CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4667

Heard in Montreal, January 10, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer (LE) G. Paisley of Calgary, AB issued on September 15, 2017.

THE JOINT STATEMENT OF ISSUE:

On August 12, 2017, Mr. Paisley was called at 08:55 for Train 603-189. Train 603-189 was involved in a collision with a vehicle was reported at the Laggan Subdivision. Mr. Paisley's crew member was transported by CP Policy Constable J. Biggs by police vehicle following an inspection of the train. Mr. Paisley operated the train to Exshaw.

Upon interviewing the crew at Exshaw, Mr. Paisley was tested by CP Police Constable J. Biggs for suspicion to be under the influence of alcohol while subject to duty in which Mr. Paisley failed. Mr. Paisley was then transported to the Canmore RCMP Detachment where a qualified RCMP breathalyzer technician was waiting. He tested positive on a breathalyzer test for a 0.08 BAC.

Following an investigation on August 21, 2017, LE G. Paisley was dismissed for the following reasons, "Please be advised that you have been dismissed from Company service for your violation of Canadian Pacific Policy OHS 4100 Alcohol & Drug Policy and your use of and possession of intoxicants while subject to duty".

Subsequent to his dismissal, Engineer Paisley was restricted from operating a vehicle or rail equipment until May 22, 2019 as a result of a Prohibition Order issued by the Province of Alberta.

The Union's Position:

The Union contends that the Company has not considered the Union's position or the mitigating circumstances that were disclosed through the investigation. The investigation clearly revealed that Engineer Paisley had been struggling with countless tragedies in life which lead him to rely on alcohol as a means to cope with these adversities. His actions are common among people who are struggling with anxiety and addiction.

Following his dismissal Engineer Paisley has been diagnosed with severe alcohol use disorder, PTSD, chronic adjustment disorder and panic attacks. Engineer Paisley has recognized his illnesses and met them head on in an effort to put his life back together. He has taken action by attending AHS counselling, contacted EFAP for consultation, consultation with family doctor

for diagnosis and treatment recommendations. In addition, he has met with a Clinical Psychologist for adult addiction services and has been assigned a counsellor. Mr. Paisley has attended a residential treatment facility and is working with all the recommended aftercare to ensure his continued sobriety and to deal with his other medical conditions.

The Union contends the discipline imposed in this case was excessive, extreme and unwarranted. Regardless of the mitigating circumstances in this case and in case there was any unintended offence taken from his actions, Engineer Paisley has apologized to the Company officer involved and the Union further contends that this should be considered an appropriate response to the situation.

Engineer Paisley has acknowledged and taken responsibility for his illness, he is continuing to take all the right steps towards recovery. The Union notes there has been no attempt to accommodate Mr. Paisley's disability. Engineer Paisley is a long service employee with an impeccable work record who is not deserving of the inequitable treatment as evidenced in this case. The Union further contends that giving up on Engineer Paisley because of an addiction/disability is a violation of the *Canadian Human Rights Act* and that the Company has a responsibility to accommodate him.

The Union requests that Engineer Paisley be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position:

The Grievor was appropriately dismissed for a violation of Canadian Pacific Policy OHS 4100 Alcohol and Drug Policy and his use and possession of intoxicants while subject to duty. Within his investigation, the Grievor confirms that he not only drank whiskey while in the cab of a locomotive but also proceeded to operate his train after consuming the alcohol. Further, as submitted in the investigation, the Grievor provided a breath sample on an Approved Screening Device (ASD). The result was a 'fail'.

The incident was just cause for dismissal in and of itself.

On the date of the incident, the grievor made no attempt to extend his rest or book unfit. Furthermore, the crew was offered relief following the incident, in which both individuals refused.

The first instance of Mr. Paisley's alleged illness being reported to the Company was after the incident and during the formal investigation. Any and all medical documentation to substantiate the Grievor's medical illness was provided following his dismissal from Company service. Therefore, the Company can only proceed on the fact that the grievor is not afforded any legal protections.

Notwithstanding this, there is no casual connection between a disability of any kind and Mr. Paisley's actions on August 12, 2017 – a violation of Policy OHS 4100 – in transporting alcohol, as well as operating machinery under the influence of alcohol.

A major violation of this nature must be taken very seriously. The Company maintains that the dismissal of Mr. Paisley was appropriate and warranted under the circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Edwards	**(SGD.) C. Tsoi**
General Chairman	Labor Relations Officer

There appeared on behalf of the Company:

J. Bairaktaris	– Director Labour Relations, Calgary
L. McGinley	– Assistant Director, Labour Relations, Calgary
Dr. G. Lambros	– Chief Medical Officer, Calgary
S. Tremblay	– Manager Health Services Program, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Calgary
H. Makoski	– Vice General Chairperson, Winnipeg
G. Lawrenson	– Local Chairperson, Calgary
G. Paisley	– Grievor, Calgary

AWARD OF THE ARBITRATOR

Nature of case

1. CP terminated locomotive engineer (LE) Greg Paisley on September 15, 2017. The parties did not dispute that LE Paisley had brought alcohol onto his train and had later consumed some of it during his tour of duty.

2. The resolution of this case depends on its characterization. CP viewed the case essentially as a disciplinary matter. The TCRC argued it was instead a duty to accommodate case. At the arbitrator's request, the parties provided supplemental submissions focusing on principles arising from the Supreme Court of Canada's (SCC) decision in *Stewart v. Elk Valley Coal Corp*[1] *(Elk Valley)*.

3. For the reasons which follow, the TCRC satisfied its burden of proving *prima facie* discrimination. CP did not meet its resulting burden of proof of demonstrating that it could not accommodate LE Paisley without experiencing undue hardship.

4. The arbitrator accordingly reinstates LE Paisley, but with significant conditions to protect CP's legitimate interests as it operates a safety sensitive undertaking.

[1] [2017] 1 SCR 591, 2017 SCC 30

Facts

5. The parties worked together to produce a Joint Statement of Issue (JSI) in accordance with articles 7 and 10 of the Memorandum of Agreement Establishing the CROA&DR (*MOA*). The facts are not largely in dispute; rather it is the legal consequences which flow from them which divide the parties.

6. LE Paisley joined CP in 1984 and had roughly thirty-three years service at the time of his termination. During his long period of service, he had received only 25 demerits and two cautions. He had no active demerit points at the time of his dismissal.

7. On August 12, 2017, LE Paisley's train, despite the initiation of an emergency brake application, had an unavoidable collision with a Toyota Tundra on the track. No injuries resulted and everyone refused medical attention.

8. LE Paisley had brought a bottle of whisky on the train, allegedly as a gift for someone else. After an inspection identified no defects, LE Paisley operated the train on his own to go to Exshaw. During this time, he drank from the 750ml rye whisky bottle.

9. A CP Police constable detected a strong odour of alcohol on LE Paisley's breath and other symptoms of intoxication. LE Paisley failed a test under an Approved Screening Device (ASD), which led to his arrest and the RCMP administrating a breathalyzer test. LE Paisley had a blood alcohol concentration over 0.08. The RCMP charged him under the *Criminal Code*.

10. On August 21, 2017, LE Paisley admitted during CP's investigation that he had consumed alcohol while operating his locomotive. He advised CP that he had experienced a breakdown during his tour of duty, as a result of previous incidents which had occurred during his career, including one which resulted in the death of a 20-year-old (E-1; CP Brief; Tab 5; QA28).

11. In answer to CP's question, LE Paisley advised that he believed he had an issue with alcohol and possibly other issues (E-1: CP Brief; Tab 5; QA57):

> Q57. Mr. Paisley, do you suffer from any condition that the company should be aware of with regards to the use of Alcohol?
>
> A57. Yes, I believe that through circumstances in my personal and professional life that I have developed an issue with alcohol and possibly other mental health issues. I can assure you that this is the only time I had consumed Alcohol while on duty. The circumstances that took place on August 12th, 2017 made me realize that it was a bigger problem than I had thought previously.

12. LE Paisley disclosed some of the significant events which had caused stress in his life, including the fact that both he and his wife had battled cancer. He also advised he did not wish to diminish his responsibility by raising these issues and he apologized for his conduct to CP, his conductor and TCRC representatives.

13. LE Paisley further advised CP during the investigation of the treatment steps he had followed since the incident (E-1; CP Brief; Tab 5; QA 89).

14. CP terminated LE Paisley on September 15, 2017 on the following grounds (U-1; TCRC Brief; Tab 6):

> Please be advised that you have been DISMISSED from Company Service for your violation of Canadian Pacific Policy OHS 4100 ALCOHOL & DRUG POLICY and your use of and possession of intoxicants while subject to duty.
>
> (Capitals and underlining in original)

15. On November 14, 2017, the TCRC grieved at Step 1 and raised CP's duty to accommodate (U-1; TCRC Brief; Tab 7). CP did not respond to the grievance. The TCRC filed a Step 2 grievance on March 6, 2018 which included further information about LE Paisley's attempts at dealing with his substance abuse issues (U-1; TCRC Brief; Tab 8).

16. CP declined the grievance on the following basis (U-1; TCRC Brief; Tab 9):

> The Company has reviewed the grievance, the statement and the investigation package and cannot agree with the Union's contentions. The Grievor was appropriately dismissed for a violation of Canadian Pacific Policy OHS 4100 Alcohol and Drug Policy and his use and possession of intoxicants while subject to duty.
>
> Within his investigation, the Grievor confirms that he not only drank whiskey while in the cab of a locomotive but also proceeded to operate his train after consuming the alcohol. Further, as submitted in the investigation, the Grievor provided a breath sample on an Approved Screening Device (ASD). The result was a fail. The Grievor was then transported to the Canmore RCMP Detachment where a qualified RCMP breathalyser technician was waiting. Tests were performed and the Grievor blew over .08 mg%.
>
> A blatant violation of this nature must be taken very seriously; as such, the Company maintains that its decision to dismiss was appropriate and warranted under the circumstances.
>
> Based on the foregoing, your grievance is respectfully declined.

17. Following his termination, LE Paisley continued to take steps to address his issues. For example, he attended and completed a two-week residential addiction treatment program (U-1; TCRC Brief; Tab 14). His treating physician referred him to the Alberta Health Services Addiction Centre and included a diagnosis of, among other things, “Alcohol Use Disorder – Severe” and PTSD (U-1; TCRC Brief; Tab 15).

18. On May 22, 2018, LE Paisley pleaded guilty to one count for Impaired Operation over 0.08 of Railway Equipment. The Provincial Court of Alberta granted him a “Curative Discharge” with one year of probation. Curative discharges are available to those who demonstrate that they needed curative treatment at the time of the offence. The Crown did not contest that LE Paisley battled a severe alcohol problem (U-1; TCRC Brief; Tab 24).

19. CP highlighted from the Court’s transcript LE Paisley’s legal counsel’s comments about the extent of his alcohol drinking (E-1; CP Brief; Paragraph 56):

> With respect to his alcoholism, Mr. Paisley is a – a self-described severe alcoholic. He – I’m told that he’s been struggling with alcohol since at least 2003. I understand a typical day for him would – would involve consuming at least one bottle of whiskey a day or one case of beer. And that often, he would – his drinking would start with breakfast. He would have a beer with breakfast, and the drinking would continue, you know, throughout – throughout the day, again with a – with peak consumption being an estimated bottle of whiskey a day or a case of beer.

20. The Court concluded (U-1; TCRC Brief; Tab 24):

> THE COURT: **It is clear that Mr. Paisley suffers from an alcohol addiction, and he is need of curative treatment.** I’m satisfied that he

> has approached the matter of sobriety and curative treatment in a genuine way with intentions to be successful in managing alcoholism. One never is cured. And if successful can live a – a good life without alcohol.
>
> And I'm satisfied by the dedication that Mr. Paisley has shown that it is not contrary to the public interest to grant a curative discharge. And I do so and invite the Crown to recommend the terms of a probation order. (sic)
>
> (Emphasis added)

21. The Court granted LE Paisley a curative discharge, but subject to a one-year probation period. As noted in the JSI, a Prohibition Order prevents LE Paisley from operating a vehicle or rail equipment until May 22, 2019.

The Legal Analysis

22. As mentioned above, the characterization of this case is crucial. As CROA&DR 4648 noted at paragraphs 3-7, both the TCRC and CP may have a burden of proof to meet if a case involves the duty to accommodate. The TCRC clearly alleged in its grievances that CP had a duty to accommodate LE Paisley. It accordingly had the burden to demonstrate that *prima facie* discrimination existed.

23. If the TCRC failed to meet its burden, then CP could treat the case as a regular disciplinary case. That was clearly the focus of CP's submissions, though some of the points it raised also implicitly contested whether *prima facie* discrimination existed.

24. This Office has routinely dismissed attempts to raise a medical explanation for inappropriate behaviour in the absence of convincing evidence. For example, in SHP568,

Arbitrator Picher noted the lack of evidence to support a medical explanation for an employee sleeping on the job:

> During the course of his disciplinary investigations the grievor suggested to the Company's investigating officer that he suffered from a sleep disorder. However, no medical documentation whatsoever has been produced to substantiate any such condition. Moreover, the material before the Arbitrator discloses that in fact Mr. Demuth held a second job as a truck driver for a waste management company. When questioned about that activity by the Company the grievor suggested that it involved only part time work, normally in the early hours of the day. However, he did not deny, when pressed, that on occasion his second job as a driver for Canadian Waste Management Inc., involved making round trip assignments from Golden to Cranbrook, B.C. involving eight hours of work, sometimes on days when he was scheduled to work the same night for the Company at the Golden Mechanical Facility. Significantly, that was the apparent state of affairs on January 4, 2001, the day before the night tour of duty of January 5, 2001 when Mr. Demuth was found to be sleeping on duty.
>
> It is trite to say that it is the obligation of an employee to report for duty fit to work, and to remain awake and available to perform productive service for his or her employer during the whole of the employee's scheduled tour of duty. **The Arbitrator cannot avoid the conclusion that the grievor failed to honour that obligation when he was found sleeping on the job in his vehicle at the workplace on April 7, 2002. No good excuse or medical documentation was produced to explain the grievor's conduct, and the grievor was therefore liable to discipline.**
>
> (Emphasis added)

25. Similarly, in CROA&DR 4334, Arbitrator Schmidt rejected an attempt to change a case about inappropriate behaviour into a case involving fundamental human rights issues:

> The grievor did not acknowledge the inappropriateness of his communications during the investigation. He abdicated any responsibility for his conduct by relying on a medical condition, which has not been proven to be linked to the grievor's exhibited behaviour. **The Company is correct when it submits that, if the grievor seeks to be exonerated of culpability for the inappropriate conduct, it is incumbent on him to provide medical evidence to support a**

> **causal link between the medical condition and the misconduct itself.** It is hardly surprising that there is no such evidence before me.
>
> (Emphasis added)

26. Recently, on December 6, 2018, Arbitrator Hornung came to a similar conclusion in CROA&DR 4653-4654:

> Union Document 16, consists of a note from a doctor (who the Grievor was seeing for the first time on August 12, 2018) essentially repeating what the Grievor told him relative to his cocaine "problem". However, that letter simply does not meet the evidentiary threshold to establish a link between the misconduct at issue and the medical condition. **The evidence is that, at the time of the incident, the Grievor was an occasional user of cocaine. In the result, there is no evidence upon which I can conclude that the Grievor was indeed suffering from a disability at the time of the incident. While I accept that the assessment of a disability does not always require expert medical evidence, it requires more than that adduced at this hearing.**
>
> (Emphasis added)

27. Similarly, this Office has accepted that an employer can impose severe discipline for employees who have performed their duties while impaired. As Arbitrator Schmidt noted in SHP726:

> The overwhelming evidence in this case is that the grievor consumed both cocaine and marijuana immediately before he commenced his shift on March 21, 2015 or shortly thereafter. I find that he was impaired during his shift and there is simply no other rational conclusion to be drawn having regard to the evidence before me.
>
> An individual in the grievor's position who causes himself to become impaired on the job merits the most severe discipline, absent very compelling mitigating factors. **Not only was the grievor impaired, I must conclude that he has been dishonest about when he had last used marijuana and about his denial of cocaine use. The Company's decision to discharge the grievor in these circumstances was entirely appropriate and should not be disturbed.**
>
> (Emphasis added)

28. The above cases apply to situations where this Office has concluded, based on the evidence submitted by the parties, that the case involved no protected grounds under the *Canadian Human Rights Act* (*CHRA*). The decision in SHP730 to which CP made reference similarly fell within this line of cases.

29. However, if the TCRC meets its burden of showing *prima facie* discrimination, then the SCC had set out, as summarized briefly in *CROA&DR 4648*, *supra*, how an arbitrator's legal analysis changes.

30. A finding of *prima facie* discrimination shifts the burden to CP to demonstrate that it could not have accommodated LE Paisley without incurring undue hardship. Under the applicable jurisprudence, it is no longer enough to show that the conduct, absent a protected ground under the *CHRA* being involved, would have attracted a severe disciplinary measure.

Did the TCRC demonstrate prima facie discrimination?

31. To many labour lawyers, proving something "prima facie", which means "based on the first impression" or "at first sight", would not be overly onerous. However, in recent years, SCC jurisprudence on the issue of proving "*prima facie* discrimination" has led to

extremely complex arbitration proceedings[2]. Those cases often involve expert medical evidence as part of the "*prima facie* discrimination" analysis.

32. The term "*prima facie*" in this context no longer means what one might otherwise have thought at first glance.

33. The SCC examined the concept of *prima facie* discrimination in both *Elk Valley*, *supra*, and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*[3] (*Bombardier*).

34. In *Bombardier*, the SCC commented on the elements of *prima facie* discrimination under Quebec's Charter of Human Rights and Freedoms[4]:

> [35] First, s. 10 requires that the plaintiff prove three elements: "(1) a 'distinction, exclusion or preference', (2) based on one of the grounds listed in the first paragraph, and (3) which 'has the effect of nullifying or impairing' the right to full and equal recognition and exercise of a human right or freedom" (Forget, at p. 98; Ford, at pp. 783‑84; Devine v. Quebec (Attorney General), 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790, at p. 817; Bergevin, at p. 538).
>
> [36] If these three elements are established in accordance with the degree of proof we will specify below, there is "prima facie discrimination". This is the first step of the analysis.

[2] Two recent arbitral cases demonstrate this complexity: Humber River Hospital v Ontario Nurses' Association, 2018 CanLII 115718 and Regional Municipality of Waterloo (Sunnyside Home) v Ontario Nurses' Association, 2019 CanLII 433. The length of these decisions, due understandably in part to the use of the traditional arbitration hearing process, underscores how complex the issue of *prima facie* discrimination may be in certain instances.

[3] [2015] 2 SCR 789, 2015 SCC 39

[4] The SCC noted the Quebec *Charter* is comparable to human rights legislation in other provinces (paras 30-31).

35. *Bombardier* held that the civil standard of proof, i.e. on a balance of probabilities, applied to proving *prima facie* discrimination, despite the use of the term "*prima facie*":

> [55] As we mentioned above, an application under the Charter involves a two‑step process that successively imposes separate burdens of proof on the plaintiff and the defendant. **However, this Court has never clearly enunciated the degree of proof associated with the plaintiff's burden. It must also be acknowledged that the use of the expressions "prima facie discrimination" and "prima facie case of discrimination" may have caused some confusion about the scope of the degree of proof.**
>
> [56] **In our opinion, even though the plaintiff and the defendant have separate burdens of proof in an application under the Charter, and even though the proof required of the plaintiff is of a simple "connection" or "factor" rather than of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.**
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> …
>
> [59] **In our opinion, Bombardier is right that the standard of proof that normally applies in the civil law, namely that of proof on a balance of probabilities, applies in this case. In a discrimination context, the expression "prima facie" refers only to the first step of the process and does not alter the applicable degree of proof. This conclusion is inescapable in light of this Court's past decisions.**
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> …
>
> [65] Thus, the use of the expression "prima facie discrimination" must not be regarded as a relaxation of the plaintiff's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which he or she must still meet. This conclusion is in fact supported by the passage from O'Malley quoted above, in which the Court stated that the case must be "complete and sufficient", that is, it must correspond to the degree of proof required in the civil law. Absent an exception provided by law, there is in Quebec law only one degree of proof in civil matters, namely proof on a balance of probabilities: art. 2804 of the Civil Code of Québec; see also Banque Canadienne Nationale v. Mastracchio, 1961 CanLII 88 (SCC), [1962] S.C.R. 53, at p. 57; Rousseau v. Bennett, 1955 CanLII 84 (SCC), [1956] S.C.R. 89, at pp. 92‑93; Parent v. Lapointe, 1952 CanLII 1 (SCC), [1952] 1 S.C.R. 376, at p. 380. In the instant case, neither s. 10 of the Charter nor the Charter's other provisions create such an exception.
>
> (Emphasis added)

36. The SCC in these paragraphs emphasized that any conclusion about *prima facie* discrimination comes from the evidence the parties put before the decision maker. It further emphasized that the employee must prove, on a balance of probabilities, only a "connection or factor" rather than a "causal connection".

37. In *Bombardier*, the SCC found no *prima facie* discrimination existed since there was insufficient evidence to link the employer's refusal to hire the employee with his national or ethnic origin:

> [73] For the reasons that follow, we are of the opinion that because the Tribunal's decision was not supported by the evidence in the record, it was unreasonable and must therefore be set aside.
>
> [74] **The parties agreed that Bombardier's decision to deny Mr. Latif's request for training under his Canadian licence was based solely on the fact that Mr. Latif had not received a security clearance from DOJ to receive training under his U.S. licence. But the Commission had to show that Bombardier's decision was discriminatory by establishing on a balance of probabilities that there was a connection between the decision and Mr. Latif's ethnic or national origin.** The Commission argues that Mr. Latif was a victim of racial profiling on the part of the U.S. authorities and that Bombardier acted as a conduit for their decision. More specifically, the Commission submits that the measures implemented by the U.S. authorities at the relevant time in order to counter and prevent terrorism directly targeted Arab or Muslim people or, more broadly, people from Muslim countries, including Pakistan. Because Mr. Latif was born in the latter country, the U.S. authorities' decision concerning him stemmed from those measures.
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> …
>
> [80] Because Bombardier's decision to deny Mr. Latif's request for training was based solely on DOJ's refusal to issue him a security clearance, it is common ground that proof of a connection between the U.S. authorities' decision and a prohibited ground of discrimination would have satisfied the requirements of the second element of the test for prima facie discrimination. However, the Commission did not adduce sufficient evidence to show that Mr. Latif's ethnic or national

> origin played any role in DOJ's unfavourable reply to his security screening request.
>
> …
>
> [98] **In our opinion, the evidence available to the Tribunal — indeed the absence of evidence — was such that it could not reasonably hold that there was a connection between Mr. Latif's ethnic or national origin and the decision of the U.S. authorities, and therefore Bombardier's decision to deny Mr. Latif's training request.** As a result, it was not open to the Tribunal to conclude that Bombardier's decision constituted prima facie discrimination under the Charter.
>
> (Emphasis added)

38. Evidently, as previously noted in CROA&DR 4630P, complex cases in this area may impact this Office's otherwise successful expedited arbitration regime. Nonetheless, the choice of the best hearing process necessarily rests with the parties.

39. In *Elk Valley*, the SCC described again the obligation to prove *prima facie* discrimination:

> [24] **To make a case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [Human Rights Code, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": Moore, at para. 33.** Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups: Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39 (CanLII), [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate prima facie discrimination: Bombardier, at para. 40.
>
> (Emphasis added)

40. In *Elk Valley*, the SCC referenced the extensive evidence from the original hearing and found reasonable the conclusion that addiction was not a factor in the employee's termination:

> [25] It is conceded that the first two elements of a prima facie case of discrimination are established in this case. The only dispute is on the third requirement — whether Mr. Stewart's addiction was a factor in his termination.
>
> [26] The Tribunal cited the proper legal test and noted, at para. 117, that it was "not necessary that discriminatory considerations be the sole reason for the impugned actions in order for there to be a contravention of the Act". **After a detailed review of the evidence, it concluded that Mr. Stewart's addiction was not a factor in his termination for two related reasons. In the Tribunal's view, Mr. Stewart was fired not because he was addicted, but because he had failed to comply with the terms of the Policy, and for no other reason. The Tribunal also concluded that Mr. Stewart was not adversely impacted by the Policy because he had the capacity to comply with its terms.**
>
> [27] The only question for a reviewing court is whether this conclusion is unreasonable. Deference requires respectful attention to the Tribunal's reasoning process. A reviewing court must ensure that it does not only pay "lip service" to deferential review while substituting its own views: Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 48. If the decision is within a "range of possible, acceptable outcomes" which are defensible in respect of the evidence and the law, it is reasonable: Dunsmuir, at para. 47; see also Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708, at para. 16.
>
> [28] **I am satisfied that the Tribunal's conclusion that addiction was not a factor in the termination of Mr. Stewart's employment is reasonable.**
>
> (Emphasis added)

41. In applying the principles from these SCC decisions, the arbitrator has concluded that the TCRC met the three elements needed to demonstrate *prima facie* discrimination in this case. The evidence in the record reveals that i) LE Paisley suffered from alcohol

addiction; ii) he suffered an adverse impact when he lost his employment and iii) that his alcoholism was a factor leading to this adverse impact.

42. Certain events support this conclusion.

43. First, during the investigation, LE Paisley answered CP's question in the affirmative that he had an issue with alcohol. There was no evidence suggesting that everything LE Paisley subsequently went through constituted a "ruse" designed to obtain protections under the *CHRA*. The case law does not support the suggestion that *prima facie* discrimination can never arise if an employee only raises his/her disability after an incident. The SCC examined this possible scenario in *Elk Valley*, but in different factual circumstances.

44. The arbitrator acknowledges CP's position that LE Paisley did not provide any medical evidence until after the incident (E-1; CP Brief; Paragraphs 48-54). But CP did receive further information from LE Paisley during the investigation about the steps he was taking to deal with his issues (E-1; CP Brief; Tab 5; QA 89). It was also not clear whether CP actually disputed LE Paisley had a disability. Its Brief seemed to emphasize instead his failure to raise it prior to the incident (E-1; CP Brief; Paragraph 62).

45. Similarly, paragraph 74 of CP's brief begins with the phrase "Notwithstanding that the Grievor failed to disclose his alcoholism for which he has been struggling with for over

fourteen (14) years prior to the incident…". CP also argued a disability did not shield LE Paisley from discipline (E-1; CP Brief; Paragraph 58):

> 54. Therefore, the Grievor is not shielded as a result of his disability from his actions on the date of the incident, as he had assumed the risk and consequences that would arise as a result of his non-disclosure. Therefore, the Grievor is justifiably found culpable for the aforementioned violations of OHS Policy 4100, giving rise to some form of discipline.

46. The evidence in the record, which may not even be disputed, demonstrated that LE Paisley had an alcohol addiction.

47. Second, CP raised two reasons for its decision to termination LE Paisley after the investigation. It alleged a violation of Policy 4100. It then went further by stating "and your use of and possession of intoxicants while subject to duty" (U-1; TCRC Brief; Tab 6).

48. Third, CP referred again to LE Paisley's consumption of alcohol, which a Court later accepted constituted an "alcohol addiction". CP referred to comments from LE Paisley's lawyer in Court regarding the amount of alcohol he had been consuming daily since 2003.

49. The facts in the record distinguish this case from the situations examined in *Elk Valley* and *Bombardier*. They satisfy the three-pronged test required to prove *prima facie* discrimination[5].

[5] Neither party addressed in detail the current debate in the jurisprudence about the third part of the *prima facie* discrimination test i.e. whether the disability impacted an ability to comply with the rule versus whether the disability was a factor in the employer's decision.

50. Accordingly, since the TCRC met its burden to prove *prima facie* discrimination, the jurisprudence then obliges the arbitrator to consider whether CP demonstrated it could not have accommodated LE Paisley.

Did CP demonstrate undue hardship?

51. CP's Brief did not address the issue of undue hardship directly. CP's submissions, including its supplemental comments, argued this case was a disciplinary matter. Its analysis highlighted the three-part test for assessing discipline/discharge in *William Scott & Co. v. C.F.A.W., Local P-162* (1976), [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B) (E-1; CP Brief; Paragraph 14).

52. CP's Brief did address various issues involving a "medical condition as a shield" (para 38 onward), the "Grievor's Culpability" (para 43 onward), and the concept of a "causal linkage" between the disability and the behaviour (para 49 onward). These arguments were relevant to, and considered for, the issue of *prima facie* discrimination.

53. The TCRC's Brief reviewed several of this Office's decisions where, after a finding of *prima facie* discrimination, it then examined undue hardship.

54. The duty to accommodate does not excuse LE Paisley's conduct. No one argued his actions were acceptable, including the TCRC and LE Paisley himself. LE Paisley's conduct put his safety, that of his colleagues and that of the general public at risk.

55. But, once *prima facie* discrimination is shown, the jurisprudence requires an arbitrator to evaluate whether an employer could have accommodated an employee suffering from a disability without undue hardship[6].

56. CROA&DR 4609 summarized some of the key duty to accommodate principles. This area remains exceedingly complex for both parties and decision makers. *Elk Valley* showed that three judges on the SCC could not agree on how to apply these challenging principles.

57. This Office has frequently dealt with situations like that of LE Paisley. The older cases in this area which CP advanced in its Brief (E-1; CP Brief; Paragraph 35) should be read with circumspection, as suggested in CROA&DR 2716:

> The Arbitrator cannot accept the argument of the Company's representative, nor the reasoning of certain cases decided in the earlier years of this Office, which predate current human rights legislation and arbitral jurisprudence, to the effect that an employee discharged for the possession or consumption of alcohol or non-prescription drugs cannot, thereafter, legitimately claim that he or she should be reinstated based on rehabilitation efforts undertaken after the discharge. Both legislation in Canada, such as the Canadian Human Rights Code, and an extensive body of arbitral jurisprudence, clearly recognize that alcoholism and drug addiction are a form of illness, and are to be treated as such. **When, as in the instant case, an employee can demonstrate by clear and compelling evidence that he or she has made substantial strides in gaining control of an addictive condition, even if it be after the culminating and sometimes galvanizing event of discharge, it is incumbent upon a board of arbitration to take full cognizance of that reality in considering**

[6] The SCC examined an arbitrator's duty in this regard in McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, [2007] 1 SCR 161, 2007 SCC 4.

> **whether to exercise the board's statutory discretion to reduce the penalty of discharge.**
>
> (Emphasis added)

58. Given the focus of CP's submissions on discipline, the arbitrator must conclude that undue hardship has not been shown. The appropriate remedy therefore will be comparable to those which this Office has ordered in past cases.

Disposition

59. In similar situations, this Office has ordered reinstatement with conditions. These conditions are designed to protect CP's legitimate business interests while also respecting an employee's rights under the *CHRA*. Two of the more recent decisions in this regard are CROA&DR 4375 and CROA&DR 4472.

60. The TCRC persuaded the arbitrator to make a similar reinstatement order for LE Paisley, but with these conditions:

> A. The arbitrator directs that LE Paisley be reinstated into his employment, without loss of seniority but without compensation for any wages and benefits lost;
>
> B. Given LE Paisley's Prohibition Order from operating rail equipment, CP's obligation to reinstate prior to May 22, 2019 will be subject to its reasonable efforts to find a non-safety sensitive position in which to accommodate him;
>
> C. LE Paisley shall not return to work until such time as he is confirmed by the Company's medical officer to be physically fit to work, including testing for any substance abuse issues which the Company's medical officer deems appropriate;
>
> D. For the duration of his employment with CP, LE Paisley must abstain from the consumption of alcohol or drugs;

E. For a period of two years from the date when LE Paisley starts performing services for CP, he will be subject to random, unannounced drug and alcohol testing, to be administrated in a non-abusive fashion;

F. LE Paisley shall engage in such periodic contact and follow-up with the Company's Employee and Family Assistance Program (EFAP) program as the parties may agree is appropriate, or, failing their agreement and if requested, as shall be determined by the arbitrator; and

G. If LE Paisley violates any of these conditions, he shall be liable to termination with recourse to arbitration only for the purpose of determining whether a violation of these conditions has occurred.

61. The arbitrator remains seized for any issues which may arise as a result of this award.

February 5, 2019

GRAHAM J. CLARKE
ARBITRATOR