

IN THE MATTER OF AN ARBITRATION

BETWEEN:

EVRAZ REGINA STEEL
(A DIVISION OF EVRAZ INC. NA CANADA)

“EMPLOYER”

AND:

UNITED STEEL WORKERS , LOCAL UNION 5890
AND “DS”

“UNION/GRIEVOR”

A W A R D

Sole Arbitrator: Kenneth A. Stevenson, Q.C.

Counsel:

For the Union: Sonny Rioux
Staff Representative

For the Employer: Karen M. Sargeant

Hearing Dates: May 13 and 14, 2015
Regina, Saskatchewan

Award: June 29, 2015

A W A R D

I. INTRODUCTION

1. The parties agree that I have been properly appointed pursuant to their Collective Bargaining Agreement and that I have jurisdiction to hear and determine issues raised by the October 21, 2014 grievance alleging that DS was unjustly terminated on September 29, 2014. The parties agree that the Grievor shall be referred to as “DS”.

II. EVIDENCE

2. The Employer called evidence from Ms. Andrea Johnson, Human Resources, Business Partner, and Ms. Beckie Morin, Primary Care Paramedic. The Union’s witnesses were Vasco D’Almeida, Vice President of the Local, and DS.

3. DS commenced employment with Evraz on June 18, 2012; at the time of his termination he was a Relief Crane Operator Trainee; he was not permitted to operate a crane unless a qualified crane operator was present. The crane operator position, like most of the positions in the plant, is a safety sensitive position. A crane operator is responsible to operate a scrap crane which magnetically lifts 20 – 25 tons of scrap metal and feeds it into a steel mixture.

4. In September 2012 DS self-admitted to the Evraz medical nurse that he had a drug-addiction problem. The nurse and the company doctor formulated a treatment plan including detox and a 28-day residential treatment program. Subsequent to this, DS received the okay from medical personnel to return to work. After he successfully passed a drug test, DS returned to work in November 2012. The Employer facilitated this absence from work; during his absence he received short-term disability benefits. No conditions were attached to his return to work in relation to treatment, attendance at AA/NA meetings or abstinence.

5. After his return to work in November 2012 DS began to use drugs occasionally, then progressing to regular usage. He realized that his drug use was unmanageable and he wanted to stop using. On January 6, 2014 DS and his Shop Steward attended on Beckie Morin, Haztech Paramedic, to self-report his drug dependency advising he was using drugs daily. Haztech is retained by Evraz to provide medical services to it. DS hoped to go to the Calder Centre in

Saskatoon but was prepared to go wherever was quickest. Human Resources put DS in touch with Ceridian Lifeworks, the agency retained by Evraz to provide case management and follow-up treatment. On January 16, 2014, a Substance Abuse Professional (SAP) provided a report and opinion that DS met the criteria for a Substantial Use Disorder. The SAP provided nine recommendations including five required prior to DS's return to work:

2. Attend and complete a detoxification program to aid with withdrawal symptoms.
3. Attend and complete residential treatment program for substance dependency.
4. Attend a minimum of two (2) self-help meetings (A.A. and N.A.) per week until residential treatment admission and provide weekly verification.
5. Upon completion of treatment, provide a copy of the discharge summary and treatment program follow-up recommendations.
6. Participate in a post treatment assessment with the original assessing Substance Abuse Professional following the completion of the treatment program and before returning to work.

6. DS went into detox followed by a 28-30 day residential program in Calder. He was placed on a methadone program for the reduction of dependency on drugs. Ceridian provided Ms. Morin with SAP – Progress Reports and a Post Treatment Report on May 8, 2014 confirming his successful completion of the residential program for substance dependency. Prior to return to work he would need to have a negative drug and alcohol test. The SAP advised that he could complete the remaining recommendations while working:

1. Upon returning to duty following an MRO verified negative return to duty alcohol and drug test, as a precautionary and preventative measure, the employee will be subject to a follow-up testing program consisting of **12 unannounced follow-up alcohol and drug tests in the 12 working months** following the negative return to duty test.
2. Abstain from **alcohol and** all mood altering substances except those prescribed and monitored by a licensed medical professional.
3. Continue to attend a minimum of two (2) self-help meetings (A.A. and/or N.A.) per week and provide verification for the following six (6) months.
4. Continue on the methadone program and gradually reduce dosage under the monitoring, supervision and prescription of the attending methadone clinic physician. Provide verification.
5. Participate in a minimum of four (4) counselling sessions with a community agency to develop stronger stress management skills.

7. On May 28, 2014 DS, the Union and Evraz entered into a Return To Work Agreement (“Agreement”) pursuant to the Employer’s Alcohol and Substance Program (“Program”). The Agreement was based on the SAP post-treatment recommendations. It contained the following terms:

In consideration of the return to work for DS, Evraz, the Union and DS agree to the following:

- DS will obtain medical clearance to return to work and satisfactorily complete a drug and alcohol screen prior to returning to work.
 - DS will follow his discharge treatment plan as outlined in the recommendations provided by the Substance Abuse Professional
 - DS will participate in four (4) counseling sessions by November 30, 2014 and will provide written verification of counseling participation
 - DS will abstain from possession and use of drugs and or alcohol.
 - DS will attend a minimum of two (2) self-help meetings (A.A. and/or N.A.) per week until November 30, 2014 and will provide verification monthly to the medical department.
 - If DS suffers a slip or relapse and immediately self-reports his re-use to the Company, the Company will give due consideration to further accommodation.
 - DS will provide information to the Evraz Medical Department once per month reporting his treatment progress as well as any conditions or issues which may threaten his abstinence for the duration of this agreement.
 - DS will be subject to mandatory random alcohol and drug screening for the duration of this agreement, as arranged by the Evraz Medical Department. A positive test result or failure to comply with a drug and alcohol screening will be a breach of this agreement.
- The parties further agree that failure to meet any of the aforementioned conditions; the Company will consider a breach of this agreement and will terminate DS’s employment. If DS is terminated for violation of this Agreement, the only issue will be whether a clause in this Agreement is violated.

The parties agree that this RETURN TO WORK AGREEMENT will remain in force for twenty four (24) months from DS’s return to work.

I, DS, have read and understand all of the above conditions and agree to abide by these conditions as part of my reinstatement. I also acknowledge that I have sought and received counseling from my Union representative on this matter.

On May 28, the Agreement was fully reviewed and discussed. There was no objection taken by the Union or DS to the provisions.

8. DS underwent a Controlled Substance Test and Alcohol Test on May 29, 2014. The results were negative and DS was returned to work. DS’s follow-up with the Evraz Medical Department was through Ms. Morin to provide monthly reports on his treatment progress as well

as any conditions or issues which may threaten his abstinence. On June 11 Ms. Morin provided him with a NA/AA form to be completed as confirmation of his meeting attendance. Ms. Morin called DS on July 2 to arrange a day for him to come to see her. On July 21 DS attended with Ms. Morin. He reported: he was doing well; no issues at work; working a lot of overtime; attending NA two times per week but not enjoying overly. He promised to fax Ms. Morin the signed NA form the next day. Ms. Morin received a handwritten form on July 30. Ms. Morin never received an NA/AA form for either August or September. DS never contacted Ms. Morin nor met with her in August.

9. On June 26 Ms. Morin and Ms. Johnson discussed setting up a random drug and alcohol test for the first two weeks in July. Because of concerns as to the potential effect of DS's methadone use on the drug and alcohol test results this test was not conducted. When this concern was resolved a test was scheduled for September 8 but cancelled as DS was absent due to sickness. The test was rescheduled for September 16.

10. On September 15 DS came to see Ms. Morin. They discussed the need for him to meet her every month; he was to bring his meeting list the next day. DS reported: not seeing old friends – mostly family; attending meetings two times per week – not a fan but learning from them; had not yet attended any required counseling sessions; work good with no issues with coworkers or management. Ms. Morin urged him to attend the agreed counseling sessions and gave him a Ceridian contact to get in touch with a counselor.

11. Ms. Morin was present at the drug and alcohol screening on September 16 when DS tested positive for cocaine. Ms. Morin advised Andrea Johnson that DS was unfit for work until the lab conclusion was obtained. DS was sent home pending the final results. He did not admit any drug use. DS did not contact either Ms. Morin or Ms. Johnson subsequent to the presumptive positive on September 16. The lab results showed a reading of 57 nanograms per milliliter of cocaine. This level is not considered to be a 'positive' under the Program, but the result confirmed use of cocaine contrary to his covenant to abstain from the use of drugs. On September 24 a meeting was held with DS and Vasco D'Almeida with Andrea Johnson, Troy LaLonde, Senior Manager, Human Resources, representing Evraz and Ms. Morin present on

behalf of the Medical Department to discuss the Agreement and the test results. DS said he was doing really good, but he had friends in from out of town who he had not seen for one and one-half to two years. The friends were using drugs; they went to the bar. He did not drink but he slipped up and did cocaine one night.

12. At the September 24 meeting, there was considerable discussion about DS's compliance with the terms of the Agreement, including: attending two meetings per week and providing confirmation of attendance; the requirement to attend four counseling sessions prior to November 30. Troy LaLonde reviewed with DS the Agreement provision in relation to a slip or relapse with self-reporting and the Company giving due consideration to further accommodation. Mr. LaLonde expressed Evraz's hope that DS would have reached out and informed it of the slip or relapse. DS said that he was a last-minute guy; he had not attended any counseling sessions; he had not provided the August self-help meeting information; he said that he might go to one self-help meeting in a week and three the following week. DS acknowledged that he could do better, not procrastinate; he had not held up his end of the bargain. He was doing good except for the one slip-up.

13. DS expressed the hope that he could keep his job; however he said that he did not think it would do any good to re-enter rehabilitation as he did not feel that he would learn anything new. He expressed this view even in response to a question if treatment was a condition of his continued employment. He offered that he would prefer more drug tests.

14. Ms. Morin noted that DS had gone through treatment two times. He knows the building blocks on what to do; she said that meetings with a counselor might be a better option than going to residential treatment. Mr. D'Almeida expressed his opinion that getting to counseling would be more beneficial as DS had the cornerstones in place; DS never said that he was not prepared to go to counseling. Mr. LaLonde advised that Evraz needed to give the matter further consideration; if it was not going to not terminate the employment it would have to look at what was being put in place. The Employer's concern was the safety of DS and everyone else. Mr. LaLonde thanked DS for being honest.

15. At a meeting on September 29 Mr. LaLonde advised DS that the Employer had evaluated the circumstances; there was no dispute as to the areas DS hadn't fulfilled. The Employer did not have enough confidence that DS has made an effort; as a result it decided to terminate his employment.

16. On September 29, subsequent to his termination, in text message exchanges with Mr. D'Almeida, DS advised: *"If it absolutely comes down to it, I'll do what it takes to keep this job; treatment, consistent drug testing or whatever."* On October 16, DS advised Mr. D'Almeida that he had set up an appointment with his psychologist and that he would set up more appointments if the same were recommended. His position was that the Agreement was null and void so he was doing this for his own benefit.

17. DS says that after he used cocaine he was scared to admit this slip/relapse since it was a violation of the Agreement; he was afraid that his employment would be terminated. He says that on September 24 when he indicated that he was not willing to go for further treatment, he was referring to a 28-day residential program. He also felt that to return would be a disappointment to his family and his grandfather; they are now supportive of him. He had been through this program two times and had learned what he needed to do; he did not feel this would be beneficial. He was willing to do pretty much anything to keep his employment including submission to more drug tests for which he was prepared to pay. He is willing to do anything that the Company may require in order to get his job back, including going to treatment; he wants to do whatever is necessary to stay sober. He acknowledges that he had a single slip which resulted in a positive test. In his opinion he had not relapsed into thinking and doing drugs as he had done after the first treatment program. Since termination he has found alternate employment selling cars. He is going to AA meetings, getting some counseling and working to get off the Methadone Program. Since his termination he has not used cocaine; he continues on the Methadone Program.

18. DS acknowledges that the Agreement provides that if he self-reported a slip/relapse, Evraz would give due consideration to further accommodation. He believed that he would be terminated because he did not abstain. He acknowledges that he was not terminated when he

self-reported in 2012 and again in 2014. When he did not attend self-help meetings each week and did not provide verification of attendance he was not terminated, although this was a breach of the Agreement. Notwithstanding encouragement by Ms. Morin on September 16 to book the counseling sessions, none had been booked by September 24 or September 29. His concern was that it was a bigger violation of the Agreement to use drugs because of the safety issue. While he went to an average of two self-help meetings per week, he acknowledges this does not meet the required minimum of two meetings per week.

19. DS says he is currently attending AA/NA meetings; he did not produce documentation. He goes from time to time as he feels the need. He saw a psychologist for counseling on one occasion; he did not present any documentary or evidence nor has he been in contact with Evraz to provide any substantiation. He says that he got out of detox for methadone dependency about three or four weeks ago. He is trying to make changes in life, has a good schedule and doing positive things.

III. POSITION OF THE PARTIES

20. Both parties agree that the legal framework within which this matter ought to be decided is properly set forth in *Merrick v. IPSCO and United States, Local 5890* (Saskatchewan Human Rights Tribunal – Lepage, November 14, 2008).

Employer Position

21. Evraz does not dispute:

- (1) DS's drug addiction is a disability protected by The Saskatchewan Human Rights Code, C. s-24.1 S.S. 1979 ("*Code*").
- (2) A slip or relapse is part of the disability that also requires accommodation.
- (3) A *prima facie* case of discrimination on the basis of disability (addiction) has been established as a result of the termination.

Evraz says that it has satisfied its duty to accommodate DS's disability and slip/relapse to the point of undue hardship. It says that DS failed to work with and follow the program of aftercare

and failed accordingly to facilitate the success of his accommodation. The Employer had just cause to terminate DS's employment.

22. Evraz says that the facts establish that it has accommodated DS's disability to the point of undue hardship.

- In September 2012 while the DS was a probationary employee, Evraz facilitated his detox, treatment and continued to pay through STD benefits.
- When DS returned to work on December 2012 he did so without a Return To Work Agreement; he was given a second chance without restrictions except that he had to pass a clear drug test.
- In January 2014 when DS disclosed months of heavy drug use the Employer did not terminate and/or discipline him. They facilitated his treatment including a third party to arrange for an assessment, treatment and post-treatment programs. During his absence he was provided with short-term disability benefits.
- When DS returned to work in June 2014, the return was covered by provisions of the Agreement; the Agreement recognized that in the event of a slip/relapse which was self-reported, that Evraz would give due consideration to further accommodation. DS was allowed to keep his privacy and to report through Haztech rather than through Human Resources. Notwithstanding the fact that DS did not attend a minimum of two self-help meetings weekly, nor provide evidence of such attendance, Evraz did not terminate his employment for a breach of the Agreement.
- When DS tested positive for cocaine, again the Company did not move to terminate his employment, but more importantly met with him to allow him to explain the situation. At that time Mr. LaLonde took the position, on behalf of Evraz, that he was not trying to take away his job, rather trying to help him keep his job. It was only after the investigation and hearing the Grievor and his explanation for his cocaine use and hearing that he was not going to self-help meetings a minimum of two times per week and that he did not want to participate in further rehabilitation that Evraz ultimately decided to terminate his employment. The termination was not simply for a breach of the Agreement.

23. Counsel says that termination for a violation of a last chance agreement is not necessarily a violation of human rights legislation. A last chance agreement may be an accommodation to the point of undue hardship. *Labatt Breweries Ontario v. Brewery, General & Professional Workers Union, Local 304* (2002), 107 L.A.C. (4th) 126 supports her submission that generally there are compelling policy reasons for upholding last chance agreements which are a significant accommodation for employees handicapped by substance abuse. The grievor in *Labatt* was terminated from his 26-year employment for a breach of a last chance agreement entered into one year earlier. The agreement provided: the company had fulfilled its duty of reasonable

accommodation; discharge was the agreed on penalty for breach of the agreement; an arbitrator shall have no jurisdiction to substitute a different penalty.

24. Employer counsel asks me to confirm and accept the decision in *Kimberly-Clark Forest Products Inc. v. Paper, Allied-Industrial, Chemical & Energy Workers International Union, Local 7 – 0665* (2003), 115 L.A.C (4th) 344. The company discharged the grievor for violation of a last chance agreement to abstain from the use of non-prescription drugs for thirty-six months. The parties agreed that discharge would be the appropriate penalty should test results indicate the presence of non-prescription drugs and that the sole issue in any grievance arising out of discharge would be whether the test results indicate the presence of non-prescribed drugs. The grievor actively smoked marijuana contrary to his commitment in the last chance agreement. The arbitrator concluded that the requirement to abstain from non-prescription drugs, submit to drug testing and the parties agreement that discharge would be an appropriate penalty should the test results indicate the presence of non-prescribed drugs, are *bona fide* occupational requirements. The Ontario Human Rights Code did not prohibit the company from relying on the prescribed penalty of discharge; the last chance agreement circumscribed his jurisdiction to substitute another penalty for the discharge.

25. Employer counsel cites the decision in *Pacific Blue Cross v. CUPE, Local 1816* (2005), 138 L.A. (4th) 27 where Arbitrator McPhillips held that the employer had met the obligations imposed on it both under labour relations concept of just cause and human rights requirement of the duty to accommodate. There was an obligation on the employer to provide reasonable rehabilitation opportunities and it did so; the employer could not be held responsible if those numerous opportunities were not taken. The employer had accommodated the grievor to the point of undue hardship. While the terms of last chance agreements or treatment agreements cannot be blindly and absolutely enforced, they provide strong indicators of what will constitute just cause as well as meet the obligation to accommodate the disabled employee.

26. The Employer relies on the decision in *Kingston General Hospital and Ontario Nurses Association* (2010), 195 L.A.C. (4th) 57, that last chance agreements are an appropriate response to the requirement to accommodate the needs of an addicted individual. Arbitrator Swan noted

that a last chance agreement which includes an absolute prohibition on the continued substance abuse was both appropriate and probably an essential part of the accommodation based on the need for rehabilitation.

27. The Employer says that DS was responsible to facilitate the success of the accommodation of his addictive disability. On September 24 he acknowledged that he “could have kept his end up better”. The Employer points to DS’s failings: June 2014 not submit verification attending any meetings; not attend a minimum of two self-help meetings per week nor submit proof of attendance August and September; no progress in setting up counseling sessions; no monthly meetings with Ms. Morin; used cocaine and not report this breach either when he returned to work or to Ms. Morin – he was not really honest with Ms. Morin about “being with old friends”.

28. The statement of DS that he did not disclose his slip/relapse because he thought that he would be automatically terminated was not reasonable. The Agreement invites self-disclosure and that the Employer would give “due consideration to further accommodation”. He hadn’t met other conditions such as attendance at and verification of attendance at self-help meetings and notwithstanding these breaches, he was not terminated. He was not terminated when he self-disclosed in 2012 and January 2014. The Agreement does not use the words “last chance agreement”.

29. The Employer says that DS’s refusal to go to further rehabilitation when the same was suggested should be considered in deciding whether or not there has been accommodation to the point of undue hardship. While the Union suggested that counseling would be a better option and Ms. Morin appeared to agree, DS did not propose this either on September 24 or 29. Further following termination no steps were taken to get to counseling other than one appointment. DS said that he did not think further rehabilitation treatment would be of assistance and he would not go even if it was a condition of his return to work or keeping his employment. This is an indication that he has not accepted ownership and responsibility, rather, he wants “more tests”. This is not sufficient treatment rather it puts the onus on the Employer. DS is not a professional and doesn’t know what the best course of treatment might be.

30. Employer counsel submits that it was reasonable for the Employer to conclude that given DS's failures to abide by the treatment program and the conditions of the Agreement and his failure to take responsibility for abiding by these terms, that as of September 2014 the Employer had done all that it reasonably could. It was not necessary to give DS a third chance in less than three years as he had already been off work for seven to eight months. The Employer has met the undue hardship onus.

31. The post-termination evidence does not negate that Evraz had just cause for the termination; it does not negate the fact that the Employer met its obligation to accommodate to the point of undue hardship by September 2014. DS takes the position that he would not take further residential treatment and provides no medical notes from the doctors or counselors concerning any proposed line of treatment. DS has failed to attend self-help meetings; not consistent two times per week and no verification. DS attended only one counseling session not the four required by the Agreement by November 2014. DS is currently pursuing detox and treatment for his methadone addiction.

32. The Employer says that the decision in *Merrick* was decided in very different circumstances. Merrick had 24 years of service; DS had 2½ years. The previous employer, IPSCO, had a very different attitude towards addictions which were described as "abhorrent behaviour" whereas now the same is treated as a disability and an addiction. Merrick complied with all other conditions of his conditional reinstatement agreement other than abstain from use the drugs. In *Merrick* there was one absence for treatment whereas here there are two. Merrick had a slip and immediately went into treatment; there is a different employer policy in place. The *Merrick* conditional reinstatement agreement is much different than the Agreement. There is nothing in *Merrick* about a slip/relapse; this is part of the failure of the employer to accommodate. The Employer says that I should come to a different conclusion as here this provision is part of the accommodation.

Union Position

33. The Union submits that the Employer has not met the onus of accommodating DS's disability to the point of undue hardship. The Employer is a large multi-national company and there is no evidence as to the financial cost to further accommodate of DS's disability. DS has indicated his willingness to pay for any random drug and alcohol tests. There is no evidence that DS has worked in an unsafe manner or was incapable of returning to the workplace and performing his job duties. The matter of undue hardship was not discussed with the Union or DS in the termination process nor was the same referred to in the termination letter; the only reference was that DS did not follow the return to work conditions.

34. Mr. Rioux points out that the Agreement provides that any failure of DS to meet the conditions of the Agreement will be considered a breach and that the Employer will terminate his employment. Although the Employer was aware that DS had not reported his attendance at self-help meetings as required, it did not seek to enforce this provision or to terminate DS for such failure. Its actions might be considered an "enabling" of DS's disability. Although the return to work program was in place nothing was done by the Employer until DS had a slip and used cocaine. The Employer took only one random test. DS is also not without fault. He failed to submit verification of his attendance at self-help meetings. The Employer could have requested such verification through the Union and thereby had the Union play a larger role in connection with the terms of the Agreement.

35. Mr. Rioux says that the Employer has failed to comply with its Program. The Program provides that when an employee returns from addictions treatment he will be subject to a follow-up program to support his recovery for a period of time professionally determined which may include unannounced testing. When DS returned to work in November 2012, the Employer failed to provide a follow-up program to support his recovery. It failed in its responsibility for the successful implementation of the Program; its actions may be seen as enabling.

36. DS is prepared to return to whatever treatment program and follow up that is required. During the September meetings he was not saying no to treatment; rather he was saying that he didn't believe that residential treatment would help him as he had already been through the 28-

day program on two occasions. Ms. Morin's evidence is that DS already has the "building blocks" in place. DS has clearly indicated by his subsequent texts that he is prepared to go to a counselor; he had scheduled an appointment for his own benefit rather than in compliance with the Agreement which is at an end as a result of his termination.

37. The Union relies on the decision in *Shaw Cablesystems G.P. v. Telecommunications Workers' Union*, [2014] C.L.A.D. No. 79. The grievor was terminated for his failure to comply with a post-treatment agreement to refrain from consuming alcohol. The panel concluded that the post-treatment agreement was essentially the employer's response to its duty to accommodate and that the employer had failed to accommodate the employee's disability to the point of undue hardship. The termination was set aside.

38. The Union draws attention to the awards which recognize, based on expert evidence, that slips/relapses are to be expected and accommodating an addict may require some allowance for such relapses. In dealing with a drug dependency the parties need to be realistic about the nature of the disease; it would be inappropriate to conclude that every relapse should be accommodated.

39. Mr. Rioux references extensively the decision in *Merrick* with particular reference to the issue of relapse. The evidence is that recovery is a process rather than a single event with relapse considered to be a therapeutic opportunity to refine the treatment process. There is a risk of relapse therefore the parties need to develop strategies to mitigate the risks. The *Merrick* evidence is that a "slip" has been defined as an isolated use where the person was still able to exercise enough self control to pull back from continued use. In the case of "relapse" the individual loses control and has continued use over a prolonged period of time. Counsel points to the fact that Mr. Lepage accepted: (1) evidence that slips/relapses are part of the disease of addiction; (2) recovery is life long – relapse not the end of the world – depends how the person reacts to it; it can be very positive and help with a real recovery.

40. Arbitral jurisprudence has addressed slips/relapses as being a component of the disease of addiction. Mr. Lepage drew the following conclusions from the jurisprudence:

- (a) No blanket rule which justifies termination of an employee who relapses after receiving treatment previously considered adequate to sustain recovery;
- (b) Several relapses is the rule rather than the exception;
- (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;
- (d) Suffering a slip/relapse is a powerful negative reinforcement making it less likely that it will happen again;
- (e) The frequency of the relapse is not as important in the medical sense as the change of pattern;
- (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.

Mr. Lepage concluded that a slip/relapse is an integral part of the disease of addiction and there is a duty to accommodate a slip/relapse to the point of undue hardship.

41. Mr. Rioux notes the reference in *Merrick* to the decision in *Kimberly-Clark* (supra) that last chance agreements are not inviolable. Parties to a collective agreement cannot contract out of the protections of the *Code*; they cannot bind a disabled employee with conditions in a last chance agreement that violate the protections the *Code* provides. DS reasonably believed that if he self-disclosed his slip he would be immediately terminated. His failure to self-disclose does not establish an undue hardship for the Employer but is simply part of the accommodation.

IV. THE ISSUE TO BE DETERMINED

42. The parties agree that the issue to be determined is whether or not the Employer has established that it had accommodated DS's disability to the point of undue hardship.

V. JURISPRUDENCE

43. It is well established by court and arbitral decisions that what amounts to undue hardship is a question of fact which will vary with the circumstances of each case. In the context of this

work environment and an employee suffering from the disability of addiction, Mr. Lepage in *Merrick* wrote:

356. ... 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.*

44. In *Labatt Breweries*, Arbitrator Barrett stated:

33. What amounts to “undue hardship” is a question of fact in every case. There is no magic formula or prescribed number of rehabilitation programs the employer is suppose to sponsor. ...

38. 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.” 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 the 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.

45. In *Pacific Blue Cross* Arbitrator McPhillips noted that it was clear from the authorities "... that what constitutes reasonable and undue hardship varies with the circumstance of each case and this concept must be applied with common sense and flexibility". Specific factors to be considered on the employer's duty to accommodate include: financial cost of the programs, level of absenteeism, impact on other employees and the size of the employer. The employee failed to respond to multiple rehabilitation efforts and opportunities and where there was no objective evidence that further efforts at accommodation would likely succeed, it was open to a reasonable conclusion that the employee had been accommodated to the point of undue hardship.

46. *Merrick* addressed the scope of the employer's duty to accommodate in addictions cases in the following terms:

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 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) (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.

47. The purpose of accommodation agreements, last chance agreements, treatment agreements, post-treatment agreements, conditional reinstatement agreements or as in this matter, a return to work agreement, are ultimately “to lead to the rehabilitation of the employee”. (*Pacific Blue Cross*). As noted by Arbitrator Levinson in *Kimberly-Clark* (supra), 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: parties being able to rely on the terms they negotiate; fostering and promoting the confidence of the parties to resolve their disputes and fashion their own solutions; not making last chance agreements meaningless and discouraging or taking away the incentive for employers to enter into such future agreements by giving employees a second last chance. Arbitrator Levinson also notes that last chance agreements are not inviolable; as a matter of public policy, parties to a collective agreement cannot bind a disabled employee with conditions in a last chance agreement that violate the protection of human rights legislation.

48. Last chance agreements and other similar tripartite reinstatement agreements are made to accommodate a grievor in addictions cases in circumstances where it is probable that the grievor would otherwise have been terminated from his employment. Such agreements are designed as an accommodation; they recognize the joint responsibility and role of the union, the employer and the employee in the accommodation of the addicted employee.

49. Last chance agreements and other related return-to-work agreements are used to bring home to an addicted employee the serious consequences of continued addiction and at the same time to allow the employee to obtain proper treatment. Such agreements provide the addicted employee with a humane and reasonable opportunity to foresee the consequences of continued consumption without having to face the consequence of a loss of employment. The general arbitral view of last chance agreements in the accommodation of an addicted individual was addressed by Arbitrator Swan in *Kingston General Hospital* (supra):

55. There is a general view in the arbitral jurisprudence that a last chance agreement is an appropriate response to the requirement to accommodate the needs of the addicted individual. Obviously, the facts of each particular case must be considered, and the language of the last chance agreement must be appropriate to the circumstances, but in general, whatever may be the view of the imposition of last chance agreements or

deemed discharge provisions in other situations of disability, arbitrators have considered last chance agreements to be appropriate in cases of addictive disabilities, and to constitute accommodation of the particular disability of addiction: see *Toronto District School Board v. C.U.P.E.* (1999), 79 L.A.C. (4th) 365 (Ont. Arb.) (Knopf).

50. Arbitral decisions based on expert evidence have consistently recognized that slips/relapses are part of the illness/disease of addictions and recognize that several slips/relapses may be the rule rather than an exception. The authorities consistently recognize that the accommodation of an alcohol or drug dependent employee may require an allowance for slips/relapses. In *Pacific Blue Cross Arbitrator McPhillips* quotes Arbitrator Knopf from *Uniroyal Goodrich Canada Inc. v. USWA, Local 677* (1999), 79 L.A.C. (4th) 129 at page 183:

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.

Arbitrator McPhillip noted that those sentiments apply with equal force to drug dependency.

51. The panel in *Shaw Cablesystems* (supra) addressed the issue of relapses by quoting Arbitrator Knopf (supra) and adding:

258. It would be unusual to expect an alcoholic employee to achieve a full recovery following a single intervention and there are many arbitration cases involving more than one intervention by an employer: see for example *Miramar Con Mine Ltd. v. United Steelworkers of America (Rolfe Grievance)* (2002) N.W.T.L.A.A. No. 4 (Ready) at para 31.

259. However, it is also important to bear in mind that care must be taken not to relieve the alcoholic of the responsibility for taking reasonable steps to prevent relapses, so as to enable continued drinking: *Slocan Group v. Pulp, Paper and Woodworkers of Canada, Local 18 (Pavelko Grievance)* (2001) B.C.C.A.A.A. No. 163; 97 L.A.C. (4th) 387 at para 123 (Taylor) ("Slocan").

VI. DISCUSSION AND ANALYSIS

52. In determining whether further accommodation would involve undue hardship, I must look at all the circumstances including the burden of the handicap already experienced, the accommodation measures already taken, and add the anticipated future burden. The Employer is now being asked, in addition to the steps already taken, to accommodate DS's re-use of cocaine and breaches of the Agreement.

53. DS was employed a relatively short period – somewhat over two years. The Employer has taken a number of measures to accommodate his drug addiction; it has gone to considerable length and spent considerable resources to accommodate DS's illness: two residential treatments, with resources for these and for the follow-up program in connection with the return to work in June 2014.

54. The Employer acted reasonably in providing assistance to DS and encouraging him to seek assistance at the Employer's cost and providing follow-up on his return to work after May 29. It is clear that subsequent to May 28, the Employer continued its role in the accommodation process through Ms. Morin. Ms. Morin contacted DS to get updates, to encourage attendance at self-help meetings and reporting his attendance, and to arrange for counseling sessions. The Employer took steps to encourage and support DS in the performance of his obligations in the accommodation and to support DS as he sought to achieve recovery. I do not fault the Employer, nor consider that it "enabled" DS when it did not act on his failure to abide by the reporting and substantiation requirements in relation to the self-help meetings.

55. With respect to the initial accommodation in 2012, DS returned to work without a follow-up program requiring such things as attendance at self-help meetings, counseling, monitoring or having a sponsor. Such programs play a critical role in providing an addict with assistance in his attempt to achieve recovery and change his life. In my opinion, the lack of a follow-up program was a significant factor in DS's relapse in 2014. I have considered this to be a relevant circumstance in assessing whether or not the accommodation of the 2014 re-use/slip/relapse was an accommodation to the point of undue hardship.

56. The Agreement was intended to be and was part of the accommodation of DS's illness. The premise of the Agreement was that DS had potential to recover from his drug dependency and to maintain abstinence; if he did not remain drug free, he faced the threat of discharge. The Employer recognized and took into account that slipping/relapsing is part of the nature of substance dependency. The accommodation included the Employer's undertaking that if DS immediately self-reported his re-use, it "... will give due consideration to further accommodation." In making covenants in the Agreement for due consideration on re-use, the Employer and the Union were being realistic about the nature of the disease and recognized that accommodation may require an allowance for a slip/relapse.

57. The Employer agreed to give due consideration to further accommodation in the event of self-reported re-use. This provision recognizes that there may be some accommodation that the Employer can make short of reaching the point of undue hardship. In other words, some further accommodation might not be unreasonable in some circumstances. This was the Employer's position as it considered its options in September. In my opinion whether or not the re-use was self-reported or as here, established on a random test, does not impact the potential to accommodate at a point below undue hardship. Self-reporting does not affect the level of hardship, although it may reflect a greater potential for treatment and recovery in that it is an admission of failure, honesty which may indicate greater rehabilitative potential and be relevant to any further accommodation.

58. The Employer does not base its just cause for termination on DS's breaches of the Agreement; it says that its just cause is the fact that it has accommodated his drug dependency to the point of undue hardship. In assessing whether the Employer has accommodated to the point of undue hardship, I must take into account the fact that the Employer, in January 2014, did accommodate DS's relapse. It did not take steps to terminate DS's employment even though it had previously accommodated his disability through the provision of absence on an STD benefits to get detox and residential treatment.

59. In my opinion the circumstances (the facts, the impact of the slip on the ongoing prognosis, and the consequences of the slip and DS's re-use of cocaine) are such that the

Employer can accommodate his disability without undue hardship. It is clear that DS has re-used cocaine. I accept his evidence that the positive test was as a result of his “slip” while with some old friends and that he has not otherwise re-used drugs or alcohol. The re-use and resultant positive test for cocaine are breaches of the Agreement. DS also breached other provisions of the Agreement: he has not attended a minimum of 2 self-help meetings per week and provided verification monthly to the Employer’s medical department; he has not provided regular monthly reports of his treatment progress; he had made no progress in scheduling the agreed counselling sessions. These breaches and their nature are relevant in assessing undue hardship and whether or not any further accommodation is reasonable having regard to the prognosis for DS to achieve and maintain rehabilitation and abstinence. It appears that DS was abstinent until the usage of cocaine on the September 13/14 weekend. There is no evidence of any attendance or work performance issues, including safety issues.

60. The circumstances of the re-use included: single event, not self-report, his tested cocaine level did not violate the Program. Given the single-use slip and no further re-use, it appears that DS may, like many addicts, have the potential to learn from his very serious error in judgment. He has rehabilitative potential; he has continued with some aspects of his recovery program and has shown good progress in his attempt to remain abstinent. There is some evidence that a last further effort at accommodation might have a reasonable chance of success. It is evident that he will need to make an extra-ordinary commitment and effort to achieve recovery. This will require that he have the assistance of professionals such as a SAP and a program which he will need to follow faithfully. In so doing, he may be well advised to have a sponsor.

61. Mr. LaLonde did consider accommodation notwithstanding that DS did not self-report; he advised DS that he was trying to help him retain his employment. It appears that it was not sufficiently clear, nor understood by management that DS’s resistance to an offer of further treatment related to an additional residential treatment, and not a blanket refusal to accept further treatment. On its understanding that DS was unwilling to seek further treatment, the Employer concluded that it could not provide any additional accommodation short of undue hardship. Had there been a refusal by DS to accept further treatment as a condition of his continued

employment, then in my opinion, the Employer would have satisfied its duty to accommodate to the point of undue hardship.

62. In all of the circumstances, it is my conclusion that accommodation to the point of undue hardship has not been established. There is insufficient evidence to conclude that the Employer could not accommodate DS's slip/relapse, without experiencing undue hardship. This conclusion is based on my finding that DS did not refuse further treatment, but questioned the value of another residential program. Ms. Morin's evidence tends to support this opinion; the real need may be for a rigid, disciplined follow-up program to support recovery. Accommodation of the relapse, in these circumstances, would not have been unreasonable. The premise of the Agreement was that DS had the potential to achieve a full recovery from his drug addiction. The parties recognized the potential for a slip or a relapse; the Employer was prepared to consider further accommodation. Although he did not self-report on this occasion, he had self-reported on two prior occasions. I accept that he did not self-report because he was afraid that he would be terminated. Unfortunately, he did not consult with his Union in this regard.

63. The Employer has assumed very significant burdens in its accommodation of DS's addiction. It is my conclusion that it is reasonable, and not an undue hardship for the Employer to provide DS with one final opportunity to achieve recovery. In my opinion, it would be unreasonable to expect it to endure any future re-use, slip or relapse. To permit any further accommodation of a relapse would only serve to relieve DS of his responsibility for re-use and enable him to continue his drug use. The disease is treatable, it will now be up to DS to achieve recovery and abstinence; it is solely within his power. The Employer should no longer be required to accommodate any future relapses.

64. I make the following order:

- (1) DS's dismissal is set aside. DS shall be reinstated to his employment on the agreement of the parties as soon as reasonably practicable for both the Employer and DS having regard to the conditions of reinstatement;

(2) Having regard to all the circumstances, I conclude that it is appropriate to leave to the Employer's discretion as to whether or not DS is now returned to his former position as Relief Crane Operator Trainee or such other position for which he is qualified. Once DS has successfully completed one year of service under the terms and conditions of this order, he should be entitled to exercise his collective agreement rights to seek position(s) for which he is qualified.

(3) DS shall be credited with full seniority from the date of his dismissal;

(4) The time DS is off work shall be deemed to be a period of suspension without pay. The circumstances do not support an entitlement to compensation;

(5) DS's reinstatement is subject to the following conditions which shall remain in effect for a period of two years following reinstatement:

(a) DS, the Union and the Employer shall enter into an agreement containing the terms and conditions of this order. In the event of a dispute between the parties as to what terms or any other reasonable terms ought to be included in the agreement or the title of the agreement, either party may request the arbitrator to convene such hearings as he may consider to be appropriate. The arbitrator shall determine the issue in dispute. If the parties are unable or refuse to reach an agreement, the arbitrator may prescribe any other conditions for DS's reinstatement as he may consider appropriate.


(b) DS shall attend on a Substance Abuse Professional at Ceridian Lifeworks or such other addiction professional as the parties may agree and shall follow the recommendations of the SAP or other professional for any treatment plan and/or discharge plan;

(c) DS shall abstain from the possession and use of alcohol and any mood altering substances except those prescribed and monitored by a licensed medical professional who is knowledgeable about his chemical dependency;

- (d) DS shall attend counseling for his addiction a minimum of once every two weeks for a period of four (4) months, or more often and for such period as his counselor shall recommend. He shall provide his counselor with the consent and authorization to discuss his participation in counseling with the Evraz Medical Department upon request. The counselor shall be selected through the Medical Department and Ceridian Lifeworks;
 - (e) DS will attend a minimum of two (2) self-help meetings (AA and/or NA) each calendar week for a period of six (6) months, or such other number and duration as his SAP or addictions professional may recommend and shall thereafter attend in accordance with such recommendation. DS shall provide the Evraz Medical Department with verification in accordance with its required format of his attendance at meetings. Such verification is to be delivered within seven (7) days of the end of each month;
 - (f) DS will provide information to the Evraz Medical Department once per month in such manner as he is advised reporting his treatment progress as well as any conditions or issues which threaten his abstinence for the duration of the two-year period;
 - (g) DS will be subject to mandatory random alcohol and drug screening for the duration of the two-year period, as arranged by the Evraz Medical Department.
 - (h) In the event that DS shall not remain abstinent or shall not comply with any conditions of this order, his employment may be summarily terminated, without recourse and every signatory to the agreement shall agree that he has been accommodated to the point of undue hardship in that event.
- (6) The arbitrator shall continue to have jurisdiction during the time that the conditions of this Award, including any further agreement, shall remain in effect, to deal with any disputes relating to the interpretation, application, operation or compliance with the conditions of this Award, or the terms of any further agreement including any

question whether DS has remained abstinent or may be properly terminated from his employment for failing to comply with the said conditions or the terms of the further agreement.

DATED at Saskatoon, Saskatchewan this 29th day of June, 2015



Kenneth A. Stevenson, Q.C.
Sole Arbitrator.