know what to do because his arrest and the drug bust may be on the news. He did not think it would be but Deters called Carr and arranged an immediate meeting. Merrick confirmed that he did not want the

Union present since he wanted to keep his addiction confidential. After the meeting Deters arranged a referral for Merrick with Hardy, a consultant utilized by Ipsco's EAP program.

64. Merrick acknowledged signing forms on September 20, 2003 to obtain WI benefits. (Ex. R-4) From the evidence I was unable to determine if Merrick's arrest had been on September 16, 2003 or September 21, 2003. In any event, nothing turns on this point.

65. Merrick admitted to filing a complaint at the Saskatchewan Registered Nurses Association ("SRNA") against Deters for having involved Carr in his request for help with a cocaine addiction since Carr is not part of EAP. Though the SRNA never disciplined Deters, Merrick maintained that she had breached his confidentiality by talking about his addiction to Carr at Human Resources when he is not part of the EAP program. Carr's discovery of his addiction adversely affected the type and level of accommodation he would obtain from Ipsco.

66. Merrick acknowledged that Carr and Peter Horvath expressed doubt on December 1, 2003 about his readiness to return to work. They knew he had not completed treatment and that he had taken drugs again shortly before going to Pine Lodge on November 7, 2003. This resulted in the second meeting of December 5, 2003 with Hardy and Union representation. Merrick admitted that at the December 5, 2003 meeting he stated he had insight into his addiction.

67. Merrick was questioned about his counselling with Hardy from December 10, 2003 until June 8, 2004 when he used cocaine. He confirmed that the plan was to meet weekly and that this never changed. He had to admit, however, that there were some weeks where he did not attend. In fact, he admitted that he went five weeks from April 2, 2004 to May 7, 2004 without seeing his counsellor. Again, he went 3.5 weeks from May 20, 2004 to June 14, 2004 with no attendance. It is during this period of time that he used cocaine again and he never told his counsellor on June 14, 2004 that he had

used. He only told him on his next counselling session of June 29, 2004 after he had tested positive. When asked why he did not tell him on June 14, 2004, he replied that at the time he did not know if Hardy was completely confidential and he was scared. He admitted to choosing to return to work on June 11, 2004 despite having used cocaine June 8, 2004.

68. With respect to signing the CRA, he reiterated that he had no choice since he wanted to return to work. He was upset he had been cut off WI benefits prior to December 10, 2003 because in his mind he was still in active treatment even though he left Pine Lodge on November 25, 2003.

69. Regarding his level of formal education, Merrick admitted that P-3 is wrong where it states he has a grade 12 education. In fact, he only has a grade 10. He also acknowledged having told Ipsco that he had a grade 11 when he was first hired in 1980.

70. Merrick maintained his position that he believed the CRA had been thrown out since it had not been mentioned at the meeting of June 24, 2004. He maintained that when Carr said “go get treatment and then we’ll talk about your job”, this meant that Carr was no longer relying on the CRA, otherwise he would have been fired immediately.

71. When questioned about paragraph 3 of the CRA that required he contact the Medical Department once per month, he maintained that he spoke to Deters every week informally about how he was doing. He did this on “a turn around” during his shifts.

72. Merrick was referred to Dr. Peter Butt’s PowerPoint presentation, p. 20 regarding the stages of change and the element of relapse. (Ex. P-18) Merrick acknowledged battling denial and not being in full recovery when he re-used. He admitted making steps forward but then taking a step back. He described recovery as an ongoing process, a journey rather than a destination. Merrick admitted that in September 2003 he was actually blaming his drug supplier rather than accepting full responsibility for his

addiction. Though he knew he was an addict by January 2003 he now believes that he was just in the first stage of seeking recovery in September, October and November 2003 when he asked to return to work. He now realizes that when he left Pine Lodge on November 25, 2003 he had not bought into steps 1, 2 and 3 of the AA 12-step program.

73. He believed, however, that he had learnt enough tools to meet his goal of staying clean. He agreed with Hardy's testimony that he had been building up for reuse long before June 8, 2004. He acknowledged that his behaviours at the time were not rational, that he was still blaming other people for his problems. He only took ownership of the disease after completing the second placement at Pine Lodge.

74. Regarding the CRA Merrick maintained that in hindsight because he had not completed the Pine Lodge program and had not bought into the first three N.A. steps, he would relapse and could not live up to the CRA.

75. In his view the Union discriminated against him on the basis of disability by participating with the employer in removing his rights in the CRA. Relapse is part of the disability and the CRA provided that once he relapses he is automatically terminated. The Union failed to counsel him to not sign it and then the Union failed to proceed with the grievance when he was terminated.

76. Merrick acknowledged that the first time he called the Union about his failure to show up for work on September 19 or 22, 2003 and being cut off WI benefits was on December 3, 2003. He acknowledged not telling the Union prior to that time about his addiction. He called them because Carr told him the Union had to be present for the December 5, 2003 meeting. He wanted to keep his addiction confidential from the Union. Merrick acknowledged that it was only 30 minutes before the commencement of the December 5, 2003 meeting that he gave a copy of a letter he had prepared for the meeting to Kallichuk representing the Union.

77. Counsel for the Union cross-examined Merrick on Carr's e-mail of December 3, 2003 to Kallichuk that explained the context of Merrick's absence from work and addiction and the purpose of the December 5, 2003 meeting. He disagreed with Carr's statements; he met Carr on the day he was released from jail – not three days later. He was not involved in trafficking cocaine. He did not miss the scheduled admission to Pine Lodge; admission was always for November 6, 2003. Merrick stated that he prepared the document regarding the chronology of events from September 22 to November 7, 2003 on December 4 in preparation for the December 5, 2003 meeting. (Ex. R-1)

78. Merrick agreed that he only raised two issues with Kallichuk about the contents of the CRA. He never told Kallichuk that he did not want to sign a CRA because it removed his rights. Merrick stated that he would have signed anything to return to work and Kallichuk did not counsel him about not signing the CRA with the conditions it contained.

79. Merrick admitted that from December 10, 2003 to June 15, 2004 he did not have formal meetings with the Union about the CRA. However, he reiterated meeting his shop steward Monty Clifford with a copy of the CRA and telling him that he was now concerned about the conditions and that he could be fired for minor things such as absenteeism and attending AA meetings instead of the required NA meetings. He expressed concern about the lack of confidentiality of the urinalysis random tests. He recalls him and Monty Clifford getting Kallichuk on the cell phone in January 2004 to discuss being fired if he had a relapse. He had heard other addicts at NA meetings discussing relapses and say it was part of recovery and he was now worried about the condition in the CRA requiring abstinence from illegal narcotics and that a breach of any of the conditions will lead to immediate termination. Kallichuk told him it was too late to change it now that it was signed. However, Monty Clifford told him, "They will not hold you to this agreement." He also spoke about it to Bill Edwards, a Union steward, but he would not express a second opinion and referred him back to Kallichuk.

80. Merrick was referred to Monty Clifford, Dave Grant and Jeff Bruch's notes of the June 24, 2004 meeting after he tested positive for cocaine. He acknowledged the contents were accurate. (Ex. P-12, P-13, P-14) Merrick stated he advised his A.A. sponsor Ilona of the slip and continued going to meetings. (Ex. P-12) He saw his physician and told him of his addiction and that he was depressed. He was put on antidepressants. He acknowledged not having told Deters that he had a slip.

81. From June 24, 2004 to his second admission at Pine Lodge on August 13, 2004, Merrick acknowledged not having further discussions with the Union.

82. After completing his second treatment at Pine Lodge on September 10, 2004, Merrick took WI benefit forms to the Union and saw Dave Grant a number of times at the Union Hall. He advised the Union how he did at treatment and discussed the issues he believed would allow him to return to work and receive WI benefits. Merrick testified that Dave Grant told him that if he was terminated the Union would take it to arbitration.

83. Merrick was referred to Jeff Bruch and Dave Grant's notes of the September 23, 2004 termination meeting. He acknowledged that they contained the gist of the discussions at the meeting. (Ex. P-15, P-16)

84. Merrick acknowledged attending at the Union Hall on October 1 and 4, 2004 to meet Dave Grant, the Union president, and Mike Park ("Park"), the staff representative. He gave Grant an 11-page document he wrote on September 29, 2004 to explain his situation and to put his termination in a broader context. He was seeking help from the Union to get his job back. (Ex. U-2) He testified that Park confused his case with the case of another employee. Park asked him why he left Pine Lodge suggesting he had failed to cooperate. They discussed Merrick's allegation that Deters had breached his confidentiality by taking him to Carr. The Union signed and filed a grievance on September 30, 2004. (Ex. U-3) On October 6, 2004 Park had Merrick sign releases authorizing Deters to release to Park all information regarding Merrick's substance abuse addiction. (Ex. U-4)

85. At a second meeting Park told Merrick he had investigated the allegation of breach of confidentiality by Deters and concluded there had been no breach. Park questioned Merrick again as to why he left Pine Lodge and intimated he had been asked to leave because he may have used again or abused the staff. According to Merrick, Park was accusing him of being kicked out of Pine Lodge. Park asked for documentation regarding both treatment sessions. Merrick testified that he contacted his counsellor at Pine Lodge who then faxed the requested documents to the Union. Counsel cross-examined Merrick alleging the Union never received the documents. Merrick insisted he did what the Union had asked him to do. He also gave the Union the two forms from his physician establishing he had completed treatment for his addiction (Ex. R-4, R-5, U-5, U-6), in order to claim WI benefits.

86. The Union admitted after an adjournment that indeed Merrick did give them the documents since Ipsco produced copies of the documents that they had received from the Union at a meeting of November 10, 2004 where the Union tried to get WI benefits for Merrick's second attendance at Pine Lodge. Merrick said he gave the documents to the Union because Dave Grant asked him to prove that he had completed treatment.

87. Merrick was cross-examined about the process the Union followed to advance his grievance. After he provided the information the Union had requested, the Union met Ipsco on November 10, 2004 to resolve the grievance. Merrick called the Union president Dave Grant for two days after the meeting and was advised that Ipsco had agreed to pay WI benefits and that the Union would no longer grieve his termination.

88. Merrick was referred to Ex. U-7, the November 15, 2005 grievance report from J.T. Bruch, chair of the Union grievance committee to the membership which in part stated:

> Based on the review of the file and our records, the grievor failed to follow the Drug, Alcohol Testing Protocol and also failed to live up to the Last Chance Agreement with the Company. These two factors alone would be cause enough

> for an arbitrator to uphold the Discipline… therefore… recommends that we do not forward this grievance to arbitration.

The Union membership accepted not to refer Merrick's grievance to arbitration.

89. Merrick was also referred to a letter of December 10, 2004 from Dave Grant, Union president, to Carr at Ipsco (Ex. U-8) advising:

> … that the Union accepts the Companies [sic] resolve [sic] to the above grievance to pay Mr. Merrick Weekly Indemnity owing for the period he was in attendance of treatment.
>
> Upon written confirm [sic] of payment to Mr. Merrick, the Union will consider this grievance resolved "without prejudice/ precedent".

Merrick testified that he refused to accept the cheque for the WI benefits because he did not agree with the Union's decision to drop his termination grievance.

90. Merrick acknowledged receiving a letter dated January 11, 2005 (Ex. U-9) from the Union asking him to attend the monthly membership meeting of January 17, 2005 "for the purpose of explaining your perspective on the grievance dealing with your termination." The letter also advised him that a member's motion to reconsider the earlier motion not to proceed to arbitration may be out of order according to Park. Merrick did attend the January 17, 2005 meeting and presented his arguments as to why the Union should proceed to arbitration. He was not allowed to stay to hear the rest of the proceedings. Counsel for the Union presented Merrick with minutes of the Union meeting. (Ex. U-10, U-11) After Merrick left, the minutes indicated that Jeff Bruch read points from the CRA and said the arbitrator will very unlikely overturn a last chance agreement and that Merrick "wasn't upfront with his relapse." The minutes show that someone stated "a drug addict and alcoholic have a tough time admitting they have a problem." The members then decided to invite someone from Qu'Appelle Health Region to talk about addiction and to indicate whether relapses are common and if so then Merrick's case should be moved to arbitration. As a result, Merrick was told by David Grant to bring information about his addiction and treatment to the next meeting

on February 14, 2005. Three days before the meeting, he was told by Grant that he could not attend the meeting. Later Merrick discovered that on February 14, 2005 the Union members did not hear from an addictions expert regarding whether or not relapses are an expected occurrence of recovery. The Union never did reverse its decision of November 15, 2004.

91. Counsel for the Union presented Merrick with the order and decision of the LRB (Ex. U-12) of November 28, 2006 wherein the Board deferred its jurisdiction over Merrick's application for breach of duty of fair representation against the Union to the SHRC. It also adjourned Merrick's application to no set date, allowing Merrick to return to the Board if all issues were not resolved by the human rights complaint. Counsel for the Union questioned Merrick about what appears to be a change of position regarding his claim against the Union. When the LRB held a hearing on whether or not to defer its case to the SHRC, Merrick seemed to argue that his case against the Union had nothing to do with the Union's failure to recognize and accommodate his disability. In fact, he suggested that he wanted to withdraw his complaint before the SHRC against the Union to ensure that the LRB did not defer jurisdiction to the SHRC. Merrick was hesitant to admit that before this tribunal he was now changing positions with respect to his claim against the Union. From reading Ex. U-12 and considering all the evidence submitted before this tribunal, I conclude that Merrick was presenting alternative arguments because he hoped that the LRB would assume jurisdiction of his application against the Union. For example, he hoped that if he was successful in establishing that the Union had not fairly represented him, the Union would then side with him in his human rights case against the employer (Ex. U-12, para. 25-27). Before the LRB the Union recognized that Merrick's primary claim against it was that due to Merrick's disability he should not have had to sign a CRA with the conditions it contained. (Ex. U-12, para. 28) Merrick argued the Union should have recognized his disability and ensured appropriate accommodation for the disability and likely relapses. (Ex. U-12, para. 41)

92. In response to the allegation that before this tribunal he was changing his claim against the Union, Merrick responded that the Union also argued in the alternative. In a letter of March 24, 2005 to the SHRC, the Union asked that the SHRC defer the complaint to the LRB because the complaint essentially relates to the Union's duty of fair representation and not discrimination. Yet, before the LRB the Union argued the exact opposite; it argued that the LRB should defer to the SHRC because Merrick's complaint essentially was that the Union discriminated against him on the basis of his disability and allowed him to sign a CRA that it should have known he could not meet because of his disability. (Ex. U-12, para. 49) I conclude that both parties put forward different arguments before the two bodies and I draw no adverse credibility findings on either side. Merrick was pressed on whether Kallichuk ever told him the CRA could not be challenged by the Union. Merrick maintained his testimony that Kallichuk told him that now that he signed the CRA it is too late to challenge it. Merrick said he got the same impression from Park. He was concerned that he could not live up to the conditions of the CRA after he learnt that relapses are a common part of recovery.

93. On re-direct by Ms. Gingell, Merrick stated that he only saw the Pine Lodge Assessment Summary of August 13, 2004 in 2005. The document was prepared by counsellors as a result of numerous interviews and he had no opportunity to make corrections in either assessment summaries.

94. Merrick's meetings with Deters after signing the CRA were held on his breaks during a turn around on his shift. He would tell fellow employees he was going to the Safety Department. He would sit and talk to Deters about problems at work and with his program. He did not see her take notes.

C. Dr. Peter Butt

95. The SHRC called Dr. Butt as an expert witness to give opinion evidence about substance dependence and treatment options. He described recovery as a process

rather than a single event with relapses considered a therapeutic opportunity to refine the treatment approach. He addressed the following matters:

- definition of drug and alcohol addictions as chemical addictions
- chemical addictions are medical disorders
- the stages of addiction
- treatment options and the process of recovery
- frequency and role of slips and relapses in the process of recovery
- risk factors that affect prolonged recovery

96. Dr. Butt's qualifications as an expert in the field of treating chemical addictions were not challenged by Ipsco or the Union. Mr. Woodard had called him as an expert in a prior human rights case in 2006. Dr. Butt's curriculum vitae is an impressive 38-page document. (Ex. P-17) Some highlights relevant to this case are as follows:

- medical doctorate from McMaster University, 1981; in practice 27 years
- family medicine residency, University of Saskatchewan, 1981-1983
- CCFP (EM), College of Family Physicians of Canada, 1994
- CMA/MD, PMI I-IV, Community Addiction Training and Advanced Counsellor Training, Nechi Institute on Alcohol and Drug Education, Edmonton, 1993
- Meadow Lake Hospital, 1984-1990; dealt with addiction related problems
- active staff, Emergency Medicine, Saskatoon, 1990-1991; dealt with addiction related problems
- developed interest and expertise in addictions medicine and teaches courses in substance abuse, addictions, methadone at the College of Medicine and for various other organizations from 1997 to 2008
- published in area of addictions:
    - "Alcohol Risk Assessment and Intervention for Family Physicians" 1996, Canadian Family Physician

- o "Methadone Guidelines for the Treatment of Opoid Dependence/Addiction" 2001
- o "Alcohol Risk Assessment and Intervention, Manual for Trainers" 1994
- o "Alcohol Risk Assessment and Intervention, Resource Manual for Family Physicians" 1994

97. Dr. Butt presented numerous conferences and lectures on addictions and treatment:

- "Substance Abuse – Therapeutics" 2007
- "Youth Drug Detoxification and Stabilization Act" 2006
- "Pain, Addictions and Methadone" 2006
- "A Troubled Interface: Addictions and Medical Professionalism" 2005
- "Alcohol Risk Assessment and Intervention" Australia, 1994

98. Dr. Butt continues to see patients with addictions in his clinical practice:

- Department of Academic Family Medicine, West Winds Primary Health Centre
- Outpatients Department, Saskatoon City Hospital

99. Dr. Butt regularly and consistently has attended or presented at Continuing Medical Education functions in the field of addictions and treatment:

- Canadian Centre on Substance Abuse, 2007
- Canadian Society of Addictions Medicine Medical Scientific Conference, 2006
- American Society of Addiction Medicine, 2005-2006
- Education Day for Methadone Prescribers, 2000-2002

100. Dr. Butt is a member and participates in numerous professional societies and committees:

- Canadian Society of Addiction Medicine
- American Society of Addiction Medicine
- Canadian Centre on Substance Abuse, National Treatment Strategy Working Group, 2007
- Physician Advisory Group on Methadone Guidelines
- Saskatchewan Health, Clinical Model Development: Re-development of the Treatment Model for Addictions in Saskatchewan, Calder Centre, Saskatoon, 2007

101. Dr. Butt never attended on Merrick and therefore his testimony was limited to giving opinion evidence on substance abuse and treatment in general. Dr. Butt is an associate professor with the College of Medicine and the Department of Academic Family Medicine at the University of Saskatchewan and also continues his clinical practice.

102. Dr. Butt explained the medical definition of substance dependency as found in the psychiatry manual know as DSM-4 TR as being a maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three or more of the following, occurring at any time in the same 12-month period:

- tolerance, a need for markedly increased amounts to achieve intoxication or desired effect
- withdrawal symptoms
- substance is taken in larger amounts or over longer periods of time than intended; person is losing control
- persistent desire or unsuccessful efforts to cut down or control use; self control no longer successful
- more time spent in activities to obtain, use or recover from the substance
- important social, occupational or recreational activities are sacrificed or reduced because of substance use; the substance takes over the person's life

> - use continues despite knowledge of having a persistent or recurring physical or psychological problem caused by it; there is loss of control in spite of being aware that the substance is creating problems but not being able to step back from it

103. Dr. Butt also testified about the definition of substance dependency/addiction used by organizations such as the American Society of Addiction Medicine:

> It's a primary disease as opposed to a secondary disorder that is chronic, ongoing and placed centrally within the brain (neurobiological). It's a brain disorder or mental illness. It has genetic, psychosocial and environmental factors that influence its development and manifestations. It is characterized by behaviours that include one or more of the following:
>
> - impaired control over drug use
> - compulsive use
> - continual use despite harm
> - craving

104. Dr. Butt testified that this definition speaks to some of the risk factors that may set a person up to develop a substance dependency/addiction. The definition also speaks to some of the risk factors that might lead to slips or relapses or a problematic recovery process.

105. Since none of the parties contested that Merrick has a substance dependency/addiction to alcohol and drugs or that substance dependency/addiction to alcohol and drugs is a disability under the *Code*, it is not necessary to carry out a detailed analysis of the evidence regarding Merrick's use and abuse of alcohol and drugs. Suffice it to say that the evidence established that indeed Merrick meets the definitions of substance dependency/addiction to drugs and alcohol.

106. With respect to treatment, Dr. Butt speaks of four general therapies. The first is simply maturation. It is often used in adolescent substance abuse. With counselling and experience the person learns that there are negative consequences and they learn to pull back and know their limits.

107. Concurrent therapy is where a person has both a mental health problem and a substance dependency. It requires concurrent treatment of the depression and the substance dependency. There has to be a holistic approach otherwise the outcome will be poor.

108. Medication therapy is a third treatment modality. The most obvious example is a person addicted to opiates can be placed on methadone therapy if abstinence is not possible.

109. The fourth treatment therapy is referred to as the matrix model and it is the most common. It may be a residential or a non residential treatment program. Increasingly, the non residential treatment approach is being used because it is cheaper to deliver. Also, many tools are used in conjunction with each other to provide a more individualized treatment modality directly in the person's actual milieu so that he develops tools to function in the real world rather than in a 28-day artificial setting. The Matrix model uses a combination of the following:

- manual based 16-week non residential psychosocial approach
- individual counseling
- cognitive behaviour therapy
- motivational interviewing
- family education groups
- body fluid testing to monitor
- 12-step programs

110. According to Dr. Butt, 80% of people with substance dependencies manage to pull back on their own with the help of their faith community, belief systems, friends and family. Only 20% of people who experience substance dependency actually go through the formalized treatment process.

111. Regarding 12-step programs their efficacy depends on many factors. It depends on the make up of the group, how much step work is being done, doing the work that is involved in each of the 12 steps, the person accepting that he/she does not control the substance and developing a spiritual centre in their life. A person has to be reconciled with the impact the substance dependency has had on themselves and others around them. The person has to get rid of the guilt and develop a consistent maintenance program and relapse prevention program.

112. The matrix model requires an effective relationship between the counsellor and the person to ensure that the person can be completely honest with what is going on in his life. Further, the person needs hope to put together a better life for himself; there has to be incentive to change.

113. Dr. Butt presented on the stages of change that a person goes through before fully internalizing a different way of acting or thinking or feeling. He presented it as follows:

- pre-contemplation or denial
- contemplation
- determination
- action
- maintenance/success
- relapse

114. At first a person denies having an addiction. Others around him can see it though. Eventually, the person will contemplate that a problem does exist but he is ambivalent about it. Eventually, the person will debate the matter with himself, weigh the pros and cons and eventually determine that he has to do something to change his life. He now starts planning the change (determination). If his problem is being overweight, he will buy the exercise equipment and it may be a long time before he

uses it. When he does, that is the action phase. Therapists and addicts often make the mistake of diagnosing the addiction and quickly wanting to move to the action stage – abstinence, in-patient treatment facility. The person may succeed for a while but typically, in this process of change, people relapse. It is a normal part of the process. Therapeutically, it is then necessary to go back and look at the maintenance plan, look at what was the trigger, what set up the person for the relapse. The action and the maintenance plan were not robust enough to sustain the change. A relapse is an opportunity to improve the action and the maintenance plan. There are stages to change and it often involves two steps forward and one step back. Recovery is not simply not using; it is about living better; it is about putting together a life worth living without using.

115. Dr. Butt testified that recovery is a lifelong process because there is always some risk of relapse. By definition, substance dependency is a chronic disease and there is always the risk of relapse and therefore developing strategies to mitigate the risk is an important part of recovery.

116. Dr. Butt addressed the effects of cocaine on the body and mind. It is a stimulant that has a rapid uptake into the blood supply. It is metabolized fairly quickly so the high lasts 10 to 20 minutes. The person goes from a euphoric state with high blood pressure, palpitations, flushing and, once metabolized, to feeling a little depressed. The psychological effects of withdrawal from cocaine tend to be greater than the physical effects of withdrawal. Since the high lasts only a short time, users often snort, smoke or inject up to 20 times in a day until the money and drugs are exhausted. Symptoms of withdrawal from cocaine are irritability, reduced ability to focus and concentrate, and cravings. The physical effects of withdrawal from alcohol last longer than from cocaine.

117. Dr. Butt commented that most residential treatment programs such as Pine Lodge are modelled on alcohol dependency since it is the most common addiction. For a person addicted to cocaine, it is not necessarily a good treatment model because it is more difficult for that person to relate to the program and to the people addicted to

alcohol. The problem is accentuated when it comes to relapse education and prevention. Relapse is all about triggers and the trigger for cocaine is not the same as it is for alcohol, though generically there are some similarities. Sometimes the generic program is not adequately tailored to meet the individual needs of an injection drug user. The program must start at the person's current stage of dependency.

118. Dr. Butt also opined that there is an unrealistic expectation about completing a 28-day residential treatment program. People think the person receives all the tools necessary for recovery while that is not the case. First, a 28-day program is based solely on what an insurance company historically would pay and has nothing to do with outcome and effectiveness. If the program is based on the 12-step program, there is only enough time to move through the first three steps. Generally, programs are set up in a way that the person has to be recovery prone to be successful and if the person is not successful than it is easy to blame the person rather than the program.

119. Dr. Butt opined that there is now a shift away from residential treatment programs. There is recognition that recovery is a process and not a 28-day event. It is necessary to continue to work with the person in a community based program, in the person's own environment. This allows the person to come to terms with triggers in his day-to-day environment. The program has to focus on the person changing the way he lives, getting rid of the risk factors, the people, the places, the things that set him up to use, getting rid of the substance and focussing more and more on doing things that are important and meaningful to the person. Programs provide tools, not a cure.

120. Dr. Butt commented about the effect of a person completing 20 of a 28-day program. It raises questions about why the person did not complete the program. Was there a mismatch between the person and the program? Was the person frustrated and angry? Was the person still in denial? Was the therapeutic intervention problematic? In considering Dr. Butt's testimony on this point, it appears that Carr, for the employer, had reason to question the impact of Merrick not completing the program and his ability to effectively return to work.

121. Dr. Butt agreed that the longer a person is in treatment and remains abstinent, the better the chance for prolonged recovery. However, it would be naïve to think that six months of abstinence removes the risk of a slip or a relapse. A person can face a series of stressors or devastating losses that will see him fall back into a pattern of behaviour that leads to a slip. The most effective recovery program is one that has a holistic approach – physical, mental, emotional, spiritual, social contacts, relationships and productive activity.

122. According to Dr. Butt, the purpose of a recovery program is to move a person from a structure where there are external controls over the substance use, such as consequences in the workplace and at home, to a shift towards an internal centre of control so the person makes decisions about what is meaningful and worthwhile for him, without the need for outside coercion. This is a lifetime process and not an event.

123. Part of the process to recovery is to have relapse education and prevention. This means learning about the people, places, things, feelings that set up the person to use again. This is done through group and individual counselling.

124. Dr. Butt admitted that behavioural contracting and reporting events that threaten sobriety can be an effective form of external control to bring home that reuse will have negative consequences. The question, however, is whether the consequence of a relapse will be punitive or therapeutic. It takes time for a person to recognize that emotionally and intellectually he is moving towards a relapse. Often it is only after a slip that a person can be taught to back up and dissect what happened in the time prior to the slip to learn not to repeat the same behaviour.

125. According to Dr. Butt, from a therapeutic perspective, it is counterintuitive to contractually oblige a person to abstain and to advise of any conditions which threaten his abstinence, such as a slip or relapse while at the same time contracting that any breach will lead to immediate termination. Why would a person disclose a slip if he knows the result is going to be punitive rather than therapeutic? A slip can lead to

consequences such as losing privileges but it must also be used to learn more about recovery. Dr. Butt acknowledged that safety is a workplace issue that must also be considered.

126. Dr. Butt defined a slip as an isolated use where the person was still able to exercise enough control to pull back from continued use. A relapse is where the person loses control and there is continued use over a more prolonged period of time.

127. According to Dr. Butt a slip is a “very, very” common occurrence in recovery and it is part of the process. It is also very difficult to fully anticipate all contingencies so, if a person is in a safety sensitive position, the person should be placed where he is less likely to cause harm for a period of time, until he puts out a series of clear urinalyses to prove that he is able to do a safety sensitive job. The longer a person stays clean, the less the risk of a slip or relapse.

128. Dr. Butt classifies substance dependency as a mental illness that is acquired or in part inherited; the disorder is not a lack of will. However, paradoxically, recovery from the disease requires putting in place over time the ability to develop an internal centre of control, the will and the tools to make a choice not to go anywhere near the edge of the cliff where the person might use again. With the assistance of a program, the person develops a process of behavioural change and the strategies to make better decisions or choices and exercise will to stay away from use. What makes it a disease is the compulsive craving. There is a loss of insight at that moment and a person uses again which is utterly irrational. Noone in his right mind would make the decision to use again since it brings on extreme harm to him and those around him. The chaos and the consequences are extreme. This speaks to the compulsion that sometimes occurs. It is sudden and overwhelming and immediately after the re-use the person knows it was not what he wanted to do. The person feels guilt and shame. Blaming the person serves no useful purpose. A person who does not understand the nature of the disease will attribute the person’s re-use to an intentional act, stupid behaviour, lack of will power, poor choices, lack of moral fibre as well as other value judgments including lack

of honesty. Unfortunately, those are the types of judgments that were made of Merrick's slip by officials at Ipsco and the Union.

129. Dr. Butt linked substance dependency – withdrawal from using the substance – and depression. Depression can occur when a person is coming off a substance. It could be in part because of the impact that the drug had on the brain receptors going back to a normal level of functioning so that the person may feel depressed in mood. The person may be depressed by what he experienced while on the substance – regrets, sense of guilt. Further, the depression could be from a predisposition to depression that was unmasked or precipitated by the drug. In Merrick's testimony he referred to the fact that his family physician put him on medication for depression in June 2004, after the positive screen. According to Dr. Butt it is normal for a person who has been abstinent for some period of time to then experience depression and it is appropriate to medically treat the depression. Such concurrent treatment is essential otherwise the risk of not treating the depression is that there is a greater likelihood of relapse because not uncommonly people will self-medicate if they are depressed. The Tribunal concludes that this was one element in Merrick's slip.

130. Counsel for Ipsco cross-examined Dr. Butt. He confirmed that he does direct therapeutic counselling one day per week with a caseload of 100 people at a time. Regarding a person using cocaine it will produce a positive screen for up to three days later, depending on how much was consumed. In comparison to cocaine which is metabolized quickly by the body, crystal meth, a methamphetamine, persists in the body for days. The person has a very sustained period of high euphoria, likely hallucinations and delusions, and weight loss. It is more addictive than cocaine because it is longer lasting. In comparison to cocaine, marijuana stays in the body for a longer period of time. It causes difficulty with concentration, focus, hand/eye coordination and sleepiness. It may create some euphoria. Like most drugs it decreases inhibition and thus more risk taking behaviour. For cocaine, the physical symptoms are relatively brief but the psychological ones are more profound. There will likely be depressed mood, irritability, problems concentrating and focusing. These symptoms could last days or

weeks for some people though as time passes it is at a reduced intensity. Dr. Butt admitted that concentration and focus is also affected by daily things such as thinking of summer holidays or thinking of a date. Not all lack of concentration is caused by substance dependency.

131. Dr. Butt spoke about cognitive behavioral therapy as a technique to take the person back through the hours, days and weeks before a relapse in order to determine what triggered the re-use. This self-knowledge is part of relapse education. It is important for the individual to delve into his own triggers, the moods, the situations, the people and the places that make him more inclined to use. Dr. Butt opined that, if a person does not know the things that set him up to use, it is very difficult not to re-use because a person ends up in those situations repeatedly. It may be a pattern of behaviour that is quite normal for the individual, but if he does not link it to the drug use and then learn how to disconnect it, the pattern will continue.

132. Sometimes, according to Dr. Butt, it is possible to “raise the bottom” to allow the person to suffer consequences of his addiction before he dies. This can be done by therapeutic contracting. This is quite different from a contract saying that if the person uses again he will be fired; that is more punitive.

133. Counsel for Ipsco reviewed with Dr. Butt the CRA signed December 5, 2003 by Merrick, Ipsco and the Union. In Dr. Butt’s opinion, that CRA is both punitive and “raising up the bottom”. It is not so much a therapeutic agreement as an employment agreement taking into consideration business risks.

134. Dr. Butt described using therapeutic contracting with physicians with substance dependencies. The physician has to abide by a course of treatment and monitoring. If there is a relapse caught by the monitoring, the physician has to go back into treatment or be referred to his regulatory body with potential loss of licence. Once the physician complies, there is a graduated return to work, taking into account risk to self and patients.

135. Dr. Butt specifically referred to condition no. 3 “Merrick will contact the Medical Department once per month to advise of any conditions, which threaten his abstinence…” He questions if this condition was put in place in order to allow Merrick to receive additional help or whether it would be used in a punitive way. According to Dr. Butt, it is not clear in condition no. 3 what the consequences will be of reporting a slip or a relapse. However, he opines that at the end of the CRA it becomes clear: “should Merrick breach any of those conditions, he will be immediately terminated for just cause”. In other words, a single slip or relapse means loss of job. According to Dr. Butt it would be better to have a graduated return to work in a less safety sensitive position, if possible, to allow the person over 6 to 12 months to gradually show that he can do the job safely, taking into account the relapsing nature of substance dependency. It is a form of accommodation where you balance a therapeutic response with mitigation of risk.

136. Counsel for the Union put Merrick’s fact scenario to Dr. Butt and asked for an opinion as to whether Merrick can be returned to work after breaching the CRA. He asked what factors and characteristics does an employer look for to determine if the person can return to work. According to Dr. Butt it is necessary to step back and look at the circumstances around the slip or relapse. Is there an indication that the person must revisit treatment or the recovery model? Do other treatment options need be put in place? Is it necessary to reassess the person’s addiction? Is there a concurrent mental health problem? Was there adequate treatment in terms of relapse education? A 28-day impatient program is not going to do that. Is the person motivated? Is the workplace a problem? Merrick testified that he used to do drugs and obtain his drugs from work mates at Ipsco. Changing his life to no longer associate with them probably caused difficulties for Merrick, as he testified. Merrick may have been seen as a threat for workmates who continued using. The employer also needs information from the employee as well as family, friends and co-workers. It is necessary to consider how much insight the person has regarding the addiction.

137. Dr. Butt expressed the opinion that it is important to create a situation where the person will want to be open and feel that he can disclose honestly. For substance dependency it is the secrets that keep the person sick. According to Dr. Butt, withholding information, not being open and transparent, keeping secrets means that people are less likely able to help and the person gets into a pattern of behaviour where he has a parallel secret life often involving substance abuse. It is important to create conditions where the person can be honest about any risks to his sobriety because early intervention can be key to preventing a slip. Creating a climate where a person is fearful of disclosing risks to his sobriety puts him at risk of relapse.

138. If an employer hears an employee blaming others for what happened, it is an indication that there is need for more treatment. According to Dr. Butt, to have a set back and to have someone react defensively is part of the process of recovery. The employer will still have to weigh risk in safety sensitive positions.

139. On redirect Dr. Butt addressed the issue of a slip as opposed to a relapse. He opined that an employer could accommodate the slip, recognizing that a slip is part of the process of learning how to live without using, while at the same time balancing safety interests. He recommends a graduated intervention and a graduated accommodation as opposed to an all or nothing situation where the person is either doing his safety sensitive job or he is terminated.

140. He also addressed unrealistic expectations that a person who comes out of treatment will never use again. The reality, according to him, is that substance relapses are a part of the process. “How else do people learn to live without it?”

D. Kenneth Robert Hardy

141. Hardy has a B.A., B.S.P. (Pharmacist), Masters in education psychology, a Pscyh. D., doctor of psychology and ICADC (International Certified Alcohol and Drug

Counsellor). He is a registered psychologist who has worked in the field of alcohol and drug counselling for 28 years.

142. Hardy became Merrick's counsellor in September 2003 when Merrick was referred to him by Deters, the EAP coordinator at Ipsco. Deters set up the first appointment for Merrick. Hardy's bills were paid by Ipsco and he reported to Deters if ever he had information that created undue risk. He would also report to Deters regarding Merrick's attendance for counselling. He would first advise Merrick if he reported something to Ipsco. For example, he reported to Deters when Merrick self-discharged early from Pine Lodge on November 25, 2003. Merrick knew Hardy was obliged to release certain information to Deters. It supports Merrick's testimony that he never disclosed the re-use to Hardy for fear that it would be reported to Deters and he would be fired.

143. Hardy would see Merrick approximately once per week at first and then less frequently. He testified that Merrick was very good at attending scheduled meetings.

144. Hardy brought his counselling file and reviewed his notes regarding each counselling session he had with Merrick from September 23, 2003 to July 14, 2007.

145. In reviewing his file Hardy indicated that Merrick also suffered from depression and generalized anxiety disorder, though that could be part of the addiction. He noted that Merrick may have historically been susceptible to anxiety. His assessment in September 2005 was that Merrick met the DSM IV criteria for cocaine dependency and generalized anxiety disorder. He had increased tolerance to drugs, withdrawal symptoms, loss of control, continued use despite knowing the harm it caused him, restlessness, fatigue and poor concentration. He scored Merrick at 50% for Global Assessment of Functioning, which is serious. He referred him to Pine Lodge for November 6, 2003. Hardy counselled Merrick both before his two attendances at Pine Lodge and thereafter. He followed an AA model of counselling.

146. On September 23, 2003 Hardy determined that Merrick was unable to perform any duties of this occupation at Ipsco since he was at risk due to his addiction.

147. Hardy's notes confirmed that Merrick was experiencing shame, guilt and fear. He came from an alcoholic family of origin. He was a fixer and a caretaker and would come to people's rescue rather than concentrating on himself.

148. On November 29, 2003 Hardy was told by Merrick that he had self-discharged early from Pine Lodge (entered November 7, 2003 – discharged November 25, 2003 after 18 days rather than normal 28 days). The report on Hardy's file from Pine Lodge stated:

> Dale was encouraged to see Ken Hardy, EAP, attend NA/AA meetings and rebook in the future. Dale's treatment is documented as incomplete. (Ex. P-19, p. 31)

Merrick told Hardy that he could not get his head around alcoholism except for the valley chart. On December 1, 2003 Hardy contacted Carr at Ipsco. Carr indicated that the employer was not happy that Merrick had left Pine Lodge early. A meeting was set for December 5, 2003 to discuss whether in the circumstances Merrick should be allowed to return to work.

149. Hardy attended the December 5, 2003 meeting and expressed the opinion that though Merrick had just stayed for 18 days he had gained information which helped him. He seemed to be more insightful. He had just balked at the process used at Pine Lodge. He advised that Merrick was continuing to see him for counselling and was attending NA and AA meetings. He was of the opinion Merrick was good to return to work because he was not using at that time, though there was no guarantee it would continue.

150. After Merrick returned to work, counselling continued. Merrick discussed some conflict at work with other employees. Hardy was of the opinion that Merrick fears anything that represents conflict and he tries to avoid conflict.

151. In January 2004 Merrick exhibited signs of depression but Hardy believed it may be associated to burn out due to Merrick's high level of anxiety and trying to please.

152. On January 30, 2004 Merrick was exhibiting frustration with people not doing what they should be doing. Hardy opined that this is because Merrick is a fixer. His notes indicate that Merrick told him that the guys do not accept him, he has no friends and the guys at work are all using. He was angry with Ipsco, people in AA, co-workers, the drug testing and NA. According to Hardy, this indicated that Merrick was very much building up to use again. There is no indication from the evidence whether Hardy discussed this with Merrick or Ipsco.

153. On February 11, 2004 Merrick is still carrying resentments. Hardy notes that he has ADHD characteristics and therefore may need rigid rules to keep him on track.

154. Subsequent meetings confirm that Merrick is attending lots of AA and NA meetings and is starting to question why he left Pine Lodge prematurely. He is working on self-acceptance. On June 14, 2004 Merrick sees Hardy but does not tell him he used cocaine on June 8, 2004. He says he is wiped out after work and is overwhelmed and not happy at work. Merrick told Hardy on June 29, 2004 that he had used on last Tuesday and that he had tested positive on a drug screen. There had been a build-up and he could not say no. According to Hardy, there was nothing to indicate that Merrick was running into trouble but that is not unusual. Hardy arranged for Merrick to return to Pine Lodge on August 13, 2004 and was discharged September 10, 2004. Merrick returned to see Hardy on September 15, 2004 and said he got rid of resentments and guilt. On October 14, 2004 Hardy received the Discharge Summary from Pine Lodge that confirmed the following:

> Dale expressed gratitude for treatment and appeared pleased to have completed. … He displayed a strong motivation towards treatment and making changes in his lifestyle. He was an active participant in group sharing. … He was open to self-disclosure. … He was able to see how his chemical addiction had negatively impacted all areas of his life. With his identification to the disease, Dale experienced relief as he progressed through his guilt and remorse. … Dale displayed a willingness and open-mindedness to examine himself, to be more aware of his behaviors, thoughts and feelings. … In taking ownership of his disease, Dale became willing to accept that he would need to commit to a plan to reach his goal of sobriety and a healthy life style. … Dale left treatment after completing all the goals and objectives of his master treatment plan as well as satisfying the criteria for discharge. (Ex. P-19, p. 3)

155. Hardy opined that Merrick did the best he could the first time he attended Pine Lodge, taking into account the state he was in at the time.

156. On cross-examination by Merrick, Hardy agreed that Merrick was confused at times as to why he was meeting with Hardy during counselling sessions. He agreed that there is still a stigma attached to the disease of addictions and that some people still see it as a moral issue.

157. On cross-examination by counsel for Ipsco, Hardy confirmed that he would report to Ipsco if the client was back to using. He explained to Merrick that he had that responsibility. This may explain why Merrick never told Hardy that he had used on June 8, 2004 until after he was caught by the positive drug screen. He knew that if he confided in Hardy this information would be relayed to Ipsco and, according to the CRA, he would be terminated.

158. Hardy described his role as providing after care to the client. He acts as a bridge from in-patient treatment to AA and NA meetings. If the person is doing fine, there is no reason to come in for counselling.

159. Hardy admitted that Merrick was building to a relapse and that this was an opportunity to go to more NA meetings and work the program. At the meeting of December 5, 2003 Hardy believed there was a reasonable probability that Merrick could

refrain from using. He was not aware that Merrick had used cocaine as recently as November 3, 2003, prior to going to Pine Lodge on November 7, 2003. Had he known, he would not have supported a return to work on December 5 because he would have been clean for only one month. Honesty is necessary for recovery, as is taking responsibility for the disease. Carr's notes indicate that on December 1, 2003 Merrick did tell him he had last used cocaine on November 3, 2003 but Carr did not pass this information to Hardy either. (Ex. R-16, p. 3)

160. On cross-examination by counsel for the Union, Hardy opined that signing a CRA is not therapy. He referred to the fact that during the prohibition era in Canada people were asked to sign pledges to abstain from alcohol and that did not work. Hardy recalled that Merrick objected to drug testing but he did follow through. He said Merrick might have objected to signing the CRA but he did not recall that, nor if he was angry with the Union. He agreed that seeking to hide a slip is not accepting responsibility and not telling him of the June 8, 2009 slip on his visit of June 14 is consistent with the hope that he would not be discovered.

E. Jonathan Neumann

161. Jonathan Neumann ("Neumann") was a 6.5-year employee at Ipsco. During that time he got to know Merrick and worked the same shift as him for 10-12 months before Merrick's last day at work on approximately June 10, 2004. He knew that Merrick had signed a CRA. He described the tasks required when working as a caster run-out operator. As partners, Merrick and Neumann would trade off working in the pulpit and operating the crane. The pulpit operator has to watch the slab come down, use the torch to cut the slabs, do paperwork and answer the phone. The crane operator has a hand held control with three levers. He has the crane pick up the slab after it is cut and places it on a rail car flat bed. He cuts metal samples and uses the manual torch to trim the slab on occasion. He also has to sweep the area.

162. There are 144 hours of training to become a certified crane operator but most people master it after two days.

163. Neumann indicated that there is a lot of interaction between the two employees running the pulpit and the crane and therefore he had ample opportunity to observe that Merrick was alert and careful. He described Merrick as a great worker, energetic and full of life. He learnt a lot from Merrick. He was aware that Merrick had difficulties with an employee who worked on the floor above. He was working when Merrick returned to work from his holiday in Banff and Calgary (June 11, 2004). He described Merrick's performance at work as the same as usual. He took three phone calls between 7:00 a.m. and 8:00 a.m. from Deters, Carr and Asante to speak to Merrick. He saw Merrick leave with an envelope and return two hours later to complete his shift. That was the last time he worked with Merrick. I presumed from the evidence that this is when Merrick tested positive for cocaine.

164. Neumann confirmed that it is necessary to be alert in these two positions because hot slabs are coming down and matters can go badly quickly. You cannot sleep on the job.

165. Neumann testified that he is aware that employees can be accommodated in various positions due to physical limitations or substance dependency. One employee was placed to work in the pulpit after back surgery. He was allowed to work eight hours shifts instead of the regular 12 hours. If an employee can only do light duties for physical reasons, he is placed in the pulpit, or operating the cranes or doing janitorial work.

166. Neumann testified about one employee, A, working as the charge crane operator with the furnaces. He was caught on a positive drug screen. The following week he was placed as a brick crew helper for a few weeks. Changing positions to accommodate can lead to the employee receiving a different level of pay or working fewer hours. Eventually, A was returned to the crane operator position.

167. Another employee, E, the locomotive operator had an accident at work and then failed a drug screen. As a result he was accommodated in a janitorial position in the security office for 1.5 years.

168. Neumann testified about the Ipsco safety meetings every two weeks with the plant supervisor. They study incident reports from Canada, USA and Europe to emphasize the need for safety. Neumann described Merrick as being a very safe employee. He personally feels safe working around Merrick and that would not change if Merrick was to return to work.

169. On cross-examination Neumann confirmed that he knew Merrick from saying hello in the change room but his opinions about Merrick are from the last 10-12 months when they worked the same shift. Neumann held no position with the Union. I found Neumann to be an honest, careful and objective witness.

Case for Ipsco

F. Mike Carr

170. Carr started with Ipsco on February 1, 1998. His role evolved over time from Human Resources and Industrial Relations Officer to being the Human Resources Director responsible for all Canadian steel operations in Regina, Calgary and Red Deer. Ipsco is a unionized workplace and the United Steel Workers Union represents all employees in the bargaining unit.

171. When Carr commenced employment at Ipsco there were concerns about use of drugs and alcohol in the workforce and its impact on safety. He engaged in high level discussions with the managers and the Union to develop the Protocol (Alcohol and Drug Screening and Treatment Protocol). According to Carr, Ipsco adopted it unilaterally since the Union wanted to reserve the right to grieve in relation to the Protocol, though the Union was supportive of an alcohol and drug free workplace. (Ex. R-7, R-8) The

Protocol first came into existence November 1, 2000 with its most recent revision being October 19, 2004. According to Carr there were no substantive changes relevant to the incidents regarding Merrick.

172. The purpose of the Protocol was to promote an alcohol and drug free workplace to ensure safety. The Protocol was also for early identification and treatment of employees with dependency issues, again to ensure safety. An outside service provider was used to carry out the testing as defined in the Protocol. Employees could be tested in the following circumstances:

1. following a work related accident or incident;
2. a reasonable suspicion of impairment or use at work;
3. follow-up to a previous positive screening;
4. as part of a conditional reinstatement following completion of a treatment program. (my underlining)

173. Refusing a request for testing leads to a presumption of impairment and discipline. A positive result leads to Ipsco's Medical Department declaring the person unfit for duty. The employee must make full disclosure. If it is prescribed medication that causes impairment, the employee is placed on short-term disability. If it is recreational use of an illicit drug or alcohol and there is an objective finding of impairment at work, the employee is disciplined. If there is no finding of impairment at work, the employee can continue working but in both cases the employee will be subject to further screening for 60 days. If during the 60 days there is a second non impaired positive test there will be an assessment to determine if an addiction exists. If so, the employee is offered treatment through EAP as a voluntary referral with WI benefits. If treatment is declined the employee will continue to be screened and removed from safety sensitive work and placed on alternate work if available. If there is a third positive test and impairment at work, the employee will be terminated.

174. If as a result of a positive test management discovers the employee suffers from an addiction, he will be sent for a mandatory assessment and treatment through EAP.

The employee will be suspended indefinitely and after treatment he will be obliged to sign a CRA to be reinstated on the following conditions:

1. abstain from use of the substance as long as employee of Ipsco;
2. employee will join and actively participate in a 12-step program related to the addiction;
3. follow all recommendations of Treatment Centre;
4. report to Medical Office at Ipsco once per month to discuss progress and report any issues which threaten their abstinence;
5. will be subject to *ad hoc* screening for 24 months following reinstatement.

The Protocol then states as follows:

> A positive result from a subsequent screening following reinstatement will result in the termination of the employee for just cause. (Ex. R-7) (my underlining)

175. Carr testified that the Protocol was applied to Merrick. When there is a positive screen the service provider tells Deters in the Medical Department who informs the employee. She only informs the employer that the employee is unfit for duty and it is the employee who must tell the employer of the reason. She will not say that there has been a positive screen.

176. Carr reviewed the efforts the employer has made over many years to better educate management and employees about the effects of alcohol and drugs on work safety. It gave monthly "Tool Box Talks" about safety to employees. It developed PowerPoint presentations for both supervisor training and for employees regarding the Protocol. (Ex. R-9 and R-10) RCMP officers spoke to employees and their children at the annual picnics (Ex. P-11) regarding drug awareness and risks. Since November 2000, all employees are educated about the Protocol. Regarding safety, "Accident Grams" are circulated to employees to educate them about safety whenever an incident occurs. Ipsco is very safety sensitive.

177. Carr testified about a significantly improved safety record since the Protocol and other programs were instituted. There has been a significant change in the workplace culture regarding alcohol and drugs.

178. The 1997 manual "Work Rules and Regulations" states:

> 7. The possession and/or use of alcohol and/or narcotics on company property, or reporting to work under the influence of alcohol and/or narcotics, is strictly prohibited. (Ex. R-2)

179. Carr testified that Deters is in charge of the EAP at Ipsco and that he plays no role in it. As the director of Human Resources he administers the Collective Agreement, grievances and discipline issues.

180. Carr emphasized the need to always remain alert at Ipsco. The noise, dust, machinery and 12-hour shifts can lead to loss of concentration. Simply allowing your mind to wonder on other things such as holidays or situations at home may lead to safety issues. Employees must be well rested, well fed and remain healthy. The steel industry is unique because of work hazards, large equipment and molten steel. Ipsco has had fatalities and significant injuries to limbs in the past. Ipsco prides itself in being an industry leader regarding safety in the steel and tubular business internationally.

181. Carr testified that Ipsco has developed job safety procedures and Job Safety Analysis ("JSA") documents for each job. Merrick was a caster helper in the Caster Department. The JSA for the caster run out was filed as Ex. P-14. Merrick had to be experienced with all these safety procedures.

182. Carr testified about the use of CRAs at Ipsco since 1985. As well as being used to manage misconduct it is also used for employees with addictions. It allows the employee to be aware of expected behavior and consequences. According to Carr it is a tool for therapeutic recovery. From 2002 to 2005 Ipsco used 24 CRAs of which 14

were for addictions. 50% of the employees breached the CRA and all were terminated as a consequence.

183. Carr spoke to Ipsco's practice of accommodating employees who have phsycial or addiction disabilities. With respect to returning an employee to work after treatment for an addiction the employee must meet the following key criteria:

1. not represent a risk to self or others;
2. abstain from use;
3. avoid substitution of one substance for another;
4. must report fit and alert and carry out assigned duty;
5. must understand the nature of the addiction and have support mechanisms in place.

184. The employee can request a return to his pre-treatment position or to another position. The onus is on the employee to indicate if he is requesting an accommodation. Human Resources and his immediate supervisor will then consider the request for accommodation.

185. When an employee has an addiction, he can access the EAP through Deters and she can arrange for treatment. The employee will be declared unfit for duty and sent for treatment, placed on WI benefits while in active treatment and upon his return, be assessed by the Medical Department who will determine if he is fit to return to duty and whether accommodation is required in conjunction with Human Resources. According to Carr the employer will not know why the person is off work, unless the person chooses to tell the employer. At the point where the person goes for treatment, the only accommodation is permission to be absent from work and WI benefits.

186. Carr testified in detail about his meeting with Merrick regarding substance dependency. On September 22, 2003 at 4:00 p.m. he received a call from Deters saying Merrick wanted to meet him. Merrick had been absent from work without leave at 6:00 a.m. on September 22, 2003. According to Carr this had never happened to Merrick before.

187. The rules provided that Merrick would have to explain his absence to his immediate supervisor, not to Carr. From the evidence it was unclear why Merrick ended up in Carr's office. He said he called Deters to meet her off-site to ensure confidentiality. Yet Deters called Carr for a meeting. Merrick disclosed his dependency to Carr thinking Carr was part of EAP and had to be involved in order to access treatment. Deters said Merrick went to Carr because he had to explain his absence, which is not the case according to the rule. (Ex. R-2, para. 4.a) and c)) All this led to Merrick, several months later, feeling that proper procedure had not been followed, that confidentiality regarding his disability had been violated and this led to him being returned to work under a CRA rather than simply being declared unfit for duty and at the conclusion of treatment returning without a CRA as allowed by the Protocol. This tribunal need not determine the issue whether confidentiality was breached though it appears to be problematic since confidentiality is the cornerstone of an effective EAP. What is important for purposes of this case is that Merrick testified that he feared disclosing anything to Deters because he believed she had violated his confidentiality when she took him to see Carr. This is after he discovered that Carr was not part of the EAP.

188. Merrick disclosed all the details of his substance dependency to Carr in September, 2003. According to Carr's notes Merrick told him he had been charged with possession of cocaine and jailed, unable to phone in about his absence. (Ex. R-15) Carr told Merrick his absence without notice would be held in abeyance pending treatment for his dependency.

189. On November 28, 2003 Merrick called Carr to inform him he was out of Pine Lodge, having left early. Carr offered to meet Merrick December 1, 2003 with Peter Horvath to assess his return to work. Merrick was asked to bring a written explanation of his actions since September 22, 2003.

190. At the December 1, 2003 meeting Merrick provided a typed two-page chronology of events since January 2003. He provided details about the cocaine addiction,

counselling and NA meetings in the spring of 2003, his inability to keep the pusher away from him, the lack of control regarding cocaine use, his blaming and his reaching out to Deters and Carr for help. He wrote of counselling with Hardy, being assaulted by two drug users for having busted the pusher, the delay of admission by one day to attend a funeral and his attendance at Pine Lodge treatment centre as being the hardest thing he had done in his life. Prior to the meeting, Deters had told Carr that Merrick had left Pine Lodge prematurely. During the meeting Carr raised this with Merrick because he was concerned that this may evidence lack of acceptance of the disease and sufficient recovery. Carr was also concerned that Merrick was still unfit to return to work. The meeting did not allay his fears so he scheduled another meeting for December 5, 2003 with Hardy and others. Merrick disclosed that he had difficulty identifying with the Pine Lodge program because it was alcohol focussed and he believed his only addiction was cocaine. He believed Pine Lodge did not work for him but that he now had sufficient tools to stay clean. Merrick also disclosed he had last used cocaine November 3, 2003, four days before admission to Pine Lodge. According to Hardy this fact was not disclosed to him by Carr or Merrick on December 5, 2003, a fact which would have led him to recommend against a return to work at that time. Carr went into considerable detail with Merrick about his addiction and treatment, as evidenced by his four pages of notes from the December 1, 2003 meeting. (Ex. R-15) Carr testified that he has considerable experience with addictions both in personal and professional settings. He questioned Merrick extensively about why he left Pine Lodge early and concluded that the Pine Lodge counsellor had tried to control Merrick's behavior and disruptive influence in treatment. He concluded Merrick's behavior had been an issue and he wrote in his notes:

> House rules violation results in ejection. (Ex. R-15, p. 274)

Carr's conclusion is not supported by the Pine Lodge Discharge Summary of November 25, 2003 where it states:

> Dale choose (sic) to self-discharge … Dale was encouraged to … rebook in the future. (Ex. P-4, p.2)

Since Merrick had been unable to satisfy Carr that he was fit to return to work, a second meeting was set for December 5, 2003 to hear from Hardy.

191. On December 5, 2003 Hardy opined that Merrick had made a lot of progress and even though he left Pine Lodge prematurely he can benefit from NA and AA and continuing counselling with Hardy. As far as risks, Merrick should be fine as long as he follows the treatment program.

192. Carr was reluctant but he accepted Hardy's professional opinion. As a result, Merrick was allowed to return to work after he signed a CRA. Carr drafted the CRA and Merrick requested two changes:

1. remove the word "abhorrent" with respect to his behaviour, since it was a disease and not intentional; and

2. remove reference to the need to abide by all work rule safety violations since that had not been a concern regarding Merrick.

At the time Merrick expressed no other concerns regarding the conditions. He was represented by Kallichuk for the Union. The CRA was signed at the end of the day and Merrick returned to work December 10, 2003 in his previous position with no restrictions regarding safety other than the *ad hoc* drug screening. It is evident from the testimony and notes that there was no discussion regarding slips and relapses.

193. Sometime before June 17, 2004 Carr was told by Deters that Merrick had been deemed unfit for work. Unable to reach Merrick to find out the cause he called Deters again and she divulged he had tested positive on a drug screen, contrary to the confidentiality requirement. As a result, a letter of June 17, 2004 was sent to Merrick suspending him and requesting a meeting. (Ex. P-6)

194. The meeting occurred June 24, 2004 with three Union representatives and Merrick and two employer representatives. Carr had three pages of detailed notes. (Ex. R-15) Merrick was asked for what drug he tested positive. Merrick phoned Deters and then advised it had been for cocaine. He disclosed he had a slip on Tuesday, June 8, 2004 following an NA meeting. He had driven an NA member home after the meeting and the member stopped at a supplier to buy cocaine. Merrick used as well. Responding to numerous questions Merrick responded that he believed he was an alcoholic. According to Carr, when he was asked if he was a drug addict, Merrick did not respond. When asked if he had a relapse, Merrick responded that he had a slip. Carr believed this was just a justification for use and was minimizing the problem. Merrick admitted that he had not disclosed the reuse to his counsellor Hardy or to Deters but that he had disclosed it to his AA sponsor Ilona. Merrick spoke of being codependent and being attracted to users and wanting to help them, to fix them. Merrick disclosed to sometimes attending five meetings per day because of the risk of using. He disclosed that he was depressed and had seen his family physician on June 23rd who had prescribed anti-depressants and scheduled a meeting with a psychiatrist. He also disclosed having a meeting at Alcohol and Drug Services at Regina Qu'Appelle Health Region and wanting to return to Pine Lodge. During the course of the meeting Carr believed Merrick showed no guilt, shame or remorse. He stated to Merrick:

> You have to accept responsibility for the choices you make. Employer is concerned about reliability, dependability and trust. (Ex. R-15, p. 109)
>
> We are very concerned about breach of CRA signed December 5, 2003. Why were you kicked out of Pine Lodge? (Ex. R-15, p. 110)
>
> Dale has a tendency to shield his issues and be evasive … Dale has a major problem. (my underlining)

195. According to Carr, Merrick was still justifying and rationalizing his behaviour and therefore not in recovery.

196. Carr believed that the CRA allowed for slips and relapses. All Merrick had to do was disclose the slip to Deters and ask his counsellor how to proceed. Carr believed

that Merrick was a moving target. At first he was addicted to cocaine and now it was also to alcohol. Carr saw Merrick as having been in treatment for nearly one year and still had no insight in his disability. He was not taking ownership. It is only after he is caught that he now plans further meetings and in-patient treatment. By failing to disclose the slip to Deters, the employer no longer trusts him. Merrick did not act openly; he did not divulge under the CRA what threatened his sobriety. Carr testified that Merrick was to enter treatment at Pine Lodge while Ipsco considers his future. Since he was on suspension, he did not qualify for WI benefits while at Pine Lodge for the second time.

197. Carr testified that Merrick dropped in to see him September 14, 2004 asking to be allowed to return to work since he had successfully completed treatment at Pine Lodge on September 10, 2004. Carr advised him the decision had been made to terminate him since he posed an unacceptable risk. Merrick was to contact the Union to arrange a formal meeting.

198. The meeting occurred September 23, 2004. Merrick was advised “that his dishonesty in explaining his situation and his failure to comply with conditions 2 and 3 of the CRA could not be overlooked. His behaviour had made his continued employment untenable.” (Ex. R-15, p. 36) The employer was no longer willing to accommodate his disability due to his lack of honesty and integrity; the employer could no longer rely on his future conduct in relation to his addiction. Merrick was likely to continue with his addiction to both drugs and alcohol. According to Carr he had not been transparent with Deters, his counsellor and his sponsor regarding the slip of June 8, 2004. Carr disagreed that by allowing Merrick to return to Pine Lodge a second time and delaying the decision on his future, there had been a waiver of the CRA. He also denied telling Merrick that his disease was self-inflicted. He recognized that recovery is a life long journey and the best that could be done is set up a framework for accountability and consequences for behavior.

199. Carr testified about the employer's duty to accommodate in the Collective Agreement (Ex. R-16). Article 14 addresses safety and health, with article 14.14(a) providing for an alternate work program. Article 14.14(b) addresses accommodation of disabled employees:

> The Company recognizes its duty to accommodate employees with disabilities. The Union and the company agree to meet at the request of either party to discuss and review alternate work for employees who become disabled. The Company will make every reasonable effort to provide the employee with suitable employment, provided such employment would not cause undue hardship to the Company. The Union agrees to assist the Company during this process by making recommendations that may help the disabled employee return to the work place.

200. According to Carr there are only six non safety sensitive job classifications at Ipsco. One is the third helper on the brick crew to the furnace. Most of his testimony was about accommodating employees for physical disabilities. Merrick's job in the pulpit on the caster is safety sensitive.

201. Carr testified that the employer did not consider a non safety sensitive accommodation for Merrick in September 2004. He said that some consideration had been given to that in December 2003 but this time the employer concluded that further accommodation was not reasonable. The circumstances had not changed since December 2003 when they concluded that if it had been necessary to place Merrick in a non safety sensitive position the employer could not have accommodated him because those positions were already filled by long service employees near the end of their careers. Further, those non safety sensitive jobs were highly sought after because they were just day shifts, Monday to Friday. No evidence was led regarding the seniority and the other circumstances of the individuals occupying those non safety sensitive jobs.

202. Carr also spoke about some instances of accommodation for positive substance screens. The locomotive operator (A) had been caught on a second screen for marijuana. However, the evidence did not disclose if he was a recreational user or

whether he had an addiction. He was transferred to a janitorial position for two years until retirement. His CRA contained the same conditions as for Merrick.

203. Mr. B worked in the melt shop as a crane operator. After an incident he tested positive for marijuana. He declared to be a recreational user and was placed in a less safety sensitive position working on the brick crew. After 60 days without a further positive screen he was returned to crane duties. While back on crane duties there was a positive screen for cocaine but the employer was satisfied that he had not personally ingested. There was no evidence of addiction. He wrote a letter to Carr committing to being free of alcohol and drugs while at Ipsco. He also signed a CRA. Unfortunately, he died prior to reassuming his position as crane operator.

204. Mr. C was charge crane operator in the melt shop. As a result of an incident he was tested and the screen was positive for drugs. He declared to be a recreational user so placed for 60 days as third helper on the floor and eventually returned to charge crane operator.

205. Employee D was a crane operator in the melt shop. He had a positive drug screen post incident. An assessment revealed an addiction. He was reinstated on a CRA following treatment. After a subsequent positive random drug test, he was terminated for violating the CRA. Two years later Carr gave him a positive reference for a similar job with another employer after being satisfied that he was in recovery.

206. Carr described the employer's different position between an employee who is addicted and the employee who self-declares to be a recreational user. The employer views the recreational user as exercising control and choice and is therefore counselled and subjected to progressive discipline. The addicted employee is viewed as suffering from a disease and unable to exercise free will. As a result, he is sent for treatment and ongoing counselling and is only returned if he is no risk to anyone by way of a CRA.

207. With respect to mitigation, Carr opined that there are numerous jobs available in Saskatchewan for which Merrick is qualified. Carr had knowledge regarding the job market because of the following positions he occupied in the past:

- President, Saskatoon Human Resources Association, 1991-1992
- Co-chair, Education and Training Committee – Canadian Steel
- Member, Sask Labour Market Commission, 2004-2007
- Advisor to Government of Saskatchewan on labour market assessing supply and demand for skilled labour
- Member, Saskatchewan Labour Relations Board

208. From 2004 to the date of the hearing Saskatchewan's job market is extremely buoyant with a substantial labour shortage in steel manufacturing for assemblers, welders, forklift and crane operators.

209. Carr was surprised that Merrick was still unemployed. Carr described Merrick, prior to September 2003 as a very positive employee, highly respected for his knowledge and commitment to safety. He would give him a positive employment reference if he confirmed he was in recovery. Merrick was described as being a very competent, intelligent, quick learner and capable of impressing employers.

210. Carr testified that the employer agreed with the Union to pay Merrick WI benefits for the time he was in treatment the second time at Pine Lodge. The cheque was delivered but Merrick refused payment. Carr testified that the payment of the WI benefits was in answer to the Union's request to settle the outstanding grievance.

G. Cross-examination of Carr

211. Counsel for the SHRC cross-examined Carr regarding the Union's letter of December 10, 2004 (Ex. U-8) to Ipsco stating:

> … the Union accepts the Companies (sic) resolve (sic) to the above grievance to pay Mr. Merrick W.I. owing for the period he was in attendance of treatment.
>
> Upon written confirm (sic) of payment to Mr. Merrick, the Union will consider this grievance resolved "without prejudice/precedent".

Carr acknowledged that was the letter that settled Merrick's grievance for unjust termination.

212. Carr agreed that he concluded Merrick was not engaged in recovery after speaking to him in June 2004. He never contacted Pine Lodge or Hardy in the fall 2004 before deciding to terminate Merrick. Carr did the assessment himself.

213. Carr agreed that he kept no notes of any accommodation discussions that he may have had regarding Merrick in December 2003. He stated that accommodation discussions take place during the morning operations meetings and happen quickly. It is essentially listening to the employee saying he believes he is capable of returning to his previous job, thinking about his prior work experience and skill set and determining if he is a suitable candidate to return to the previous job or to another one. He agreed that in September 2004 he never repeated the accommodation thought process for Merrick because he did not believe it was necessary; Merrick had violated the conditions of the CRA.

214. Carr confirmed that it is the discussion with Merrick at the June 24, 2004 meeting that convinced him to terminate Merrick. He and Asante reached that decision. Meeting Merrick briefly on September 10, 2004 did not change his opinion. According to Carr what led to Merrick's termination was his failure to disclose the re-use in violation of the CRA. The small crack left open until after his second treatment at Pine Lodge quickly closed when Merrick suggested he had a second deal with Ipsco and the first CRA was no longer an issue. Carr interpreted this as not accepting ownership for his disease. Carr admitted that he was not prepared to consult Merrick's counsellor a second time before deciding whether Merrick was now fit to return to work. Carr felt he

was capable of making that assessment without the help of any professionals. He had 25 years of experience making those decisions. Carr's assessment was that Merrick stood a great risk of re-using and being in contravention of any conditions placed on him. Carr never considered accommodation to the point of undue hardship because he considered Merrick had been dishonest in not disclosing his re-use to Hardy and Deters and had therefore violated the CRA. It would happen again in the future so he severed the employment relationship.

215. Carr agreed that Merrick was fast tracked into the mandatory section of the Protocol because he disclosed his cocaine addiction to his employer. Had there not been an element of discipline involved, i.e. failing to report for work, Merrick could have disclosed his addiction to Deters at EAP and simply gone to a voluntary referral to treatment, thus avoiding disclosure to management, the use of a CRA and the attendant risk of a violation. It is the disciplinable misconduct element that may lead to management finding out about the addiction.

216. In Merrick's case, since he had a clean discipline record, failing to report two hours in advance that he would be absent for work would have resulted in a written warning or a one-day suspension. In Merrick's case, discipline was held in abeyance and when he returned to work the issue was never raised again.

217. Carr stated that the CRA signed by Merrick offers latitude for a relapse. When asked to point out the language in the CRA that offers this latitude, Carr replied that "the discretion is in the experience and not in the writing". Further, the evidence did not disclose any case where the employer exercised that latitude to allow an employee to continue to be employed after a relapse. In fact, the evidence was to the contrary. According to Carr, if the CRA specifically stated that a relapse would lead to further treatment rather than termination, it would defeat the purpose of the CRA, which is to impose consequences for non compliance. Carr testified that he never exercised the discretion to continue Merrick's employ because he had been evasive, was minimizing, had not disclosed the re-use and there was no assurance that there would never be a

re-occurrence. Carr believed that even at the hearing Merrick was not very far advanced in his recovery. Carr admitted that Merrick never showed up impaired at the workplace. Regarding the use of the term “abhorrent” in the CRA, Carr indicated that the word he had been looking for was “aberrant” to recognize that Merrick’s behaviour was out of the ordinary. My observation of Carr was that he had a very good command of the English language and he would have known the meaning of the word “abhorrent”. In fact, he used the same word (abhorrent) when he terminated Mr. F. in August 2004 for behaviour related to an addiction. (Ex. P-21)

218. Carr was questioned about how the Protocol (Ex. R-7) functioned. He agreed that a self-declared recreational drug user caught in a positive screen can make a voluntary referral to EAP for treatment and following treatment he returns to work without a CRA. However, an employee who has a positive screen and admits to management to the disease of addiction, he is sent to EAP for a mandatory referral for treatment and following treatment he can only return to work with a CRA. The CRA requires abstaining from use and any violation leads to termination for just cause. He explained the difference in approach in that the fundamental principles of treatment regarding addiction are that recovery never occurs without compliance to treatment.

219. Carr testified that Merrick did not get WI benefits for the second admission to Pine Lodge because he had been suspended for breaching the conditions of the CRA. He was not suspended for his addiction and therefore under the Protocol he did not qualify for benefits to go into treatment. I find this interpretation to be too narrow. It does not take into account that according to Dr. Butt, a relapse or a slip is part of the disease. It fails to take into account that the CRA specifically says that if Merrick does not abstain, he will be terminated. A slip or a relapse is not abstaining. That is how Merrick interpreted the CRA. It is understandable that he did not disclose the slip since the CRA clearly states that if he does not abstain he would be terminated.

220. Carr admitted that he did not exercise any discretion to continue Merrick’s employment because he understood Merrick had not disclosed the re-use to anyone.

He admitted that if Merrick had disclosed it to his sponsor, that factor would have positively influenced him. He also admitted that in his view Merrick characterizing his drug usage on June 8, 2004 as a "slip" was minimizing and therefore showed that he was not taking responsibility for the disease and was not advanced in his recovery. I find that the evidence established that Merrick had disclosed the drug use of June 8, 2004 to his AA sponsor Ilona (Ex. P-14) and that the term "slip" as opposed to "relapse" is accepted terminology in the field of addictions to describe a one-time use as opposed to a return to drug use over a longer period of time; it is not evidence of minimizing or failing to accept responsibility for the addiction.

221. Referred to a letter he wrote to the SHRC, Carr admitted that at Ipsco no one who has admitted to an addiction has ever been reinstated without agreeing to sign a CRA and no one whose employment was continued under a CRA has ever been reinstated following a breach of the condition of the CRA. Though Carr testified the CRA allows for discretion to be exercised when an employee discloses a slip or a relapse, in practice that discretion has never been exercised to allow a person to return to treatment rather than terminating him. Ex. P-14 also confirms that Carr erroneously believed that Merrick was "asked to leave Pine Lodge" the first time. I find that the evidence established the opposite; Merrick self-discharged and had not been involved in any wrongdoing.

222. Carr stated that his concern about drug use by an employee is not just that he may be impaired on the job but also that he may be experiencing withdrawal on the job – declining attention, agitation, frustration and fatigue. He admitted that many things can lead to those situations, such as lack of sleep and declining attention from working 12-hour shifts rather than 8-hour shifts and shift work. Normal events of daily living can also lead to lack of focus at work such as thinking of an upcoming holiday, a date and disagreements with a spouse or child at home. He admitted that it comes down to balancing and managing risk since it is impossible to provide a risk free workforce.

223. Carr was again referred to the Protocol to discuss accommodation. If an employee is screened positive but not impaired at work and states he is just a recreational user, he will be subjected to further *ad hoc* screens for 60 days. If there is a second positive screen, it will trigger an independent assessment by an addictions counsellor. If it is determined the employee should go for treatment but he refuses, he will be returned to work but he will be "removed from any safety sensitive work and placed on alternate work if such work is available". When asked what Ipsco meant by "safety sensitive" work, he stated that because there was a limited amount of non-safety sensitive work, Ipsco had to be somewhat circumspect and place people in jobs where there was less risk associated with the role. He tries to match the employee's work experience and skill set to another job where the risk is lower rather than no risk at all. He recognized that there are risks in any setting and it's a matter of managing risk and safety. Counsel for the SHRC referred Carr to p. 101 of the Collective Agreement ("CA") (Ex. R-16) in conjunction with a document entitled "Regina Steel Mill Job Description and Classification Record". (Ex. P-22) One element of classification for all jobs at Ipsco is entitled "Responsibility for Safety of Others". The higher the number assigned to that element, the higher is the safety requirement. For example, Merrick's job as a Caster Helper had a .8 ranking, a Ladle Controller had a 1.2 ranking, a third helper in the melt shop had a .8 ranking, the Counterman (Stores) had a .4 ranking, and a Tundish Liner had a .4 ranking. Presumably, this means that an employee who cannot be in a highly safety sensitive position should be re-assigned to a job with a lower safety ranking. Carr explained, however, that this safety ranking is not necessarily reflective of all the real safety issues in each job. It is only one factor to consider when re-assigning an employee. Each job has different kinds of risks and Carr admitted that he would have difficulty in qualifying the magnitude of risk in any given job. From Carr's testimony it appeared that Ipsco did not have any other document that contained a comparative analysis of the level of safety sensitivity for each individual job. The Job Safety Analysis ("JSA") documents (Ex. R-14) did not compare the safety aspects of all jobs.

224. With respect to accommodation for a disability, Carr recognized that a medical leave of absence without pay has been used at Ipsco in the past as a form of accommodation.

225. Carr recognized that some jobs require significant protective equipment and that this may be some indication of the safety risks associated with the job. Janitors, counterman (stores) and forklift operators wear less safety equipment.

226. Merrick questioned Carr about an e-mail he sent to Kallichuk for the Union on or about December 3, 2003. Merrick suggested errors in the e-mail. He saw Carr the same day he was released from jail and not four days later (September 19 and not September 23). He was arrested for possession of cocaine and not for trafficking in cocaine. Carr acknowledged that when they met that day Merrick was emotional, candid and appeared to sincerely want help for his addiction.

227. Counsel for the Union cross-examined Carr regarding his notes of events with Merrick (Ex. R-15) and article 14.14 of the CA. Carr indicated that Ipsco and the Union meet whenever an issue of accommodation arises. Sometimes it requires that duties be modified but first it is necessary to know what are the employee's restrictions. Normally, Ipsco will propose an accommodation and, if the Union rejects it, a counterproposal is made. If an agreement is not reached, the Union may file a grievance for failure to accommodate.

228. Carr also acknowledged that the Union did file a grievance regarding Merrick's termination for violating the CRA. Carr stated that he met the Union bi-weekly to discuss issues and Step 3 grievance issues can be raised even at these bi-weekly meetings. Merrick's case was raised by the Union at various dates to address the following:

- Merrick's allegation that Deters breached his confidentiality;

- Merrick's entitlement to WI benefits; and
- Merrick's reinstatement.

Carr confirmed that Ipsco refused the Union's request that Merrick be reinstated.

229. On re-direct Carr referred to the JSA for the Caster area where Merrick worked to highlight the safety sensitive nature of the job. (Ex. R-14) He confirmed that from 2003 to 2005 there were seven CRAs that were breached for failing to disclose a positive screen and in each case the employee was terminated. The employer would have treated Merrick differently had he disclosed his re-use before being caught in a positive screen. By failing to disclose voluntarily Carr stated that he showed he could not be relied upon because of the very nature of the addiction.

H. Jane Deters

230. Deters was a certified Occupational Health Nurse at Ipsco and licenced with the Saskatchewan Registered Nurses Association. In 1996 she became the full-time manager of the Medical Department.

231. Deters testified about receiving a call from Merrick in September 2003. She acknowledged that, after hearing Merrick testify about the meeting at Smitty's Restaurant, it triggered her memory of the event. She testified about recommending that Merrick speak to Carr, his supervisor and the Union regarding having failed to phone in two hours in advance of his absence from work. She phoned Carr to arrange the meeting. She attended as support for Merrick. Since the tribunal has no jurisdiction over Merrick's allegation that Deters breached his confidentiality regarding his disability by taking him to Carr, it is not necessary to go into great detail about what was said and to whom. I do find, however, that his belief that his confidentiality had been breached affected his willingness to disclose a slip to Deters.

232. After the meeting, Deters referred Merrick to Hardy for an assessment and was advised he needed treatment at Pine Lodge. She arranged for his WI benefits.

233. On reviewing her file, she noted that Merrick phoned her November 27, 2003 saying he left Pine Lodge one week early and wanted to return to work. She recommended he call Carr about it. She attended at the meeting on December 5, 2003 but was not present when the CRA was discussed.

234. According to her recollection, Merrick never reported monthly to her at all except for casual meetings. She arranged for two random screens on January 28, 2004 and June 11, 2004. Merrick had a positive screen so when she was unable to reach him, she notified Carr at first that Merrick was medically unfit and when Carr phoned to inquire why, she told him he had a positive screen. She testified that, if Merrick had told her he was having difficulty staying off cocaine, she would have declared him medically unfit and removed him from work.

235. Deters acknowledged that, as soon as Merrick disclosed his addiction to Carr, everything changed; he was then subject to a mandatory referral for treatment and a return on a CRA. She does not get involved in accommodation for return to work.

236. Deters generally had a poor recollection of the details of her involvement in the case. She acknowledged having no training in the disability of substance abuse or any knowledge of whether relapse is part of the disease. She acknowledged that Merrick did tell her at Smitty's Restaurant that he wanted to keep his drug use confidential from Ipsco and the Union but she maintains that Merrick chose to divulge his drug use to Carr and that she played no role in that.

I. Peter Horvath

237. At the relevant time, Peter Horvath ("Horvath") was supervisor of primary operations at Ipsco. Merrick reported to his immediate shift supervisor who reported to

the area manager who in turn reported to Horvath. He explained the disruption when an employee fails to report for work.

238. Horvath attended the meeting of December 1, 2003 with Carr and Merrick. He was concerned that Merrick had not completed the entire 28-day program and that he did not have enough recovery to prevent further use. As a result, he requested further information before deciding if Merrick could return. He participated in the December 5, 2003 meeting and signed the CRA for Ipsco. (Ex. P-5) He heard from Hardy and from Merrick who was eager to return to work, and was satisfied that he would not re-use. He testified that a CRA is used for people with addictions. It is used to ensure there is no re-use. He recognized that Merrick was a valued employee.

239. On cross-examination he acknowledged that there was no discussion on December 5, 2003 of returning Merrick to any job other than his caster operator position. In his experience as supervisor, all employees on CRAs who breached the conditions were terminated.

J. Brian Stettner

240. Brian Stettner ("Stettner") testified about the process used to make metal and the safety aspects involved. He took the tribunal and the parties for an on site viewing and also did a power point presentation as part of his testimony.

241. After being a 31-year Ipsco employee, Stettner returned as a consultant to conduct training in basic procedures for all aspects of steelmaking. From the 1970s to 2008 he saw a paradigm shift in the way steel is made and the processes put in place to ensure safety. He testified going from a time where there were no established and written practices and procedures to today where every aspect of the process is mapped out in writing, safety procedures are developed and employees are trained continuously and dressed appropriately. He testified about the past where some regular employees

used alcohol daily at work to the present where Ipsco has moved to zero tolerance. All this attention to safety greatly improved Ipsco's safety record.

242. Stettner described how safety is now part of the indoctrination of each employee; its Ipsco's priority. Ipsco falls under the category of heaving industry and uses a "Hot Metal" process which sets it apart from all other industries in Saskatchewan. Scrap metal is melted at temperatures exceeding 3000 degrees Fº. The containment and controlled flow of molten metal are two safety priorities Ipsco employees must achieve. Once containment is lost with liquid metal, there is no control as to where it will go. Waterlines, oxygen lines and natural gas lines can all be melted or damaged creating serious hazards to employees and equipment. Each part of the steelmaking process – from the scrap yard to the pit area, to the Ladle Metallurgical Furnace ("LMF") to the caster run out (where Merrick worked), to the rolling mill and eventual shipping – has its own unique safety concerns. Other than the risk of molten metal, there is a lot of heavy equipment moving about at all times.

243. In the caster run out area where Merrick worked, slabs are cut to specified length, tagged, loaded and transported to the slab yard areas. A 50-ton remote controlled crane travels through the area. A shuttle car that runs on rails is used to transport the slabs. Stettner described the following as the hazards associated in this area:

- caster breakout
- ladle burn through
- dropped slabs
- extreme burns

The entire steel making process requires strict adherence to developed practices and procedures.

244. Stettner described how employees have to remain in their assigned work area and within designated walking paths for safety purposes.

245. On cross-examination Stettner recognized that though steel making is inherently dangerous, there are some positions that are more dangerous than others. He acknowledged that some positions described in the Job Description and Classification Record (Ex. P-22) have lower rankings regarding responsibility for safety and the hazard level. A lot of the changes have resulted from a change in attitude. There are regularly scheduled safety meetings with all employees. He acknowledged that he remembers Merrick attending a lot of the safety meetings and that Merrick would have had ample time and opportunity to go speak to Deters at the Medical Department during "turn arounds" since it is in close proximity to the caster run out area. Merrick had taken a lot of the safety courses, first aid and first responder and participated in the STOP safety program as an auditor. All of these courses would have made Merrick very knowledgeable and aware about safety issues.

K. Lyell Armitage

246. Lyell Armitage ("Armitage") was qualified to give expert opinion evidence regarding the process that a person with an addiction must follow to create optimum conditions for recovery. He was also qualified to provide opinion evidence as to the criteria an employer should apply to determine whether an employee will have a favourable prognosis for a return to work free from the usage and effects of drugs and alcohol. (Ex. R-17) In the early 1970s, Armitage was employed with McMillan Bloedel Ltd. As a person suffering from the disease of alcoholism, he went through treatment and eventually headed up the Employee Assistance Program from 1976 to 1979. He then was a counsellor at Par Consulting in BC from 1979 to 1986. He became regional director of the Saskatchewan Alcohol and Drug Abuse Commission from 1986 to 1995 and then Director of Alcohol and Drug Services at the Regina Health District from 1995 to 2002. Since that time he has a private consulting practice training organizations on EAP and doing family interventions. He has extensive experience assessing individuals

with addictions. His only formal education in counselling is through the William Glasser Institute where in 1994 he became a certified reality therapist while working full-time as well. He acknowledges that for many years he was primarily involved in administration rather than direct counselling.

247. Armitage testified that there are no assessment tools developed to measure a person's prognosis for recovery from an addiction. However, he follows Terance Gorski's "Developmental Model of Recovery". In his opinion a person's prognosis for recovery can be determined by observing his behaviours and interactions with his counsellor.

248. Armitage heard Hardy and Butt testify. He did not disagree with any of their testimony, except for Butt's statement that 80% of people recover without any formal treatment. He opined that a counsellor's task is to help the person break through the denial that prevents him from seeing the reality of his disease. Denial is a symptom of the addiction. It relates to conduct. The person denies, minimizes and rationalizes all of his behaviours.

249. The only way to recovery is to be rigorously honest with yourself and others. He indicated it takes time and a lot of work to develop that honesty.

250. To remain sober a person must make major changes in his life. Mere sobriety does not equate to recovery.

251. According to Armitage, the optimum conditions for a successful recovery can be summarized as follows:

- honesty;
- make major changes in your life;
- accept personal responsibility and stop focussing on the outside world; and

- work well with other people.

According to Armitage attending treatment for 20 to 30 days is not recovery. It is merely the start of a long process that could take 9 to 11 years before the person returns to a pre-addiction stage.

252. To determine an employee's prognosis for a successful return to work, an employer should observe the following:

> Honesty: Document what the employee says he will do and document his behaviour to determine if he has followed through.
>
> Behaviour: Document the employee's performance to determine if the employee's performance has changed since going into treatment. Is he coming to work on time? Is he doing his job?
>
> Expectations: Document the expected behaviours and observe if the employee meets the expectations. Is he abiding by his CRA? Does he have a support system?

253. In cross-examination Armitage recognized that many counsellors refuse to predict prognosis for recovery since it is not a science. Further, honesty is but one aspect to assist in making a prediction. He recognized that it was important to do an assessment on an individualized basis.

254. On the subject of relapse, he testified that it is impossible to experience a relapse unless a person was already in some form of recovery. A person has to be past denial to experience a relapse. Once a person is in the action stage, it can be said he is in recovery.

255. On cross-examination by Merrick, Armitage reiterated that recovery is a life long process. Addiction is an illness that can be arrested but not cured. A relapse is not the end of the world; it depends how the person reacts. It can be a very positive occurrence if it helps the person get into real recovery – break through denial, analyze the circumstances that led to reuse, develop organized behaviours to not repeat the behaviour or thinking that led to the reuse. According to Armitage some people are recovery prone while others will take more time. Further, it is impossible to predict how many relapses a person can suffer. The key, however, is if the person is honest about the relapse. The prognosis for recovery is slim if he is secretive about a relapse.

256. I conclude that there is very little difference between the evidence of Butt and Armitage. Both recognize that reuse and relapse are part of the disease of addiction. The key is that the person uses the occurrence to progress further along in recovery. With respect to honesty, both recognize that it is a key component to real recovery. The evidence established that Merrick was honest about his reuse with his sponsor Ilona. However, he did not divulge it to others whom he believed were connected with his employer. I find that he did not tell them because he believed he would be fired for the reuse; a slip/relapse is contrary to abstaining and therefore was a violation of the condition in the CRA. The paradox is that the conditions in the CRA hindered Merrick rather than helped him along with his recovery. I will address that more completely when I assess the totality of the evidence.

Case for the Union

L. Bill Edwards

257. The Union called Bill Edwards (“Edwards”), president of Local 5890 since 2006. The Union represents all employees in production, maintenance and OT departments in both steel and pipe divisions. Everyone is covered by the Collective Agreement (“CA”) filed as Ex. R-16. Edwards has occupied virtually every position possible in the Union, commencing since 1985. He was well versed in Union matters.

258. When Merrick did not show for work on September 22, 2003, Edwards was his shop steward; he has known Merrick for over 20 years.

259. Edwards has a lot of experience investigating and advancing grievances. He knows the importance of obtaining proper evidence and having necessary information from the member.

260. Edwards has extensive education in union activities from arbitration to the duty to accommodate, to evaluation of the courses that are being taught. He spent one year on accommodation issues at Ipsco. He did some work on addictions accommodation. Working as a crane operator and ladle controller hooking and unhooking while the steel empties from the ladle into the tundish, he knows the importance of safety and being alert and being able to trust the people working around you. Everyone has the right to a safe workplace.

261. Edwards testified that the Union sought and obtained many modifications to the CRAs over the years, such as shortening the length of the conditions from three years to two years. The name of the agreements changed from Last Chance Agreements to Conditional Reinstatement Agreement since the purpose of the CRA is to encourage the member to comply. CRAs are used in a multitude of situations – safety violations, absenteeism, work performance and addiction. The Union took the position that the issue of whether the conditions of the CRA had been breached could be grieved. Further, a CRA could not remove a member's human rights and right to fair representation by the Union.

262. Edwards opined that Merrick could have reported "I'm falling into my old ways." and by divulging it he would not have been violating the condition of abstinence but rather was using the CRA the way it was meant to work.

263. When there is a violation of a condition in a CRA for substance abuse, it is treated differently. If you did not disclose the violation but rather were caught in a

positive screen and used the CRA to hide, the person will be treated differently; the CRA will be enforced. The Union will still investigate the violation but if there is not information to warrant going to war, the Union will not pursue it.

264. Edwards' understanding of the WI benefits is that the WI is paid while the member is in his first active treatment program and thereafter the member does not qualify for WI. (I disagree that the Protocol (Ex. R-7) limits WI to only the first time active treatment is used.) Merrick signed a CRA when he returned to work in December 2003. Merrick approached him as his shop steward numerous times questioning portions of the CRA since he was not happy with clauses of the CRA.

265. Edwards referred him to the chief shop steward and executive member David Grant. Edwards concluded Merrick was suffering from "buyer's remorse". Edwards was in the Union office in September 2004 when Merrick phoned David Grant ("Grant") after having tested positive. Grant was asking Merrick for information and he got frustrated and told Merrick to "fuck off" and hung up on him. Edwards convinced Grant to phone Merrick back and handle the matter in a more positive way.

266. Edwards attended a union meeting in November 2004 where the grievance chair report recommended that Merrick's grievance not go forward. Edwards spoke of the CA wording and requested that the executive do some things. Edwards inquired if a proper investigation had been carried out and if proper questions were asked. The reply he received was that the Union did not get the information it required from Merrick to move the grievance forward. Edwards suggested that Merrick be invited to the January 2005 meeting to provide more information about his disability directly to the membership. He understood that this occurred but he could not testify about the proceedings since he missed the January and February 2005 meetings.

267. On cross-examination Edwards testified he worked with Merrick and he never felt unsafe working with him; he was unaware that he was a drug user.

268. In the last five years Edwards dealt with four or five CRAs. CRAs are rarely the first response to a discipline issue. The conduct has to be very serious such as theft, a major safety breach or an addiction issue. Edwards could not think of one instance where a CRA was the first response to a discipline issue. The Union would advise its member against signing a CRA if it believed Ipsco did not have a strong case. On occasions, rather than a CRA, Edwards has suggested a form of accommodation such as a transfer to a less safety sensitive position for a person being disciplined for a sleep disorder.

269. Edwards stated that a person's level of seniority plays a role in the type of accommodation he can get. Merrick would have needed sufficient seniority before being eligible for accommodation in a position ahead of him on the line of seniority. Edwards personally received an accommodation when he had a neck vertebra operation. He was accommodated into a position lower down the line of seniority. In my opinion lack of seniority should not be a barrier to an accommodation; it is only one factor to consider. In Merrick's case, seniority did not play a factor so I need not comment further.

270. Edwards testified about individuals who were accommodated for physical disabilities but not directly for the disability of addictions. There was no evidence from Edwards about discussions the Union had to accommodate Merrick in December 2003 or in September 2004.

271. On cross-examination by Merrick, Edwards acknowledged being accommodated back to work in the caster run out area while on 140 mg per day of pain killers, subsequent to the neck operation. He would stay away from hot metal. At times he was also the extra person on the run out. Edwards pointed out the importance of the member having the CRA fully explained to him before signing.

272. Edwards reiterated that in his view a re-use of a drug after signing a CRA is not a violation of the conditions. He said that if an employee came to him about a "slip", he

would take him to the employer to report the slip. He would be returned to treatment and he would not be terminated. But if the person hides the slip and is then caught, it is different because he knows the rules; there was an avenue to get help but he never used it.

273. Edwards does not know if the CRA was explained so that Merrick would have understood that a re-use was not a violation and that the Union would have helped him to simply be removed from work for further treatment rather than be terminated.

M. David Grant

274. Grant was elected vice president of the Local twice but when the president, Kallichuk, took the position of staff representative at the international level, Grant assumed the role of president off and on from 2000 to May 2006. Since Kallichuk had left just prior to June 24, 2004 it was Grant who attended the June 24, 2004 meeting where Merrick was suspended for a positive drug screen.

275. Grant testified that he had taken very few courses regarding Union matters but he would teach the shop steward course. Further, he had very little training in grievance investigation.

276. When Merrick signed the CRA on December 5, 2003, Grant was vice president but since he worked in the pipe division he had little involvement with what was happening in the steel division and therefore was unaware of the CRA.

277. Grant did not recall Merrick raising issues about the CRA before producing a positive screen in June 2004. Prior to the June 24th meeting he had no idea what was to take place; it is Kallichuk who told him to attend. Grant took detailed notes of the 30-minute meeting (Ex. P-14). After the meeting Grant reassured Merrick saying that this is not the end of the road and that he was not in serious trouble based on the information provided in the meeting.

278. Grant testified that Merrick contacted him many times after the suspension. Grant believed that Merrick had a very positive outlook and a good handle on what was needed to progress in his recovery. Grant's notes indicate that when asked what he did about the slip he replied:

> D.M. "I went to AA and my doctor. Told him I was depressed… I've filled my prescription and I'm taking my medication. I live alone. I've been going to meetings since my relaps." [sic]
> M.C. "Did you advise Jane you slipped"
> D.M. "No."
> M.C. "Ken"
> D.M. "No. My sponsor was advised (Ilona)."
> …
> M.C. "Have you told your doctor of your addiction"
> D.M. "Yes."

Grant also attended the September 23, 2004 meeting where Merrick was terminated. He notes that it was because Merrick did not disclose the relapse that he was terminated.

279. After the termination Merrick delivered an 11-page document (Ex. U-2) written September 29, 2003 to Grant and Jeff Bruch, the grievance chair, at the Union office, outlining his addiction and seeking the Union's help to grieve the termination. Merrick explained that he had discovered that slips and relapses are part of the disease. Grant put the document on Merrick's Union file and the following day he signed a grievance for Merrick's unjust termination. (Ex. U-3) After September 30, 2004 Grant asked Merrick for a counsellor's report confirming he had completed treatment, that the problem had been addressed and that he could now move forward. According to Grant the Union never received that information and it is for that reason that on November 15, 2004 it decided not to proceed with the grievance. Then on November 26, 2004 the Union settled the grievance by accepting four weeks of WI benefits for Merrick. Grant

confirmed that even at the Labour Relations Board hearing he told Merrick “give me that report and we’ll forward it to arbitration”. Grant received from Merrick in October 2004 two Standard Life Disability Claim Forms. The first one October 6, 2004 (Ex. U-5) was completed by Merrick to disclose his disability of substance abuse and the contact information for Dr. Michel and Hardy who were treating him. The second one October 13, 2004 (Ex. U-6) was completed by Dr. Michel. It diagnosed Merrick as suffering from drug and alcohol addiction for which he was being treated since July 9, 2003. It disclosed that Merrick had attended the Pine Lodge treatment facility and was totally disabled from August 13th to September 10, 2004.

280. Rather than read these documents and do the requisite follow-up, Grant simply put them in the file saying they contained medical information and therefore he treated it as private information: “It is like going into a woman’s purse; its hallowed ground; I don’t do that.” Grant misunderstood his role. In order to assist Merrick he should have read the medical evidence Merrick was producing and get further information if he believed it was necessary. Grant testified about speaking to Merrick on the phone and requesting something tangible about his inpatient treatment. He admitted to losing his temper and telling Merrick to fuck off and hanging up. When Merrick phoned back, he apologized but insists he did not get what he wanted from Merrick.

281. By then, Merrick’s file would also have had signed consents dated October 6, 2008 authorizing the Union to obtain any information it needed about Merrick’s disability from Deters. The Union secretary had phoned him to sign the consents; Merrick had cooperated.

282. According to Grant, by the time the grievance committee had to decide what to do with Merrick’s grievance, it still did not have any report regarding Merrick’s prognosis for recovery or rehabilitation. There was evidence that Merrick had opted out of completing treatment the first time.

283. Grant testified about the grievance committee meeting of November 10, 2004. As acting president he sat on the executive who received the report from the grievance chair in the afternoon. The grievance report was then presented to the membership meeting on November 15, 2004 when it was adopted. The report read as follows:

> In regards to Grievance Number 02/06-0174, Dale Merrick termination, the Grievance Committee has taken into consideration many factors in deciding the Recommendation of this Grievance. Based on the review of the file and our records the grievor failed to follow the Drug, Alcohol Testing Protocol (sic) and also failed to live up to the Last Chance Agreement (sic) with the Company. These two factors alone would be enough for an arbitrator to uphold the discipline. The Grievance Committee, therefore, in the best interest of the Local Union membership, recommends that we do not forward this grievance to arbitration." (underlining mine) (Ex. U-7)

284. By November 10, 2004, six weeks after filing the grievance, the Union had already ended its investigation and decided to not move it forward. (Ex. U-15) I find that the two stated reasons for not moving forward with the grievance contradict the testimony given by the Union at the hearing. At the hearing the Union maintained it decided not to move forward because Merrick had failed to produce evidence regarding his disability, treatment and prognosis and that he had not cooperated with the Union's investigation.

285. At the monthly membership meeting of November 15, 2008 two members asked for a reconsideration of the decision. (Ex. U-15) Merrick was to be asked for a report confirming he has completed the treatment program. As a result a letter dated January 11, 2005 was sent to Merrick by Grant inviting him to explain "your perspective on the grievance dealing with your termination" at the meeting of January 17, 2005. The letter also said:

> I am instructed by our staff representative that a motion to reconsider the earlier motion … may not be in order. … Following your presentation you will be required to leave the meeting. (Ex. U-9)

286. However, Grant testified that in the meantime he again met Carr on November 26, 2004 and reached a settlement. He sent Carr a letter dated December 10, 2004 confirming that upon written confirmation of payment to Merrick of the WI owing for the period he was in treatment the Union would consider the grievance resolved. (Ex. U-8) On the same day Ipsco accepted to make the payment.

287. At the hearing Grant testified that there is no linkage between the decision to withdraw the grievance and the payment of WI to Merrick while he was in treatment. That testimony contradicts the contents of his letter to Carr (Ex. U-8) and Carr's understanding as evidenced by his e-mail to Grant on January 5, 2005 where he arranges for the payment of WI to Merrick and says: "This payment is in full satisfaction of a grievance filed by and on behalf of Dale Merrick alleging unjust dismissal." (Ex. U-17)

288. In light of the previous evidence it is surprising that the Union still invites Merrick to present his case at its membership meeting of January 17, 2005. How can he convince the Union to proceed with his grievance when it has already reached a settlement to withdraw the grievance? Despite this, Grant testified about the outcome of the meeting. He filed the notes of the meeting. (Ex. U-11) Merrick described his addiction and the fact he never completed treatment the first time. He suffered a relapse and failed a drug test and went back into treatment and then was terminated. After Merrick left the meeting, Bruch read the conditions in Merrick's CRA. He also told the membership that an arbitrator will very unlikely overturn a Last Chance Agreement and that Merrick had not been up front with his relapse.

289. These comments are telling since they disclose the reasons why the Union did not proceed to arbitration. It had little to do with Merrick failing to provide the necessary reports regarding completion of treatment or lack of cooperation.

290. At the end of the meeting members wanted further information from an alcohol expert about whether relapses are normal. If so, then the Union may want to move the

case to arbitration. Unfortunately, the evidence discloses that Roger Ives who was contacted by Grant could not come to speak because he has counselled Merrick personally. Grant never followed up with any other alcohol expert. I note that the grievance chair Jeff Bruch was not called to testify about the reasons he recommended against moving the arbitration forward.

291. On cross-examination Grant confirmed that all employees who had signed a CRA due to an addiction and who had subsequently re-used were all terminated. The Union grieved all of them and moved them all to the third stage but none went to arbitration. When questioned about his lack of knowledge of the case before going into the meeting of June 24, 2004, Grant confirmed that he was inexperienced and had been asked to attend by Kallichuk. In retrospect, he realizes that he could have asked for an adjournment in order to be better prepared. He confirmed that his notes of the meeting showed that Merrick had disclosed the slip to his sponsor Ilona and to his AA home group. (Ex. P-12) Grant confirmed that he felt encouraged by Merrick's upbeat demeanour for treatment. Upon being referred to Carr's letter of June 17, 2004, he acknowledged that the Union was copied and would have known the purpose of the June 24 meeting. He confirmed that there were tense moments between him and Merrick. They would "lock horns" because Merrick insisted he was entitled to WI benefit but proof was required that he was under a doctor's care. He admitted to losing patience and not being able to communicate effectively with Merrick. He was upset that Merrick would meet with Ipsco without Union representation. He acknowledged that the staff representative of the Union confused Merrick with another employee who had been terminated. He recalled Merrick coming to the Union office on September 29, 2003 to give him the 11-page document describing his disability. Grant remembered Merrick wearing "a long black trench coat … you had chains dangling all over and then you left." He acknowledged that the information in the document helped him at the third stage hearing.

292. At the meeting of September 23, 2004 when Merrick was terminated, he acknowledged he (Grant) and Bruch on behalf of the Union said nothing. (Ex. P-15)

Further, the notes of the third stage grievance meeting held November 10, 2004 between himself and Ipsco were very sketchy and he could not recall what all the notes meant. (Ex. U-13) Grant stated that he does not recall calling Merrick after the November 10th grievance committee meeting to tell him of the decision. He acknowledged that he was frustrated with Merrick and when that occurs he does not think rationally.

N. Jeff Kallichuk

293. Kallichuk was elected president of the Union local in 2000 and 2003 but was on two leaves of absence for the International Union. He was away for 18 months commencing October 14, 2000 and left again June 21, 2004 and has not returned since. He left three days before Merrick was suspended for a positive screen. It is for that reason that Grant attended the meeting without knowing the history of Merrick's case.

294. Kallichuk had taken Union training regarding the duty to accommodate. He considered a CRA as an industrial relations tool to resolve tough issues, addictions primarily. The Union sees it as a win-win situation to preserve a member's job rather than be terminated and having to bear the cost and risk of an arbitration. He believes that the CRA template was developed with the Union's legal assistance.

295. Kallichuk was asked to review the CRA Merrick signed December 5, 2003. (Ex. P-5) In his opinion, the CRA does not violate human rights as long as paragraph 3 has a provision for a relapse. When a relapse occurs there has to be a mechanism to contact the employer to have the employee deemed unfit for work and put on medical leave. Any discipline from a failure would be dealt with at a later meeting. Kallichuk then read paragraph 3 to find the clause that provides for reporting a relapse. It took him a long time to comment. He became uneasy and uncomfortable and after awhile he said regarding paragraph 3 of Merrick's CRA: "On this one, this is where it would be." I was left with the impression that he realized there is no reference to what occurs when there is a relapse.

296. Kallichuk testified about his involvement in having Merrick sign the CRA on December 5, 2003. He had received an e-mail two days earlier from Carr giving him his version of the history of the file. Kallichuk never met Merrick before the meeting and heard for the first time that Merrick had not completed the 28 days at Pine Lodge. He reviewed the CRA prepared by Carr and passed on two concerns Merrick raised. After they were addressed, the CRA was signed at the end of the day. When asked what was Merrick's understanding of the CRA, he replied, "He just wanted to get to work." He acknowledged that there was no dialogue about returning to work without a CRA or any other less stringent form of accommodation.

297. When asked to relate his previous experience investigating addictions issues, he replied that it is a touchy matter. There are medical issues that involve information between medical professionals and the employee. The Union, therefore, does not normally ask for copies of medical reports and tests. I conclude that the Union misunderstood its role. It had a right to receive those reports in order to be able to advocate for its member.

298. Kallichuk testified that the Union cannot prevent Ipsco from resorting to CRAs. When used to address addictions, he opined that it gives the employer parameters to monitor through random tests. For the employee it helps keep him clean and therefore it is a useful tool.

299. In cross-examination he confirmed that the Protocol (Ex. R-7) is a unilateral Ipsco document through which a CRA is used for mandatory referrals. He remembered reading the CRA with Merrick but he could not remember the details of any advice he may have given him. He reviewed the CRA as a better alternative to being fired. However, from the evidence I conclude that Merrick was not at risk of being fired.

O. Michael Park

300. Michael Park ("Park") is the staff/service representative for the local union. He has a history since 1978 of working in the coal mining and steel making industries. For some years he was a full-time president of the Union before being hired full-time in 1994 as the staff service representative. In that capacity he helps the local union negotiate a collective agreement, administer the grievances, provide education to members, coordinate organizing drives and represent the Union at political events. Park has participated in at least 100 grievances that proceeded to arbitration. He is educated in the duty to accommodate and familiar with arbitral jurisprudence and leading cases on the subject. He views seniority and departmental protection as the biggest barriers to accommodate. At Ipsco there are many places to transfer an employee who requires accommodation. The wider the circle becomes the more difficult it becomes to manage accommodation because it has an impact on other employees' rights.

301. Park testified that he has a lot of experience with accommodation at Ipsco. He presented a flow chart on how accommodation works. (Ex. U-18) The individual identifies a need for accommodation to the Union and the employer. Medical input is sought if necessary. The employer proposes an accommodation. If it is not acceptable to the individual or the Union, the Union submits a counterproposal. If an agreement is not achieved, the Union may file a grievance after looking at the wide picture and not just the individual.

302. With respect to Merrick's case, he views the CRA as Ipsco's proposed accommodation and not as any form of discipline. Since Merrick was insisting to sign the CRA, Park stated that the Union allowed it since the Union is not there to babysit its member. Park views the CRA as an industrial relations tool to monitor compliance in circumstances such as safety, productivity, anger management, attendance and addictions. A CRA short circuits the cost and risk of arbitration when the Union knows that conditions need to be imposed in any event. A CRA helps focus the employee on

the importance of his conduct. Park recognizes that a CRA has to comply with the *Code*.

303. Park opined that, if Merrick had refused to sign the CRA, Ipsco could have held him as out of service and then Merrick would have had to prove that he was fit to return to work without the need for conditions.

304. Park filed the case of *Len Fehr and the Union* v. *Ipsco* decided November 26, 2003 by arbitrator Semenchuck to show that the Union had already in the past grieved a termination for a violation of a CRA. In that case, Fehr had signed a CRA due to numerous safety violations. He breached the CRA by using a torch without wearing a face shield as obligated to do so for safety reasons. In that case, the termination was upheld. The Union had agreed that the shield was required for safety purposes. The arbitrator refused to circumvent the CRA where the parties had agreed that any violation would lead to termination and limited the power of the arbitrator to simply deciding if a breach had occurred and not whether a termination was appropriate. The arbitrator followed well established jurisprudence:

> 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. … 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". … It is also settled case law that the parties to a last chance agreement can legitimately oust the arbitrator's jurisdiction to modify the prescribed penalty.

The arbitrator upheld the CRA and the termination. (Ex. U-19)

305. I point out, however, that all parties agree that a CRA cannot contract out of the *Code*. Further, the fact the Union has in the past gone to arbitration on the violation of a CRA for safety violations is not helpful in the case of using a CRA for an addiction. Further, it cannot be ignored that the Union did agree with the use of a CRA for Merrick

and is a signator to the CRA. Without that signature there would have been no CRA. In the Fehr case the CRA was a last chance after having exhausted all other forms of progressive discipline to address numerous ongoing violations. In Merrick's case the CRA was used as a first response to an admission of an addiction for an employee with an excellent work record.

306. Park testified about the role he played in investigating the grievance and in formulating the decision not to proceed to arbitration. He acknowledged that he commenced working on the grievance on October 1, 2004 after Merrick dropped off the 11-page document he prepared to allow the Union to proceed with the grievance. (Ex. U-2) In fact, Park investigated two grievances simultaneously, Merrick's and Mr. F's. He met them together to review their documents. Both were on a CRA for addictions and had been terminated for a positive drug screen. Neither had divulged the slip before the positive screen.

307. Park met Carr to discuss the allegation that Deters had violated confidentiality by taking Merrick to Carr. Park concluded that Deters did not violate confidentiality. Park also investigated why both had been placed on a CRA. In Merrick's case he had volunteered that he had an addiction when he explained to Carr why he had missed calling two hours in advance to say he would be absent from work. Merrick believed he should have been sent on a voluntary assessment under the Protocol. This would have allowed him to come back without a CRA.

308. Park testified that he concluded Carr had the obligation, according to the Protocol, to only allow him back with a CRA. He concluded Ipsco had done nothing wrong. It was evident that Park did not investigate whether the Protocol itself was a discriminatory standard.

309. With respect to Merrick's position that the CRA was discriminatory because it did not allow for a slip or a relapse, Park concluded that the proper interpretation to give to paragraph 3 of the CRA was that it does allow for a slip/relapse. In his opinion,

abstinence includes a slip. The only requirement is that the employee disclose the slip and then he will not be terminated. In Park's opinion the word abstinence is a grey area; a person who is abstaining will have slips/relapses. It is a threat to his overall abstinence and the only requirement is to disclose it.

310. Park concluded that if an employee does not report it and is then caught in a positive screen it is an attempted cover up and it is dishonest. Park said the individuals who self report do get shipped off for further treatment … "paragraph 3 of the CRA says it." Park concluded that there was nothing wrong with the CRA that Merrick signed; what was wrong was Merrick's failure to report and his dishonesty about it. The Union and Ipsco treated Merrick the same as other employees in similar situations.

311. Park recalls meeting Merrick twice in person and once on the phone to conduct the investigation between October 4 and November 8, 2004. He also testified meeting Mr. F and telling him that abstinence allows for slips/relapses. He said Mr. F told him he did not know it was to be interpreted in that fashion and that was not how Ipsco interpreted it. Park filed a copy of his investigation notes. (Ex. U-20) They were sparse and nearly illegible. I note one entry that said:

> LCA
> ? Abstinence – said include individuals who slip – He has to own up to failure – if caught by test then individuals. … (Ex. U-20, p. 4)

I could also decipher some of the notes of Park's meeting with Merrick on November 8, 2004 where he reviewed the circumstances of his investigation. At the hearing he acknowledged that it is at that meeting that he confused Merrick with another person he was dealing with out of Yellowknife. Merrick looked like the guy from Yellowknife. Once Merrick pointed out to Park that he was not talking about his case, he apologized and retrieved the proper file. He also acknowledged having been aggressive with Merrick at a previous meeting.

312. On November 8, 2004 Park told Merrick that he did not have a good case. He did not believe Merrick was telling the whole story about his re-use and in fact questioned if he was an addict or just a recreational user. Further, he told Merrick, if you did not tell Deters you used and then you got caught, you will be fired for dishonesty.

313. When Merrick told Park that this was a voluntary disclosure of an addiction and therefore there should never have been a CRA, Park responded that Ipsco had a duty to impose a CRA to monitor compliance in order to ensure the safety of other employees. If Ipsco did not do so, it could be charged for murder. He referred to the Westray mine case that led to an amendment of the *Criminal Code* of Canada to address corporate negligence regarding safety issues. The problem I have will Park's position is that the Protocol itself does not impose a CRA to monitor compliance when an employee discloses only to EAP rather than to management. In fact, he returns with no supervision or conditions.

314. Park said that Merrick told him on November 8, 2004 that he would have his counsellor Toby from Pine Lodge send the document to prove he had successfully completed treatment. Park testified that he never got the document. It appears that the Union did not do any follow up to obtain the necessary reports. Park testified that he believed Merrick had been dishonest about Deters' violation of his confidentiality and his re-use. He said that the employer has to be able to trust that Merrick will be honest about relapses. The trust was gone since Merrick did not disclose the re-use. In Park's view Merrick's difficulty with Ipsco was his dishonesty more than the breach of the CRA. Further, Park doubted that Merrick was an addict.

315. Park testified that on November 10, 2004 he recommended to the Grievance Committee not to take the case to arbitration. He did the same thing at the membership meeting of November 15, 2004. He told them that Merrick made false allegations against Deters, that he had no credibility, that his promises are suspect and that there is

a difference between being an addict and self-reporting that you are an addict. Based on that report it is not surprising that the membership voted to not proceed to arbitration.

316. Park testified there was no dealing of WI benefits in exchange for dropping the grievance for wrongful termination.

317. On cross-examination Park was asked if a CRA with similar conditions of termination would be used for an employee who is bipolar, to ensure he does not stop taking his medications. Despite several attempts to get a response, Park never answered the question. He was very defensive during cross-examination. He did acknowledge, however, that under the Protocol, a person who discloses an addiction to Deters at EAP will be treated and returned to work without a CRA and management would never find out about it. When asked if he has any safety concerns about an employee returning to work after treatment for addictions without a CRA, he admitted that he was worried about it and torn since he has no way of monitoring. When asked if he agreed that it is because Merrick did not lie to Carr about being an addict that he was subject to a mandatory CRA, Park responded “Merrick didn’t have to tell Carr he was an addict.” He opined that Merrick always wants to drive the ship rather than to take advice.

318. According to Park a CRA is a part of an accommodation process. He acknowledged that Ipsco has no other Protocols that deal specifically with other disabilities; there is only one for addictions. According to Park the Union did not have to tell Merrick that he could have a slip/relapse without being at risk of termination.

319. On cross-examination by Merrick, Park acknowledged that Grant did receive the document in November 2004 to the effect that Merrick had entered and completed treatment at Pine Lodge. The evidence was unclear if it arrived before the Union decided on November 10 to not proceed with the grievance.

V. THE ISSUES

1. Did Merrick suffer from a disability protected by *The Saskatchewan Human Rights Code*?

2. Is a slip/relapse an integral part of the disability that also requires accommodation?

3. Was a *prima facie* case of discrimination on the basis of disability (addiction) established by Merrick?

    a) Application of the elements required for *prima facie* discrimination

        i) Merrick suffers from a disability protected by the *Code*

        ii) Causal connection between the disability and the violation of the CRA

        iii) The disability was a factor in the termination

4. If a *prima facie* case of discrimination exists, has Ipsco established that it has accommodated Merrick to the point of undue hardship?

    a) Accommodation and addictions

        i) The principles relating to accommodation

        ii) Last Chance Agreements ("LCA"): general approach and impact of Human Rights Legislation

        iii) Accommodation to point of undue hardship

        iv) Duty of employee to facilitate accommodation

        v) The scope of the employer's duty to accommodate in addiction cases

        vi) The role of relapse

    b) Applying the principles of accommodation regarding addictions to Merrick

        i) The Protocol/CRA: the standard that Ipsco applies regarding alcohol and drugs

ii) The Protocol addresses only one disability

iii) The Protocol as applied to Merrick

iv) The differential treatment provided in the Protocol: recreational use versus addiction and voluntary versus mandatory referrals

v) The wording of the CRA regarding a slip/relapse

vi) The actual application of the CRA regarding a slip/relapse

vii) The safety sensitive nature of the workplace

viii) The reason for termination

ix) Use of post-discharge evidence in assessing likely success of accommodation

x) Summary of conclusions regarding accommodation

5. Was the Union's participation in the use of the Protocol/CRA discriminatory contrary to section 18 of the *Code*?

a) The Protocol

b) Use of CRA as first line of accommodation

c) The law regarding Unions and accommodation

d) Applying *Renaud* to the facts in Merrick

VI. ANALYSIS OF THE ISSUES, FACTS AND LAW

1. Did Merrick suffer from a disability protected by *The Saskatchewan Human Rights Code*?

320. The relevant provisions of *The Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1 are as follows:

2(1) In this Act:

(d.1) "disability" means:
(i) any degree of physical disability, infirmity, malformation or disfigurement …
(ii) any of:
(C) a mental disorder;

(e) "employee" means a person employed by an employer and includes a person engaged pursuant to a limited term contract;

(f) "employer" mean a person employing one or more employees and includes a person acting on behalf of an employer;

(i.1) "mental disorder" means a disorder of thought, perception, feelings or behaviour that impairs a person's:
(i) judgment;
(ii) capacity to recognize reality;
(iii) ability to associate with others; or
(iv) ability to meet the ordinary demands of life;

(m.01) "prohibited ground" means:
(vii) disability;

(p) "trade union" means an organization of employees formed for the purpose of regulating relations between employees and employers or for purposes that include the regulation of relations between employees and employers;

3 The objects of this Act are:
(a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

(b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment, on the basis of a prohibited ground.

(7) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, disability or age do not apply where sex, ability or age is a reasonable occupational qualification and requirement for the position or employment.

18 No trade union shall exclude any person from full membership or expel, suspend or otherwise discriminate against any of its members, or discriminate against any person in regard to employment by any employer, on the basis of a prohibited ground.

321. The testimony of Butt referred to the definition of substance dependency/addiction as being a primary disease that is chronic, ongoing and placed centrally in the brain (neurobiological). It is a brain disorder or mental illness.

322. I accept his opinion that an addiction is a mental illness and as such it meets the definition of a disability at section 2(1)(d.1)(ii)(c) "a mental disorder." The cravings, the continual use despite harm and the compulsive nature of the disease renders it a disability that leads to non-culpable activity. That is not to say that all actions of a person suffering from the disease of addiction are non-culpable.

323. Prior to the hearing, all parties admitted that an addiction to drugs/alcohol is a disability within the *Code* and that Merrick did suffer from the addiction. However, during the hearing, Park for the Union seemed to put into issue whether Merrick actually suffered from an addiction as opposed to simply raising it as a defence after getting himself in trouble with the law and his employer. The Union is bound by its admission. In any event, I have no hesitation based on the evidence to conclude that Merrick is addicted to both drugs and alcohol and that it is a protected ground under the *Code*. The evidence established that Merrick sought out help from a counsellor in March 2003, prior to having any trouble with Ipsco. He met an addictions counsellor Roger Ives at Alcohol & Drug Services for an assessment. He was counselled to attend NA meetings which he did in April 2003. He managed to remain drug free for a month.

324. He testified about numerous attempts to unsuccessfully cut off communications with his supplier. All of this occurred well prior to his arrest of September 21, 2003 and subsequent disclosure of his addiction on September 22, 2003. To suggest that Merrick may possibly be a recreational user rather than an addict or that he stated he was an addict to avoid the consequences of his actions simply is contrary to the evidence. The only trouble Merrick was facing with his employer on September 22, 2003 was breaching the work rule that he phone at least two hours before the commencement of his shift to say he would be absent. He had a clean discipline record and at most faced a written warning or a one-day suspension.

325. The law is clear that addiction is a disability for the purposes of applying human rights legislation to the employer/employee relationship: see *Canadian Union of Postal Workers v. Canada Post Corp*. 2008 BCSC 338 at para. 35; *Smooth Rock Falls Hospital v. Ontario Nurses' Assn.* at para. 16; *Edmonton (City) v. Amalgamated Transit Union, Local 569* at para. 32; *Espanola (Town) v. Canadian Union of Public Employees, Local 534* at para. 49; *Alcan Rolled Products Co. v. United Steelworks of America, Local 343* at para. 100; *Telus v. Telecommunications Workers Union* at para. 163.

2. Is a slip/relapse an integral part of the disability that also requires accommodation?

326. According to Butt it is imperative to take into account the relapsing nature of substance dependency. He testified that a slip/relapse is a very common occurrence in recovery and it is part of the process. (para. 127) The longer a person is in treatment and remains abstinent, the better the chance for prolonged recovery though recovery never completely removes the risk of a slip or a relapse. A person facing a series of stressors or losses can fall back into a pattern of behaviour that leads to a slip/relapse. According to Butt part of the process of recovery is to have relapse education and prevention. He testified that to be effective as an opportunity to learn, the consequences of a slip/relapse must be therapeutic rather than punitive. At first it is difficult for a person suffering from an addiction to recognize that he is moving towards a slip/relapse. Often it is only after such events that the person can be taught to back up and learn not to repeat the same behaviour pattern. To conclude on this point, Butt pointed out that the very definition of an addiction speaks to some of the risk factors that may lead to slips/relapses. I accept Butt's opinion that slips/relapses are part of the disease of addiction.

327. Armitage opined that recovery is a life long process. Addiction is an illness that can be arrested but not cured. A relapse is not the end of the world; it depends how the person reacts. It can be a very positive occurrence if it helps the person get into real recovery – break through denial, analyze the circumstances that led to re-use, change

the behaviours or thinking that led to re-use. (para. 255) Like Butt, Armitage recognized that a slip/relapse is part of the disease of addiction. I accept Armitage's evidence on this point.

328. Hardy who counselled Merrick testified that a relapse is an opportunity to work the program and go to more NA meetings.

329. Numerous cases have addressed slips/relapses as being a component of the disease of addiction:

> *Alcan Rolled Products Co. v. United Steelworks of America, Local 343* (1996), 56 L.A.C. (4th) 187 at para. 98
>
> *Health Employers' Assn. of British Columbia on Behalf of Castlegar & District Hospital Society v. British Columbia Nurses' Union (Bergen Grievance)* [2000] B.C.C.A.A.A. No.9 at para. 62
>
> *Slocan Group v. Pulp, Paper and Woodworkers of Canada, Local 18* (2001), 97 L.A.C. (4th) 387at para. 96
>
> *Telus v. Telecommunications Workers Union (H.S. Grievance)* [2007] C.L.A.D. No. 289 at para. 156-161

330. To respond to the issue of whether a slip/relapse is part of the disease of addiction, I draw the following conclusions from the jurisprudence:

(a) There is no blanket rule which justifies termination of an employee who relapses after receiving treatment previously considered adequate to sustain recovery. (*Alcan Rolled Products Co. v. United Steelworks of America, Local 343* (1996), 56 L.A.C. (4th) 187, para. 127);

(b) Several relapses is the rule rather than the exception. (*Health Employers' Assn. of British Columbia on Behalf of Castlegar & District Hospital Society v. British Columbia Nurses' Union (Bergen Grievance)* [2000] B.C.C.A.A.A. No.9, para. 40);

(c) The initial phase of recovery is reasonably attainable; it is only after the addict starts to face his past and experiences stress does management of the addiction become difficult. (*Health Employers' Assn. of British Columbia on Behalf of Castlegar & District Hospital Society v. British Columbia Nurses' Union (Bergen Grievance)* [2000] B.C.C.A.A.A. No.9, para. 44);

(d) Suffering a slip/relapse is a powerful negative reinforcement making it less likely that it will happen again. (*Health Employers' Assn. of British Columbia on Behalf of Castlegar & District Hospital Society v. British Columbia Nurses' Union (Bergen Grievance)* [2000] B.C.C.A.A.A. No.9, para. 63);

(e) The frequency of the relapse is not as important in a medical sense as the change of pattern. All the factors of each relapse must be considered on a case by case basis. (*Slocan Group v. Pulp, Paper and Woodworkers of Canada, Local 18* (2001), 97 L.A.C. (4th) 387at para. 122); and

(f) Even though relapses are part of the disease, the employee does have an obligation to work the program and be actively involved in an after care program to avoid relapses. (*Telus v. Telecommunications Workers Union (H.S. Grievance)* [2007] C.L.A.D. No. 289 at para. 172).

331. I conclude that a slip/relapse is an integral part of the disease of addiction. Therefore, there is also a duty to accommodate a slip/relapse to the point of undue hardship.

3. Was a *prima facie* case of discrimination on the basis of disability (addiction) established by Merrick?

332. In *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58; leave to appeal dismissed [2006] S.C.C.A. No. 140, the Court addressed the test to establish *prima facie* discrimination under British Columbia's equivalent of our section 16:

> 30**.** In this case, the starting point for the prima facie analysis is s. 13(1)(a) and s. 1 of the Human Rights Code. Under s. 1, "discrimination" is defined to include conduct that offends s. 13(1)(a). In my view, there is therefore no need to conduct a comparative analysis. *It is, by definition, prima facie discriminatory for an employer to refuse to employ or continue to employ a person because of a physical or mental disability.* I do not accept the employer's argument that in order to establish prima facie discrimination a claimant must show that it is impossible for him to comply with the standard. Here the arbitrator correctly articulated the test to be applied under s. 13(1()(a) to establish a prima facie case of discrimination:
>
> > *... the starting point of a human rights analysis is to determine whether the disputed dismissal is prima facie discriminatory. The dismissal must be found to be prima facie discriminatory if the grievor had a physical or mental disability; if the company treated the grievor adversely; and if it is reasonable on the evidence to infer that the disability was a factor (not necessarily the sole or overriding factor) in the adverse treatment: Martin (2001) 41 C.H.H.R. D/88.* [underlining mine]
>
> 31. The arbitrator went on to apply this analysis to assess Mr. Gardiner's termination:
>
> > There is no dispute that the grievor is addicted to marijuana and that marijuana addiction is a disability within the meaning of the Human Rights Code. Neither can it be disputed that there was adverse treatment of the grievor: dismissal from employment. The company does dispute, however, that the grievor's disability was a factor in the adverse treatment. The company submits that the grievor's dismissal was not because of his disability, but rather because of his violation of the policy against the possession or use of alcohol or illegal drugs at the mine site, coupled with his repeated decisions not to avail himself of the alternatives to such misconduct. But simply put, the reason the company dismissed the grievor was that he was found to be using marijuana at the mine site. The grievor's possession and use of marijuana at the mine site (as I have found) was partly the product of substantially diminished control due to his addiction. In the light of the conversation between the grievor and his supervisors at the mine bunkhouse on August 15, 2004, and the union's prompt assertion on the grievor's behalf of an addiction ..., the company

> cannot plead that it was altogether unaware of the possibility of the grievor having the disability later diagnosed by Dr. Hedges. In my view, the grievor's disability must be found to have been a factor in his dismissal. [Emphasis in original]

See also: *Telus v. Telecommunications Workers Union* at para. 163; *Canadian Union of Postal Workers v. Canada Post Corp.* at para. 36.

333. The Supreme Court of Canada described a *prima facie* case in the context of adverse effects discrimination as "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer". (*Ontario (H.R.C.) v. Simpsons-Sears Ltd.* [1985], 2 S.C.R. 536 at 558)

334. A September 18, 2008 decision from the B.C.C.A., *British Columbia (Public Service Agency) v. B.C. Government and Service Employees Union* extensively canvassed the components a complainant must prove to establish a *prima facie* case. The long term manager of a liquor store was confronted after liquor had gone missing on numerous occasions during the previous year. After being assured no criminal charges would be laid, the employee admitted the facts, advised the employer for the first time he was an alcoholic and entered treatment. Two months later the employer terminated him for wilfully committing theft of liquor and stated that honesty was vital to maintaining a viable employer/employee relationship. Theft struck at the fundamental trust required for his employment. At issue on the appeal was whether the complainant had established a prima facie case by establishing that there was a nexus between the disability and his termination. The majority held that he had failed to establish a nexus. It concluded that the employer had terminated him for the theft and not because of his disability. It held that the arbitrator had erred by concluding that there had been *prima facie* discrimination because a disability (alcohol dependency) was a factor in the theft. It stated that a *prima facie* case only exists if the disability was a factor in the decision to terminate. The majority of the appeal court quoted with approval the following case:

Wu. v. Ellergy Manufacturing, 2000 BCHRT 53:

> 24. In order to establish a *prima facie* case of discrimination, Mr. Wu must persuade me, on a balance of probabilities, that; he had a disability, he was treated adversely … and there is evidence from which it is reasonable to infer that his disability was a factor in the adverse treatment. The burden then shifts to (employer) which, in order to avoid a finding of discrimination, must show that its conduct was justified because it was based on a *bona fide* occupational requirement and, in particular, that it reasonably accommodated Mr. Wu's disability to the point of undue hardship: … ("Meiorin")

335. The majority also relied on the following case:

Martin v. Carter Chevrolet Oldsmobile, 2001 BCHRT 37:

> 20. Under the *Code*, there is no positive duty to accommodate people with disabilities. That is, proof that a respondent failed to accommodate a person with a disability is not sufficient to establish a contravention of the *Code*. Rather, the duty to accommodate arises as part of a defence to a *prima facie* case of discrimination. …
>
> 21. To succeed, a complainant need only show that the ground alleged was one factor in the respondent's conduct; it does not need to be the sole or overriding factor … it is sufficient that the discrimination be <u>a</u> basis for the employer's decision. …
>
> 22. To establish a *prima facie* case, therefore, Ms. Martin must establish that: she has a disability, Carter Chev Olds refused to continue her employment, and it is reasonable to infer from the evidence that her disability was a factor <u>in that refusal</u>. (underlining in original decision) (par. 4-6 of *B.C. (Public Service Agency) v. BCGSEU*)

336. The majority concluded:

> 15. I can find no suggestion in the evidence that Mr. Gooding's termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on misconduct that rose to the level of crime. That his conduct may have been influenced by his alcohol dependency is irrelevant if that admitted dependency played no part in the employer's decision to terminate his employment and he suffered no impact for his misconduct greater than that another employee would have suffered for the same misconduct. (underlining mine)

337. The minority addressed the correct legal test for determining *prima facie* discrimination in cases of addiction–related employee misconduct. She concluded a *prima facie* case had been established:

> 28. The arbitrator analyzed the grievor's dismissal in a culpable versus non-culpable framework. He accepted Dr. Baker's evidence that an addict acts involuntarily in the theft of his or her drug of choice and that alcoholism is a disease of addiction…
>
> …
>
> 54. … The final step is to determine whether the addiction was a factor in the termination …
>
> 55. … In a situation of adverse effects discrimination, the employee must adduce evidence establishing a nexus between the addiction and the misconduct – the stated reason for termination. This evidentiary burden is significant, for it cannot be assumed that addiction is always a causal factor in an addicted employee's misconduct. In its factum, the employer submitted, "[g]iven the prevailing view of addiction experts that addiction can result in a lowering of moral and ethical conduct on the part of the addicted person, it will be a rare case where some connection between the addiction and the misconduct cannot be established.": … This view undervalues the importance of evidence in cases of this kind, and the necessity for a contextual inquiry that considers the nature of the disability and the misconduct, and the connection between the two.
>
> …
>
> 59. However, fulfilling the evidentiary requirement and establishing a connection between the disability and the misconduct does not end the analysis. On the evidence adduced by the employee, it must be reasonable for the arbitrator, or decision-maker, to infer that the disability was therefore a factor in the adverse treatment. Thus, the employee can advance his case only so far; it is for the arbitrator to take the final, necessary analytical step and factor in the stated reason for termination. As in *Health Employers*, the contentious issue in the case at bar is whether Mr. Gooding's alcoholism was a factor in the termination or whether there was an explanation for his termination unrelated to his disability. (underlining mine)

338. The minority of the court concluded that alcoholism was a contributing factor in the grievor's theft of alcohol. The court stated:

> 61. On the evidence establishing the causal connection between the alcoholism and the theft of alcohol, it is reasonable to infer that Mr. Gooding's

> alcoholism was related to his termination for theft. Theft was the reason given for Mr. Gooding's termination; there was not a reason for termination unrelated to his alcoholism. The employee therefore established *prima facie* discrimination.

339. The majority believed the employer when it stated that the termination was solely due to the theft and not because of the behaviour that flowed from the addiction, whereas the minority believed that his alcoholism was related to his termination for theft. Irrespective of the different result there is no dissension regarding the elements required to establish a *prima facie* case of discrimination.

a) Application of the elements required for *prima facie* discrimination

340. From the jurisprudence I conclude that the following elements must be proved by Merrick to establish a *prima facie* case of discrimination:

1. that he suffers from a disability that is protected by the *Code*;
2. that there is a causal connection between the disability and the misconduct; and
4. that the evidence establishes, or it is reasonable to infer, that the disability was a factor in the adverse treatment – termination and denial of WI benefits.

It is only after those elements are established that the onus shifts to the respondents.

i) Merrick suffers from a disability protected by the *Code*

341. The parties conceded that Merrick suffers from the disease of addiction to alcoholism and drugs. It was also conceded that the disease of addiction constitutes a disability (a mental disorder) as defined in the *Code* (s.2(1)(d.1)(ii)(C)). In any event, I conclude on the evidence that those two elements have been established.

ii) Causal connection between the disability and the violation of the CRA

342. I concluded that a slip/relapse is an integral part of the disability – the disease of addiction. Despite Merrick's best efforts at the time, he had a slip on June 8, 2004 when he used cocaine. As allowed by the CRA he was called for a random drug test on June 11, 2004 which he failed. It evidenced re-use which I find, based on a reasonable interpretation of the CRA, is a failure to abstain from the use of drugs. It is self-evident that there is a causal connection between the disability and Merrick's misconduct.

343. Merrick's case is markedly different from the facts in *Ryan v. Canada Safeway Ltd.*, which states as follows:

> 27. In the present case, Ms. Ryan would have to establish that her misconduct, in taking the money from the till and not returning it for some days, was related to her alcoholism. If it was not, then, regardless of the state of the Employer's knowledge with respect to her alcoholism, it was not *prima facie* discriminatory for the Employer to terminate her employment for engaging in that conduct, and she could not succeed in her complaint.
>
> …
>
> 45. On the information before me, it is possible that Ms. Ryan's misconduct was related to her alcoholism. Any poor decision by a person suffering from a substance abuse problem could, in some sense, be said to be potentially related to that problem. That is what Dr. Hedges' opinion that "it is indeed possible that Ms. Ryan's apparent alcohol dependence contributed to her poor decision-making" amounts to. When considered in light of all the information before me, however, I find that it is not reasonably possible that Ms. Ryan would be able to establish that her misconduct was sufficiently related to her alcoholism to establish the necessary nexus between her misconduct and her disability. There is no question that Ms. Ryan knew that her Employer had a strict no-tolerance policy when it came to theft, especially the theft of cash. Nor is there any question that she knew that in "borrowing" the money from the till she was in violation of that policy. On her own account, she also knew that she was an alcoholic. Despite ample opportunity to do so, and despite what she says was her own willingness to discuss her drinking problem with members of management in the past, she chose not to raise it as a mitigating or explanatory factor during the Employer's investigation. The necessary nexus between her alcoholism and the misconduct for which she was terminated is absent.

344. It is with respect to element three that the positions diverge. Ipso takes the position that Merrick was terminated for violating the CRA and not for his addiction. Ipsco says that it was reasonable to impose a CRA on Merrick to assist him in controlling his addiction. The termination resulted because of his dishonesty in not divulging he had a slip/relapse to the Medical Department. This was a violation of the conditions in the CRA according to Ipsco. He was also terminated for having tested positive in a drug screening and for having failed to abstain from the consumption of drugs, all of which constituted a violation of the conditions in the CRA. The non disclosure of a slip/relapse went to his honesty and Ipsco no longer trusted that he would divulge future slips/relapses thus putting everyone at risk in a highly safety sensitive environment.

345. Merrick and the SHRC took the position that Merrick had voluntarily disclosed his addiction to EAP and had a clean employment record and in those circumstances it was discriminatory to even oblige Merrick to sign a CRA with terms and conditions the violation of which would lead to immediate termination. Further, the reason Merrick did not disclose the slip/relapse to the Medical Department was because the CRA never provided for him to do so and never provided that it would be dealt with as a part of the disease of addiction. Rather, it was argued that the correct interpretation of the CRA was that a slip/relapse was a failure to abstain thus leading to immediate termination if he disclosed his re-use.

346. Further, they argued that a slip is part of the disability and this is what led to the failure to abstain and the positive drug screen. The failure to disclose was not due to dishonesty but because he did not want to lose his job. The slip, the positive drug screen and the failure to voluntarily disclose the slip are causally connected to the disability. Merrick argues that the disability, which includes the slip/relapse was a factor in him not receiving WI benefits when he returned to treatment at Pine Lodge the second time and to his ultimate termination. He suffered adverse consequences because of his disability.

iii) The disability was a factor in the termination

347. Merrick had an excellent work record prior to his arrest in September 2003. He was arrested when he intentionally called the police to seize the cocaine and arrest the pusher. He was attempting to distance himself from the use of drugs. He was released and charges were dropped against him. Immediately upon his release he contacted EAP at Ipsco to confidentially disclose his drug addiction and to seek help for his addiction. He could have been less than straight forward and simply told his immediate supervisor that he did not call in two hours before the commencement of his scheduled shift because he was sick. He naively assumed that disclosing his addiction to management while explaining his failure to phone in his absence from work would not have any adverse consequences on how his disability would be handled. He was wrong. The voluntary honest disclosure of his addiction to a member of management set into motion the Protocol which requires he be declared unfit for work and sent off for a mandatory assessment and treatment. The Protocol then made it mandatory that he only be allowed to return after signing a CRA with the terms and conditions required by the protocol:

> 1. abstain from the use of substance to which they are addicted for as long as they remain an employee of Ipsco;
> …
> 4. report to the Medical Office once per month to discuss their progress and report any issues which threaten their abstinence to medical staff as needed.
> 5. be subject to periodic ad hoc screening for a 24-month period.
>
> A positive result from a subsequent screening, following reinstatement will result in termination of the employee for just cause. (Ex. R-7)

348. Merrick signed the CRA with the conditions and shortly thereafter learnt about the risk of relapse. He made attempts to clarify the CRA but without success. Noone told him that a slip/relapse would not be considered a violation of the condition he abstain as long as he disclosed it immediately to the medical office. Noone told him in all likelihood he would then simply be declared unfit and returned for treatment without risk of losing

his job. Merrick had a slip June 8, 2004. He disclosed it to his AA sponsor Ilona but he did not disclose it to the medical office or his counsellor Hardy. He tested positive in an *ad hoc* drug screen on June 11, 2004. This led to his suspension from work and a meeting to discuss his reuse on June 24, 2004. Merrick returned to Pine Lodge for the second time. After successful completion of the program he was immediately advised he would be terminated based on the information the employer had obtained at the June 24, 2004 meeting. A formal termination meeting was held on September 23, 2004.

349. The letter of termination stated:

> This decision has been reached based upon your breach of the terms and conditions contained in the conditional reinstatement agreement you entered into with the Company on December 5, 2003. (Exhibit P-9)

350. Notes of the September 23, 2004 termination state that Carr told Merrick:

> You broke the conditional re-instatement agreement. You were given treatment, you opted out, we do not have confidence you won't do it again. (Exhibit P-15)

351. During the hearing Carr testified that Merrick was terminated because he was dishonest in not disclosing the slip/relapse to the medical office before being caught in a positive drug screen and hence he could not longer be trusted. According to Carr the reason for the termination was Merrick's dishonesty and the consequent lack of trust. Even if the tribunal were to accept this characterization of the evidence, it does not negate the fact that the obligation to disclose the slip was directly related to the disability. The positive drug screen was directly related to the disability. It is not necessary that Merrick establish that the disability was the only factor that led to his termination; it is sufficient that is was a factor and the tribunal is satisfied on a balance of probabilities that his disability was a factor in the termination. The onus now shifts to the respondents.

4. If a *prima facie* case of discrimination exists, has Ipsco established that it has accommodated Merrick to the point of undue hardship?

a) Accommodation and addictions

i) The principles relating to accommodation

352. At this point in the analysis, the onus shifts to Ipsco to show that the impugned standard or policy (the Protocol/CRA) is a *bona fide* occupational requirement ("BFOR"). Subsection 16(7) of the *Code* states:

> The provisions of this section relating to discrimination … for a position or employment based on … disability … do not apply where … ability … is a reasonable occupational qualification and requirement for the position or employment.

353. Once a *prima facie* case of discrimination is established, the decision-maker must consider whether the impugned conduct can be defended as a *boni fide* occupational requirement. In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* (Meiorin Grievance) [1999] 3 S.C.R. 3, the Supreme Court of Canada proposed a three step test for determining whether a *prima facie* discriminatory standard is a *boni fide* occupational requirement (hereinafter "BFOR"). For the purposes of the present case, it is worthwhile reproducing the Supreme Court of Canada's articulation of the three step test:

> 54. Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. 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 particular standard in an honest and good faith belief that it was necessary to the fulfilment 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 demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

55**.** This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in Central Alberta Dairy Pool, supra, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the prima facie case of discrimination stands.

56. Having set out the test, I offer certain elaborations on its application.

Step One

57**.** The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. The initial task is to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases but there may well be other reasons for imposing particular standards in the workplace. …There are innumerable possible reasons that an employer might seek to impose a standard on its employees.

58. The employer must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job. For example, turning again to Brossard, supra, Beetz J. held, at p. 313, that because of the special character of public employment, "[i]t is appropriate and indeed necessary to adopt rules of conduct for public servants to inhibit conflicts of interest". Where the general purpose of the standard is to ensure the safe and efficient performance of the job -- essential elements of all occupations -- it will likely not be necessary to spend much time at this stage. Where the purpose is narrower, it may well be an important part of the analysis.

59. The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose. This inquiry is necessarily more general than determining whether there is a rational connection between the performance of the job and the <u>particular standard</u> that has been selected, as may have been the case on the conventional approach. The distinction is important. If there is no rational relationship between the general purpose of the standard and the tasks properly required of the

employee, then there is of course no need to continue to assess the legitimacy of the particular standard itself. Without a legitimate general purpose underlying it, the standard cannot be a BFOR. In my view, it is helpful to keep the two levels of inquiry distinct. (underlining in the original)

Step Two

60. Once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. This addresses the subjective element of the test which, although not essential to a finding that the standard is not a BFOR, is one basis on which the standard may be struck down: see O'Malley, supra, at pp. 547-50, per McIntyre J.; Etobicoke, supra, at p. 209, per McIntyre J. If the imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory animus, then it cannot be a BFOR.

61. It is important to note that the analysis shifts at this stage from the general purpose of the standard to the particular standard itself. It is not necessarily so that a particular standard will constitute a BFOR merely because its general purpose is rationally connected to the performance of the job: see Brossard, supra, at pp. 314-15, per Beetz J.

Step Three

62. The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the performance of the job. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship", it is important to recall the words of Sopinka J. who observed in Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970, at p. 984, that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

63. When determining whether an existing standard is reasonably necessary for the employer to accomplish its purpose, it may be helpful to refer to the jurisprudence of this Court dealing both with the justification of direct discrimination and the concept of accommodation within the adverse effect discrimination analysis. For example, dealing with adverse effect discrimination in Central Alberta Dairy Pool, supra, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial cost of the possible method of accommodation, the relative

> interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also Renaud, supra, at p. 984, per Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in Chambly, supra, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".
>
> **...**
>
> 67. If the prima facie discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. The employer has failed to establish a defence to the charge of discrimination. Although not at issue in this case, as it arose as a grievance before a labour arbitrator, when the standard is not a BFOR, the appropriate remedy will be chosen with reference to the remedies provided in the applicable human rights legislation. Conversely, if the general purpose of the standard is rationally connected to the performance of the particular job, the particular standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is a BFOR. If all of these criteria are established, the employer has brought itself within an exception to the general prohibition of discrimination.
>
> 68. Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.

ii) Last Chance Agreements (“LCA”): general approach and impact of human rights legislation

354. A review of the case law in the areas of labour arbitration and human rights reveals that last chance agreements are routinely entered into between employees, Unions and employers as a means of addressing addiction in the work place. Such

agreements, however, are not beyond the reach of human rights legislation. In *Kimberly-Clark Forest Products Inc. v. Paper, Allied Industrial Chemical and Energy Works International Union, Local 7-0665* (2003), 115 L.A.C. (4th) 344, Arbitrator Levinson addressed both the importance of Last Chance Agreement in the labour context and the limitations of such agreements in light of human rights legislation:

> 17. Arbitrators have articulated persuasive policy reasons for enforcing and giving effect to the terms of last chance agreements containing a prescribed penalty where such agreements have been breached. They include the importance of the parties being able to rely on the terms of the last chance agreements they negotiate, the fostering and promoting of confidence in the parties' ability to resolve their disputes and to fashion their own solutions instead of having a third party impose one, not making last chance agreements meaningless and discouraging or taking away the incentive for employers to enter into future last chance agreements by giving employees a "second last chance". See Re Labatt Breweries Ontario and Brewery, General and Professional Workers' Union, Local 304 (2002), 107 L.A.C. (4th) 126 (Barrett) at page 134 and cases cited therein, Re Thames Valley District School Board and Canadian Union of Public Employees, Local 190 (1998), 71 L.A.C. (4th) 418 (Charney) and Re Domtar Sonoco Containers and I.W.A. - Canada, Loc. 1-1000 (1992), 28 L.A.C. (4th) 11 (Thorne). See also Re Toronto District School Board and Canadian Union of Public Employees (1999), 79 L.A.C. (4th) 365 (Knopf) at page 382 and cases cited therein and Re Labatt Breweries Ontario and Brewery, General and Professional Workers' Union, Local 304 (supra) at page 133 and cases cited therein explaining why arbitrators have found last chance agreements to be a form of accommodation. *Nevertheless, last chance agreements are not inviolable. As a matter of public policy, parties to a collective agreement cannot contract out of the protection of the Code and they cannot bind a disabled employee with conditions in a last chance agreement that violate the protection the Code provides.* [Emphasis added]

355. Thus, last chance agreements must not offend human rights legislation and are open to challenge on the basis that they are discriminatory: see also *Milazzo v. Autocar Connaisseur Inc.* 2005 CHRT 5 at para. 31; *Smooth Rock Falls Hospital v. Ontario Nurses' Assn.* (2004), 123 L.A.C. (4th) 1 at para. 13; *Edmonton (City) v. Amalgamated Transit Union, Local 569* [2003] A.G.A.A. No. 71 at para. 33 (Alberta Grievance Arbitration); *Labatt Breweries Ontario and B.G.P.W.U.*, *Loc. 304* (2002), 107 L.A.C. (4th) 126 at paras. 15 – 18; *Slocan Group v. Pulp, Paper and Woodworkers of Canada, Local 18* (2001), 97 L.A.C. (4th) 387at para. 96; *Espanola (Town) v. Canadian Union of Public Employees, Local 534* (1997), 61 L.A.C. (4th) 149at paras. 44 and 51; *Alcan*

Rolled Products Co. v. United Steelworks of America, Local 343 (1996), 56 L.A.C. (4th) 187 at para. 98; *Telus v. Telecommunications Workers Union (H.S. Grievance)* [2007] C.L.A.D. No. 289 at para. 156-161; *Health Employers' Assn. of British Columbia on Behalf of Castlegar & District Hospital Society v. British Columbia Nurses' Union (Bergen Grievance)* [2000] B.C.C.A.A.A. No.9 at para. 62).

iii) Accommodation to the point of undue hardship

356. Under the third stage of the Meiorin test the employer is required to demonstrate that it has accommodated the employee to the point of undue hardship. The concept of undue hardship has been addressed in numerous cases involving employees suffering from the disability of addiction. The British Columbia Court of Appeal in the case *Kemess Mines Ltd.*, supra, stated the following with respect to undue hardship:

> 37**.** It is a question of fact in each case whether the duty to accommodate to the point of undue hardship has been met. In Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970, [1992] S.C.J. No. 75 [Renaud], the Supreme Court of Canada said the following about the concept of "undue hardship":
>
> > [19] ... More than mere negligible effort is required to satisfy the duty to accommodate. 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 undue 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.*
>
> 38. In Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489 at 521, the Supreme Court of Canada stated that "where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations". The safety factor is highly relevant in the circumstances of this case. There is no dispute that an open pit mining operation is a safety-sensitive work environment, *and that an employee impaired by drugs poses a safety risk not only to him or herself, but also to other employees. The concept of "undue hardship" has to be considered with those safety concerns in mind.*
>
> 39. As to the employer's safety concerns, it is relevant that the employer was prepared to rehire Mr. Gardiner, without seniority, after he successfully

> completed a rehabilitation program. *The employer was apparently of the view that the employment relationship remained viable, after rehabilitation.* [Emphasis added]

357. In the *Slocan Group* case, supra, arbitrator Taylor stated the following with respect to the undue hardship analysis:

> 125. In discussing the factors which constitute "undue hardship", the Court in Central Alberta Dairy Pool, supra, provided the following list relevant to that case (p.521):
>
> > "... 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."
>
> 126. The Court in Commission scolaire régionale de Chambly v. Bergevin, [1994] 2 S.C.R. 525 reiterated those factors and said at p.546:
>
> > "These factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situation presented in each case. The situations presented will vary endlessly. For example, in a large concern, it may be a relatively easy matter to replace one employee with another. In a small operation replacement may place an unreasonable or unacceptable burden on the employer. The financial consequences of accommodation will also vary infinitely. What may be eminently reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession. However, the listed factors can provide a basis for considering what may constitute reasonable accommodation."

In *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union* 2006 BCCA 57, leave to appeal refused [2006] S.C.C.A. No. 139, the Court stated as follows regarding the duty to accommodate:

> 46 There is no dispute that the first two elements of the analysis are satisfied. The only issue is the third stage of the Meiorin test, whether the duty to accommodate has been satisfied. Accommodation must be approached with basic notions of balance, flexibility and common sense: see Meiorin, supra at

> para. 63. The Supreme Court of Canada has stated that "where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations": Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489 at 521. As a nurse, Mr. Bergen was in a position where public safety was of crucial importance and this must be considered in the context of accommodation.
>
> 47 In my view, the arbitrator erred in failing to consider that there was a duty on Mr. Bergen to facilitate the accommodation process, and in failing to consider that he had been given two previous opportunities to rehabilitate his addiction, had relapsed, and had failed to take the necessary steps to address that relapse.

iv) Duty of employee to facilitate accommodation

358. The case law is clear that an employee who is aware of his/her addiction must facilitate the success of his/her own accommodation. In *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970, Sopinka J. for a unanimous Court addressed the duty of a complainant to facilitate his/her own accommodation:

> 43. The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley. At page 555, McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.
>
> 44. This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. *When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal*. If failure

> to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged. [Emphasis added]

359. In *Telus v. Telecommunication Workers Union*, Arbitrator Beattie summarized arbitration awards that address an employee's obligation to facilitate his/her own accommodation:

> 184. The grievor has no one to blame but himself for his lack of commitment to recovery. Failure of grievors to take action themselves has been the subject of commentary by numerous arbitrators:
>
> 185. (a) Arbitrator Roberts in ***Kellogg Canada*** (above, p.31) at pp.22, 23, stated:
>
> > When an alcoholic employee has failed to respond to multiple rehabilitation efforts and there is no objective evidence that further efforts at accommodation would be likely to succeed, it is generally concluded that the employee has been accommodated to the point of undue hardship and he or she should be terminated. See ***Re York Region, [2004] O.L.A.A.A. No. 326, and Pacific Blue Cross,*** *supra.* That would appear to be the situation that is before me. It has already been found that by the time of termination: (1) the employer had made repeated and far-reaching efforts to accommodate and rehabilitate the grievor; (2) the grievor repeatedly failed to respond to these efforts; and (3) the grievor breached his last chance agreement by coming to work in an impaired state. In the light of the grievor's failure to provide the employer with strong and compelling evidence during his two-month reprieve that he truly had attained and was maintaining sobriety, it must be concluded that at the time of termination the employer had a more than adequate basis for concluding that the grievor had been accommodated to the point of undue hardship and should be terminated.
>
> 186. (b) Arbitrator Taylor in ***Slocan Group*** (above, p.25) states at p.19:
>
> > There exists a corresponding duty on the part of the handicapped to take reasonable steps to obtain treatment and to recover from the handicap: ***Fletcher Challenge,*** *supra.* [2000] B.C.C.A.A.A. No. 274 (QL)]

187. (c) Arbitrator Marcotte in ***Espanola*** (above, p.31) states at p.169:

> What all the above reveals relevant for purposes of our award, is that in the case of handicap for reason of alcoholism, a treatable disease unlike a non-treatable handicap, while the employer does have an obligation to accommodate an employee up to the standard of undue hardship, the employee also has an obligation to undergo treatment where "successful treatment...will ameliorate or eliminate an individual's inability to meet the reasonable requirements of a job in which the individual seeks accommodation", ***Re Alcan Rolled Products,*** *supra*. In ***Re Sault Ste. Marie***(Hinnegan) *supra* the arbitrator succinctly approves this view at p.12: "If an alcoholic employee expects consideration and seeks accommodation with respect to his illness, he must be accountable for any irresponsibility on his part exacerbating the situation."

188. (d) The British Columbia Court of Appeal in ***Kemess Mines*** (above, p.25) states at p.144:

> An addicted employee does have a duty to facilitate accommodation through rehabilitation: see ***Handfield v. North Thompson School District No. 26*** [1995] B.C.C.H.R.D. No. 4 (QL). In my view however, the scope of the employee's duty may vary depending on the relevant factors in the case, including whether the employee is in denial or unaware of his addiction/disability. I would not say that there can never be a duty on an undiagnosed employee to seek help voluntarily. And once the employee is aware of his addiction, there is no doubt that he must do all he can to facilitate the success of his rehabilitation and treatment. The facts of each situation must be assessed on a case by case basis.

189. (e) In the ***Handfield*** award referred to by the British Columbia Court of Appeal in ***Kemess***, it is stated:

> The argument is that, because alcoholism is an illness, the victim "has no control over whether he will suffer a relapse". I disagree with the conclusion drawn form this argument. While the evidence shows that compulsion and denial are fundamental aspects of the disease of alcoholism, it also reveals that alcoholism is a treatable illness, and that success of the treatment depends upon the commitment and effort of the person afflicted. It is true that alcoholics cannot be held responsible for the development of the disease; however, it is not to say that, once the disease has been diagnosed and a plan of treatment undertaken, alcoholics bear no responsibility for the success or failure of the treatment. This cannot be so since, as we have seen, alcoholism cannot be

> effectively treated without recognition and effort by the afflicted person. [Page 145, 165 C.L.L.C.]

In *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, the Court commented as follows:

> 52 The arbitrator's error, having correctly put the last chance agreement aside, was in failing to consider adequately or at all that Mr. Bergen had received two prior employment opportunities to cope with his addiction, and had failed to do so. The employer's duty to accommodate Mr. Bergen was matched by his duty to facilitate the accommodation process: see Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 at paras. 43-44. Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program: see Handfield, supra. Mr. Bergen failed to discharge that duty, and the duty to accommodate was exhausted.

v) The scope of the employer's duty to accommodate in addiction cases

360. The duty of employers to accommodate employees suffering from the disability of addiction is not without its limits. Labour arbitrators and human rights tribunals have attempted to articulate these limits and the difficult task of balancing the rights of employers and employees. In *Slocan Group v. Pulp, Paper and Woodworkers of Canada, Local 18)*, Arbitrator Taylor commented on this balance as follows:

> 127. The Employer in this case cannot be faulted for its attitude and assistance toward the Grievor. It has encouraged him at every step to seek assistance at the Employer's cost and those efforts appeared to have succeeded when the Grievor achieved sobriety from March 2000 to November 2000.
>
> 128. In Re Alcan Rolled Products Company (Kingston Works) and United Steelworkers of America, Loc. 343, (1996) 56 L.A.C. (4th) 187 (Gray), the board said:
>
> > "In determining whether further accommodation of an employee would involve undue hardship, the burden of the manifestations of handicap already experienced and of the accommodative measures already taken during the period of handicap must be added to the anticipated future burden." (p.234)
>
> 129. In addition to the accommodation already undertaken by the Employer, including the last chance agreement, the Employer is now being asked to

> tolerate the relapse of November 19 and 20, 2001, a relapse of short duration which has been followed by 5 months of sobriety.
>
> 130. The Grievor is entitled to be free from discrimination and the Employer is entitled to be free of the Grievor if it has accommodated his disability to the point of undue hardship. Striking that balance is the issue which would confound Solomon.

361. In *Labatt Breweries Ontario and B.G.P.W.U., Loc. 304*, Arbitrator Barrett commented on the finite nature of the employer's duty to accommodate:

> 39. *Referring again to the* Toronto District School Board *case, the test of undue hardship in accommodation cases is not whether anything else could have been done. "There is always the hope that one more try or one more treatment will turn a situation around [p. 387]." To accept the Union proposition that the test is a forward-looking test would mean that a disabled employee could never be terminated as long as there was any hope at all for recovery. In substance abuse cases, there is always hope for recovery because addiction is a treatable disease.* However, it requires exceptional commitment on the part of the addicted person to succeed, and that is something over which nobody but the individual has control.

362. Likewise the Canadian Human Right Tribunal in *Milazzo v. Autocar Connaisseur Inc.* 2005 CHRT 5 stated:

> 35. The Tribunal agrees that the concept of accommodation has its limits. This view was recently expressed by Madame Justice Heneghan of the Federal Court in City of Ottawa v. Desormeaux and City of Ottawa v. Parisien, [2004 FC 1778]. There, the Court endorsed what had been said by the Federal Court of Appeal on the issue of accommodation in relation to absenteeism in Scheuneman v. Canada (Attorney General), (2000) 266 N.R. 154 (F.C.A.), where leave to appeal to S.C.C. was refused, [2001] C.C.C.A. No. 9:
>
> > "( ) It is a basic requirement of the employment relationship that an employee must be able to undertake work for the employer or, if temporarily disabled by a medical condition from so doing, must be able to return to work within a reasonable period of time. Dismissing a person who cannot satisfy this requirement is not, in the constitutional sense, discrimination on the ground of disability."
>
> Madame Justice Heneghan went on to say that "there comes a point when the employer can legitimately say that the bargain is not completely capable of performance."
>
> 36. *Thus, as an employer, the Respondent is not subject to an endless rehabilitation process. It might well be that a second violation of the policy will*

> *entail the end of one's employment with the company. As stated earlier, this determination will have to be made on a case-by-case basis*.

363. The approach adopted in *Milazzo v. Autocar Connaisseur Inc.* was confirmed by the Supreme Court of Canada in *Hydro-Québec v. Syndicat des employés* 2008 S.C.C. 43 regarding an employee who had missed 960 days of work in 7.5 years for various physical and mental health problems. In that case the employer had accommodated her numerous times and in numerous ways. The medical reports confirmed that she would continue with these chronic problems and as a result there would be chronic absenteeism in the future. The court upheld her termination concluding the employer had accommodated to the point of undue hardship:

> (16) The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, it if can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

The test for undue hardship is not total unfitness for work in the foreseeable future. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future. Undue hardship resulting from an employee's absence must be assessed globally starting from the beginning of the absence to the present and what the future will likely hold: *McGill University Health Centre v. Syndicat des employés* [2007] 1 S.C.R. 161.

vi) The role of relapse

364. In determining whether the duty to accommodate an employee suffering from the disability of addiction has been satisfied, labour arbitrators and human rights tribunals are called upon to consider relapse. In *Alcan Rolled Products Co. v. United Steelworkers of America, Local 343 (Discharge Grievance)*, Arbitrator Gray stated as follows regarding the role of relapse in the accommodation analysis:

> 127. I agree with the observation in Handfield that there can be no blanket rule which justifies the termination of an alcoholic employee who relapses after receiving treatment previously considered adequate to sustain recovery. That decision observed that "[i]f the Complainant suffered a relapse, it is necessary to consider all of the factors which led to that relapse." Here, again, the grievor's addiction counsellors considered him "able to maintain sobriety when he is actively involved in following his treatment plan." In the face of that, there was no attempt by the union to identify factors which led to the grievor's relapse on September 23, 1994, beyond reiteration that the grievor is an alcoholic. There is nothing to suggest that on that day he found himself in a situation with which his previous treatment and counselling had not equipped him to cope. On the evidence before me, I have found that the grievor could have avoided drinking alcohol on September 23, 1994 if he had valued his job sufficiently to make the necessary effort.

In *Health Employers' Assn. of British Columbia on Behalf of Castlegar & District Hospital Society v. British Columbia Nurses' Union (Bergen Grievance),* [2000], the grievor faced his second termination after experiencing a relapse. After his initial termination the grievor had remained drug free for almost two years. The grievor participated in a strict program of rehabilitation which included entering into a last chance agreement. The agreement required that grievor abstain from drug use and submit to regular and random urine tests, among other conditions. The consequence for breach of the last chance agreement was termination. Prior to his initial termination the grievor was head nurse at the Castlegar & District Hospital. The Arbitrator heard expert evidence on the issue of relapse from both the grievor and the employer. The Arbitrator summarized the expert evidence for the grievor as follows:

> 40. As with any complex behavioral change requiring a rigorous treatment regime, relapse is the rule rather than the exception. Most recovering substance dependent people will have from one to several brief relapses but with a monitored contingency agreement in place they are quickly put back on track. <u>It is not usually considered appropriate to establish a 'last chance agreement' for the first relapse following re-entry to the workplace anymore than it would be appropriate to arrange for termination of a diabetic or person with bipolar disorder for a single relapse of their chronic disorder</u>. Dr. Baker testified that most addicts find the initial phase of recovery to be reasonably attainable because, as he said, 'It's easy to be a holy man, when you live on top of the mountain'. Only after the addict starts to face his past and he starts to experience stress does management of his addiction become difficult; (underlining mine)

365. The Arbitrator summarized the expert evidence for the employer as follows:

> 46**.** The elemental theme of his evidence was that while he accepted the proposition put by Dr. Baker that a relapse is a powerful negative reinforcing mechanism that greatly assists the addict to recover, he felt that it is improper to reinstate such a person to employment in the face of a last chance agreement because that has the effect of 'enabling' his addiction. He explained that any action that leads the employee to believe that the Employer will not enforce the agreement constitutes an enabling activity. If the employee comes to believe that there will be no negative consequences to his addictive activities he will not be highly motivated to quit.

366. In addressing the employer's duty to accommodate, Arbitrator Larson stated as follows:

> 57. The main issue that arises on that analysis is whether the Employer has already suffered undue hardship in this case due to the manner in which the grievor's disease has manifested itself through what would ordinarily be considered serious workplace misconduct, which is to say, the misappropriation of drugs and falsifying records to cover up the resultant defalcation. It is not to be forgotten, however, that drug addiction is to be treated as a disease, no different from diabetes or arthritis, both of which are chronic illnesses capable of disablement but that can be effectively managed through proper medical therapies. Any actions by the employee that are direct outcomes of the compulsive nature of the disease, meaning that the employee is unable to control his behavior cannot, therefore, be counted as misconduct in any culpable sense although the amount of hardship that an employer must accommodate is less in positions that are safety sensitive: Re Toronto Transit Commission and Amalgamated Transit Union (Goebey) (1997) 72 LAC (4th) 109 (Shime); or involve a significant element of public interest: Re Canada Post Corp. and Canadian Union of Postal Workers (Sedorf) (1992) 25 LAC (4th) 104 (Joliffe).

367. Ultimately, Arbitrator Larson concluded as follows:

> 63. The fact is that there is no evidence available in this case that would indicate that the Employer would suffer undue hardship if the grievor were reinstated to his employment at the Hospital following a single relapse in his addiction treatment program. Apart from the obvious problems caused by the loss of drugs and the manner they were taken, the only evidence of hardship was that certain nurses were upset when they discovered that they might be displaced because he was going to be returned to his previous job. Once that situation was worked out, they accepted his condition and supported his treatment program. Moreover, I accept the evidence of Dr. Baker that the relapse suffered by the grievor was a powerful negative reinforcement, making it less likely that it will happen again.

368. In *Slocan Group* v. Pulp, Paper and Woodworkers of Canada, Local 18, the grievor was dismissed from his employment as a planer at the employer's mill after showing up to work impaired in breach of a last chance agreement. In May 1997, the employer provided the grievor with a warning letter alleging impairment at work, threatening discipline and offering assistance. In September 1997, the employer issued a similar letter. In January 1998, the grievor received a three shift suspension, the grievor's continued employment was made conditional on his attendance at counseling and the grievor was warned that further incidents of intoxication in the workplace would likely result in his termination. In April 1998, the grievor received a five shift suspension and his continued employment was made conditional on his attendance at counseling and Alcoholics Anonymous. In addition, the employer offered to send the grievor for detox and rehabilitation. The grievor was warned that further incidents would bring him closer to termination. In April 1999, the grievor again reported to work intoxicated and asked the employer for assistance. The grievor was suspended for ten shifts and advised that this was his final warning. In November 1999, the employer issued a warning letter addressing the grievor's failure to attend his scheduled shift. In March 2000, the grievor reported to work intoxicated and he was terminated on March 28, 2000. The Union persuaded the employer to give the grievor one final chance and the employer, the Union and the grievor entered into a last chance agreement. Among other things, the last chance agreement provided as follows: "if two company representatives believe that you show objective signs of being under the influence of alcohol at work you will be terminated immediately. It will be your obligation to prove otherwise". Following the death of a friend, the grievor attended work smelling of alcohol and intoxication was suspected. Arbitrator Taylor found that the grievor had breached the last chance agreement and did not discharge the onus upon him to prove otherwise. During the course of its reasons, the Arbitrator addressed the issue of relapse:

> 112. The evidence in this case is that the Grievor's relapse which led to his dismissal was of short duration and he has been sober since that time.
>
> . . .

122. In Re Uniroyal Goodrich Canada Inc. and United Steelworkers of America, Local 677 (1999) 79 L.A.C. (4th) 129 (Knopf), the board said:

> "It may be too much to expect an alcoholic employee never to relapse. Dr. Negrete's expert evidence makes this clear. Therefore, accommodating an alcoholic employee may demand allowances for a relapse and require unions, employers and arbitrators to fashion careful solutions that balance the interests of the grievor, co-workers and the employer while at the same time being realistic about the nature of the disease. But it would be inappropriate to conclude that every relapse should be accommodated. That would clearly be a wrong-minded approach. (p.183)
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> . . . . .
>
> The expert evidence made available to this arbitration is sufficient to allow me to conclude that there may be cases of alcoholics who have developed such a dependency on alcohol that relapses are inevitable, but acceptance of treatment has improved the condition significantly. Employers may be able to accommodate this in some circumstances without undue hardship. They should do so. Therefore, it may be contrary to the Human Rights Code to discharge an alcoholic employee simply because of a relapse in some circumstances. But the evidence also shows that treatment is available for alcohol dependency, that people can benefit from these treatments and that their conditions can improve. Those seeking accommodation must themselves facilitate the available treatments and recoveries. It is not contrary to the Human Rights Code to terminate the employment of an alcoholic employee who does not accept treatment or take steps to facilitate its success. All the factors must be considered in each case. (pp.184-185)
>
> . . . . .
>
> The medical evidence teaches us that the relapse comes from the dependency, the loss of control or voluntary capacity and/or the inability to make rational choices. The frequency of the relapse is not as important in a medical sense as the change of pattern. What is significant in the labour relations context is that the inevitability of relapse must be taken into consideration in terms of the remedy being sought." (p.186)

123**.** In considering this issue of relapse, one must be careful not to relieve the alcoholic employee of the responsibility for not suffering a relapse and one must not enable the alcoholic to continue drinking. The first of those two points was addressed in Handfield:

> "The argument is that, because alcoholism is an illness, the victim 'has no control over whether he will suffer a relapse'. I disagree with the conclusion drawn from this argument. While the evidence shows that compulsion and denial are fundamental aspects of the disease of alcoholism, it also reveals that alcoholism is a treatable illness, and that success of the treatment depends upon the commitment and effort of the person afflicted. It is true that alcoholics cannot be held responsible for

> the development of the disease; however, it is not to say that, once the disease has been diagnosed and a plan of treatment undertaken, alcoholics bear no responsibility for the success or failure of the treatment. This cannot be so since, as we have seen, alcoholism cannot be effectively treated without recognition and effort by the afflicted person." (pp.226-227)
>
> 124**.** The issue of "enabling" the alcoholic to evade responsibility for continued drinking was discussed in Castlegar in which expert evidence suggested that reinstatement of the alcoholic employee could have the effect of "enabling" the addiction. The contrary view is that a relapse is a negative mechanism which assists the alcoholic to recover.
>
> . . .
>
> 130**.** The Grievor is entitled to be free from discrimination and the Employer is entitled to be free of the Grievor if it has accommodated his disability to the point of undue hardship. Striking that balance is the issue which would confound Solomon.
>
> 131. In all of the circumstances, I find, on the balance of probability, that accommodation to the point of undue hardship has not been established. The premise of the last chance agreement was that the Grievor had the potential to recover from his alcoholism and reach a point of sustained abstinence from alcohol. A tragic event occurred in the Grievor's life and he took a brief fall. The evidence is that a relapse was a reasonably predictable event in the Grievor's recovery program. There is insufficient evidence to conclude that requiring the Employer to accommodate that brief relapse would have been, in all of the circumstances, and in the legal sense, unreasonable. It would, however, be unreasonable and an undue burden to add to all the Employer has done and expect it to endure future relapses.
>
> 132**.** I have concluded that, on the balance of probability, the Employer did not accommodate the Grievor to the point of undue hardship. But, this must be the end. The Employer cannot be expected to tolerate any future relapses.

369. In *Telus v. Telecommunications Workers Union (H.S. Grievance),* Arbitrator Beattie addressed an allegation of failure to accommodate an employee suffering from a cocaine addiction. The grievor was a cable splicer technician and his duties included transferring facilities to new poles and splicing and terminating new cables. The grievor has significant absenteeism dating back to at least 1999. In 2003, the grievor attended an addiction treatment program at the employer's expense. The grievor was expected to return to work on September 2, 2003. The employer received a doctor's note indicating that the grievor was under medical care for episodes of narcolepsy. In

November 2003, the grievor informed the employer that he was continuing to have troubles staying awake and that he was continuing with counseling for his substance abuse. The employer offered the family assistance program to the grievor but the grievor did not seek help through this program for his drug addiction. The employer received another doctor's note in early 2004 indicating that the grievor continued to suffer from a sleep disorder. In March 2004, the employer received a doctor's note indicating that the grievor could commence light duties as of March 22, 2004. The grievor did not return to work in March 2004 and the employer received another doctor's note in August 2004 indicating that the grievor could likely return to work in one month. In October 2004, the employer received a doctor's note indicating that the grievor could return to full duties as of September 28, 2004. In October 2004, the grievor returned to fulltime duties as a cable technician. The grievor worked in a crew, drove to customer work sites and performed cable splicing. In January 2005, the grievor received a written reprimand for misappropriation of employer funds. In May 2005, the grievor received a five day unpaid suspension for failing to follow reporting instructions, failing to provide medical documentation for absences, leaving work without approval, claiming the time as worked and continuing to use his Telus cell phone for non-business purposes. In May 2005, the grievor advised the employer that his problems were not due to drug use. On May 30, 2005, the grievor was terminated for sleeping on the job, leaving work without permission and claiming the time worked, conducting non-related work activities on company time and using Telus systems and resources for non-business related activities. In June 2005, the Union advised Telus that the grievor had a cocaine addiction. In September 2005, the grievor attended a treatment program which was paid for by the Union. Following his treatment programs in 2003 and 2005, the grievor did not follow the after care plan. In December 2005, the grievor was reinstated pursuant to a last chance agreement. According to the last chance agreement, the grievor was to abstain from drug use, was not to have any unexplained absences and if suspected of drug use, was to undergo a drug test if requested.

370. In January 2006, the grievor had unexplained absences, admitted to smoking crack cocaine and refused a drug test. With respect to the issues of relapse and accommodation, Arbitrator Beattie stated as follows:

> 172. The essence of the Union's case is that recovery by addicts or alcoholics often involves a number of relapses and that TELUS should have assessed the grievor's situation after his relapse in January, 2006 which led to the termination pursuant to the Last Chance Agreement. While I accept the premise of the argument (i.e. likelihood of relapse), I do not accept that there was a further obligation on TELUS to accommodate the grievor's disability. In my view, any further accommodation by TELUS would be undue hardship on the Company. I need not repeat the submissions of Counsel for TELUS beyond referencing the factors of the grievor's safety sensitive employment position with the attendant dangers to himself and others, the many morale issues with fellow employees engendered by the abysmal attendance record of the grievor, and perhaps most significantly the very extensive accommodations extended to the grievor by TELUS (set out in the TELUS argument above at pp.34, 35). It is true, as Counsel for the Union asserts, that TELUS, because of the grievor covering up his addiction, was apparently not aware of the continuation of the grievor's addiction until it terminated the grievor's employment in May, 2005. However, once it was fully apprised of the extent of the cocaine addiction, and had agreed with the attendance of the grievor at the AADAC Grande Prairie treatment program, it entered into the LCA to give the grievor one final chance at rehabilitation.

371. The Arbitrator was also influenced by the “almost complete lack of adherence by the grievor to the prescribed after care program and the provisions of the last chance agreement, including finding a sponsor and a home group and providing proof of attendance at the meetings”: at para. 183.

b) Applying the principles of accommodation regarding addictions to Merrick

i) The Protocol/CRA: the Standard that Ipsco applies regarding alcohol and drugs

372. The evidence established that there was a paradigm shift at Ipsco regarding the tolerance of alcohol and drugs in the work place. From historically allowing the presence of alcohol on the work site and its consumption, Ipsco developed a zero tolerance policy. It adopted Work Rules and Regulations as follows:

> The following work rules represent a guide to good conduct for Ipsco employees ("Employees"). They have been established to ensure safe and effective company operating practices to protect the health and well-being of Employees and those around them, and to safeguard Employee properly, and the property of the Company. … Violations of these work rules are therefore grounds for disciplinary action which could result in termination. …
>
> 7. The possession and/or use of alcohol and/or narcotics on company property, or reporting to work under the influence of alcohol and/or narcotics, is strictly prohibited. (Ex. R-2)

There was no evidence that Merrick ever attended work while in the possession of or impaired by cocaine. As a result he never violated that work rule.

373. On November 1, 2000 Ipsco adopted a Protocol for Alcohol and Drug Screening and Treatment Program. (Ex. R-7) The companion component of the Protocol was its obligation that an employee returning from mandatory treatment signs a CRA with strict conditions. The purpose of the Protocol was to promote a substance free workplace for the safety of the employees. One way of doing that was to identify and provide treatment for employees suffering from substance dependencies.

374. At the heart of this case is the standard that was applied to Merrick and whether it met the employer's obligation to accommodate his disability to the point of undue hardship.

375. The tribunal has no difficulty in concluding that the standard applied was for a purpose rationally connected to the performance of the job – the safety of each and every employee). The standard also appears to generally have been adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose. However, the standard fails the third stage of the analysis for numerous reasons.

ii) The protocol addresses only one disability

376. An argument was advanced that the Protocol is discriminatory and should not be allowed to stand because it singles out only one disability – the disease of addiction. Other disabilities such as bi-polar disorder, diabetes, heart conditions and sleep apnea, if they go untreated can also lead to serious safety hazards. This argument does not necessarily advance the case for Merrick. The problem may be that there is a need for other protocols to address those problems. However, the under inclusiveness does not detract from the fact it was adopted in an honest and good faith belief that it was necessary for the performance of the job.

iii) The Protocol as applied to Merrick

377. An argument was advanced that the mandatory portion of the Protocol should not have been applied to Merrick since the facts that led to him divulging his addiction to an EAP officer did not bring him within that portion of the Protocol. The corollary to that argument was that Merrick should have been allowed to access addiction treatment on a voluntary and confidential basis through EAP as described in the EAP brochure. (Ex. P-2) This would have allowed him to be off work without management knowing the reason and to return to work without a CRA and a condition leading to termination for a positive screen.

378. The Protocol provides for *ad hoc* drug screening in four circumstances:

1. following a work related accident/incident;
2. whenever a reasonable suspicion of impairment or use exists while at work;
3. as a follow-up to a previous positive screening; and
4. as part of a conditional reinstatement following completion of a treatment program.

The only reason Merrick was subjected to *ad hoc* screening was because management was advised he had an addiction. Item 4 of the Protocol suggests that all employees returning from a treatment program have *ad hoc* screening as part of a conditional reinstatement agreement. However, the evidence established that item 4 is only applied to employees whose addictions come to the attention of management. Merrick was adversely affected by the disclosure of his addiction to management. If management had not learnt of his addiction, he would have gone into voluntary treatment and returned without a CRA and *ad hoc* screening. However, Merrick was not treated differently because of his addiction. He was treated differently because of lack of stringent application of confidentiality requirements and lack of advice being provided to Merrick. It was evident that Merrick reached out to the EAP officer upon release from jail and insisted on a meeting off site so that his employer would not discover his addiction. He should have been advised that he need not disclose his addiction to the employer even though he had to disclose to his supervisor the reason for not having called two hours in advance to advise that he would be late or absent for his shift. He should also have been advised that if he does disclose his addiction to management it would lead to mandatory treatment with a CRA rather than voluntary confidential treatment with no CRA.

iv) The differential treatment provided in the Protocol: recreational use versus addiction and voluntary versus mandatory referrals

379. In assessing whether Ipsco could have accommodated Merrick further regarding his addiction, it is necessary to consider the differential treatment accorded employees under the Protocol.

380. If an employee comes under items 1 to 3 of the Protocol, the employer will impose *ad hoc* drug screenings for the next 60 days. If the employer refuses to cooperate then he will be "subject to discipline for such refusal. A failure to participate in post incident or reasonable suspicion screening will lead to a presumption of impairment and appropriate action will be taken." (Ex. R-7, p.1) Under the mandatory

standard imposed on Merrick, a refusal to provide a drug screen leads to termination. Under item 1 to 3 of the Protocol, if a positive drug screen is produced within the 60 days, the employee will be declared unfit for duty and a meeting will be held for the employee to disclose the cause of the positive screen.

381. If the employee declares he is a recreational user, a determination of the level of impairment present while on the job will be made. If objectively the employee was impaired at work, he will be subject to discipline.

382. If the self-declared recreational user is objectively found to not be impaired at work, he is declared fit and allowed to return to work with no loss of earnings. The only consequence for the positive screen will be further *ad hoc* screening for a 60-day period. The standard imposed on Merrick did not provide for an objective assessment to determine if he was impaired at work.

383. Under items 1 to 3 if the self-declared recreational user has a second positive drug screen in the 60 days it will trigger an independent assessment by an addictions counselor to determine if an addiction is present. If so, he will be offered treatment through EAP as a voluntary referral. If the employee decides to take addictions treatment, he is placed on sick leave and receives WI benefits. He is allowed to return without a CRA and without conditions.

384. Under items 1 to 3, if the self-declared recreational user refuses treatment after a counselor determines he suffers from the disease of addiction, he will be subject to further *ad hoc* screening but will be allowed to return to work in non safety sensitive work if it is available. If a third positive screen occurs and he is determined to be objectively impaired at work, he will be terminated. In the standard applied to Merrick, he can only return to work with a CRA and the condition that if he produces one positive drug screen he is terminated. (Ex. R-7, p.3)

385. I conclude that the Protocol imposes a harsher standard on a person who admits to management that he suffers from an addiction. He is not allowed to enter treatment on a voluntary referral. He is not allowed to have three positive screens before facing termination. After a positive screen he is not assessed objectively to determine if he was impaired at work and allowed to continue work if he is not impaired. In essence, Merrick with an excellent work record, with no evidence of ever having been objectively impaired at work and who honestly came forward to disclose an addiction, without there having been a work related accident or incident or previous positive screen, is immediately sent for a mandatory referral and only returns to work with a CRA. A second positive screen leads to termination according to the clear wording of the Protocol:

> A positive result from a subsequent screening, following reinstatement will result in the termination of the employee for just cause. (Ex. R-7)

386. The tribunal concludes that the Protocol contains a standard that itself is discriminatory and does not meet the test of accommodation to the point of undue hardship. Further, the Protocol establishes that Ipsco can accommodate employees who are objectively impaired at work. The person will be subjected to progressive disciplining and will be encouraged to seek addictions treatment and be allowed to return without a CRA. If Ipsco has concluded that it can assume that risk and accommodate those employees, there is no logical reason that it cannot accommodate an employee who admits to an addiction to at least the same extent. It is reasonable to conclude that an effective way of promoting safety at the workplace is to promote disclosure of a slip/relapse to EAP and allow further treatment rather than automatic termination.

v) The wording of the CRA regarding a slip/relapse

387. The respondents argued that the CRA did allow for a slip/relapse and therefore did accommodate for that occurrence. According to their argument Merrick would

simply have had to disclose the slip to the Medical Department and he would have been declared unfit and allowed to return to treatment and back to work after establishing he was again fit to work.

388. The tribunal rejects that argument. The wording of the standard in the Protocol is clear:

> C) l) The employee will abstain from the use of the substance to which they [sic] are addicted for as long as they [sic] remain an employee of Ipsco.
> …
> 4. The employee will report to the Medical Office once per month to discuss their progress and report any issues which threaten their abstinence to medical staff as needed.
> …
> A positive result from a subsequent screening, following reinstatement will result in the termination of the employee for just cause. (Ex. R-7)

389. The wording of the standard in the CRA Merrick signed December 5, 2003 is equally clear:

> 2. … Merrick will abstain from the use of illegal narcotics for as long as he remains an employee of the Company.
>
> 3. … Merrick will contact the Medical Department once per month to advise of any conditions, which threaten his abstiencne…
>
> The parties … agree that should Dale Merrick breach any of these conditions, he will be immediately terminated for just cause … (Ex. P-5)

390. The wording of the standard applied to Merrick did not allow for a slip/relapse; quite the opposite. This is a failure to accommodate to the point of undue hardship. For self-declared recreational users, three positive screens are allowed before facing termination. Further, for an employee who had voluntarily disclosed his addiction to the EAP administrator, he apparently would have been allowed to advise the EAP administrator of a slip/relapse and he would have been declared unfit, returned to treatment and then returned to work once declared fit. This could occur for as many times as required to accommodate slips/relapses. Presumably, the only time that

person would be subject to discipline is if his rate of absenteeism for being declared unfit to work would draw his case to the attention of management.

391. I find that item 3 of the CRA which obliges Merrick to contact the Medical Department monthly "to advise of any conditions, which threaten his abstinence …" does not mean that he is allowed a slip/relapse. The plain meaning of the words is that he must abstain forever. A slip/relapse is a failure to abstain. If Ipsco meant its standard to accommodate for a slip/relapse, it should have stated it clearly. Further, if Ipsco and the Union wanted to give those words an interpretation that allowed a slip/relapse, they should have advised Merrick of that interpretation. This would have allowed him to disclose to the Medical Department the slip/relapse and be declared unfit in order to return for further treatment and then return to work. The failure to so advise him of that interpretation reasonably led him to believe that if he suffered a slip/relapse and he divulged it he would be terminated. As a result it created a situation where he reasonably believed that if the employer discovered the slip he would be terminated. He, therefore, kept it secret and did not declare himself sick to return to treatment. It was inevitable in those circumstances that it was just a matter of time before he would produce a positive screen.

vi) The actual application of the CRA regarding a slip/relapse

392. Ipsco argued that its practice was to allow for a slip/relapse even if the employee had signed a CRA with the conditions listed above. There was a suggestion that telling an employee directly that a slip/relapse would not lead to immediate termination would be "enabling" and would not be therapeutic because the employee would not have to face the consequences of his actions. This latter suggestion has no merit since it presupposes that a slip/relapse is not part of the disease. The evidence also establishes that in practice Ipsco and the Union did not accommodate a slip/relapse on a mandatory referral. There was evidence that employees on a CRA who suffered a slip/relapse were terminated. Carr testified that of all the cases of employees having

signed a CRA due to an addiction, 50% of them suffered a slip/relapse and all of those were terminated. I conclude that the wording of the standard and its actual application fails to accommodate to the point of undue hardship. Employees allowed to access treatment on a voluntary basis are accommodated to a far greater extent, which is in keeping with the employer's obligation under the *Code*. Merrick had the right to at least the same level of accommodation and he did not receive it.

vii) The safety sensitive nature of the workplace

393. The cases previously cited such as *Re Toronto Transit Commission and Amalgamated Transit Union (Goebey)*[2] confirm that an important factor to consider in determining whether the employer has accommodated to the point of undue hardship is the safety sensitive nature of the workplace. Ipsco led extensive evidence to establish that many of its employees work in positions that require a high level of ability to focus and remain alert for 12-hour shifts. Working with molten metal requires constant attention to safety of self, others and property. It argued that there were few non safety positions. (see testimony of Carr, Horvath and Stettner) Further, those non safety sensitive positions were already filled with senior employees.

394. The evidence established that Ipsco's Regina operation has at least 1250 employees in three divisions: steel, rolling mill and office and technical staff, all covered by the same Collective Agreement. There is no doubt that many of the jobs in the steel division and the rolling mill division requires a high level of security. Operating an overhead crane, using a torch to cut through slabs of hot metal and loading the slabs into a rail car require compliance with the safety rules.

395. The evidence established that Merrick was never disciplined for any safety violations. In fact, management recognized that he has always been involved in safety programs. He volunteered to be part of the first responder team and was an auditor for

[2] *Re Toronto Transit Commission and Amalgamated Transit Union (Goebey)* (1997) 72 L.A.C. (4th) 109

the STOP program at Ipsco to observe fellow employees do their jobs to develop processes that are even safer. His workmate, Newman, for the last 10-12 months of Merrick's employment, testified that he never observed any safety violations and that Merrick was a very safe employee. It must be remembered that this is after Merrick returned to work after his first treatment at Pine Lodge. It was at the time that he was struggling with the risk of a slip/relapse and when he actually had a slip. There was no evidence that Merrick ever went to work while impaired. As the Protocol recognizes there is a difference between an objective determination of actual impairment at work and a drug screen picking up trace elements of the drug in the body three days after use. Merrick's disability came to the attention of management through an honest disclosure on his part; it was not as a result of an accident or incident at work or workplace misconduct. The evidence established that Merrick recognized on his own that he suffered from the disease of addictions. He sought out treatment and was already attending NA, 12-step meetings before he disclosed his addiction to the EAP coordinator. He had already embarked upon the process of personally accepting that he suffered from the disease. I believe there are fewer safety risks when the employee acknowledges his addiction rather than still being in denial. Lastly, Merrick suffered a slip and not a full blown relapse thus facilitating further prompt recovery. (see *Health Employers' Association, Castlegar*, supra, para. 47)

396. The degree of risk posed by accommodating an employee to return to work has to be done on a case-by-case basis. It is fact driven. Ipsco failed to do this. It did not take into account Merrick's very positive safety record. As a result it did not accommodate him to the point of undue hardship.

397. In Merrick's case Ipsco allowed him to return to his same safety sensitive job after having completed 18 of 28 days at Pine Lodge. The evidence established that he successfully performed his job for six months without incidence or absenteeism. Obviously, the employer concluded that it was not necessary to do a gradual return to work in a less safety sensitive position to first assess his capacity to work safely. If after a second round of treatment for 28 days at Pine Lodge the employer now had concerns

for safety, it could have considered a graduated return to the safety sensitive job he occupied. It could have considered a host of options such as:

1. a temporary leave of absence;
2. a temporary posting in a less safety sensitive position;
3. temporary use of 8-hour rather than 12-hour shifts if it was concerned about his ability to focus; and
4. allowing time off during a 12-hour shift to attend NA meetings or to phone a sponsor in a confidential environment.

The options listed are mere suggestions. The evidence established that Ipsco never seriously considered the need to accommodate in September 2003, except to allow Merrick a leave of absence on WI benefits to attend Pine Lodge. After Merrick suffered a slip in June 2004, Ipsco admitted it never turned its mind to the need to accommodate. It never considered whether there would be any safety issues that would be raised by allowing Merrick to return to his regular position. The evidence established that Ipsco was able to accommodate other employees who suffered from the disease of addiction but who were dealt with under a voluntary referral. Some were placed temporarily in less safety sensitive positions. Ipsco was able to accommodate employees suffering from physical disabilities that posed safety risks such as heart conditions for crane operators or neck surgery which may limit an employee's ability to react quickly or intervene physically in an emergency, affecting safety.

398. Employers and employees have a statutory obligation to provide a safe work environment[3]. However, the statute also recognizes that the obligation is not to guarantee the safety of a work site: "Every employer shall: a) ensure insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers." There are too many factors over which there is no control. It is a matter of balancing interests and turning your mind to the relevant issues. For example, a crane

[3] *Occupational Health and Safety Act*, 1993, ch 0-1.1, section 3

operator can suffer from a heart attack or go into diabetic shock. An employee with bi-polar disorder may suffer an incident. An employee with no disability can be momentarily inattentive due to day dreaming, thinking about upcoming holidays, a date or difficulties at home. An employee may be tired as a result of a poor night's sleep or lack of proper nourishment or exercise. It is necessary to anticipate potential safety concerns in as many situations as possible but from the evidence led at the hearing Ipsco could not take the position that it was no longer prepared to take any risks whatsoever after Merrick suffered his first slip. The jurisprudence cited in this decision has shown that in other safety sensitive work environments employees have been accommodated even after two or three lengthy relapses. I conclude that it was a failure to accommodate to the point of undue hardship to impose the standard that Merrick could only return in December 2003 after signing a CRA with the conditions it imposed. It discriminated against Merrick based on his disability. The CRA was punitive rather than therapeutic. As an employee Merrick went from having an excellent work record to being forced to sign a CRA because he inadvertently disclosed his disability to management. No other disabilities were treated in that manner by Ipsco.

399. I conclude that in September 2004 Ipsco failed to accommodate Merrick to the point of undue hardship after he suffered a first slip. Ipsco failed to even turn its mind to the issue and as a result there is insufficient evidence to establish that it could not have accommodated his return to work for safety reasons.

viii) The reason for termination

400. Ipsco argued Merrick was not terminated because of the slip/relapse but rather because he failed to disclose the slip as required by condition 3 in the CRA, with the consequent positive drug screen. This went to the root of the trust relationship required in his employment with Ipsco. The tribunal rejects this argument. I have previously concluded that it was not a clear condition of item 3 of the CRA that he disclose a slip to the Medical Department. Therefore, failure to disclose the slip does not go to the root of

his employment contract. In the case of a voluntary referral for treatment a slip or failure to disclose a slip is never disclosed to management.

401. In Merrick's case I conclude that he reasonably believed that if he did disclose the slip he would be immediately terminated. It is the wording of the standard and its failure to clearly recognize the existence of a slip/relapse and an accommodation of it that led to Merrick's non disclosure to the Medical Department. I accept that Merrick was meeting at least monthly with Deters to advise her of any conditions which threatened his abstinence. He discussed the difficulties he was having at work with some fellow employees and his attendance at 12-step meetings. I conclude he took his treatment seriously as well as his monthly reporting requirement. At no time over the six months did Deters draw to his attention that in her view she believed he was not reporting monthly as required. Deters kept no notes when she would meet Merrick and her recollection of events at the hearing lead me to accept Merrick's testimony whenever it diverged from her testimony.

402. My assessment of the evidence leads me to conclude that Merrick was terminated because of the slip/relapse. The evidence establishes that Carr interpreted the slip as failure to abstain and thus a violation of condition 2 of the CRA. Being caught in a positive drug screen was the evidence of the slip/relapse. The CRA provided that a breach of any of the four conditions would result in immediate termination for just cause. The CRA went further than the Protocol which provided that it was only for a positive screen that an employee would be terminated.

403. Ipsco characterized the lack of disclosure of a slip/relapse as an act of dishonesty. It argued this act of dishonesty led to the termination and not the addiction. In my view, it is an interesting argument but it fails to recognize that what brought Merrick to that point was the admission of an addiction. Imposing a CRA at that first stage of the process was a failure to accommodate to the point of undue hardship. The slip was failing to "abstain" and it led to his termination. To now argue that the termination is totally divorced from the addiction goes contrary to common sense and to

the stated reasons for the termination. The facts in Merrick are not similar to the facts in *B.C. (PSA) v. BCGSEU* [2008] B.C.J. No. 1760 (Sept. 18, 2008) when the majority held the reasons for termination of a manager of a liquor store was for theft of liquor and not because of his addiction to alcohol. In the letter of termination, Carr stated that the termination was "based upon your breach of the terms and conditions contained in the conditional reinstatement agreement …" (Ex. P-9) The letter makes no mention of termination for dishonesty and lack of trust.

404. The evidence also confirmed the actual application of the CRA. All positive drug screens for employees on a CRA for addictions led to termination. It is reasonable to assume that Carr interprets all relapses as no longer requiring accommodation. Even if the tribunal were to accept Carr's position that failure to disclose a slip/relapse prior to being caught on a positive drug screen constitutes dishonesty, that does not relieve the employer from having to assess the need to accommodate. There is still a causal connection between the disability and the adverse consequence – the termination.

ix) Use of post-discharge evidence in assessing likely success of accommodation

405. The jurisprudence supports the use of post-discharge evidence[4] to assess whether Merrick could have been further accommodated. Subsequent to the positive drug test Merrick immediately arranged to disclose the slip/relapse to his AA sponsor. He disclosed it to his family physician who diagnosed he was also suffering from depression and put him on medication. He continued seeing Hardy as his counselor at his cost. I conclude that he failed to tell Hardy prior to June 29, 2004 of the slip because he knew Hardy had an obligation to disclose to EAP and he believed that would lead to his termination. I do not interpret his lack of disclosure on the first visit after the slip as an indication he is not motivated to participate fully in his recovery, a factor to consider in the need for further accommodation. Merrick enrolled for a second time at Pine

[4] *Telus v. Tele Communications Workers Union* [2007] C.L.A. No. 289, para. 179 to 182; *McGill University Health Centre v. Syndicat des employés* [2007] 1 S.C.R. 161; *Kellogg Canada and B.C.T.* (2006) L.A.C. (4th) 1

Lodge and successfully completed the 28 days of treatment. The report from Pine Lodge and Merrick's testimony confirmed he had now learnt relapse prevention techniques. He had developed an after care program and followed it. He attended on his counselor, his AA and NA sponsors and NA and AA step groups religiously. He exceeded the goals he had established. He returned for follow-up visits to Pine Lodge and practiced the 12th step by leading 12-step groups in schools, jails and other community institutions. He had read extensively on the disease. The evidence satisfied me that he had a robust recovery plan in place and he was following through. He had managed to abstain from the use of drugs and alcohol since being discharged from the treatment facility on September 10, 2004.

x) Summary of conclusions regarding accommodation

i) The standard in the Protocol and its application in practice are discriminatory because they treat employees who admit to an addiction more harshly than an employee who self declares to being a recreational user.

ii) Using a CRA as was done for Merrick as the first line of accommodation after voluntarily disclosing an addiction, fails to accommodate the addiction to the point of undue hardship. It fails to consider Merrick's individual circumstances. It treats employees with addictions more harshly without evidence that it is required for safety reasons. In fact, the evidence established that Ipsco was able to accommodate the return of employees with addictions without a CRA through its EAP.

iii) Merrick's termination was causally connected to the slip/relapse. Termination after a single slip/relapse in the circumstances of this case was not accommodation to the point of undue hardship.

5. Was the Union's participation in the use of the Protocol/CRA discriminatory contrary to section 18 of the *Code*?

a) The law regarding Unions and accommodation

406. The leading case to consider in determining the responsibility of a union regarding human rights issues is *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970. That case examined a union's obligation to relax the provisions of a Collective Agreement ("CA") to facilitate an employer's accommodation of an employee's religious rights. The Union refused to allow the creation of a Sunday to Thursday shift to accommodate the employee as it was viewed as a severe violation of the CA. As a result, the employee was terminated for refusing to work his regular Friday night shift. The Supreme Court of Canada concluded that the employer and the union had an equal duty to accommodate and neither could contract out of it.

> In both instances private arrangements, whether by contract or collective agreement, must give way to the requirements of the statute [Code]. (p. 986c)

407. The Union's duty to accommodate arises from section 18 of the *Code* and the definition of person as including a Union (section 2(m) of the *Code*). According to the Supreme Court of Canada:

> Accordingly, a union which causes or contributes to the discriminatory effect incurs liability. In order to avoid imposing absolute liability, a union must have the same right as an employer to justify the discrimination. In order to do so it must discharge its duty to accommodate. (*Renaud*, supra, p. 989) (underlining mine)

408. A Union can become a party to discrimination in one of two ways according to the Court:

> First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. (*Renaud*, supra, p. 990)

> …
> Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the Union impedes the reasonable efforts of an employer to accommodate … In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination.
> …
> The timing and manner in which the union's duty is to be discharged depends on whether its duty arises on the first or second basis as outlined above … the representative nature of a union must be considered.
> …
> While the general definition of the duty to accommodate is the same irrespective of which of the two ways it arises, the application of the duty will vary. A union which is liable as a co-discriminator with the employer shares a joint responsibility with the employer to seek to accommodate the employee. If nothing is done both are equally liable.
>
> … When it is a co-discriminator with the employer, it shares the obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect. (*Renaud*, supra. p. 992-993)
> …
> … in view of the fact that the duty to accommodate of the union was shared jointly with the employer, it was not incumbent … to determine whether all other reasonable accommodations had been explored by the employer before calling on the Union. (*Renaud*, supra, p. 994)

409. In *Renaud*, supra, the Court concluded that the Union had an original duty to accommodate because it fell within the first of the two ways a Union can become a party to discrimination. "Its conduct was a factor in the formation of the discriminatory rule and in its operation." (*Renaud*, supra, p. 996) It concluded, however, that the Union also fell within the second way a union can become a party to discrimination. "The union also contributed to the continuation of the discrimination with its refusal to accept the employer – suggested accommodation…" (*Renaud*, supra, p. 996)

410. The jurisprudence since the *Renaud* decision has continued to apply these principles to union liability in cases of discrimination. This Tribunal applied them in the case of *Kivela v. CUPE Local 21 and the City of Regina* October 10, 2003, www.saskhrt.ca and *Regina v. Kivela* 2004 SKQB 372, 2006 SKCA 2, 2006 SKCA 38 (CanLii).

b) The Protocol

411. The Union refused to be a signator to the Protocol and as such it is a unilateral work rule adopted by Ispco. There was evidence of the Union opposing compulsory random drug testing. The Union did, however, support a drug and alcohol free workplace and encouraged its members to take positive action by using the EAP. (Ex. R-8 – Steelworkers Statement on "Drug and Alcohol" in the Workplace) None of the parties raised whether the use of *ad hoc* drug screening in the manner described in the Protocol/CRA met the requirements of the *Code*. For that reason I have refrained from addressing it though the jurisprudence seems to allow it in appropriate circumstances.

c) Use of CRA as first line of accommodation

412. The evidence established that the Union participated in the use of CRAs as the first line of accommodation for an employee who admitted to an addiction to management. As indicated previously, this standard is discriminatory and is a failure to accommodate to the point of undue hardship. The CRA could not have been used without the signature of the Union. Normally, a CRA should be used to avoid a termination. It is to provide one last chance for the employee to prove he can effectively perform the job safely. Rather, in Merrick's case and in all cases of mandatory addiction treatment referrals, the CRA is used as the first line of accommodation, contrary to how a CRA is used in other circumstances.

413. The evidence established that the Union did not challenge the use of a CRA as a first line of accommodation for addictions. Merrick was not advised by the Union that there could be other alternatives to signing a CRA at the meeting of December 5, 2003. It was left up to Merrick to indicate if he had any problems with the proposed contents of the CRA. The Union simply acted as a conduit to effect the two changes requested by Merrick.

414. In January 2004 Merrick approached various union officials and shop stewards to express his concern about what would happen in the event of a relapse. One union official believed Merrick was simply having “buyer’s remorse”. Another told him it was too late to amend it. Yet, another told him not to worry and just do his job and the Union would defend him if he was ever terminated. When Merrick was caught by a positive drug screen, union officials attended the suspension meeting of June 24, 2004 and took careful notes but did not counsel him or meet with him alone. The union official was impressed by Merrick’s desire and sincerity in obtaining further treatment for his addiction. A union official expressed an opinion that Merrick would not lose his job in these circumstances.

415. After Merrick completed his second treatment at Pine Lodge, he met with Carr on September 10, 2004 to return to work. He was advised he was to be terminated. The Union attended the termination meeting of September 23, 2004 and took careful notes. A union official told Merrick after the meeting that his discharge would not stand and that the Union would fight to get his job back.

416. Merrick provided the Union with an 11-page summary of his addiction in order to allow the Union to represent him. (Ex. U-2) The Union filed a grievance on September 30, 2004. Park, for the Union, had Merrick sign consents for the release of information by Ipsco concerning his substance abuse. (Ex. U-4) Merrick filed documents with the Union from his family physician confirming he had completed treatment at Pine Lodge.

417. The testimony from Edwards, Grant, Kallichuk and Park gave the details of the investigation carried out by the Union. In short order the Union decided that it would not proceed with the grievance. I conclude that the reasons the Union withdrew the grievance are correctly set out in its grievance report for November 14, 2004:

> … Based on the review of the file and our records the grievor <u>failed to follow the Drug, Alcohol Testing Protocol</u> and also <u>failed to live up to the Last Chance Agreement</u> with the Company. These two factors alone would be cause enough for an Arbitrator to uphold the Discipline. The Grievance Committee, therefore,

> in the best interest of the Local Union Membership, recommends that we do not forward this grievance to Arbitration. (Ex. U-7) (underlining mine)

The report was adopted by the membership of the Union. There were attempts by Merrick and some members to reverse the decision after hearing from an addictions expert regarding relapses. The decision was maintained and the membership never did hear from an expert in the field of addictions.

418. Though the Union never signed the Protocol, it is obvious from its decision that it agreed with the use of the Protocol for Merrick. It also agreed with the use of the CRA (the Last Change Agreement) for Merrick. The evidence establishes that the Union did not canvass or propose any other alternative forms of accommodation in substitution for the termination. It did ask Carr to give Merrick's job back but the Union never engaged in any meaningful course of proposing alternate accommodation.

419. The day after the decision was made not to proceed to arbitration regarding Merrick's termination, Park for the Union wrote a memo dated November 16, 2004 regarding "Drug Testing". The following part is relevant to Merrick's case:

> As a final note on last chance agreements. If you have a person in your area who is on a last chance agreement for drug and alcohol use, and you are approached by this person because they have used recently, (often described as a slip/relapse) then you must direct them to report this <u>to the Company immediately</u>. We have seen a few members in this set of circumstances lose their jobs because they do not report it and are coincidentally randomly tested in accordance with their LCA's. <u>Once the positive result is discovered following a test, it is too late to explain or admit a slip or relapse. The principle here is that the individual would continue to cover up except for the co-incidental (sic) discovery. This is just like lying. The individuals are then discharged for the dishonesty as well as a breach of the LCA</u>. (Ex. U-21) (underlining mine)

420. I conclude from the evidence that the Union discriminated against Merrick contrary to section 18 of the *Code* since it participated and acquiesced in the use of the Protocol and the CRA. As indicated earlier in this decision, those standards – the Protocol/CRA – are discriminatory and fail to meet the employer's obligation to accommodate to the point of undue hardship. The Union failed to advocate to protect

Merrick's rights under the *Code*. It failed to advocate for another form of accommodation rather than the CRA after a voluntary disclosure of the addiction. By failing to proceed with the arbitration it acquiesced and became a party to the discrimination based on Merrick's disability. I conclude that in these circumstances the Union is jointly and severally liable for the discrimination experienced by Merrick.

421. The Union raised the argument that the reason it did not proceed with the arbitration is because Merrick wanted to "steer his own ship"; he would meet management without the Union; he did not cooperate in providing the information the Union required to advance his case. I find this argument is without merit. The Union succinctly stated the two factors that led to its decision – Merrick's violation of Ipsco's Protocol and his violation of the CRA. None of their documents support their testimony that Merrick had failed to provide them with the necessary proof that he had successfully completed treatment. Further, irrespective of what Merrick may have produced as evidence to support his successful treatment, the Union was satisfied that failure to respect the Protocol and the CRA were cause for termination. The Union both participated and supported the standards imposed by Ipsco regarding an employee suffering from the disease of addiction.

d) Applying *Renaud* to the facts in Merrick

422. In considering the evidence and the arguments the tribunal concludes that the Union became a party to discrimination in the first way described by the Court in *Renaud*.

423. Though the Union did not participate in the formulation of the Protocol (the standard imposed on Merrick) it did participate in its application. It participated in applying the Protocol to Merrick when it withdrew its grievance of his termination on the ground that "the grievor failed to follow the Drug, Alcohol Testing Protocol". (Ex. U-7) By withdrawing the grievance on that basis the Union became a co-discriminator.

424. Regarding the CRA the Union did participate in its formulation. The employer proposes it as its standard form of accommodation for any addictions brought to its attention. The Union participated in negotiations to reduce the length of duration of the standard CRA from 36 months to 24 months. (Park testimony) The Union agreed to the use of CRAs as the standard form of accommodation in cases of mandatory referrals for addictions. It agreed that a grievance of a CRA would be restricted to a determination of whether the terms and conditions of the CRA were breached. (Ex. P-5) This is contracting out of its human rights obligations and it is prohibited. (*Renaud*, supra, p. 985)

425. With respect to the specific CRA used for Merrick, the Union was present to negotiate and amend some of the wording. Kallichuk signed the CRA on behalf of the Union. Without the Union's signature the CRA could not have been implemented. Lastly, the Union participated in the application of the CRA by withdrawing its grievance of Merrick's termination on the second ground that Merrick "failed to live up to the Last Chance Agreement with the Company". (Ex. U-7) I have no difficulty in concluding that the Union owed a joint duty to accommodate. It failed to establish it had accommodated to the point of undue hardship. It did not canvas its members to determine if Merrick could be further accommodated without it having a substantial adverse affect on other members. The onus of proof with respect to this issue was on the Union and it was not discharged. Because the duty to accommodate was shared jointly with Ipsco the tribunal need not determine whether all other reasonable accommodation had been explored by Ipsco before calling upon the Union.

426. Merrick had done everything in his power to assist the Union in arriving at an acceptable accommodation. He attended the meetings, provided the necessary documents and signed the releases for medical reports. Merrick fully discharged the duty resting on him to cooperate in the accommodation process and in his treatment for the addiction. The Union and Ipsco are jointly liable for the discrimination and the damages that flow from it.

427. The principles enunciated in *Renaud*, supra, have been consistently applied in the following cases: *Canada Safeway Ltd. v. Saskatchewan (H.R.C.)* [1997] S.J. No. 502 SKCA, *Ontario Nurses Association v. Orillia Soldiers Memorial Hospital* [1999] O.J. No. 44 Ontario C.A., *United Food and Commercial Workers, Local 401 v. Alberta HRCC* [2003] A.J. No. 1030 ABCA and *Hamilton Police Association v. Hamilton Police Services Board* [2005] O.J. No. 2357 Ont. S.C.J.

VII. REMEDY

A. Cessation of Contravention Order

428. Having found that Ipsco and the Union discriminated against Merrick on the basis of his disability, in contravention of subsection 16(1) and section 18 of the *Code*, the next step is to determine the appropriate remedy. Section 31.3 empowers me to compensate Merrick in the following manner:

> 31.3 Where the human rights tribunal finds that the complaint to which the inquiry relates is substantiated on a balance of probabilities, the human rights tribunal may, subject to section 31.5, order any person who has contravened any provision of this Act, or any other Act administered by the commission, to do any act or thing that in the opinion of the human rights tribunal constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation for that injury, including:
>
> (a) requiring that person to cease contravening that provision and, in consultation with the commission on the general purposes of that provision, to take measures, including adoption of a program mentioned in section 47, to prevent the same or a similar contravention occurring in the future;
>
> (b) requiring that person to make available to any person injured by that contravention, on the first reasonable occasion, any rights, opportunities or privileges that, in the opinion of the human rights tribunal, are being or were being denied the injured person and including, but without restricting the generality of this clause, reinstatement in employment;
>
> (c) requiring that person to compensate any person injured by that contravention for any or all of the wages and other benefits of which the injured person was deprived and any expenses incurred by the injured person as a result of the contravention;

429. Merrick suffered because of the discriminatory standards contained in the Protocol and the use of the CRA as a first line of accommodation in an addictions context. Essentially, the standards have to be rewritten to take into account the human rights of employees suffering from the disease of addictions which includes slips and relapses. To correct the problems the Tribunal identified in the Protocol and the CRA all parties have to cooperate and devise solutions so that the standards take into account the needs of persons with addictions. In order to facilitate that task, the Tribunal makes the following order:

> Pursuant to subsection 31.3(a) Ipsco and the Union shall cease contravening sections 16 and 18 and, in consultation with the SHRC on the general purposes of those provisions, shall amend its Protocol and use of a CRA to respond to the needs of employees suffering from the disease of addictions, especially as it relates to their use as a first line of accommodation.

B. Cost, Wages and Benefits

430. The Tribunal finds that there is a causal connection between Merrick's termination and the discrimination. The Tribunal finds, pursuant to subsection 31.3(c), that there was a loss of wages and benefits from September 24, 2004 to the present for which compensation is required. The remedial provisions of the *Code* are to put Merrick back to the position he would have otherwise occupied but for the discrimination. Regarding whether there should be a "cut off" of the amount of damages, Merrick should receive for wage loss, the Tribunal has to consider that the total loss must have been reasonably foreseeable, and this is specific to the facts of each case: *Canada (Attorney General) v. Morgan* [1992] 2 FC 401 (Fed. C.A.) As stated by the appellate court the law of wrongful dismissal does not apply. As the Tribunal stated in *Kivela*, supra: "The basis upon which liability flows is different: in wrongful dismissal the wrongful act is termination without reasonable notice; in human rights cases, it is discrimination. Consequently, to make an employee whole who is wrongfully dismissed, all that is required is to provide payment during the notice period. In cases of

discrimination, it is to provide compensation for all damages flowing from the discrimination." (par. 129)

431. Merrick's wage losses were reasonably foreseeable consequences of the discrimination. However, the law also imposes a duty on Merrick to mitigate his loss. The duty to mitigate is not a duty to take any employment that comes along, but rather employment for which a person is reasonably suited. The complainant must make timely, reasonable efforts to obtain new employment: Tarnopolsky and Pentney, *Discrimination and the Law*, looseleaf (Scarborough, Ont.: Thomson Carswell) at 15-172. The respondent bears the onus of establishing that the complainant failed to mitigate his or her damages: *Discrimination and the Law* at 15-172. The Saskatchewan Human Rights Tribunal has considered a complainant's duty to mitigate on several occasions. In *Joni Lynn Shier v. Ray Edworthy and Shirwill Enterprises Ltd.*, S.H.R.T. 25 August 2003, the Tribunal stated:

> Shier was also required to mitigate her loss as a result of quitting her job. She testified that she applied at other stores in the mall and also checked the papers. There is no evidence that she registered with Employment Insurance or checked their job bank from time to time. In the circumstances, I find that Shier failed to adequately mitigate her loss. Bearing in mind that many retail employers would probably only be looking for part time assistance over the Christmas season, and that generally speaking the retail sector is slow after the new year, I am prepared to award Shier 9 pay periods commencing with the pay period ending on November 19th until the pay period ending on March 11, 2001, less what she actually earned at Bentley Leathers over the course of the same period.

432. The Tribunal has to consider all the relevant factors regarding mitigation of damages. Merrick was 49 years of age at the time of the hearing and had worked all of his adult life at Ipsco (24 years). His work experience is making steel. Ipsco is the only employer who makes steel in Saskatchewan. Though some of the individual skills he learnt are transferable, such as driving bobcats, operating cranes and using a cutting torch, there are not many places in Saskatchewan using a combination of those skills. Merrick was being paid in the range of $67,000 to $79,000 per year and it would be difficult to find another job in that salary range. Merrick did make attempts to find other

work but has been unsuccessful. (par. 49-50). He limited his search to Regina where he has a house and a recovery network. Merrick testified that he spent a lot of time trying to regain his job. He prepared documents to convince the Union to reverse its decision. He attended meetings and read a lot about the disease of addiction including relapses. He filed an application at the Labour Relations Board alleging unfair representation. He did all the work personally without a lawyer. This took a lot of his time. He helped prepare his case through the SHRC and prepared his own case as a self-represented complainant. This took a lot of his time. Merrick testified that the loss of his job had a major impact on him since he really drew a lot of satisfaction from his employment; he was a loyal long-term employee. There is no doubt that a sudden loss of employment impacted on his need to replace it with a life worth living for himself, in order to avoid a relapse. (see testimony of Dr. Butt). The evidence confirmed that indeed he worked particularly hard at relapse prevention after the termination. I conclude there was a causal connection between the job loss and the extra time Merrick spent in his recovery.

433. Carr testified about the buoyant Saskatchewan economy and the high number of jobs available for which Merrick was qualified. (Carr, par. 205 to 208) He indicated he would give Merrick a positive employment reference if Merrick could confirm he was in recovery. At the time of the hearing, Merrick still did not have such a positive reference from Carr and there was no evidence as to what would be necessary to obtain one. I was left with the impression that Carr still doubted that Merrick was truly on the road to recovery, even at the time of the hearing. Without such a positive letter of reference from Carr, Merrick's ability to secure alternate employment is considerably limited. It is reasonable to infer that a potential employer would want to know Merrick's employment history and seek a positive reference. Being told he was terminated for violating a CRA would considerably impede his chance of success. Ipsco has an excellent reputation as an employer in Saskatchewan, therefore, being terminated by such a prestigious employer will weigh heavily in Merrick's ability to secure employment in that industry. I am not satisfied on a balance of probabilities that Ipsco has established Merrick failed to mitigate his damages. I conclude it was reasonable for Merrick to want to remain in

Regina. It is one of the major employment markets in the province. Accordingly, the damages will not be discounted. If Merrick has received employment income since his termination, it will have to be deducted from his damage claim.

434. In order to address Merrick's lost wages and benefits, the Tribunal makes the following order:

> Pursuant to subsection 31.3(c), Ipsco and the Union shall pay to Merrick any and all wages and other benefits of which he was deprived as a result of the contravention. To the extent that Merrick benefited from overtime in the past, he is also entitled to compensation for loss of overtime earned. Without limiting the meaning of the phrase "other benefits", Merrick is entitled to pension benefits, CCP, insurance benefits, EI, sick days and reinstatement of seniority benefits and entitlement to shares of Ipsco. The purpose of this order is as stated in the Union's grievance report:
>
> > That Dale be reinstated and made whole in all areas of pay – seniority – shares – pension. (Ex. U-3)
>
> The Tribunal retains jurisdiction solely for the purpose of calculating these damages in the event the parties cannot reach an agreement.

435. Merrick seeks payment of WI benefits from November 25, 2003, when he left Pine Lodge, until December 15, 2003 when he returned to work. He claims it was discriminatory to cut him off WI benefits during that period. Ipsco argued the contract of insurance only provides benefits while an employee is in "active treatment" and there was no evidence from Merrick that between those dates he was in active treatment. Merrick further alleged the Union discriminated against him in not seeking payment for him. (Ex. P-28, item b) The Tribunal finds that there is insufficient evidence that Merrick was in active treatment during that period and that the non payment of benefits was

causally connected to Merrick's disability or that the Union failed to assist him because it applied a different standard of service due to his disability.

436. Merrick also claims WI benefits for his second attendance at Pine Lodge from August 13, 2004 to September 10, 2004. Ipsco had agreed to make that payment as part of the settlement with the Union, though Merrick refused the payment since he did not want to be seen as consenting to the settlement. Contrary to Merrick's allegation, the Union did assist him in obtaining this payment. There is a causal connection between Merrick's disability, the discriminatory treatment and the non payment. The tribunal, therefore, makes the following order:

> Pursuant to subsection 31.3(c), Ipsco shall pay to Merrick the WI benefits he was entitled to during that period of time (August 13, 2004 to September 10, 2004). There is no order for the wider period of June 24, 2004 to September 23, 2004 since there was no evidence all that time constituted "active treatment".

437. Merrick also seeks reimbursement of costs of treatment "provided by the Company appointed Addictions Counsellor". (see Merrick's Closing Argument brief regarding benefits, p. 32 of 32) I presume this refers to Ken Hardy. No evidence was led as to the cost of this service to Merrick and therefore Merrick has failed to prove a loss. As a result, there will be no order.

438. Lastly, Merrick asked that he be compensated for the loss resulting from the need to cash in RRSPs in order to live subsequent to the termination. There was insufficient evidence led to address this issue. His 2005 Income Tax Return (Ex. P-11) showed be cashed in $57,673.61 of RRSPs which was then subjected to taxation in 2005. His 2006 return showed he cashed in $75,380.30. There was no evidence to establish a loss of interest income from cashing in the RRSPs during those two years. There was no evidence that it resulted in a higher payment of income taxes. Further, there was no indication that it was necessary to cash in the RRSPs. No evidence was

led as to whether Merrick applied for or qualified for Employment Income. For all these reasons, there will be no order regarding the RRSP issue.

C. Pre-judgment Interest on Damages for Wage Loss and Other Benefits

439. For the reasons stated in *Kivela*, supra, at paragraphs 135 to 140, the Tribunal orders as follows:

> Ipsco and the Union shall pay to Merrick interest on lost wages and benefits. The rate of interest shall be the rates pursuant to *The Pre-Judgment Interest Act* and calculated in the manner provided for in the Act for lost wages (upon three-month intervals).

D. Reinstatement

440. Merrick and the SHRC request reinstatement whereas the respondents deny any discriminatory conduct.

441. While reinstatement is not appropriate in all circumstances, the purpose of human rights legislation is to put a person in the position that she/he would have been but for the contravention of the *Code*. Subsection 31.3(b) specifically authorizes reinstatement in employment.

442. There are numerous human rights cases where reinstatement has been ordered so that the complainant is made whole: see *Kivela v. CUPE Local 21 and City of Regina*, October 10, 2003, SHRT; *McAvinn v. Strait Crossing Bridge Ltd.* [2001] C.H.R.D. No. 36; *Parisien v. Ottawa-Carleton Regional Transit Commission* [2003] C.H.R.D. No. 6; and *Desormeaux v. Ottawa-Carleton Regional Transit Commission* [2003] C.H.R.T. No. 1.

443. In the arbitration context, reinstatement as a result of an employer violating the provisions of a CA relating to “just cause” for dismissal, is the rule rather than the exception. This recognizes the employee’s investment in his employment through years of service, 24 in Merrick’s case. In keeping with the principle discussed in the case *Re Tenant Hotline and Peters and Gittens*, (1983) 10 L.A.C. (3d) 130 at pp 138-139 when an employee such as Merrick invests a big part of his life in his job, as a matter of fairness, this investment should not be arbitrarily or unjustly extinguished, especially as a result of discrimination.

444. There was no evidence to indicate that reinstating Merrick to his previous employment at Ipsco would result in any significant disruption of the workplace environment.

445. Carr admitted that Merrick is a very positive employee, highly respected for his knowledge and commitment to safety. He was very competent and intelligent. (Carr, par. 209) There was evidence he had difficulty getting along with a fellow employee but Ipsco was able to resolve that issue before Merrick’s termination. Ipsco is a large workplace with three divisions. The evidence was that Merrick is in good health and therefore should be able to resume work without difficulty.

446. The Tribunal, therefore, makes the following order:

> Pursuant to subsection 31.3(b), Ipsco shall reinstate Merrick to his previous position or any similar position acceptable to Merrick. He shall be treated as having confidentially disclosed his addiction to the director of EAP and thus allowed to return without a CRA. It would be expected that if he should suffer a slip or relapse in the future he would disclose it to EAP and follow any requirements of an addictions counsellor.

E. Compensation for Injured Feelings

447. Section 31.4 of the *Code* empowers the Tribunal to order compensation to Merrick to a maximum of $10,000 where the Tribunal finds he suffered with respect to "feeling, dignity or self-respect as a result of the contravention". (subsection 31.4(b), *Code*)

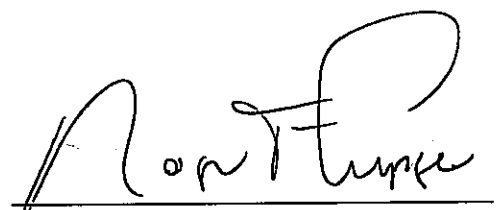
448. While compensation under this heading may not be appropriate in all cases, the case is one where I find it appropriate to exercise my discretion and make an award for injured feelings. Merrick sought out addictions treatment on his own but was unsuccessful. When he was arrested he sought out confidential assistance from Ipsco's EAP director. Unfortunately, he was placed under the standard of a mandatory referral with a return to work under the CRA. Despite having an excellent work record and no prior problems with substance abuse at work, he immediately faced the threat of termination if he had a slip. The foreseeable happened and he was terminated. What followed was a long and arduous task of clearing his reputation and obtain reinstatement. He was accused of being dishonest and no longer meriting trust by his employer. The Union first came to his assistance but quickly upheld the appropriateness of his termination. It also stated he had been dishonest in not divulging the slip prior to the positive drug test. Rather than being assisted by his Union, he was left fighting both entities. In essence, Merrick is facing two separate incidences of discrimination flowing from the same transaction. The evidence established that Merrick was very proud of his employment and to a large extent it defined who he was. The Courts have often recognized that removing a person's employment can be devastating to a person's sense of self-worth and dignity. On the evidence I am satisfied that this was the case for Merrick. In light of all the circumstances in this case, I find it warrants a substantial award.

449. A damage award for injury to dignity or to feelings under the *Code* is compensatory and is not in the nature of a penalty, forfeiture or punishment. (see *Canadian (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 392)

450. In conclusion, to address Merrick's suffering with respect to feeling, dignity and self-respect, the Tribunal makes the following order:

> Pursuant to subsection 31.4(b), Ipsco shall pay $4,000 to Merrick and the Union shall pay $4,000 to Merrick.

451. There was no request for costs even though the issue had been drawn to the attention of the parties prior to commencement of the hearing. As a result, there will be no order as to costs.



Roger J.F. Lepage