IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIFOR, LOCAL 975

-AND-

ENBRIDGE GAS DISTRIBUTION INC.

Termination grievance of Taylor Letwin

Mary Ellen Cummings, arbitrator

Appearances:

J. James Nyman, Terry Ball, Dan Valente and Taylor Letwin for the union

Karen R. Bock, Leslie A. Frattolin, Norm Bailey, Chris Spence and Bill Elliott for the employer

Award issued on September 11, 2016 at Georgetown, Ontario

AWARD

1. The union filed a grievance challenging the employer's decision to terminate the employment of Taylor Letwin. At the time of the termination, the employer concluded that Mr. Letwin had arrived at work under the influence of drugs, which is both contrary to the employer's policies, and contrary to common sense. Mr. Letwin worked as a Labourer, assisting Gas Technicians with the installation and repair of gas lines from a main pipeline to individual residential and commercial customers. Mr. Letwin operated machinery and used hand tools, often working around "live gas".

2. There is no disagreement that Mr. Letwin worked in a safety sensitive position. An employee working while under the influence of drugs or alcohol could, with impaired judgment, cause an accident with catastrophic consequences for himself, other employees, customers, members of the community and property.

3. There is also no disagreement that Mr. Letwin has a disability that is recognized under the *Human Rights Code* R.S.O. 1990, c. H.19. Mr. Letwin has a history of abuse of illegal and prescription drugs. The employer was aware of the disability and had accommodated Mr. Letwin in the past, in ways I will detail below. Mr. Letwin is a short service employee.

4. The employer argued that its extensive efforts to support and pay for the rehabilitation of Mr. Letwin when his drug dependency first came to its attention is enough to meet its obligation to accommodate Mr. Letwin to the point of "undue hardship", the test required by the *Human Rights Code*, particularly bearing in mind that he was an employee with short service.

5. In contrast, the union argued that a single episode of relapse, to be expected in a drug addict, does not discharge the employer's obligation to accommodate a disabled employee to the point of "undue hardship". Moreover, the union submitted that whether Mr. Letwin is a short service or a long service employee is irrelevant to a consideration about whether the employer has accommodated to the point of "undue hardship". While the union recognizes and commends the employer for its efforts to accommodate and support Mr. Letwin when he first made the employer aware of his addiction issues, that generosity does not end the employer's obligations, particularly for drug addicts, who are generally known to relapse. In the union's view, the employer was not entitled to discharge Mr. Letwin at the first sign of relapse.

6. However, the union recognizes that the employer need do no more in the future, if I order Mr. Letwin's reinstatement on terms. Essentially, the union is requesting that Mr. Letwin be reinstated in his safety sensitive position with no back pay, subject to conditions, without time limits.

Relevance of post-discharge evidence

7. The employer argued that I should determine this case on the basis of the information that was available to it at the time it made the decision to terminate the employment of Mr. Letwin. I should therefore, it argued, exclude evidence of post-discharge events. Counsel for the employer relied on *Compagnie minière Québec Cartier*

v. United Steelworkers of America, Local 686, [1995] 2 S.C.R. 1095. In that decision, the Supreme Court of Canada determined that an arbitrator adjudicating the dismissal of an employee, could not consider evidence of events which followed the dismissal. At paragraph 13, the Court held subsequent-event evidence is relevant only where "it helps to shed light on the reasonableness and appropriateness of the dismissal…at the time it was implemented". But if the arbitrator determines that the dismissal was justified at the time the employer made the decision, the arbitrator "…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". The Supreme Court concluded that consideration of subsequent-event evidence would lead to the "absurd conclusion that a decision by the Company to dismiss an alcoholic employee could be overturned when that employee, as a result of the shock of being dismissed, decides to rehabilitate himself, even if such rehabilitation would never have occurred absent the decision to dismiss the employee"

8. I accept the union's argument that *Compagnie minière Québec Cartier*, which arose in Quebec, has not generally been followed in Ontario, in large part because the *Ontario Labour Relations Act, 1995* at section 48(17) allows arbitrators to exercise their discretion when they have found that an employee has been disciplined or discharged for cause. The arbitrator "may substitute such other penalty for the discharge or discipline as to the arbitrator…seems just and reasonable in all of the circumstances".

9. That discretion can only be fully exercised if the arbitrator looks to the circumstances before him or her at the time of the hearing, which will necessarily include events that follow the employer's decision to terminate. In *Natrel Inc. v. Milk and Bread Drivers Dairy Employees, Caterers and Allied Workers, Local Union No. 674* (Albertyn) (2004 CanLII 55036), the arbitrator referred to *Compagnie minière Québec Cartier* but declined to follow it. Arbitrator Albertyn relied on his jurisdiction under section 48 (17) of the *Labour Relations Act, 1995* to consider the grievor's drug and alcohol addictions at the time of his termination, even thought they were unknown to the employer. The arbitrator also considered evidence of the grievor's rehabilitation efforts post discharge. I agree with that approach.

10. Moreover, a consideration about whether the employer has met its obligation to accommodate to the point of "undue hardship" pursuant to the *Human Rights Code* is not necessarily constrained by a consideration of facts at the time the employer made its decision. I note that the Supreme Court's decision in *Compagnie minière Québec Cartier* did not address human rights issues. The Court only considered the arbitrator's jurisdiction under the workplace parties' collective agreement.

11. Both counsel agreed that if I considered post-discharge evidence, I needed to consider both the positive and the negative.

The grievor's employment history

12. Mr. Letwin started as a seasonal Labourer in the Niagara region in May 2010. In the Spring 2011, Mr. Letwin was hired as a full-time Labourer. Under the parties' collective agreement, Labourers who perform satisfactorily are expected to progress to become Gas Technicians, and the employer sends potential Gas Technicians to "Gas Tech School", the employer's own training program.

13. As a Labourer, Mr. Letwin worked under the direction of Gas Technicians. Supervisors usually drop by to see crews at some point in the work day, but generally, after work is assigned at the start of the day at the employer's office, the crews work without supervision.

14. Mr. Letwin operated a directional drill. He used hand tools to dig. He set up traffic controls, assisted equipment operators and manned a fire extinguisher when Gas Technicians were performing installation and repairs. Like other Labourers, Mr. Letwin was expected to shadow and learn the tasks Gas Technicians perform, including safety procedures and applying Enbridge processes.

The grievor asks for help, May 9, 2012

15. Mr. Letwin worked without incident until May 9, 2012. On that day, he drove in his personal vehicle, under the influence of cocaine, from the Niagara region, to the employer's Head Office in Toronto. In his evidence, Mr. Letwin said that he had been using cocaine regularly for a while and was on a run, when he drove to Toronto. He stopped from time to time on the drive to use cocaine. He said that he was not heading to the employer's Head Office, and was surprised to find himself in a parking lot across the road. He decided to call his supervisor, Glen Walton Mr. Letwin told his supervisor he was "messed up" and needed help. Mr. Walton testified that Mr. Letwin sounded shaky and said he was scared. Mr. Walton said he would find help. The Manager of Operations for Niagara, Bill Elliott, was at a meeting at Head Office. Mr. Walton contacted Mr. Elliott. Mr. Elliott agreed to find Mr. Letwin and Mr. Walton kept talking to Mr. Letwin until Mr. Elliott met him.

16. Without detailing every step that was taken, I can say that Enbridge took a number of measures to support Mr. Letwin from that first phone call. Mr. Elliott took Mr. Letwin to the Health Centre, where he met with Manager, Occupational Health Anita Harvey, who is a nurse. In very little time, the employer committed to making arrangements for and paying for a 30 day residential treatment program at Bellwood Health Centre. The employer also involved the union from the beginning. The employer placed Mr. Letwin on short term sickness benefits while he attended the Bellwood program. Ms. Harvey and Mr. Walton stayed in touch with Mr. Letwin while he was in residence at Bellwood. Ms. Harvey and Mr. Walton visited Mr. Letwin while he stayed at Bellwood. Mr. Walton testified that he wanted Mr. Letwin to know that he had Enbridge's support and Mr. Walton's personal support.

17. Before Mr. Letwin was admitted the Bellwood, he and representatives of the union and the employer held a HealthWise meeting to discuss the treatment plan and return to work. At that meeting, the employer said it would pay the cost of treatment "with the expectation that Taylor participates fully in the program, including the required after care components". Enbridge paid more than $25,000 for the Bellwood program. Ms. Harvey prepared a memo after the meeting documenting Mr. Letwin's agreement and his and the union's expression of thanks to the company.

18. Mr. Letwin attended a longer program at Bellwood because his initial assessment identified an additional non-substance addiction that should also be addressed. Further, Mr. Letwin had a long history of substance abuse, and two previous efforts at rehabilitation. Mr. Letwin had achieved 12 years of sobriety before he began using

cocaine and marijuana in November 2011. The initial assessment at Bellwood indicated "there appear to be underlying issues that need to be addressed". In addition, the assessor suggested Mr. Letwin needed "relapse prevention techniques, life skills and coping strategies as well as an understanding of his vulnerability for other addictions".

19. The Bellwood Health Services Exit Summary, which was provided to Ms. Harvey at Enbridge, said that Mr. Letwin had completed the intensive treatment portion of the program. The Exit Summary said it was "very important for him to participate regularly in a 12-step program and work with a sponsor". Mr. Letwin did not participate in Bellwood's weekly after care program because of the distance between its Toronto location and his home in the Niagara area. Bellwood recommended that he follow an after care program in Welland, and join a 12 step group with at least 3 weekly meetings, and find a sponsor.

20. Enbridge convened a HealthWise meeting with Mr. Letwin and the union on July 3, 2012 before his return to work. Ms. Harvey prepared a memo confirming what was discussed. Mr. Letwin returned to work with the limitations that he could not operate a company vehicle nor heavy equipment; he could not work independently in a safety sensitive position, which was described by Enbridge as working independently "where impaired performance could result in a catastrophic incident affecting the health and safety of the employee, co-workers, the public or the environment". The third limitation said that Mr. Letwin would be subject to "close supervision and monitoring".

21. The employer also required Mr. Letwin to participate in an after care program, including attendance at a mini program offered by Bellwood four times a year; attendance at weekly meetings through a local support network, providing Ms. Harvey with attendance records. Mr. Letwin was also to participate in random urine testing as required. Ms. Harvey and Mr. Letwin were to maintain regular contact.

22. The employer also sent Mr. Letwin a letter outlining the restrictions I have set out above. The employer wrote that "the company is not prepared to cover any further costs associated with a treatment program if you relapse in your recovery". The employer also warned Mr. Letwin that "if you are found to be under influence of drugs and or alcohol in the workplace and when driving a company vehicle you will be terminated for cause".

23. It is worth pausing to note that the employer never alleged that Mr. Letwin engaged in any misconduct around the events that led him to the employer's Head Office on May 9, 2012. It was understood at the time that Mr. Letwin had driven under the influence of drugs to the head office, where he contacted a supervisor, admitted a drug problem and asked for help. Up to that point, Mr. Letwin had not engaged in any conduct that attracted the employer's attention. I emphasize the circumstances because they are not typical. More often, employees engage in misconduct, whether it is absenteeism, lateness, or erratic behaviour, which an employer then addresses. In the course of addressing the behaviour, an addiction issue is discovered or disclosed. That did not happen in this case. Mr. Letwin did not engage in any misconduct that attracted discipline.

24. After his return to work, Ms. Harvey remained in touch with Mr. Letwin, at first weekly, then bi-weekly. He reported that everything was going well. She believed him.

25. Mr. Walton said that he provided closer supervision and maintained extra contact with Mr. Letwin as the employer had promised. He said he was able to do so without significant hardship.

26. Mr. Letwin maintained normal attendance, talked positively to colleagues about the rehabilitation he had undertaken. He worked hard and the limitation on driving company vehicles was lifted in August 2012 after Mr. Letwin's supervisors consulted with Ms. Harvey. Mr. Letwin testified that his supervisors and Ms. Harvey took active roles in his recovery.

27. But Mr. Letwin was not following the aftercare program. He was not attending 12 step meetings with any regularity. He did not have a sponsor. Mr. Letwin did not provide Ms. Harvey with after care meeting attendance records. No one asked Mr. Letwin to provide a urine sample.

The incident that led to the grievor's termination

28. Late Sunday night or early Monday morning October 29, 2012, Mr. Letwin left his supervisor, Glen Walton, a text message saying that he was not coming into work because he had food poisoning. Mr. Walton tried to contact Mr. Letwin by text and voice on both his work phone and personal phone several times during the Monday without success. Mr. Letwin did not respond which Mr. Walton found unusual. Mr. Walton was concerned that Mr. Letwin had relapsed. In the previous week, Mr. Letwin had a verbal altercation with a more experienced "old school" Gas Technician. Mr. Walton testified that Mr. Letwin is usually very easygoing and the conflict was unusual. That combined with Mr. Walton's inability to contact Mr. Letwin, gave Mr. Walton concern.

29. Mr. Walton was also thinking that another Labourer, hired around the same time as Mr. Letwin, killed himself after a relapse. I believe that Mr. Walton was genuinely concerned about Mr. Letwin's well-being. Mr. Walton advised both Mr. Elliott and Ms. Harvey that he had not been able to contact Mr. Letwin.

30. On Tuesday October 30, 2012 Mr. Letwin reported to work as usual. He greeted Mr. Walton and other employees. It is normal for the crews to collect at the company's office, and chat casually with one another and their supervisors, until work assignments are handed out. Mr. Walton testified that at first Mr. Letwin seemed fine. But Mr. Letwin did not seem concerned that Mr. Walton had been unable to reach him.

31. Mr. Elliott testified that he convened a meeting with Mr. Letwin, raising the concern that Mr. Letwin had just texted his supervisor about his absence, instead of calling, as all employees are required to do. Mr. Walton testified that such a meeting would be held with any employee who left a text message and then could not be contacted.

32. Mr. Elliott testified that Mr. Letwin seemed fidgety and unable to settle down. Mr. Walton said that Mr. Letwin took his boot and sock off to show the meeting participants an ingrown toenail that was bothering him. Mr. Walton and Mr. Elliott said that Mr. Letwin seemed unable to complete a thought, talking about his foot, then the food poisoning, without finishing a sentence.

33. Mr. Elliott and Mr. Walton were suspicious that Mr. Letwin was using drugs again. Mr. Elliott told Mr. Letwin that he was "keeping him back". Mr. Elliott sent Mr.

Letwin to a computer in another area of the office, directing to him to catch up on some on-line training. Mr. Elliott and Mr. Walton conferred with Ms. Harvey by phone.

34. Ms. Harvey then talked privately to Mr. Letwin on the phone. He assured her that everything was fine and he was eager to get to work. Ms. Harvey told Mr. Elliott and Mr. Walton that she had asked Mr. Letwin if he had relapsed and he told her "no". Ms. Harvey concluded that she thought Mr. Letwin was fine, that he was not high, and they should let him go to work.

35. Mr. Elliott and Mr. Walton remained worried. Mr. Walton testified that Mr. Letwin left his computer training on a couple of occasions, to return to Mr. Walton saying, "What's up", "I'm totally clean, "I'm ready to go, why are you holding me back". Mr. Walton described Mr. Letwin as fidgety, nervous and hyped up. Mr. Walton said he concluded that Mr. Letwin was high.

36. After consultation with his manager and labour relations colleagues at head office, Mr. Elliott told Mr. Letwin that he was taking him to a laboratory to have a urine test. Mr. Letwin responded, "No problem, I'm clean, let's go". At the point when they arrived at the testing facility, Mr. Letwin told Mr. Elliott, "I've been using, I'm going to fail".

37. Mr. Elliott testified that Mr. Letwin told him at first that he had last used the previous Friday. Then after Mr. Letwin had another private phone conversation with Ms. Harvey, Mr. Letwin told Mr. Elliott that had last used on Sunday. Mr. Letwin also told Mr. Elliott that because of a prescribed drug he was now taking, "he was in better control of his drugs".

38. In cross-examination, Mr. Letwin denied that he came to work under the influence of drugs on October 30. He said he had only been using on the weekends for a few weeks. He readily admitted that within a week or two, he would have progressed to the point where he was using during the work week and would have been coming into work impaired. He said that he came into work on October 30 because he did not believe he was under the influence. He knew he was on the day before and that is why he called in sick. But he did agree that when he came into work on October 30, he was still affected by his cocaine use on the weekend.

39. Both Mr. Walton and Mr. Elliott testified that after the drug test was administered and Mr. Letwin returned to the depot, Mr. Letwin told them he was in control of things and he would keep his job or his uncle would get it back. At that time, a relative of Mr. Letwin held a senior executive position at the employer.

40. Mr. Walton drove Mr. Letwin home. Mr. Walton said Mr. Letwin told him he was using drugs again, and had used all weekend which is why he called in sick on Monday. He told Mr. Walton he was "all strung out".

41. The drug test result was negative for alcohol, but non-negative for cocaine. I will have more to say about what "non-negative" means in relation to the employer's allegation that Mr. Letwin attended work on Tuesday October 30, 2012 while under the influence of illicit drugs.

42. Enbridge terminated Mr. Letwin's employment on November 8, 2012. The reasons expressed for the termination are as follows:

…..for cause, for violating Enbridge Alcohol and Drugfree Workplace policy, Intoxicants and Abusive Drugs policy, and for not complying with Company mandated Health Wise restrictions and conditions of your employment, and with failing to be honest with your Supervisor and Health Care Manager.

43. I note that the termination letter also reminded Mr. Letwin that aftercare related to his previous rehabilitation program were still available to him.

Mr. Walton and Mr. Elliott's evidence about the impact of reinstating Mr. Letwin

44. Both Mr. Walton and Mr. Elliott testified about their views around the possibility of Mr. Letwin's reinstatement. Mr. Elliott said that he felt he could not trust Mr. Letwin. He had lied to his supervisors and to Ms. Harvey about his relapse. He did not tell the truth until he arrived at the drug test facility. Mr. Elliott was also concerned about the safety factor and a member of the field staff thinking it was okay to be using drugs. If Mr. Letwin returns to work, relapses and is working while high, the consequences of an accident would be catastrophic.

45. Mr. Elliott also reflected that Mr. Letwin had only two years service, had been offered expensive help and support. But when caught, his attitude was, "My uncle will get my job back", as if he really did not care. Mr. Elliott said that when Mr. Letwin was returned to work after rehabilitation, the employer clearly advised him that he would be dismissed if he came to work impaired; "you don't screw up or you won't be here".

46. Mr. Elliott testified that if Mr. Letwin is reinstated, it will have a negative effect on the workplace. Other employees will see a two year employee, getting the full Company support, who then falls down with no repercussions. Mr. Elliott is concerned that sends a message that Enbridge is not serious about its rules around maintaining a drug free workplace.

47. Mr. Walton testified that he no longer trusts Mr. Letwin. He lied about being on drugs again. He did not follow the path that the Company had set for him. He said that supervisors cannot be at every job site and rely on workers to be truthful about the work they do, the processes they follow and the testing they do. He also felt that reinstatement of Mr. Letwin would go against Enbridge's safety culture and leave the message with other employees that lying is okay and you get many chances.

The grievor's history of substance abuse

48. Mr. Letwin testified about his history of addiction, recovery and relapse in great detail. Mr. Letwin's father was an alcoholic and cocaine user. He left the family home when Mr. Letwin was a child. The grievor grew up with his mother, sister and later, a stepfather.

49. Mr. Letwin began using drugs at age 13, starting with marijuana, hash, LSD and magic mushrooms. At first drugs were made available in social situations. When his drug use progressed to cocaine, Mr. Letwin used theft and drug sales to support his use. He was expelled from school in Grade 10 for disciplinary infractions. Shortly after, he was kicked out of his mother and step father's home. He spent time in a group home, then on friends' couches, and finally moved to a drug house.

50. Mr. Letwin said that the owner of the drug house would let people stay, and the owner provided needles, drugs. The owner dealt in weapons and stolen goods. Mr.

Letwin stayed on and off for 3 to 4 years as a "doorman", holding the drugs, selling them to people who came to the door. Through the period, Mr. Letwin was using cocaine, marijuana, speed and crystal meth. Mr. Letwin was charged with theft and drug possession as a Young Offender. He ultimately spent time at Young Offender facilities. In this period, he had sporadic contact with his family.

51. As part of his interaction with the law as a Young Offender, Mr. Letwin had two periods of rehabilitation and sobriety at the Newport Treatment Centre.

52. Mr. Letwin left the drug house when he was around 19 years. He moved to Vancouver with a woman, who had also lived at the drug house. They both worked, but continued using. In 1998, Mr. Letwin was hospitalized twice for heroin overdoses. When they were destitute, they called Mr. Letwin's uncle who sent enough money for train tickets back to Ontario.

53. Mr. Letwin testified that when he returned to Ontario, he did not want to go back to the drug house. He made contact with the Newport Treatment Centre. His clean date was February 14, 1999. He completed a 18 day rehabilitation program, based on the 12 step program, which is the cornerstone of Alcoholics Anonymous. After leaving the Newport Rehabilitation Centre, Mr. Letwin followed an aftercare program. He found a "home group" attended many weekly meetings, found a sponsor, did service at his home group. He and his partner were both in recovery. After about two years, they broke up.

54. Mr. Letwin took up skydiving and base jumping. He returned to school and completed his Grade 12 equivalency.

55. Mr. Letwin began another romantic relationship with a woman who was also a recovering addict. He heard about an opening at Enbridge and called his cousin, Steve Letwin, who he knew was in a senior position. Steve Letwin arranged for an interview and the grievor was hired as a seasonal employee. He was laid off at the end of 2010. He then applied for and got a permanent position in the Spring of 2011.

56. While Mr. Letwin was attending Narcotics Anonymous meetings, he was also going to strip clubs and generally, as he put it, not acting consistent with the principles of the 12 step program. He was not using drugs but was also deluding himself. He testified that staying clean is one step, but you have to have a whole lifestyle change to retain sobriety.

57. Mr. Letwin and his partner's relationship ended dramatically. He then started a dangerous volatile relationship with a 21 year old woman who lived in Hamilton. She was a drug user and escort. Mr. Letwin attended fewer meetings and relapsed on marijuana. He hid from his sponsor. He paired alcohol with marijuana and escalated quickly to cocaine. At the time, he thought he was not an addict and could do drugs recreationally.

58. Mr. Letwin then started on a cocaine "run", which he described as staying up for multiple days and using. Eventually, it made him paranoid and he thought the police were looking for him. He got in his car, thought he'd visit his girlfriend in Hamilton, but instead decided to continue to Toronto. He stopped from time to time, used more cocaine and then ended up across from the Enbridge Head Office on the north east side of Toronto. At the time, he said it felt like "an event outside my life". He remembered that

Glenn Walton, his supervisor, said he could call anytime, and so he did. That was May 9, 2012. In earlier paragraphs, I have described the events that followed under the heading "The grievor asks for help, May 9, 2012".

59. Mr. Letwin remembers, generally, the interventions of Bill Elliott and Anita Harvey. He testified that he was pretty high at the time, so does not have a good recollection. He was so high, that his admission to Bellwood Health Centre was delayed a few days so he could detoxify.

60. Mr. Letwin recalls that Ms. Harvey burst into action, contacting Bellwood, helping him dispose of the cocaine he was carrying. He was surprised and very grateful for the support he received from Enbridge.

61. Mr. Letwin said that he went to Bellwood willingly. It was not based on a 12 step program but had alternate therapies, including meditation, yoga, individual and group therapy. He felt that he learned a lot.

62. When Mr. Letwin returned to work, he understood and accepted the limitations. He also understood the after care program he was supposed to follow. Mr. Letwin attended the first of the four Bellwood aftercare programs. He did not reconnect with this former sponsor or find another.

63. He relapsed on alcohol the second or third weekend in September 2012. He had read that sometimes, the medications that are prescribed for people with Attention Deficit Hyperactivity Disorder (ADHD) are helpful for cocaine addicts because the prescribed medication produce a similar calming effect. Mr. Letwin obtained two prescriptions from his family doctor. Mr. Letwin spiralled quickly to cocaine in early October 2012. In cross-examination, he said that some people can use those stimulants properly as a substitute for cocaine, but not him. He quickly returned to addictive thinking.

64. Mr. Letwin testified that he used cocaine on three weekends in October 2012. He denied using drugs during the work week; "I had not fallen to that point yet". But on weekends he was using alcohol, cocaine and the prescribed ADHD stimulant Concerta.

65. Mr. Letwin said that after work on Friday October 26, 2012, he went to a bar, had a couple of drinks and bought a baggie of cocaine that he snorted, all night. He said he did not use on Saturday October 27. He slept late, tried to stay sober, ate some food and went to bed. On Sunday October 28 he went to the climbing gym with friends who do not have addiction issues, and they parted early evening. He then made what Mr. Letwin called a "bad decision" to visit his girlfriend, who had cocaine and he used a gram to one and half grams. He stopped using at 11:00pm because he knew he was supposed to work the next day. But after he went to bed, he realized that he could not go to work Monday, and that's when he texted Mr. Walton and said that he was not feeling well. Mr. Letwin admits he lied about having food poisoning. Mr. Letwin said that he did not use cocaine on Monday. He continued using the ADHD medications. Mr. Letwin did not provide any explanation as to why he did not respond to Mr. Walton's efforts to reach him on the Monday.

66. Mr. Letwin testified that he was on edge when he went to work on Tuesday. He had relapsed, he had missed work, his ingrown toenail was painful and he had lied. Mr. Letwin said that he felt many alarms ringing when Mr. Walton told him he was being

held back from work. Mr. Letwin agreed that he lied to Ms. Harvey when she asked him outright if he was using drugs and he denied it.

67. Mr. Letwin said that when the employer told him he would be sent for drug testing he "knew the jig was up" and on the way to the clinic he told Mr. Elliott he would fail. He knew that cocaine can be detected in the system for three to five days and he was in that range. Mr. Letwin agrees that he lied when he told Mr. Elliott he had last used on the Friday; " I was trying to make the truth better".

Mr. Letwin's conduct after termination

68. Mr. Letwin testified that the last time he used cocaine was before his termination from employment. But he graduated to abuse of the ADHD medications, which he got on the street. He was also using marijuana.

69. Mr. Letwin then met a woman who had her own struggles with alcohol and gambling addictions, but "she was in a much more stable place than I was". They moved in together in February or March of 2013. Mr. Letwin continued to abuse the ADHD medication, and marijuana. In April he had a "psychic break" and was hospitalized, ultimately, without his consent. Mr. Letwin spent more than two weeks in a psychiatric ward of a hospital. He stopped using all drugs. His clean date is April 27, 2013.

70. Mr. Letwin attended a month long residential rehabilitation program at Homewood Health Centre. Its approach is based on the 12 step program of Alcoholics Anonymous and Mr. Letwin said that his return to the 12 step approach "ignited a fire in my belly". He found employment within a few weeks, attended Narcotics Anonymous or Alcoholic Anonymous meetings 5 days a week and got back in touch with his former sponsor. The sponsor is active in his church and encouraged Mr. Letwin to join. Regular attendance at church is now part of his recovery.

71. When Mr. Letwin testified in December of 2015 and January of 2016, he described that he was living a completely different life. He has been clean and sober since April 2013, so almost three years. He is married to the supportive person who he started living with in early 2013, and they are now the parents of two young children. He testified that he has responsibilities and has built a lifestyle around meeting those responsibilities. That includes attending meetings, doing service, seeing his sponsor, attending church and staying employed. He is not skydiving or base jumping. He understands that is another form of high risk behaviour that he must avoid to stay clean.

72. In cross-examination, Mr. Letwin agreed that he will always be an addict. He must abstain, there is no cure. But, he has found that once there's a period of abstinence, he could transition to a different kind of life. He is in control of what happens on a daily basis and can implement what he learned at both the Bellwood and Homewood rehabilitation programs.

73. At the request of the union, Mr. Letwin has been going for drug and alcohol testing through his family doctor. His family doctor is not an addiction specialist. As the employer established in its cross-examination of Dr. Gilmore, the "protocol" that Mr. Letwin's doctor has been following is less than ideal. The tests have not been entirely random, and are scheduled at predictable times. Sometimes Mr. Letwin had to remind his doctor to schedule a test. As he approached the days of his testimony of the hearing, the

tests became more random and Mr. Letwin was required to attend the testing lab immediately. Mr. Letwin has passed every test.

74. Mr. Letwin testified that he wants to return to Enbridge. He recognizes it as a fantastic company and he believes he is now ready to be a good employee. He said he knows he really screwed up and lied to people like Mr. Walton, Mr. Elliott and Ms. Harvey, who were trying to support and help him. At the hearing, he said that he was sorry for what he had put them all through, and also for putting the union on the spot.

75. Mr. Letwin said that he does not believe that he will relapse again. With hindsight, he can see that he had a pattern of bad decision-making in the past. But since he has attended Homewood, he has made good decisions and that has created a path to sobriety. He lives in a stable household, he understands that working the 12 step program has to be part of his daily life; it is not a short term commitment.

76. When Mr. Letwin testified in December 2015 and January 2016, he was attending meetings once a week. He explained that with two young children, it was hard to find time for more. He remains in close contact with his sponsor.

Evidence of Dr. Trevor Gillmore, addiction specialist

77. Dr. Gillmore was retained by the union to assess Mr. Letwin and provide an opinion on his "diagnosis, prognosis and fitness to occupy a safety sensitive position" Dr. Gillmore met with Mr. Letwin in March 2014 and March 2015. I will detail Dr. Gillmore's assessment below. In summary, he concluded that Mr. Letwin was fit to resume duties in a safety sensitive position and that his condition did not present a risk to public safety. Dr. Gillmore recommended a number of conditions, which I will also set out below.

78. Dr. Gillmore is a pilot and a physician. There is no dispute between the parties that he an expert in addiction medicine and qualified to give opinion evidence about a person's fitness to return to a safety sensitive position.

79. Dr. Gillmore has a practice that, among other things, assesses pilots, nurses, air traffic controllers and rail employees and their fitness to work in safety sensitive positions. He has been regularly retained by Union Gas, whose employees perform the same work as do the employees of Enbridge. Dr. Gillmore testified that he performs 75 to 80 assessments a year. As part of the assessment he makes monitoring recommendations, if necessary.

80. Before meeting with Mr. Letwin, Dr. Gillmore reviewed Mr. Letwin's family doctor's medical file and a report and medical records from Homewood Health Centre. On meeting Mr. Letwin in March 2014, Dr. Gillmore examined Mr. Letwin. He found no physical signs consistent with drug use (track marks, mucous, spider veins). Dr. Gillmore also collected a urine specimen, and arranged for blood to be collected. Those tests revealed no evidence consistent with drug or alcohol usage.

81. Dr. Gillmore had Mr. Letwin fill out a questionnaire and Dr. Gillmore interviewed him about his history of drug abuse and lifestyle. A review of Dr. Gillmore's report indicates that Mr. Letwin recounted a story similar to what he testified about.

82. In his initial report in March 2014, Dr. Gillmore's diagnosis was:

> A history, physical examination and review of the documentation establish that MR. Letwin fulfils the Axis I DSM-IV criteria for Polysubstance Dependence in Early Full Remission last use April 26, 2013.

Dr. Gillmore's report continued that Mr. Letwin's "…prognosis for maintaining abstinence is excellent if he continues to engage in his recovery". Dr. Gillmore thought that Mr. Letwin had good insight into how his addiction developed and was motivated by work and family commitments to maintain sobriety. Dr. Gillmore felt that the grievor's positive motivation was shown by his willingness to participate in any therapy recommendations and a structured monitoring program. Dr. Gillmore concluded that Mr. Letwin's condition did not present a risk to public safety.

83. In his first report, Dr. Gillmore conceded it is difficult to give an opinion on Mr. Letwin's ability to achieve sustained abstinence. He wrote that "most relapses occur within the first year of treatment with two thirds occurring within the first ninety days." He said that those who remain in treatment the longest have the best outcomes and Mr. Letwin was continuing treatment. In testimony, Dr. Gillmore said that Mr Letwin presented as sincere and forthright and engaged in his recovery.

84. Dr. Gillmore made the following treatment and monitoring recommendations:

1) Mr. Letwin is to be in full compliance with all treatment and follow up recommendations made by his most recent treatment facility;
2) Mr. Letwin is to maintain complete abstinence from Alcohol or any non-prescribed mood altering substances;
3) Random urine drug screening should be performed in accordance with his relapse Prevention Agreement;
4) Mr. Letwin shall continue to obtain treatment and monitoring relating to his Substance Dependence Disorder;
5) Documentation attesting to his sobriety and progress in recovery will be required from a professional knowledgeable in Addiction Medicine;
6) Mr. Letwin is to regularly attend 12 step meetings and maintain a home group;
7) Mr. Letwin is to maintain a sponsor and be in regular contact with the individual;
8) The duration of the above-mentioned recommendations should be maintained for three (3) years upon returning to work.

85. Dr. Gillmore prepared a follow up report in April 2015. He repeated the treatment and monitoring recommendations from his first report. He tested Mr. Letwin's urine and blood again and reviewed his recovery engagement activities. Dr. Gillmore revised his assessment to conclude that Mr. Letwin "fulfils the Axis I DSM Criteria for Polysubstance Dependence in Sustained Full Remission".

86. In testimony at the arbitration proceeding, Dr. Gillmore commented on the incidence of relapse among those who, like Mr. Letwin, had previously achieved 12 years of abstinence. Dr. Gillmore says it is more common that we would like and occurs when people make their recovery a lower priority. They then face a stressful situation that in the past they would deal with by abusing substances, and they relapse. He said that addiction is incurable and the best that can be achieved is sustained remission. That, in turn is achieved by attending meetings as an active participant, doing service and incorporating the 12 step principles in every aspect of life.

87. Dr. Gillmore said that for employees in safety sensitive positions, abstinence must be the basis. He has seen a lot of success in those who follow abstinence based 12 step programs, so long as they regularly attend meetings, and participate in individual or group therapy. He has seen a good deal of success for people who attend the rehabilitation programs at Homewood Health Centre.

88. Dr. Gillmore also testified that he typically recommends random drug testing as part of a monitoring program. It acts as a deterrent. He usually recommends two years of random drug testing. In Mr. Letwin's case, he recommends three years of testing because of his history of relapse.

89. In cross-examination, Dr. Gillmore agreed that the urine testing protocol Mr. Letwin had been following with his family doctor did not meet Dr. Gillmore's recommendation because the testing was not random, not frequent, and the doctor did not take steps to ensure that Mr. Letwin could not provide a substitute sample. Moreover, Mr. Letwin did not go to an addiction specialist, who could be a physician or a counsellor. However, in re-examination, Dr. Gillmore said that those deviations from his recommendations did not change the conclusion in his reports that Mr. Letwin could be returned to a safety sensitive position with the conditions and monitoring he recommended.

90. Dr. Gillmore also explained what is tested when urine is screened for cocaine. He said that cocaine rapidly metabolizes and can only be detected for hours after use. However, benzoylecognine (BE) is a cocaine metabolite that can be detected in urine of a casual user for 2 to 3 days, or in the urine of regular user for 4 to 5 or even up to 10 days. The presence of BE in the urine says nothing about whether the person tested is impaired; it only indicates that cocaine has been used in the past number of days. When urine is tested for cocaine, the testing standard is to look for BE.

91. Dr. Gillmore was not able to say whether Mr. Letwin was impaired when he attended work on October 30, 2012. He was not able to say whether or not Mr. Letwin would still be under the influence of drugs on Tuesday if he had not used on Monday. He agreed that the psychotic element of cocaine used on Sunday would not be present on Tuesday but the person may have hangover effects on Tuesday. He could not predict the likelihood of the hangover effect on Tuesday. Dr. Gillmore also agreed that employees in safety sensitive positions should not be working in either the active or withdrawal or hangover phases of drug use.

Did the employer have just cause to terminate the grievor's employment?

92. In *Toronto Transit Commission and Amalgamated Transit Union, Local 113, (Tavares)* (Howe) [2012] O.L.A.A. 429, the arbitrator followed the approach of making a labour relations analysis separate from a human rights analysis "to ensure that all employees who commit misconduct are treated in a similar manner and that the human rights issues are adequately addressed within the human rights context". (paragraph 48) I think that approach also makes sense to organize the analysis.

93. The employer's principal argument is that I should conclude from the evidence that Mr. Letwin came to work on Tuesday October 23, 2012, impaired by drug use. The employer's policy entitled "Intoxicants and Drug Use" says that as a public utility it is the

employer's obligation to "ensure that employees providing a service do not use, possess or be under the influence of intoxicating beverages or abusive drugs during working hours". A breach of that policy by employees "is subject to disciplinary action, up to and including dismissal". Although the letter of termination also asserted that Mr. Letwin breached the "Alcohol and Drug Free Workplace Policy", in my view that policy is more about the health consequences to employees of alcohol and drug dependency and the support services available. Consequently, I will focus more on whether Mr. Letwin came to work under the influence of abusive drugs and lied about it.

94. The employer relies on the positive drug test, which showed the presence of BE in the grievor's urine. The employer accepts that the presence of BE alone does not establish impairment. But the presence of BE, which establishes recent use of cocaine, combined with the observations of Mr. Elliott and Mr. Walton, establish that Mr. Letwin was impaired. Counsel for the employer emphasized that Mr. Elliott and Mr. Walton knew Mr. Letwin, saw him daily and were able to recognize that he was nervous, edgy, scattered, high. The employer also relied on the evidence of Dr. Gilmore that the "hangover effect" is also an element of impairment and employees experiencing the symptoms of previous cocaine use are not fit for safety sensitive positions. The employer emphasized Dr. Gilmore's evidence that is not possible to predict whether someone is n impaired on a Tuesday if they say they have not used since Sunday. Much depends on the individual.

95. The union submits that Mr. Letwin testified in a direct and forthright manner about a number of highly sensitive, personal issues, and events that did not cast him in a positive light. I should accept that evidence, counsel for the union argued, because it is a direct and fundamental element of Mr. Letwin's commitment to a sober life and a lifestyle that is consistent with those principles. Mr. Letwin understands that he has not always been honest with himself, and not honest with others. To stay sober, he has to be completely honest with himself, and that is reflected in his testimony.

96. The union argued, therefore, that I should accept Mr. Letwin's evidence that at the end of October 2012, his drug use had not yet escalated to the point where he had no control. He was using on weekends but not during the week. He called in sick Monday, but I should accept that he did not use on Monday. It is entirely predictable and understandable that he appeared edgy and jumpy to Mr. Walton and Mr. Elliott even though the grievor was not impaired. He knew he was in a relapse, he had lied about why he was sick, he had not followed the proper procedure for calling in. He had raised the employer's suspicions and he was being held back from work. Of course, the union argues, Mr. Letwin was acting oddly. But he was not impaired.

97. The onus is on the employer to prove on a balance of probabilities that Mr. Letwin was impaired when he came to work on Tuesday. I accept Mr. Letwin's evidence that he did not use cocaine on Monday. Although he was in relapse, he did have some control. But, he agrees that he was using the ADHD medication, a stimulant. We do not know if Mr. Letwin was following dosage recommendations. I am troubled by Mr. Letwin's failure to provide a good explanation about why Mr. Walton was not able to reach him on the Monday. It is more likely than not that Mr. Letwin was hiding some behaviour that the employer would have found troubling.

98. I have no reason to doubt the observations of Mr. Elliott and Mr. Walton about Mr. Letwin's demeanour. They both knew him well. They were able to describe in detail what they found unusual, so I am not prepared to conclude that their suspicions coloured their observations. In fact, Mr. Letwin does not deny that he was jumpy and edgy. He was also in relapse. He was afraid of getting caught. He knew that his failure to come to work and make proper contact with Mr. Walton would raise the employer's suspicions.

99. Even if Mr. Letwin was not actively impaired by cocaine or other drugs, because he had not used on Monday, based on his own evidence and that of Mr. Walton and Mr. Elliott, I can readily conclude that Mr. Letwin was not fit for work in a safety sensitive position when he came in on Tuesday. As Dr. Gilmore testified, presence of BE in urine tells us nothing about whether someone is impaired. Different people are affected differently and he could not agree that a person who used cocaine on Sunday would not be suffering the effects on Tuesday, particularly when the impact of the "hangover effect" is taken into account. I am satisfied that the employer has established that Mr. Letwin was impaired by abusive drugs when he came to work on Tuesday October 30 and not fit to work in a safety sensitive position. The employer made the right call in keeping him from work.

100. Looking at the grounds for termination relied on by the employer, it has established that Mr. Letwin came to work impaired; that he lied to the employer about the relapse and he failed to follow the aftercare program to which he had committed after his return from rehabilitation at Bellwood. Applying a labour relations analysis to the facts, Mr. Letwin is guilty of misconduct. I emphasize again that he works in a safety sensitive position. If he works on live gas while under the influence of drugs, his errors could kill him, his colleagues, residents and, at best, cause significant property damage. While it is true, as the union argued, Labourers do not work alone and crews have a minimum of 2 people, all of Enbridge's employees are reasonably expected to contribute to the safety culture. It is not adequate that only some of the crew are sober and alert.

101. Again, applying a labour relations analysis, Mr. Letwin does not have significant seniority as a mitigating factor. He has about 2 ½ years of service. One mitigating factor in his favour is that at the point he was to take the drug test, Mr. Letwin told both Mr. Elliott and Ms. Harvey the truth; that he would fail the drug test because he had been using. Of course, at that point, he did not have much choice. On the other hand, I agree with Mr. Walton and Mr. Elliott's view that Mr. Letwin's statement that he would keep his job or regain his job because of his relationship with Steve Letwin is an aggravating factor. As they said, it was as if his behaviour did not matter, because he could not be touched. That attitude is an aggravating factor because it does not offer much hope that an employee will change that behaviour if reinstated.

102. If I were applying only a labour relations analysis, I would conclude that Enbridge had established very serious misconduct, in a short service employee, performing a safety sensitive job, who thought that a family connection would keep him employed. Applying a labour relations analysis, I would uphold the employer's decision to terminate Mr. Letwin's employment.

Has the employer accommodated Mr. Letwin to the point of undue hardship?

103. But of course, I am not applying only a labour relations analysis. I need to consider that Mr. Letwin has a disability, the impact of the disability on his misconduct and whether the employer has accommodated Mr. Letwin's disability to the point of undue hardship. The *Human Rights Code* guarantees freedom from discrimination in employment on the basis of disability. However, section 11(2) provides:

> The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

104. I must consider, then, whether the employer has established that it would cause undue hardship if it were required to tolerate Mr. Letwin's relapse in October 2012 and potentially address further relapse in the future. I need to consider costs and health and safety requirements.

105. Although the employer relied on cases that concerned the breach of a "last chance" agreement, in my view those cases are not relevant. Setting aside for the moment how a "last chance" agreement fits with an employer's obligation to accommodate a disability to the point of "undue hardship", as required by th*e Human Rights Code*, there is no "last chance" agreement in this case. After the May 9, 2012 incident, which again, did not involve any misconduct by the grievor, the employer imposed conditions on his return to work, advised him that it would not pay for any more rehabilitation and told him "if you are found to be under influence of drugs and or alcohol in the workplace and when driving a company vehicle you will be terminated for cause". There are no elements that one would typically find in a "last chance" agreement. In any event, since Mr. Letwin did not engage in any misconduct before he went to rehabilitation, it is difficult to see how a "last chance" agreement would have been appropriate. To that point, the grievor had been given no chances.

106. Many of the other cases on which the employer relied concerned employees whose drug or alcohol disabilities had played a significant role in their level of absenteeism or workplace misconduct for a number of years. That misconduct included failure to call in to report an absence and working while under the influence of drugs and alcohol. In *International Forest Products Ltd. v. IWA-Canada, Local 3567*, (Munroe) [2001] B.C.A.A.A. the arbitrator recounted that grievor's 10 year history of using alcohol at work. He was offered assistance many times. The employer provided leaves of absence for treatment, but the grievor did not attend the treatment and he was absent for long periods. The employer terminated the grievor. After termination, the grievor attended treatment. He was reinstated with a "final commitment" letter, indicating that any further alcohol or drug related issues would result in termination. Two years later, the grievor was found to be drinking at work and the employer terminated his employment. In considering whether the employer had adequately accommodated the grievor's disability, the arbitrator considered that working in a saw mill is a risky situation and the safety of other employees has to be taken in the balance. The arbitrator concluded that "Given the seemingly relentless pattern of the preceding ten years, the company was fully justified in

concluding in May 2000 [the date of termination] that the safety risks associated with the grievor's continued employment had become intolerable".

107. In *Labatt Breweries Ontario v. Brewery, General and Professional Workers' Union, Local 304* (2002), 107 L.A.C. (4th) 126 (Barrett), the grievor's employment was terminated after the employer had accommodated his addiction to heroin with four leaves of absence for treatment, two of them paid. The grievor had a lengthy discipline record and history of absenteeism. Ultimately, the parties entered into a "last chance" agreement, which specifically said that the employer had satisfied its duty to accommodate to the point of undue hardship. The grievor breached the "last chance" agreement. The employer believed that he was working under the influence of drugs or alcohol. It asked the grievor to provide a urine sample pursuant to the "last chance" agreement. It was later established that the urine sample had been falsified. The arbitrator concluded that the employer's history of accommodation established that it had met its duty under the *Human Rights Code*, and the workplace parties had specifically agreed that the employer had met that obligation in the "last chance" agreement. The arbitrator upheld the discharge.

108. In *Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (grievance of Tavares)*, (above) Arbitrator Howe considered whether the employer had met its duty to accommodate a transit janitor with substance abuse issues, to the point of undue hardship. The grievor had a lengthy discipline record for insubordination, absence without leave and lateness. He had a high level of absenteeism, which affected the work of other employees. In the course of five years, the grievor has been involved in 5 or 6 detox and rehabilitation programs after relapses. The employer and the union entered into a "last chance agreement". The grievor breached the "last chance" agreement but was not fired. He was also accommodated with a weekdays-only shift schedule to allow him to attend treatment, even though his seniority did not entitle him to that schedule. Finally, one morning the grievor called to say he would be late for work. He was drunk at the time. The employer fired him.

109. The Arbitrator concluded that the employer had already made significant efforts to accommodate the grievor, over many years. The accommodation had been costly, his absences had required others to do his work. Managing the employee had also been a burden to staff. The arbitrator determined that to require the employer to reinstate the grievor and enter yet another "last chance" agreement "would impose undue hardship on the Commission and require it to go beyond the scope of its duty of accommodation under the *Code*".

110. The facts before me are very different. At the risk of repetition, on May 9, 2012, when the grievor asked for help he had engaged in no misconduct. The employer made a significant effort of support, including paying for expensive rehabilitation and providing sick leave benefits. But those efforts did not follow months or years of dealing with an employee who failed to show up, who was absent a lot, or otherwise creating workplace problems. There is no "relentless pattern of the preceding ten years", as there was in the *International Forest Products* Ltd. case (above). I recognize that Mr. Letwin had only worked for about a year, but there had been no issues with his employment. Everyone was surprised when Mr. Letwin revealed an addiction issue.

111. Then after Mr. Letwin returned to work there were no issues of absenteeism or misconduct. Again, I recognize that he only worked for a couple of months. Then he relapsed. Once. In contrast, all of the cases that the employer relies to sustain Mr. Letwin's termination involve multiple relapses and stints in rehabilitation.

112. In my view, this case is more similar to *Clean Harbors Canada and Teamsters Local Union 419* (2013) 234 L.A.C. (4th) 115 (Knopf), relied on by the union. The grievor worked in a safety sensitive position. His employment was terminated for innocent absenteeism. He was reinstated pursuant to an agreement that he maintain a certain level of attendance. He met the terms of the agreement for its eighteen month duration. About six weeks after the agreement expired, the grievor began a long absence. He requested a leave of absence to attend rehabilitation to address issues of alcoholism and depression. Prior to this the grievor had not told the employer that he had any issues that were affecting his ability to attend work regularly. The employer granted the leave of absence. The employee contacted the employer to arrange a return to work. It was revealed that the employee had not completed the rehabilitation program. He wanted to return to work and, at the same time, complete rehabilitation as an out-patient. His doctor said he was fit to work. The employer fired the grievor on the basis that he had already been terminated for absenteeism, had failed to complete the rehabilitation program, and was not actively engaged in treatment. The employer felt that it had met its duty to accommodate to the point of undue hardship in granting the leave of absence for rehabilitation.

113. The arbitrator concluded that the employer had not done enough. She noted that the reported cases "where it was accepted that employers had accommodated to the point of hardship are all examples of situations where people with addiction problems have been given more than ample chances to seek and benefit from rehabilitation programs" (paragraph 27). Offering a single opportunity is not enough because of the well-known difficulties in remedying addiction:

> Unlike some metabolic illnesses, it cannot be cured by a simple medication regime or a single course of therapy. Treatment takes time….It is also an ongoing process, requiring constant attention and consideration by both the addict and his/her family. This is not to say that an employer should have to put up with a dysfunctional and non-productive addictive employee endlessly in the hopes of eventual success. But it does mean that it is unrealistic to expect that the serious condition of combined mental health challenges and cross-addictions could be cured in the first try.

114. Arbitrator Knopf emphasized that the duty to accommodate recognizes that "some hardship" will be endured by the employer; it is only "undue hardship" that can be avoided.

115. Before me the employer submitted that I need to consider the potential future burden on the employer if Mr. Letwin continues to need accommodation. And since he is a short service employee, who works in a safety sensitive position, the potential for the employer to have to endure multiple future relapses is an unfair burden.

116. The employer emphasized that when the grievor came to work on October 30 2012 under the influence of drugs, he gave no concern for his own safety and the safety of others. Moreover, he lied about his recovery, relapse and drug use. He did not come

forward, admit to his relapse, and seek help. It is not reasonable, the employer argued, to require it to bear the burden of Mr. Letwin's continued employment.

117. As highlighted by Arbitrator Knopf in *Clean Harbors Canada Inc.*, the duty to accommodate requires an employer to bear some burden. Enbridge has already borne some burden. I do not minimize the support, both financial and emotional, that Enbridge provided to Mr. Letwin. In their testimony, Ms. Harvey, Mr. Elliott and Mr. Walton described what they did to help and support Mr. Letwin, which included driving him home after both incidents, taking him out for dinner, visiting him while he was in rehabilitation treatment. Enbridge demonstrated genuine caring, backed up with a substantial payment of $25,000 for rehabilitation treatment and the provision of sick leave benefits. That is some burden, but not burden to the point of undue hardship.

118. To be blunt, Enbridge has not tolerated a single relapse. Having regard to the case law and the well-recognized reality that addicts regularly relapse, failure to tolerate a single relapse does not meet the test of accommodating Mr. Letwin's disability to the point of undue hardship.

119. Enbridge has also asked me to take into account that if Mr. Letwin is reinstated, it may well have to deal with future relapses, and that burden would be undue, particularly because Mr. Letwin is a short service employee. First, I agree with the submissions of the union that the duty to accommodate under the *Human Rights Code* does not provide for a sliding scale of accommodation or measuring of the burden of accommodation based on the length of an employee's seniority. While seniority is a factor taken often taken into account by arbitrators in determining whether a disciplinary response to misconduct should be reduced, seniority is not relevant in the human rights context.

120. Second, the union's proposed conditions of reinstatement which I will detail below would, in union counsel's own words, make it very difficult for anyone to argue that the grievor would remain employed after a further relapse.

121. The employer also asked me to take into account that Mr. Letwin had not taken all of the steps required of him to facilitate his accommodation. He did not participate in an after care program. He did not attend weekly meetings or stay in touch with his sponsor. In the employer's view, up to the point that it made the decision to terminate Mr. Letwin in early November 2012, he had not provided a glimmer of hope that he would meet the employer's expectations in the future.

122. As I have set out above, I reject the employer's argument that I should rely only on the information available at the time it made its decision to terminate. In order to exercise my discretion pursuant to section 48(17) of the *Ontario Labour Relations Act, 1995* to consider a lesser disciplinary penalty and to consider whether the employer has accommodated the grievor to the point of undue hardship, it is necessary to consider post-discharge evidence.

123. I agree with the union's argument that the evidence establishes that Mr. Letwin is much changed. He has stopped using drugs and alcohol. He has changed his lifestyle to one that is consistent with maintaining sobriety. He has received more treatment. He is pursuing follow up care. He is working his recovery.

Can Mr. Letwin be reinstated into a safety sensitive position, and if so, on what terms?

124. Dr. Gillmore, an addiction specialist, led uncontradicted evidence that Mr. Letwin fulfils the criteria for Polysubstance Dependence in sustained full remission. Further, Dr. Gillmore gave the expert opinion that Mr. Letwin does not pose a risk if he is returned to a safety sensitive position. I accept that opinion. I note that Dr. Gillmore emphasized that Mr. Letwin needs to be monitored and needs to continue to be actively involved in maintaining his sobriety.

125. I also acknowledge that Mr. Letwin has not fully followed Dr. Gillmore's recommendations to date. The urine testing protocol has been imperfect. Mr. Letwin's attendance at meetings has slipped to once a week, instead of the three times a week Dr. Gillmore recommends and Mr. Letwin has been working with his family doctor, instead of an addiction specialist. However, I also accept Dr. Gillmore's evidence that even taking those shortcomings into account, he is satisfied that Mr. Letwin can be reinstated to a safety sensitive position.

126. The employer has raised legitimate concerns about the need for Labourers, like all of its employees, to be honest about the work they perform. The employees work as a crew without supervision. Mr. Letwin lied about his relapse and fitness to work on October 30 2012. He was afraid and he did not want to get caught and tested. I can shrug and say "addicts lie" but that is little comfort to Enbridge and the people who have to actually manage Mr. Letwin. I understand that Mr. Elliott and Mr. Walton have lost confidence in Mr. Letwin, for understandable reasons. They had established that they were willing to help and support him. They were rewarded with dishonesty.

127. It is their reluctance to see Mr. Letwin back at work that has given me the most pause. But in the end, I have accepted the expert opinion that Mr. Letwin is in sustained recovery and his return to a safety sensitive position does not pose a risk to public safety. I have also concluded that part of an employer's duty to accommodate an addiction disability to the point of undue hardship includes some uncertainty. Ultimately, Mr. Letwin will have to rebuild a relationship of trust and retain his sobriety.

Disposition

128. For the reasons set out above, I conclude that Mr. Letwin came to work impaired by drugs and that he lied to his employer about his fitness to work and his relapse. I further find that the misconduct is related to his disability of drug and alcohol addiction. The disciplinary penalty of discharge is reduced to a 10 day suspension.

129. For the reasons set out above, I order that Mr. Letwin be reinstated in his employment as a Labourer as soon as reasonably practicable. He will be credited with the seniority he had at the time of his discharge in November 2012.

130. In my view, once Mr. Letwin has been reinstated to employment and the conditions have been implemented, the employer will have met its obligation to accommodate Mr. Letwin's disability to the point of undue hardship. A substantive breach of the conditions set out below will result in Mr. Letwin's discharge from employment. That penalty of discharge constitutes a "specific penalty for the infraction" within the meaning of section 48(17) of the *Labour Relations Act, 1995*. It is my

intention to convey that if Mr. Letwin substantially breaches any of the conditions, an arbitrator hearing any grievance will be limited to determining if the condition was substantially breached. The following conditions, which I have taken from Dr. Gillmore's report, are to remain in place for the rest of Mr. Letwin's employment with Enbridge:

1) Mr. Letwin is to be in full compliance with all treatment and follow up recommendations made by his most recent treatment facility;

2) Mr. Letwin is to maintain complete abstinence from Alcohol or any non-prescribed mood altering substances;

3) Random urine drug screening should be performed in accordance with his relapse Prevention Agreement;

4) Mr. Letwin shall continue to obtain treatment and monitoring relating to his Substance Dependence Disorder;

5) Documentation attesting to his sobriety and progress in recovery will be required from a professional knowledgeable in Addiction Medicine;

6) Mr. Letwin is to regularly attend 12 step meetings and maintain a home group;

7) Mr. Letwin is to maintain a sponsor and be in regular contact with the individual.

131. I remain seized to deal with any issues arising out of this award or its implementation.

Signed at Georgetown Ontario, this 11th day of September 2016.

Mary Ellen Cummings