THE SASKATCHEWAN EMPLOYMENT ACT

PROVINCE OF SASKATCHEWAN

IN THE MATTER OF THE ARBITRATION PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT RESPECTING THE GRIEVANCE OF MS. AB

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA and MS. AB

UNION/GRIEVOR

– and –

SASKATCHEWAN GAMING CORPORATION

EMPLOYER

AWARD

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before

John Comrie, QC, FCIArb **Arbitrator**

Heard in Regina, Saskatchewan on September 23, 24 and 25, 2015 and via the internet on October 5 and 7, 2015

For the Employer: **Brian J. Kenny, QC**

Lynsey Gaudin

For the Union: **Jana Stettner**

INTRODUCTION AND BACKGROUND

[1] This arbitration arises as a result of a grievance ("Grievance") brought by Local 40005 of the Public Service Alliance of Canada ("Union" or "PSAC") on behalf of Ms. AB ("Ms. AB" or "Grievor" or "Employee"), who at the time of her termination worked full time for Saskatchewan Gaming Corporation ("SGC") as a Dealer II.

[2] The Grievance was date-stamped by SGC on November 14, 2013, and stated that Ms. AB had been "wrongfully terminated".

[3] The parties agreed that I had jurisdiction to deal with the Grievance and waived compliance with section 6-50(1) of The Saskatchewan Employment Act.

[4] I was cautioned by the parties that I was being requested only to decide whether the Grievance should be upheld. If I were to decide that the Grievor had been wrongfully terminated, I was asked to remain seized of the matter, but not rule on any applicable remedial measures until the parties had determined if they could come to a mutual agreement on terms of reinstatement. Counsel for the Grievor advised, however, that during this hearing she would address possible conditions of reinstatement should I uphold the Grievance, and that I was welcome to make whatever recommendations or observations I thought helpful.

THE EVIDENCE

The Grievor's Personal and Employment History

[5] Ms. AB quit school in grade 11, had her first child at the age of 17, and two more children shortly thereafter. Prior to her work at SGC she stayed at home with her children or worked at convenience stores and fast food restaurants. Her first job at SGC provided her with a significant increase in pay.

[6] Ms. AB began working for SGC on October 8, 2004, as a server in the food and beverage department. From there she moved to the position of dealer, and at the time of the termination of her employment on October 23, 2013, she held the position of Dealer II and her employment status was full time.

[7] At the time Ms. AB began working for SGC, she had been a user of alcohol and marijuana for all her adult life, and occasionally used other drugs such as Ecstasy. Sometime in 2006 or early 2007, she began using crack cocaine; and by 2008, she had developed an addiction where she was spending between $1000-$2000 per pay-day to support her habit.

[8] From June 22-27, 2008, Ms. AB sought help from and then attended the Regina Detox Centre, where among other things she learned about the possibility of addiction treatment at the Pine Lodge treatment centre outside Regina.

[9] SGC Human Resources was advised orally and subsequently by letter dated June 26, 2008, from Par Consultants and Counsellors, a firm providing employee and family assistance specialist services, that Ms. AB was being admitted on June 27, 2008 to a 28-day addiction rehab program at Pine Lodge. SGC was also advised that Ms. AB had completed the 28-day program, and she was cleared to return to work effective August 7, 2008.

[10] The Grievor managed to stay clean for several months after her rehab treatment, but by the end of 2008 or early 2009, she had relapsed and started using crack cocaine again. That usage continued until the termination of her employment on October 23, 2013, with the exception of an indefinite period of sobriety resulting from her second stay in the Regina Detox Centre which ended in August 2011. Ms. AB testified that although she could not remember the exact date she resumed her drug habit, she was certain she was using crack cocaine regularly prior to February 2012.

[11] From May 2011 until October 2013, Ms. AB's absenteeism rate ranged from a low of 12. 8% to a high of 26.6% and averaged 21.2%.

[12] Generally speaking, throughout the time period in question, Ms. AB's drug usage coincided with the days she received income, such as her pay from SGC which was deposited to her account very early in the morning on every second Friday. She typically would be absent from work for the shift during which she expected to receive her pay by direct deposit, as well as the next day's shift when she was recovering from the previous day's drug usage.

[13] Although she could not recall the exact dates when she used crack cocaine or missed work because of drug use, working backwards from her pay-days she gave evidence indicating the days she missed work on her absenteeism reports which coincided with these payments. A significant percentage of Ms. AB's days absent throughout this time period were clearly the result of her drug usage.[1]

[14] Ms. AB's employment at SGC was terminated on October 13, 2013, for excessive absenteeism, as documented under the corporation's Attendance Support Program ("ASP").

[1] Looking at the absenteeism reports, Ms. AB highlighted the hours (i.e. shifts) that could be directly correlated to pay-days. Counsel for the Grievor advised the hearing that she had calculated the average absenteeism rate as 14.2% when these hours were removed, or an approximately 33% reduction from the rate of 21.2% calculated by SGC management under the ASP. This is no doubt a conservative estimate, as there were both direct and indirect effects of drug usage on the absenteeism rate.

The Grievor's Involvement with the SGC Attendance Support Program

[15] The Employer implemented the ASP on April 1, 2011, and the Grievor was placed into the program in May 2011 and remained there for 11 consecutive quarters until October 2013.

[16] The Grievor's record of absenteeism throughout this time period was summarized by the Employer in the following table:

ASP Review Period	Absenteeism Rate	Record of Program Meetings and Formal Letters
ASP Q1 (September 20, 2010-March 20, 2011)	23.2%	Stage 1 Letter – May 31, 2011
ASP Q2 2011 (December 27, 2011-June 26, 2011)	12.8%	No Meeting Held
ASP Q3 2011 (March 21, 2011-September 18, 2011)	21.7%	Stage 2 Letter – November 29, 2011
ASP Q4 2011 (June 27, 2011-December 25, 2011)	26.6%	Stage 3 Letter – March 12, 2012
ASP Q1 2012 (September 19, 2011-March 18, 2012)	26.3%	No Meeting Held
ASP Q2 2012 (December 26, 2011-June 24, 2012)	26.3%	Stage 3 Letter – August 23, 2012
ASP Q3 2012 (March 19, 2012-September 16, 2012)	20.0%	Stage 3 Letter – December 5, 2012
ASP Q4 (June 25, 2012-December 23, 2012)	17.7%	Stage 3 Letter – February 13, 2013
ASP Q1 2013 (September 17, 2012-March 17, 2013)	19.5%	No Meeting Held
ASP Q2 2013 (December 24, 2012-June 23, 2013)	21.2%	Stage 3 Letter
ASP Q3 2013 (March 18, 2013-September 15, 2013)	18.1%	Termination Letter – October 23, 2013

[17] The average absenteeism rate for all employees at SGC was 9% upon the inception of the ASP in 2011, and it has not changed since then. That rate is used as the threshold point for determining whether an employee will be on management's radar screen as someone who may benefit from involvement in the ASP. It is calculated each quarter as the percentage resulting from the employee's absence hours divided by his or her actual hours for the previous rolling six-month time period. Each of these terms is defined in the plan and has somewhat technical meanings. For example, "absence hours" includes "sick leave with or without pay", and "actual hours" includes absence hours, regular hours and vacation hours. A 9% absenteeism rate translates into missing 185 hours of work. Assuming an 8-hour shift, the average at SGC converts to approximately 23 days absent in a given year.

[18] To give some absolute context to these numbers, the Collective Agreement provides that an employee can earn 1.25 days per month for sick leave. If an employee had accumulated the maximum allowance for sick leave and took all his or her sick days the following year, that employee would be absent 15 days for sick leave, which would correlate to approximately 120 hours absent in a year, assuming an 8-hour shift.

[19] In light of the fact the Grievor's absenteeism rate averaged in excess of 21% and at times came close to 27% – almost three times the corporate average – it goes without saying, and there was no disagreement between the parties on this issue, that her rate would be considered "excessive" as that term is used in the literature and case law on this subject, unless there were extenuating circumstances which proved otherwise or indicated a possible disability requiring accommodation.

[20] The program is designed to exclude absences identified as being caused by a disability (in which case another program would apply and an effort would be made to develop an accommodation). The program materials appear to suggest a significant awareness on the part of SGC management of the need to be sensitive to the possibility of a disability, notwithstanding SGC's failure to do so in the case of the Grievor as described below.

[21] The evidence of management and the ASP plan documents also confirm SGC's awareness of the need to avoid mechanistic procedures in the administration of the program. Each employee was intended to receive an ongoing individualized assessment of his or her attendance issues.

[22] The ASP provides for a series of quarterly employee meetings with an increasing level of seriousness, identified as Stage 1, 2, 3 or 4. In the meetings for the first three stages, the employee is given a report about his or her absenteeism rate in the previous six-month period, which then leads into a discussion about the circumstances surrounding the absences. Each meeting, as well as the templates used as an agenda for the meetings, is designed to fulfill all the current requirements for well-designed attendance management programs. This includes among other things:

a. Presence of a union representative at each meeting in addition to SGC management;
b. Confirmation of the employee's absenteeism rate for the last two quarters;
c. Reminder to ask the employee if any health issue exists which the employer should be aware of;

d. A question as to whether SGC can do anything to assist the employee to improve his or her absenteeism or managing any difficulties they are experiencing, and names and contact information for people who might assist the employee;
e. Offering a brochure on how to make use of the Employee and Family Assistance Plan, and
f. In the templates for all Stage 3 meetings, two statements to the effect that "continued excessive absenteeism could result in the termination of your employment".

[23] SGC had seven such non-disciplinary attendance support meetings with the Grievor between May 2011 and August 2013, five of which were categorized as Stage 3 counselling meetings. The Stage 3 meetings were held on February 8, 2012; August 21, 2012; November 29, 2012; February 12, 2013 and August 21, 2013, and each of them was attended by an SGC Manager, a Human Resources Consultant, a Union Shop Steward and Ms. AB.

[24] In addition to Ms. AB, three SGC employees testified as to the content of these meetings: Dean Cherewayko, Cindy Hanoski, and Eliza Cherewayko. As well, notes were taken during the meetings using a template set out in the "Manager Guidelines for the Attendance Support Program". Except as noted below, the evidence of all witnesses as to the content of these meetings was relatively straightforward and consistent.

[25] Each meeting was followed up with a letter to the Grievor confirming the matters discussed in the meeting again in a form set out as Attachment #3 to the Attendance Support Program.

[26] The most important elements of these meetings concerned two main subjects: firstly, the nature of the warnings given to the Grievor to the effect that if her attendance did not improve, her employment could be terminated as the result of her excessive absenteeism; and secondly, Ms. AB's disclosure of her addiction issues, and SGC's response. I have summarized the evidence related to these two areas below.

Warnings to the Grievor that She Could Lose Her Job Due to Excessive Absenteeism

[27] The first evidence of a warning given to the Grievor was in the template used for taking notes of the first Stage 3 meeting. That template, as was the case with the notes for each of the four other Stage 3 meetings, contained the following "pre-typed" phrases presumably to be read to the Grievor at each meeting:

- "We are advising you that continued, excessive absenteeism could result in termination of your employment."

- "Once again, to emphasize, this meeting is to advise you that continued, excessive absenteeism could result in the termination of your employment."

The evidence was somewhat unclear about whether the actual discussion at each Stage 3 meeting followed the form of the template for each meeting, and whether all the words in the template were actually read to Ms. AB at each meeting. However, it is likely at least one of these warnings, and perhaps two, were given to her in substantially the same language as in the template. There were no actual notes written at each meeting to suggest any other warning was given.

[28] In addition to the verbal warnings given to Ms. AB at each Stage 3 meeting, a standard form letter was sent to the Grievor immediately following each meeting. The form of each one of these letters was taken from the administrative guide for the ASP program and contained the following paragraph:

> "As per our discussion, you have been clearly advised that continued, excessive absenteeism could result in the termination of your employment. Your attendance record will be monitored and reviewed again for improvement in three (3) months' time. I will meet with you again at the end of the review period."

[29] This paragraph was therefore also in the last communication with Ms. AB prior to her termination. It is worth noting immediately after the warning in the first sentence, the second sentence undermines its effect by suggesting at the very least, and prior to any termination, Ms. AB's attendance would be monitored over the next 3 months, and a meeting would be held to review her results. Only then would a termination be a possibility.

[30] Ms. AB's testimony regarding the nature of both the verbal warnings in the counselling sessions and the written warning in the follow-up letters was that no emphasis was given to these warning statements, and she treated them as routine as they suggested another meeting would be held before any final steps were taken. She did acknowledge, however, her understanding that at least the final meeting on August 21, 2013 was more serious because of the presence of Mr. Les Clouthier, a more senior executive at SGC. However, in her mind she clearly did not understand any of these warnings as indicating that she "would" be terminated if no improvement was shown, as they always used the word "could". It is worth noting that the exact same warning language is shown a total of 15 times during the various Stage 3 meetings over the time period from February 2012 to October 2013, and no action was taken in this regard after any of these 15 warnings, except for the ultimate termination of the Grievor in October 2013.

[31] Consistent with the evidence of the Grievor on this point were the statements set out in the only Performance Review of Ms. AB put into evidence. This document is instructive, as it was completed on August 23, only two days after the ASP meeting of August 21, 2012. The Performance Review outlines 12 job duties, three of which are described as "Key Duties", but none of those three referred to attendance at work. However, one of the job duties that was not considered "Key" was job duty 12, described as "Attends work on time and as scheduled". Ms. AB's rating for this job duty was a "4" on a scale of 1 to 10, where "5" is what is expected from all employees and "4" is described as "Mostly meets performance expectations of the job".

[32] The final written communication with the Grievor was the letter of October 23, 2013, which terminated her employment that day. This termination letter was given by hand to Ms. AB on October 23, 2013, notwithstanding that the August 21, 2013 letter suggested another meeting would be held in 3 months (i.e. around November 21, 2013).

[33] The final termination letter contained the following paragraph, which included a sentence that purports to describe the events leading up to the termination, including previous warnings:

> "In each of the meetings and letters, you were clearly informed that your absenteeism was unacceptable and the expectation that you demonstrate improvement in your ability to attend work. When you failed to make the necessary improvements to your attendance record, you were clearly informed that should you continue to fail to demonstrate improvements and meet acceptable levels of attendance, your employment would be terminated**.**" (emphasis added)

This was clearly inaccurate, but it suggests that SGC management thought this was a requirement prior to any termination, which fits with the case law on this issue.

[34] Upon delivery of the termination letter to Ms. AB on October 23, 2013, she was clearly shocked that this final step had been taken by SGC. She described her reaction upon hearing this news as "going ballistic" and she had to be escorted out of the SGC facilities.

The Grievor's Disclosure of her Addiction Issues

[35] The Grievor disclosed her addiction issues to SGC in at least three of the five Stage 3 meetings, as evidenced by SGC notes to that effect:

a. Notes of February 8, 2012 meeting: "In the meeting … [Ms. AB] disclosed a substance abuse problem that she is recovering from and has been effecting (*sic*) her ability to improve her attendance. In this discussion she also mentioned there have been some depression issues in her recovery from substance abuse. … [Ms. AB] was aware of EFAP and utilizes the service."

b. Notes of August 21, 2012 meeting: "She stated she is still recovering from an addiction issue as well as issues with her shoulder. For her addiction issues she is seeing a counsellor on an ongoing basis, with the exception of recently as the counselor has been on vacation. … [Ms. AB] stated she would ensure that proper follow up will be done with her physician to ensure we have updated medical."

c. Notes of August 21, 2013 meeting: "—going to meetings for addiction and managing it the best I can"

[36] Ms. AB testified she never disclosed to SGC the fact she had relapsed after discharge from the Pinelodge Treatment Centre in 2008, and her usage of drugs had been more or less continuous since then, apart from her second trip to the Regina Detox Centre in August 2011 in an effort to get clean again, which was not successful. Generally, Ms. AB's testimony about this and other subjects displayed a clear effort to be honest and forthcoming in response to questions that were at times difficult for her at the hearing. She also testified with respect to SGC's notes about the August 21, 2012 meeting that she was not honest with SGC about the status of her addiction, and probably told SGC that she was "going to meetings and working her program".

[37] In addition to the issues around her addiction, there was significant time spent in several of Ms. AB's ASP meetings dealing with another issue related to an injury to her shoulder that may have been caused by her work as a Blackjack Dealer and regardless of the cause was clearly made worse by such work. The issues around the shoulder problem were dealt with by SGC in an appropriate manner, who offered up the possibility of an accommodation that would minimize future problems and made an effort to get Ms. AB to have her doctor complete a form and provide further information that would assist SGC in managing the matter. Because Ms. AB was not keen to give up the Blackjack work, she was not very cooperative in getting the requested forms signed. These shoulder issues did not really bear on any issue in the case, other than in due course, when Ms. AB was asked to provide a "physician" letter relative to the shoulder and the addiction, some confusion arose about exactly what was being asked of the doctor, who never had any role in the treatment of the Grievor's addiction issues.

SGC's Response to the Grievor's Addiction Disclosures

[38] In response to the Grievor's substance abuse disclosure in the February 8, 2012 meeting, the SGC manager conducting the counselling session referred the matter to SGC's Return to Work Consultant, Cindy Hanoski, to deal with the matter. Ms. Hanoski sent a letter to Ms. AB that reads in part as follows:

> "During a meeting with your manager in regards to your attendance, you identified that you may have a medical issue that is keeping you from attending work on a regular basis. … SaskGaming is committed to ensuring our employees are provided with the opportunity to be accommodated where legitimate medical restrictions exist and where work is available that meets these legitimate medical restrictions … As a result of the above, I have enclosed an additional letter and job description for you to present to your physician that outlines the information we require at this time. This information will allow us to meet our obligations related to a potential disability, if one exists, that is affecting your ability to meet performance expectations …"

[39] A second letter was sent by Ms. Hanoski again, asking for the completed form. The letter stated, "If I do not hear from you by that date [i.e. March 8, 2012 ed], I will presume there is no medical issue keeping you from work, and therefore, no need for a workplace accommodation."

[40] Ms. AB testified she ignored this letter as well as the follow-up letter, with the result that SGC advised that because no information had been forthcoming from "your physician", a significant and sustained improvement in the Grievor's attendance was required, outlining new goals for the next quarter.

[41] In response to the disclosure of Ms. AB at the August 21, 2012 meeting, the matter was again referred to Ms. Hanoski, who again asked the Grievor, using the same form letter as previously, to arrange for "her physician" to provide further information. This time, the form enclosed with the letter included the following language:

> "During a meeting with her manager, Ms. AB identified that she has been suffering from an addiction, but now feels that she is in recovery and is clean. She explained that she is experiencing some depression-like symptoms caused by the recovery. She also made reference to a possible injury to her shoulder that may be keeping her from attending work on a regular basis.
>
> "Does Ms. AB suffer from a medical disability that would prevent her from attending work on a regular basis?
>
> No____ Yes____ "

[42] After a second follow-up request, the required form was completed and returned to SGC by Dr. Kothare, the Grievor's family physician, who ticked "No" in the above box.

[43] Dr. Kothare testified that she had never treated Ms. AB for addiction, and that when she signed the form, she intended her answer "No" to be responsive to the question of whether Ms. AB's shoulder injury constituted a medical disability that would prevent her return to work on a regular basis. When asked if she saw the sentence in the prelude to the question about addiction, she said, "I saw it and … [Ms. AB] said she was OK and clean and in recovery, so my opinion was restricted to the shoulder".

[44] Ms. Hanoski testified about her role in the above events. She said if at any time an employee identifies an illness or disability that might give rise to a duty to accommodate, the matter is referred to her as the "Return to Work Consultant", who among other things organizes the involvement of someone to assess whether a disability exists and whether an accommodation exists that would allow an employee to return to work.

[45] Ms. Hanoski reviewed the history of accommodation issues with the Grievor relative to her shoulder injury and the addiction disclosures by Ms. AB outlined above. She testified she had reviewed her notes for this arbitration, but she did not recall much detail of any of the meetings she

attended with the Grievor other than the information in the notes recording the content of each meeting referred to above.

Evidence of Addiction Expert Mr. Rand Teed

[46] Mr. Rand Teed, a certified addictions counsellor, was called as an expert witness on addiction and recovery. He has an impressive resume, including a Gemini award for the series he developed as a high school program to educate students about substance abuse, and the Angus Campbell Award relative to a curative discharge process under supervision of the courts. He has been in private practice since 2005, and is currently in the process of purchasing St. Michael's Retreat outside of Regina as a facility to provide addiction treatment.

[47] Mr. Teed made a number of preliminary comments about the nature of addiction and how it presents in the workplace. These are summarized in a separate section below.

[48] Apart from having known Ms. AB several years ago when she was in high school and he was a guidance counsellor, Mr. Teed had six interviews with the Grievor during 2015, with a view to assessing whether she was addicted, whether her absence from work was causally related to the addiction, assisting with her recovery and providing this testimony. He reviewed Ms. AB's personal history and the results of a screening process he conducted with her which indicated she scored high for all addictions, depression and social anxiety. He testified she was clearly addicted to drugs, and after reviewing her attendance record over the relevant period, he concluded that a significant number of the Grievor's absences from work would have been caused by her addiction.

[49] He also testified that on the basis of the drug tests he had conducted on Ms. AB in 2015, and his discussions with her over their several meetings, he understood and believed that she had been clean of crack cocaine since the week following her termination, and he supported the recovery program she had been following under the supervision of a psychologist/counsellor at Ranch Ehrlo. He also made several recommendations to enhance the continued recovery of Ms. AB.

Post Discharge Evidence of Ms. AB's Addiction and Recovery

[50] The Grievor testified that within a few days after her termination, the shock of what had happened to her as a result of her addiction caused her to get clean and sober again, and to resume her recovery program and go back to her 12-step meetings at Narcotics Anonymous and Alcoholics Anonymous in Regina. Initially she decided to stay clean only of crack cocaine but not marijuana; but since meeting with Mr. Teed in the spring of 2015, and coming to understand the common progression from smoking "weed" to the resumption of crack cocaine, she has been clean of that drug as well.

[51] In November 2013, Ms. AB began to work as a front desk clerk at the Empire Hotel initially on a part-time basis, and since May 2014 on a full-time basis. Her employer submitted a letter indicating that she had worked five 8-hour shifts per week since May 2014, and that since the beginning of her employment in November 2013, she had not taken any sick days and had not missed a scheduled shift.

[52] Mr. Teed testified that Ms. AB's willingness to work the midnight shift at her current employment, which was not an attractive place of employment for several reasons, all without any absences, was an important indicator of her continued likely recovery.

THE ARGUMENTS

[53] I will summarize the respective arguments and submissions of the parties in the order they were presented.

The Employer's Submissions

[54] The Employer's basic submission stated the Grievor was terminated for frustration of the employment contract and that her termination should therefore be upheld. The ASP was consistently and properly applied to the Grievor. She failed to heed several verbal and written warnings; and combined with her attempt to mislead SGC about the status of her addiction, she gave the Employer just cause for termination. Accordingly, the Grievance should be dismissed.

[55] The Employer established a well-designed ASP using principles and conditions well recognized as best practices.

[56] Ms. AB participated in the ASP for over 30 months, and her average absenteeism rate over that period was 21.2%, without any significant or sustained improvement during that time period.

[57] Ms. AB's absenteeism rate was excessive relative to the average corporate rate of approximately 9%, and there was no prospect for improvement.

[58] The Grievor was warned verbally and in written communications that her job was in jeopardy if she did not improve her attendance performance.

[59] The Union was present at every counselling session held with the Employee, and did not object to any aspect of the ASP procedures utilized to try and improve the Grievor's attendance.

[60] SGC applied the ASP to the Employee in a fair and equitable manner.

[61] In response to the Employee's only direct and clear disclosure of addiction issues in August 2012, SGC acted appropriately by seeking a physician's diagnosis, which was obtained and indicated "no disability", and this sequence of events exhausted any duty to accommodate the Grievor.

[62] Moreover, the Employee did not "honestly or fully inform" SGC of any disability that was impacting her ability to attend work. She therefore did not fulfill her obligation to assist the Employer in identifying her disability, thus relieving SGC of any further duties to accommodate her illness.

[63] All the evidence about Ms. AB's recovery was inadmissible; and even it were admissible, it should not be relied upon for any decision in this award.

The Union's Submissions

[64] Counsel for the Grievor first argued that the Employer did not satisfy the test of innocent absenteeism in that "There is a reasonable prospect that … [Ms. AB] will be able to attend work at the Casino".

[65] An employee's prospects for future attendance can be determined "post-discharge" at the time of the arbitration hearing. *Quebec Cartier* (case no. 10 in Appendix A) does not preclude consideration of post-discharge evidence.

[66] Regardless of the jurisprudential rulings on post-discharge evidence, the recent *The Saskatchewan Employment Act* (at Section 6-49(3)) gives an arbitrator residual discretion to "… receive and accept any evidence and information … that the arbitrator … considers appropriate, whether admissible in a court of law or not …"

[67] Evidence of Ms. AB's post-discharge recovery establishes she is capable of regular attendance.

[68] The warnings given to the Grievor that her job was in jeopardy, particularly in the August 21, 2013 meeting and the follow-up letter, were unclear. This lack of clarity as to what was required of Ms. AB and the evidence of Mr. Cherewayko that the Grievor was never given a final warning were inconsistent with SGC's attendance management policy, which witnesses for the Employer conceded required attendance expectations to be communicated clearly and in writing.

[69] Furthermore, SGC discriminated against Ms. AB "… by terminating her employment in part due to disability-related absences, and by failing in its duty to accommodate to the point of undue hardship".

[70] Ms. AB was suffering from the disability of addiction throughout the time period she was being counselled in the ASP, and SGC should have known this at the time of her termination.

[71] There was a causal link between Ms. AB's addiction and her absences.

[72] There is no undue hardship to SGC in this case, as the Grievor has been or is capable of rehabilitation and the Union is agreeable to reinstatement on conditions that would include drug-testing for a one-year period and a requirement that Ms. AB's absences not exceed the absenteeism threshold in the ASP for the same period.

[73] Accordingly, the termination of the Grievor was invalid, and the Grievance should be upheld and the Grievor's employment reinstated on conditions to be negotiated between the parties, failing which they would return to this arbitration to be finally settled by me.

Authorities Relied Upon by the Parties

[74] The Parties relied upon numerous arbitral, judicial and legislative authorities in support of the respective arguments. Those authorities are set out in Appendix A to this Award, and assigned a number for ease of reference.

THE DECISION

Modern Day Law of Innocent Absenteeism – The Four Tests

The original doctrine of innocent absenteeism stems from the decision of Arbitrator Weiler in *United Automobile Workers and Massey Ferguson Ltd. (*1969*)*, 20 LAC 370(WL) (Ont Arb). The decision is still important because of its elaboration of the logic that underlies the doctrine, which is helpful to understanding the requirement that the employee be given a warning. In the decision, Arbitrator Weiler explained (at paragraphs 6, 7 and 8):

> "The first basic principle is that innocent absenteeism cannot be grounds for discipline, in the sense of punishment, for blame-worthy conduct. It is obviously unfair to punish someone for conduct which is beyond his control and thus not his fault. However, arbitrators have agreed that, in certain very serious situations, extremely excessive absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. Because the relationship is contractual, and the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter …

> "If an employee is constantly missing a few days' work, or, even worse, leaving during the middle of a shift, this simple solution is not possible. It is continually irritating to supervisors, and very harmful to production, always to be making adjustments and putting whatever employee is immediately available into the absentee's place …
>
> "There is another reason for the necessary power of termination in this kind of case – the extreme difficulties of proof by the employer that the absenteeism is not *bona fid*e and innocent. If an employee is constantly missing a few days' work, it will be because of minor ailments and pains whose existence is very subjective … Hence (the employer) must finally rely on the objective facts of the absenteeism, and, if it cannot be expected to cease or at least come within the range of reasonable expectations for the employees, it must have the right to discharge the employee."

[75] Because Canadian labour law had already developed the concept of "disciplinary" actions by an employer, typically manifested as a series of progressive punishments in response to some action or lack thereof, it was necessary to describe innocent absenteeism as "non-disciplinary". Where the termination was to be justified objectively, simply by the extent of the employee's absences over a period of time, there would be no blameworthy conduct; that is to say – blame or no blame – it was irrelevant. With time, it became clear that terminating an employee in these circumstances (where the employee's actions were literally beyond their control) would be unfair to an employee without at least some kind of warning or notice that their job was in jeopardy. But to stay within the conceptual framework of the doctrine, this warning needed to be seen as "non-disciplinary".

[76] Thus developed the requirement for a "non-disciplinary" warning. An employee could be terminated (regardless of the fact the employee's actions were beyond his or her control) if his or her excessive absenteeism was not brought into line with some reasonable expectations. In turn, the expectations themselves had to be clearly communicated to the employee in a non-mechanistic manner and a warning had to be given to the employee that was not "disciplinary in nature" but one which warned that if attendance did not improve, the employee would be terminated. This requirement is confusing to everyone, not least the human resource managers who have to administer programs dealing with this issue.

[77] With the advent of modern human rights legislation, it became necessary in any case of innocent absenteeism to add to the above requirements a consideration of whether any of the absences in question were caused by a protected "disability". The impact of modern Canadian human rights legislation has thus been superimposed upon the original doctrine. The typical human rights codes now effectively (albeit indirectly) prohibit any termination for innocent absenteeism without consideration of whether the absences in question were caused by a protected disability.[2]

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[2] In Saskatchewan, Section 16 (1) of *The Saskatchewan Human Rights Code* (the "*Code*") provides that "No employer may 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" where this latter term is defined to include a "disability" which is defined to include "any degree of physical disability" and a "mental disorder" which is also defined in manner, and has been interpreted by case law, to include drug and alcohol addiction.

[78] Thus, the original doctrine of innocent absenteeism came to require satisfaction of a combination of principles. They were well summarized in the *Shelter Regent Industries (*case no. 26 in Appendix A), where Arbitrator Ponak described these four tests (at paragraph 39) (the "Four Tests"):

> "… the proper analytical approach is for the arbitrator to determine whether the tests for a non-culpable dismissal for excessive innocent absenteeism have been met. These tests, which are well supported by the authorities, are:
>
> 1) was the absenteeism excessive;
>
> 2) was the employee warned that his or her absence was excessive and failure to improve could result in discharge;
>
> 3) was there a positive prognosis for regular future attendance at the time of dismissal, and
>
> 4) if the absenteeism was caused by an illness or disability, did the employer attempt to accommodate the employee to the point of undue hardship prior to dismissal …"

[79] There was no debate between the parties as to whether the First Test was met, namely the requirement that it be "excessive". The Grievor's absenteeism rate averaged 21.2% during the time she was in the ASP; and notwithstanding the fact the trend line of her percentage absences was downward over the course of 30 months, the line was always significantly above the threshold of the average rate for all SGC employees. Hence, it was excessive, as required by the test.

The Second Test – The Warning Requirement

[80] There is, however, a significant disagreement between the parties as to whether the Second Test was met and satisfied.

[81] It is helpful to first consider some examples of warnings that have satisfied arbitrators:

a. *Federated Co-Operatives Ltd (case no.15 supra at paragraph 45 and 77)*: where Arbitrator Stevenson characterized the requirement as a need for a "solemn warning", which was met when the Grievor was advised he must improve his attendance to the warehouse average and that otherwise he "… **will be** subject to termination of employment" (emphasis added);

b. *Shelter Regent Industries (case no. 27 supra at paragraph 41):* I am satisfied that a reasonable employee would conclude from these communications that management was very unhappy with his attendance record and a significant risk of job loss existed unless attendance improved. Two letters explicitly warned of dismissal, and the last letter used

terms like "unacceptable" and specified a level of absenteeism that should signal danger to any employee."

c. *Telecommunications Workers Union v. TELUS* 2011 BCSC 1761(*at paragraph 31)*: Quoting from Arbitrator Kinzie: "In fact, she was warned repeatedly, verbally or in writing, that her attendance failed to meet the standards the employer reasonably expected of its employees, and that failure to improve **would** place her employment in jeopardy …" (emphasis added)

d. and "… written warnings **clearly and unequivocally** put her on notice of the severity of the issue, and she had ample time and opportunity to improve." (emphasis added).

[82] Surveying the literature and the case law on the nature of the warnings, there does not appear to be any particular format or formula for what is sometimes termed "notice" to the employee and sometimes a "warning", as long as it is effective in the context of the facts and circumstances in each case. The main requirement is that the warning be effective from the standpoint of a reasonable employee. The reason for this is that the employee is being terminated for something that is "not blameworthy" and likely "beyond their control", so before taking such a serious step, the arbitral law has dictated that the employee be given a reasonable chance to prepare himself or herself for a typically climactic event, namely the loss of one's job. Some of the more important considerations would include the following:

a. From the objective standpoint of a third party observing all the facts and circumstances, should the employee reasonably be expected to have clearly understood there was a real risk that his or her job would be terminated if there was no improvement in his or her attendance?

b. Was the warning "hidden" or "minimized" or "confused" in any manner that made it less than effective? In this regard, comparison might be had to the extensive literature on when a waiver of liability or exclusion clause will be considered valid against a purchaser of a product or service.

c. How easy would it be to transform an unclear or confused warning into one much less so in the circumstances? In the present case for example, it would have been very simple for SGC to have given its last follow-up letter in duplicate, with a clause inserted at the bottom of the letter to be counter-signed by the Grievor and retained by SGC, acknowledging that she had read the warning and understood its consequences.

d. Finally, of particular importance in this case, was the employee known or suspected to be an addict? The relevance of this factor is critical because of the symptom of "denial" discussed below relative to the employee's duty to cooperate with the employer in identifying the need of an accommodation. When a person denies the existence of his or her addiction, it is particularly important that the warning be clear and effective to

> penetrate the addict's denial. Often a termination can penetrate a denial after the fact, but an effective advance warning may also have the same result.

[83] The Second Test requires the employer to advise the employee that not only was his or her absenteeism rate excessive, but that his or her job would be in jeopardy if the rate did not improve. The arbitral case law does not prescribe whether the warning needs to say an employee's job "could" be terminated, as opposed to providing the much clearer and effective warning that such position "would" be terminated absent some improvement in the rate. Nonetheless, in the examples referred to above, all the warnings were stronger, more definitive and much clearer than the present case. However, regardless of the actual language, the point of the warning is for it to be effective. Without such clarity and the resultant effectiveness, the various warnings to Ms. AB did not even comply with the objectives of the ASP, which required clear communication of attendance goals to the employees.[3] In the present case, the warning became a kind of "boilerplate" language incorporated into every counselling session with the employee without any apparent consequence, with the result that the warning was not clear and not effective.

[84] In this case, as many as 15 almost identical warnings were given to Ms. AB that were all delivered with the standard form language developed to ensure the warnings were not seen as disciplinary or punitive, which is how SGC apparently saw a more clear "would" type warning that was stated to be final and then acted upon if applicable. As a result, Ms. AB was told over and over again only that she "could" be terminated, but there was never any real and final warning that she "would" be terminated if her absenteeism did not improve.

[85] What really confounded the warning issue was the complete opposite message given to Ms. AB in her performance review on August 23, 2012. That process involved the completion of a detailed document and review of all performance indicia which was held on the exact same date as the second Stage 3 ASP counselling meeting. The performance review described something called Job Duty # 12 – "Attends work on time and as scheduled" – but was not categorized as a "Key Duty" of the Grievor. Moreover, regardless of its status as "key or not key", her performance for this Job Duty was rated as "**Mostly meets performance expectations of the job**" (emphasis added), only two days after her counselling session on August 21, 2012, and the very same date as the follow-up letter of August 23, 2012, where the Grievor was given at least two and perhaps three warnings that her employment "could" be terminated if her attendance did not improve. Needless to say, it is not surprising that Ms. AB testified she was completely shocked by the decision to terminate her employment on October 13, 2013.

[86] The importance of the warning can be seen from the impact the termination had on Ms. AB, which led almost immediately to her longest period of sobriety since she became addicted to crack cocaine. Query whether an effective warning prior to the termination would have had the same result. In that event the requirement to assess the likelihood of Ms. AB's improvement relative to attendance issues, namely the third innocent absenteeism test, would have looked very different.

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[3] See page 3 of Exhibit E-1- Attendance Support Program

[87] At the very least, as noted by Arbitrator Kinzie (in *United Steelworkers of America, Local 1- 423 v. Tolko Industries Ltd.* [2005] B.C.C.A.A.A. No. 176 (QL), had the employer provided one final, clear and effective warning of a pending termination, Ms. AB might have gone to the union, and with its help, raised the question of her own addiction and whether an accommodation, including a return to the treatment centre and related possibilities, might be considered.

[88] Finally, it is worth noting that even SGC in its termination letter, a letter not typically written without considerable attention and review by others, incorrectly stated and seemed to acknowledge the need for Ms. AB to be given a final warning of the kind referred to in the cases quoted above. Her termination letter of October 13, 2013, read in part: "… **you were clearly informed that should you continue to fail to demonstrate improvements and meet acceptable levels of attendance, your employment would be terminated"** (emphasis added)

[89] As a result, I conclude that the Second Test for innocent absenteeism was not met, the termination was therefore invalid, and the Grievance is upheld. However, in case I am wrong or challenged on this point, I also consider the application of the Third and Fourth Test.

The Third Test – The Prognosis for Improved Attendance

[90] The Third Test requires an assessment of the employee's prognosis for improved attendance as such existed at the time of the dismissal. There was significant evidence and argument presented relative to this point. It centered on the evidence relating to Ms. AB's post-discharge recovery and whether, in light of *Quebec Cartier*, it was evidence that should even be considered at all.

[91] Ms. AB's evidence, and that of Mr. Teed, needs to be understood as falling into two important but very different categories:

a. Evidence of facts <u>that existed at the time of the discharge</u> but was unknown to the Employer and only became known after the discharge; and

b. Evidence <u>that did not exist at the time of the discharge</u> about the prognosis for the employee's potential or actual recovery from the addiction that might provide the Employer with a different answer to the Third Test.

[92] Evidence of facts that existed at the time of the discharge relating to Ms. AB's addiction is considered below, relative to the issue of "causation" in the Fourth Test.

[93] At the time of the termination, there was no compelling reason to think that Ms. AB's prognosis for improved attendance was other than what it had been in the past. Whether that was all that should be considered to satisfy the Third Test is an issue that involves the admissibility of true "subsequent-event" evidence, namely the apparent recovery from relapse of Ms. AB and her significant work record following her termination without any absences for sickness of any kind.

[94] I note with interest the recent decision of The Honourable Mr. Justice Elson of the Queen's Bench Court of Saskatchewan, on December 10, 2015 (*Mosaic Potash Esterhazy Limited Partnership and Unifor Local* 892 as yet unreported), provided to me by counsel for the Grievor. In particular I was referred to the pages of that decision (43-46) that deal with the subject of post-discharge evidence. The Court distinguishes The Supreme Court of Canada's decision in *Quebec Cartier* because "… [it] was not made in the context of an arbitrator measuring the extent to which an employee's disability was being accommodated." (at 46) The Court, in *Mosaic Potash,* also notes with approval the current provisions of *The Saskatchewan Employment Act,* which permitted the Arbitrator to consider a penalty lesser than termination. On the basis of those statutory provisions, the Arbitrator had considered post-discharge evidence of an employee's recovery from alcoholism in coming to a decision about whether the termination should stand.

[95] Notwithstanding this recent case, and the related arbitral jurisprudence and case law, I believe there remains significant debate, as well as many conflicting authorities on the issue of post-discharge evidence, particularly as it applies to the decision of an employer who is then second-guessed in its decision after the fact. This is particularly important relative to addiction cases. For that reason, and in light of my findings relative to the Second Test (above) and the Fourth Test (below), I find it is not necessary to make any ruling on the satisfaction of the Third Test or the admissibility of post-discharge evidence at this time.

The Fourth Test – Did the Duty to Accommodate Arise and Was It Exhausted

Part A: Was the Excessive Absenteeism Caused by a Disability Protected by The Saskatchewan Human Rights Code?

[96] Both the Grievor and Mr. Teed testified that Ms. AB was suffering from an addiction to drugs at least through the time period she was in the ASP, and likely much longer. There was no significant debate about whether this was the case, and in turn, whether a significant portion of the Grievor's absences were caused by the disease.

[97] There was also no dispute whatsoever about whether a drug or alcohol addiction was a disability protected by *The Saskatchewan Human Rights Code.*

[98] A major issue between the parties, however, was whether any of this "post-discharge evidence" could be considered at all. The main issue around what is referred to as "post-discharge" evidence stems from the judgement of L'Heureux-Dube J. (on behalf of the Court at paragraph 13, in *Quebec Cartier*):

> "This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable …"

[99] As described above (at paragraph 91), one must distinguish post-discharge evidence of facts that existed at the time of the discharge and evidence of facts which did not. Evidence of the first kind is not prohibited by *Quebec Cartier* and should be admissible and considered, if relevant to the causation issue; evidence of the second kind may not meet the test, and whether it should be admissible and considered is a question that need not be answered for this award.

[100] On the issue of causation, I have no hesitation in concluding that the Grievor's excessive absenteeism was both a direct and indirect result of her drug addiction, without which Ms. AB might not have even qualified for counselling in the ASP. Both Mr. Teed and Ms. AB testified to the direct and indirect effects of the drug addiction on her attendance record. The recitation by Ms. AB as to how she would wait for confirmation her pay had been deposited to her account shortly after midnight on a Thursday evening, how she would immediately arrange for the withdrawal of funds to purchase drugs, and the resultant effect on her attendance for at least the next two, and sometimes three, shifts all had the ring of truth.

[101] The main point is that even though it was not known to the Employer, and even though the Employee went to some effort to conceal the extent of her addiction, the evidence of both the Grievor and Mr. Teed confirmed that at the time she was terminated, she was addicted and the addiction caused the absences. The evidence of the addiction did become known "post-discharge", but it concerns facts extant at the time of termination. This is not what L'Heureux-Dube J. called "subsequent-event evidence" that she deemed inappropriate. That might be the case about the evidence of the recovery of Ms. AB, as that was a "subsequent event" and all other things being equal may be subject to the ruling in that case.

[102] Actual proof of "causation" has been determined by arbitrators in a multitude of different ways that include both expert evidence and the evidence of the employee, and there appears to be no standard requirement as long as the arbitrator is satisfied with its probity, relevance and quality. There was no significant debate in this case whether Ms. AB was addicted and whether that addiction caused a significant extent of the absences in question.

Part B: Did the Duty to Accommodate Arise and Was It Exhausted?

[103] As a result of the finding on the issue of causation above, the duty to accommodate the employee to the point of undue hardship clearly arose. What is the nature of that duty in this case? How and when is it satisfied or exhausted?

[104] The Supreme Court of Canada has commented extensively on the duties of not just the Employer but also the Employee and the Union relative to determining whether and to what extent a duty to accommodate may exist. The Court famously described it as a "multi-party inquiry" in the Renaud case (*Central Okanagan School District No. 23 v. Renault* (1992), 95 D.L.R. (4th) 577) (the "*Renault* case").

[105] Obviously the Union has played a significant role in supporting the Grievor through this arbitration. However, during the process of Ms. AB's involvement with the ASP, there is no evidence of any active participation by the Union, other than being present at the counselling sessions. Assuming the Union can act as an independent third party, it is conceivable that with some minimal training for shop stewards who participate in all Stage 3 ASP meetings and with the cooperation of the Employer, the Union could play a very positive role, particularly with employees who are known to be addicted to drugs or alcohol. They are in a different position of trust and confidentiality than the Employer's management personnel, including the support services of an employee assistance plan. In this case, whatever the duty of the Union might be considered to be, they did not satisfy it.

[106] In general, the duty of the employer is simply described as a prohibition of termination of an employee suffering from a protected disability to the point of "undue hardship". Most of the case law and literature concerns the question of the nature and the extent of the accommodation. What does "undue" mean in any particular case? In the present case, that would, at a minimum, mean arranging for and supporting Ms. AB to obtain treatment for an initial addiction or for her relapse before consideration of any termination.

[107] The real issue in the present case concerns the duty of the employee. Again, in general, the employee is obligated to come forward and present the employer with whatever particular medical information is necessary to adequately disclose the disability, and allow a reasonable assessment of what if any accommodation can be made up to the point of being "undue". In the *Renault* case, the Supreme Court said the employee has a duty "to assist in securing an appropriate accommodation".

[108] However, the duty of an addicted employee requires a more complicated analysis. "Denial of drug or alcohol addiction raises particularly perplexing issues, because denial is often one of the symptoms of the disease … the courts have held that an employee is under an onus to identify the need for accommodation and to cooperate in the implementation of a reasonable accommodation

arrangement. Meeting these obligations may create significant difficulties for an addicted employee, given the denial and lack of self-control which typically accompany alcoholism and drug abuse"[4]

[109] Failing to protect an addicted employee who was dismissed because of his or her addiction and who is in denial of his or her addiction would be tantamount to allowing the arbitral system to countenance a second discrimination, in contravention of *The Saskatchewan Human Rights Code.* As a result, I conclude an addicted employee has a "diminished responsibility" to identify and disclose the nature of their disability to their employer. To understand these duties requires further analysis of the nature of addiction.

The Nature of Addiction and the Duty of the Employee to Cooperate

[110] Mr. Teed provided a written report and testimony on the nature of addiction that is helpful to properly understand the duties of the employee in these circumstances. He first noted the research evidence accumulated in recent years regarding significant genetic heritability and permanent brain changes associated with substance abuse. The latter resulted in changes to the pre-frontal cortex that over time make the craving for drugs equal to or greater than the perceived need for food, air and water. In turn, all higher level needs (as per Maslow's hierarchy) are put on hold unless and until this craving is satisfied on an ongoing basis. The disease of addiction is now seen as a disruption of the "choice-making function of the brain" and a kind of chronic illness that can only be managed over the long term by abstinence, using a number of different programs and treatments that have shown some success in this area.

[111] He also testified that the typical family doctor receives little or no training in addiction medicine, with the result that only specialists in the area are capable of meaningful input.[5]

[112] Mr. Teed also testified that once the addiction sets in, and the craving combines with the guilt felt around the ongoing addiction, then the addiction starts to tell you what to do and you will lie and manipulate to any extent necessary to satisfy the habit. This is particularly relevant in the workplace context where the addict typically lies to his or her employer about the very existence of their addiction or the existence of a relapse. Denial, a major element of the disease, is used by the addict to prevent a perceived threatened loss of income which is necessary to support the ongoing habit.

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[4] Mitchnick and Etherington, *Labour Arbitration in Canada* (2nd edition), Lancaster House, 2012 at pp. 341 and 359

[5] In this regard: "While the concept of addiction as a chronic illness has been attractive in research, addictions have not been part of mainstream health care and physicians have never been trained – or reimbursed – to manage addictions like other chronic illnesses." Herron and Brennan, *The ASAM Essentials of Addiction Medicine* (2nd ed) Wolters Kluwer 2015 at 163.

[113] Finally, relapse is a common feature of the disease, particularly in the early years of recovery. The longer an addict can stay clean and sober, the more likely the addict will stay in continued long-term recovery.

[114] In summary, an employee suffering from a drug addiction that is not in recovery or has relapsed may, as a symptom of his or her disease and therefore beyond his or her control, lie to his or her employer about the status of their recovery, deny the existence of any drug problem, and continue to do or say anything necessary to maintain the flow of employment income that supports the addiction. All this is very commonplace for people like Mr. Teed, who see addicted people on a regular basis.

[115] Accordingly, if the employee is suffering from the disability of addiction, and is either not in recovery or has relapsed, and the evidence shows that such employee has failed to disclose this fact to the employer, then that employee cannot necessarily be expected to cooperate any further with the employer in identifying the need for accommodation. The duty of an employee to assist in the identification of the need for accommodation will be exhausted in these circumstances.

[116] To hold otherwise would constitute further additional discrimination against the employee because of his or her disability. This conclusion needs to be buttressed by reliable evidence from an addictions expert skilled at making assessments as to whether the employee is addicted, and whether he or she was in relapse and had deceived the employer as part of the denial symptom. In addition, reliable post-discharge evidence of the employee as to the state of his or her addiction at the time of termination may be helpful.

[117] With respect to the Grievor's diminished duty to assist and cooperate in the identification of her disability, I find that she exhausted this obligation by virtue of the three different occasions she raised the matter of her addiction in her counselling sessions. In fact, based on the evidence of Mr. Teed, Ms. AB's disclosure of her addiction status was more extensive than most addicts will disclose to their employer.

The Duty of the Employer to Identify the Need for Accommodation of an Addicted Employee

[118] The duty of an employer is somewhat more complicated in dealing with addiction matters, depending on whether the employer knows or should know that the employee is an addict, regardless of whether the employee says he or she is clean and sober and in recovery.

[119] If the employee is not known to the employer to suffer from the disability of addiction and there are no circumstances that would lead an impartial reasonable third party to suspect the possibility of addiction, and if all other things being equal, the employee is then terminated and subsequently wants to invoke the protection of a human rights code, the employee will be under an obligation to cooperate with the employer in identifying the need for a reasonable accommodation

and in implementing same to the point of undue hardship. Failure to do so will negate any duty of the employer to accommodate. Essentially a continuum exists of facts and circumstances that need to be analyzed in each case to determine at what point on that continuum an employer is freed from the duty to accommodate by the lack of cooperation of the addicted employee.

[120] Query whether that cooperation must happen at the time of the termination or whether it can happen after the dismissal, prior to the hearing. How can the employer be expected to call for this assessment prior to termination without any evidence? These are difficult questions. But, as indicated above, there is no need to address this issue or the general nature of this continuum or the related issue of post-discharge evidence. In this case, the employer both knew the Grievor was an addict, and the Grievor disclosed that she was having issues with her addiction.

[121] On the surface, the situation in this case appears to be closer to that in *Shelter Regent Industries* (case no. 26 in Appendix A), where Arbitrator Ponak outlined the Four Tests to which I have referred at some length already. Counsel for the employer recognized some of these similarities, and quoted at length from this case relative to the duty of the employee to cooperate in identifying his or her addiction as the cause of the absences. In that case, Arbitrator Ponak asked, "Should the Employer still be held responsible for failing to realize at the time of discharge that the Grievor had a substance abuse problem that might be connected to his absenteeism? I conclude that the answer to this question is no." (at paragraph 51).

[122] However, a closer look at the *Shelter Regent Industries* case reveals a number of factors that make it substantially different from the circumstances of this case:

a. There was no expert evidence before Arbitrator Ponak about the nature of addiction, its power and the resultant symptom of denial. Indeed, in that case, there was no evidence that the employee was actually addicted, and Arbitrator Ponak simply accepted the Union's argument that a "substance abuse problem" existed. He found it "… difficult to accept that an individual who has already been through a substance abuse rehabilitation program and is drinking heavily and using drugs can claim that he was unaware that he had a problem requiring further treatment." (at paragraph 51) However, as outlined above, that in fact is exactly what Mr. Teed testified happens to an addict. The power of the craving is so great that the addict will go to any length – comparable to the craving for food and water – to maintain access to the drug, and typically thinks that denial of the problem will do just that.

b. Secondly, and of perhaps greater importance, in *Shelter Regent Industries* it was "… difficult to readily identify any single source as the cause of his continuing attendance problem." Arbitrator Ponak concluded, "There was never any nexus established between the Grievor's substance abuse and his attendance problems." (at paragraph 52) Again, in the present case, the exact opposite was the case: there was a definitive nexus established between Ms. AB's absences and her addiction, both by the Grievor herself, and the expert, Mr. Teed.

c. For these reasons, although Arbitrator Ponak's outline and analysis of the applicable law is very helpful, his conclusions in the *Shelter Regent Industries* flow from a set of facts significantly different from this case.

[123] Counsel for SGC also argued in its brief that it was Ms. AB who chose to deliver the questionnaire "… to a doctor who had never treated the Grievor for substance abuse and who had never even been informed by the Grievor that she had any such medical issues." However, it was the cover letter to Ms. AB from SGC that specifically asked for the questionnaire to be completed by the Empoyee's "physician", as opposed to the counsellors SGC was aware had been working with Ms. AB either at Par Consultants or Ranch Ehrlo, both of which had been disclosed to SGC.

[124] Moreover, the very nature of the questionnaire, the form of which was developed by SGC, combined issues of addiction with the shoulder injury in the very same question, and therefore made it impractical to give the form to two different people, and indeed to even give a different answer for each issue. The issue of the addiction status of the Employee should have been separated out from the shoulder injury in a separate form and acted upon independently from any other injury. It was not appropriate to develop a questionnaire that combined the requested medical information into the same question, let alone the same form.

[125] The case law is clear that in all situations, the employer is under an obligation to ensure it has requested all the information necessary from the right people to make a proper assessment of the situation. In dealing with addictions, however, this obligation is more pointed. (On general obligations of the employer, see *Canada Safeway Ltd and U.F.C.W., Local 401,* [007] C.L.A.D. No. 269 (QL). Where the employer knows or should know that an employee is an addict, the employer must either involve human resources personnel who are familiar with addictions issues, or call for an assessment by a qualified individual who would know that the disease of alcoholism includes the real possibility of relapse, that denial of relapse is a symptom of the disease, and to be on the alert for signs of these issues.

[126] Whether an employer actually knew an employee was an addict is simply a matter of evidence. Whether the employer should have known an employee was an addict is a function of the circumstances in each case. In this regard, by way of example, one arm of the employer (i.e. Ms. Hanoski in Human Resources) knew Ms. AB was an addict, but not all people in the company may have had the information; but, they should have had the information to fulfill their duties. In this case, it can be said that the employer "should have known".

[127] Similarly, the employee may show signs or sufficiently clear symptoms that, with hindsight, a third party arbitrator can determine whether the nature of the signs or symptoms were such that the employer ought to have been aware of a potential addiction.

[128] If the employer is alert to the fact it is dealing with an addicted employee and aware of a need to investigate the potential need for an accommodation, what are its responsibilities and what degree of investigation is necessary to exhaust the duty to accommodate?

[129] For example, should the manager responsible for the addicted employee be advised by human resources of the employee's addiction, and at least have enough training that he or she knows when to call for help? Will it be satisfactory for an employer to rely on the opinion of a family doctor who has no training in addiction medicine and has never been involved in the treatment of an employee's addiction? Should the employer call for an assessment of the employee by a qualified professional once the issue of a possible disability arises? At the very least, where an employee is a known addict and issues have been raised about the possible need for an accommodation, such as treatment for relapse, the employer should seek the input of its own employee assistance plan professionals to assess the situation. These are all general principles that need to be canvassed in the circumstances of each particular case.

[130] In this case, I conclude there were reasonable grounds for SGC to question the status of the Grievor's addiction, and the Employer should have called for a professional assessment of Ms. AB by someone skilled in such services. Such an assessment might well have uncovered Ms. AB's ongoing relapse and led to a return to treatment.

[131] As indicated in the evidence section above, SGC was aware that Ms. AB was an addict, both because of the reports from Par Consultants, the Employee Assistance Plan specialists in 2008, to the effect that she was entering a 28-day program for the treatment of drug addiction. Moreover, Dean Cherewayko testified that although he had no direct knowledge of Ms. AB's addiction, he had heard rumours to that effect from other employees, and clearly was on notice of the fact the Grievor may be an addict. Ms. Hanoski from SGC's Human Resource Department testified she knew of Ms. AB's addiction. I find SGC failed to satisfy and exhaust the duty to accommodate by failing to investigate whether and to what extent Ms. AB's addiction status had changed each time it was raised by Ms. AB in the counselling sessions.

[132] From all the evidence at the hearing, it was clear to me that SGC took very seriously their obligation to identify needs for accommodation. In this case, Ms. Hanoski, the other SGC employees involved in the counselling sessions, and the Union simply did not have enough knowledge and training to properly fulfill their respective obligations.

[133] That would have required, at a minimum, initiating a process to have a proper assessment made of Ms. AB's addiction status by someone capable of doing so to confirm whether she had relapsed and was using drugs again, and presumably arrange for relapse treatment for the Grievor. There was no good explanation given at the hearing as to why SGC initially wrote to Ms. AB asking her to have her "physician" provide information about the status of her addiction when SGC should have known from the HR files that Par Consultants had been involved in arranging for the Grievor's treatment at Pine Lodge. At the very least, SGC's own employee assistance plan (EFAP) should have been involved to ensure this kind of assessment was made. SGC knew that Ms. AB was using the EFAP program, and they would no doubt have been better able to obtain a qualified assessment.

[134] In addition to my conclusions in paragraph 89 above related to the warning, I conclude that Employer did not meet the Fourth Test in that it did not satisfy and exhaust its duty to accommodate the Grievor. The Employer therefore discriminated against the Employee by

terminating her because of absences caused by a protected disability. The Grievor's termination was therefore invalid, and the Grievance is upheld.

[135] As requested by the Union, I have set out below my recommendations for the conditions of reinstatement of the Employee. However, should the parties be unable to mutually agree on such conditions, I remain seized of this matter and will resume this arbitration upon notice to that effect from either one of them.

RECOMMENDATIONS FOR REINSTATEMENT

[136] I conclude Ms. AB must be reinstated in her previous position at SGC, subject to conditions of reinstatement mutually agreed by the parties, failing which I will prescribe appropriate conditions. In that regard, with respect to any consideration of monetary issues, I would recommend that each of the parties, namely Ms. AB, PSAC and SGC, bear in mind what I consider to be their equal respective responsibilities for the events described above.

[137] The main conditions of reinstatement should relate to the management of Ms. AB's addiction. In this regard, I would suggest that the Union ask Mr. Teed to recommend employment conditions related to her addiction, and that they be carefully considered. His report addressed these issues to some extent, and suggested ongoing counselling for Ms. AB either through her existing counsellor at Ranch Ehrlo or perhaps alternatively or additionally through the SGC Employee and Family Assistance Plan. As well, Mr. Teed recommended Ms. AB remain active in both Narcotics Anonymous ("NA") and Alcoholics Anonymous ("AA"), attending meetings of each organization at least once weekly.

[138] Mr. Teed made it clear, the longer Ms. AB remains clean and sober, the more likely she is to remain that way. As well, my own personal experience with addiction suggests it is very difficult to forecast any individual's likelihood of success. I would recommend as one condition of employment that Ms. AB be required for one year to make a regular weekly report of her attendance at both NA and AA Regina meetings of her choice.

[139] I would also recommend two conditions be agreed to, the breach of which would result in an immediate termination of Ms. AB without any further legal process and a waiver of any rights to dispute the termination under the Collective Agreement for the breach of that condition.

[140] The first would relate to random drug tests for all drugs, including marijuana and cocaine, with frequency as recommended by Mr. Teed. In light of his testimony that Ms. AB's living arrangements – that include residing with two other people who regularly smoke marijuana – it may be advisable to investigate the possibility of using drug tests other than saliva-based tests, which can be compromised by second-hand smoke, even when it is done outside the home. There may be some technology such as hair tests which is less susceptible to false positives.

[141] Additionally, I would also recommend a second objective condition, the breach of which would lead to immediate termination, to be based on Ms. AB's actual attendance performance under the ASP. I would recommend, if at any time in the first year following her reinstatement, Ms. AB's absence rate under the ASP exceeds the corporate average for the last rolling 6-month period, then her position be terminated unless there is some proven explanation for her absence related to her health other than her addiction.

John Comrie, QC, FCIArb

Dated on December 24, 2015

APPENDIX A

1. *AFG Industries Ltd. And A.B.G.W.I.U, Local 295G* (1997) 68 L.A.C. (4th) 239
2. *Air BC Ltd. V. C.A.L.D.A.* (1995), 50 L.A.C. (4th) 93
3. *Alcan Smelters & Chemicals Ltd. V. CAW-Canada, Local 2301* (1996), 55 L.A.C. (4th) 261
4. *Behlen Industries LP and USW, Local 7913, Re,* [2013] MGAD No. 17 (WL) (Man Arb)
5. Brown & Beatty's <u>Canadian Labour Arbitration</u> at 7:6150 Drug and alcohol addiction
6. Brown & Beatty's <u>Canadian Labour Arbitration</u> at 7:6110 – Incapacity and innocent absenteeism
7. *Canada Post Corp. v. C.U.P.W.* (2001, 96 L.A.C. (4th) 298
8. *Canada Post Corp. v. C.U.P.W.* (1982), 6 L.A.C. (3rd) 385
9. *CAW-Canada, Local 111 v. Coast Mountain Bus Co.*, 2010 BCCA 447
10. *Cie Miniere Quebec Cartier v. Quebec*, [1995] 2 S.C.R. 1095 (WL) (SCC)
11. *City of Hamilton v. C.U.P.E., Local 5167* (2011), 214 L.A.C. (4th) 254
12. *City of Sudbury* (1981), 2 L.A.C. (3rd 161 (WL) (Ont Arb)
13. *Direct Energy v. Communications, Energy and Paperworkers Union of Canada, Local 975* (2009), 184 L.A.C. (4th) 7
14. *Federated Co-Operatives Ltd. And UFCW, Local 649 (Papuzynski), Re,* (2013), CLAS 67 (WL) (Sask Arb)
15. *Loblaws Cos. And UFCW, Local 247 (P. (J>)), Re* (2014), [2014] BCCAAA 17 (WL) (BC Arb)
16. *MacMillan Bathhurst Inc. v. I.W.A., Local 242* (1990) L.A.C. (4th) 109
17. *Mosaic Potash Esterhazy Limited Partnership v. Unifor Local 892* [2014, unreported]
18. *Natrel Inc. v. Teamsters, Local 674* (2004), 134 (4th) 142
19. *Pastachak v. Bienfait (Town)* (1996), 143 Sask R 139 (WL) (SKQB)
20. *Re Massey-Ferguson Industries Ltd. And United Automobile Workers, Loc. 458* (1972), 24 L.A.C. 344 (WL) (Ont Arb)
21. *Re School District No. 39 (Vancouver) and I.U.O.E., Local 963* (1997), 66 L.A.C. (3rd) 135 (QL (BC Arb)
22. *Re Smoky River Coal Ltd. V. U.S.W.A., Local 7621* (1995), 52 L.A.C. (4th) 409 (WL) (Ab Arb)
23. *Re St. Paul's Hospital and Hospital Employees' Union* (1995), 47 L.A.C. (4th) 423
24. *Sault Area Hospital v. CAW-Canada, Local 1120,* [2010] OLAA No 174 (WL) (Ont Arb)
25. *Sault Area Hospital and ONA (Murphy), Re,* [2014] OLAA No 176 (WL) (Ont Arb)
26. *Shelter Regent Industries v IWA-Canada, Local 1-207* (2003), 124 L.A.C. (4th) 129 (WL) (Ab Arb)
27. *Toronto (City) Board of Education v. O.S.S.T.F., District 15,* [1995] 1 S.C.R. 487
28. *United Nurses of Alberta, Local No. 2 v. Red Deer Regional Hospital,* (1998 ABQB 57, 59 Alta LR (3rd) 112 (WL)
29. *United Automobile Workers and Massey Ferguson Ltd.* (1969), 20 L.A.C. 370 (WL) (Ont Arb)
30. *Westmin Resources Ltd. And C.A.W., Loc. 3019* (1996), 54 L.A.C. (4th) 332 (WL) (BC Arb)