CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

SALVATORE MILAZZO

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AUTOCAR CONNAISSEUR INC.

Respondent

- and -

MOTOR COACH CANADA

Interested Party

DECISION ON THE POLICY ISSUE

PANEL: Pierre Deschamps, Chair
Michel Doucet, Member

2005 CHRT 5
2005/01/28

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I. INTRODUCTION

[1] In the Tribunal's Reasons for Decision, dated November 6, 2003 and found at 2003 CHRT 37, the following Orders were issued:

> Autocar Connaisseur take steps, in consultation with the Canadian Human Rights Commission, to formulate a policy that ensures that individuals who suffer from substance-related disabilities who test positive in employer-sponsored drug tests are accommodated to the point of undue hardship, in accordance with this decision.
>
> Within six months of this decision, the parties shall file with the Tribunal copies of Autocar Connaisseur's revised drug testing policy. If the parties are unable to agree with respect to any terms of the revised policy, the Tribunal retains jurisdiction to deal with any outstanding issues.

[2] Although many attempts were made, both in writing and through meetings, the parties have been unable to reach a consensus on certain matters regarding the Respondent's policy dealing with drugs and alcohol testing.

[3] The parties having arrived at an impasse, the Respondent, in accordance with the Tribunal's order, is now seeking the guidance of the Tribunal on two issues which deal first, with the definition of "Safety-Sensitive Position" and, second, with the question of "accommodation."

II. THE MATTERS IN ISSUE

A. Safety-Sensitive Positions

[4] The Respondent's proposed "Alcohol and Drug Policy" defines a "Safety-Sensitive Position" as a "position in which individuals have a key and direct role in an operation where performance limitations due to substance use could result in a significant incident or accident causing fatalities or serious injury, significant property damage or significant environmental damage. For the purposes of this policy, employees who are required to operate a motor vehicle in the care or

control of the company, either as part of their regular duties or from time to time are considered to hold a Safety-Sensitive Position."

[5] In a letter dated March 15, 2004, the Commission commented as follows on this definition: "*With respect to the definition of safety sensitive, I note that this section has been modified somewhat, however the Commission would need assurances that Motor Coach Canada will not be subjecting mechanics who are under regular supervision to drug testing. I therefore suggest that the definition be further modified to state: "employees who are required to operate a motor vehicle in the care or control of the company, either as part of their regular duties or from time to time, <u>and are not under regular supervision</u>, are considered to hold safety sensitive positions.*"

[6] The Respondent disagreed with this suggestion, considering it ambiguous. In a letter, dated March 24, 2004, it responded: "*Insofar as the definition of Safety Sensitive Positions, our client is not prepared to accept the change proposed, because the entire point of including mechanics who, as part of their regular duties or from time to time, drive vehicles, is that the employer has a duty towards public safety and public interest. The addition proposed would nullify entirely the purpose of the inclusion because it is obvious that mechanics are under supervision when they are in our client's facility while it is also obvious that they are not under any supervision whatsoever when called upon to drive a vehicle.*"

[7] The issue, according to the Respondent, is not whether mechanics, per se, should be tested but whether those mechanics who are commercial motor vehicle drivers and who, as part of their duties, are called upon to drive a commercial motor vehicle should be covered by the policy.

[8] The Respondent is of the opinion that it is clearly within the Tribunal's jurisdiction to make a ruling on this issue because when a mechanic, duly authorized and licensed to drive a commercial vehicle, is driving a bus, he/she is a commercial motor vehicle driver and not a mechanic. It insists that it has no intention of including mechanics that are not commercial motor vehicle drivers to its "Drug and Alcohol Testing Policy."

[9] According to the Commission, the issue raised by the Respondent is whether or not the proposed "Alcohol and Drug Testing Policy" applies to employees other than commercial bus drivers; that is, employees who were not the subject matter of the Tribunal's initial hearing in this case. The Commission takes the position that this is an issue that cannot be determined by the Tribunal.

[10] The Commission refers to paragraph 189 of the Tribunal's initial Reasons for Decision in which the Tribunal indicated:

> Before turning to the question of remedy, we wish to make a brief comment with respect to Autocar Connaisseur's new alcohol and drug testing policy. It will be recalled that this policy, which only came into force in March of this year, applies not just to bus drivers, but to bus mechanics as well. This policy is not the subject of Mr. Milazzo's complaint, and, in our view, we would be overstepping our jurisdiction if we were to extend the scope of our inquiry to include a consideration of the legality of testing mechanics. Accordingly, we make no finding regarding Autocar Connaisseur's new policy, and specifically with respect to the question of whether the testing of Autocar Connaisseur's bus mechanics is reasonably necessary.

[11] The Tribunal further indicated that during the initial hearing very little time was spent by either of the parties on the question of testing mechanics. Consequently, the Commission asserts that the only guidance the Tribunal can provide to the parties in these circumstances is that they have come as far as they can and that they have not been able to agree on the scope of what constitutes a "Safety-Sensitive Position."

[12] The Commission further argues that mechanics are supervised during their entire workday other than when they take a bus on the road. The issue in this case is to try to find a way of systematically capturing those people who may represent a risk for the company. It was determined that when employees are unsupervised, they should be subjected to the Policy. While this is the case for the drivers, the Commission asserts that it is not the case for mechanics. In order to overcome this problem, the Commission suggested that the words "*and are not under regular supervision*" be added to the definition of "Safety-Sensitive Position."

B. Accommodation

[13] The issue of "accommodation" still unresolved has to do with Part IX of the Respondent's "Alcohol and Drug Policy" entitled "Consequences of a Policy Violation". The very last sentence of that section states "Failure to meet these conditions, including a second violation of this policy, will result in termination of employment in accordance with the agreement." It is the Commission's position that the word "will" must be replaced in this sentence with the word "may". According to the Commission, the stringent consequence imposed by the policy for a second violation for an addiction type disability completely ignores the law and the obligation of accommodation.

[14] This issue also brought forward the matter of "last chance agreements." These agreements involve the Respondent, the Union representing the employees and the employee who has tested positive and has gone through a rehabilitation

process. According to this agreement, when an employee who has completed his rehabilitation program tests positive again, his/her job will be terminated without further accommodation.

[15] The memorandum of settlement or "last chance agreement" provided as evidence at the hearing states, among other things: "*The Union and the Operator [employee] agree that it would be unreasonable for the Employer to further accommodate the Operator's performance beyond the accommodation provided in this settlement and that the Employer's duty to accommodate under the Canadian Human Rights Act has been satisfied.*" Paragraph 7 further adds, "*It is also agreed by the Union and the Operator that any further accommodation by the employer would be undue hardship under the Canadian Human Rights Act.*"

III. CONCLUSIONS OF FACTS DURING FIRST HEARING

[16] In order to better understand the conclusion of the Tribunal on the present issues, it is important to recall certain conclusions on the facts arrived at during the initial hearing:

> [20] Evidence with respect to the state of the motor coach industry was provided by James Devlin, and Brian Crowe. Mr. Devlin is the current President of Autocar Connaisseur. Mr. Crowe is the President of Motor Coach Canada, the trade association representing motor coach companies and motor coach tour operators in Canada. Motor Coach Canada represents approximately 95 bus operators and 115 tour operators - somewhere between 75% and 90% of the Canadian industry.
>
> [21] Motor coach companies generally have approximately 75% of their employees working as drivers. Fifteen or 20% of the employees are mechanics, and the remainder provide administrative services. Most Canadian companies are fairly small, family-run businesses.
>
> [22] The motor coach industry operates on an `on demand' basis. According to Mr. Crowe, a typical operator in the bus industry operates 24 hours a day, 7 days a week. As Mr. Crowe noted, the industry has to have services available when people want to move. This means that route patterns may be quite

unpredictable: Mr. Crowe cites the example of travel to the United States, stating that a company may not go to the United States at all one month, and then make 20 U.S. trips the next month, because of customer demand.

[23] According to Mr. Crowe, it is this ability to respond quickly to customer demand that is one of the strengths of the motor coach industry.

[24] Mr. Crowe described the Canadian motor coach business as a `mature industry', meaning that there is little growth in this sector. Indeed, the industry is in decline. Mr. Crowe explained that charter bus companies in Canada have to compete against heavily subsidized transport providers such as the airlines and Via Rail. World events, such as the Gulf War, the September 11, 2001 attacks, the war in Iraq, the SARs epidemic and the outbreak of Mad Cow disease in western Canada have combined to greatly reduce the tourism business available to the motor coach industry.

[25] The state of the market creates serious economic challenges for motor coach operators. Mr. Crowe explained that a motor coach costs $600,000.00. Charter rates in Canada now vary between $500 and $700 per day, meaning that bus companies operate on very thin margins. This has resulted in a number of company bankruptcies in the industry in recent years.

[26] The motor coach industry in Canada is heavily regulated. Because Autocar Connaisseur operates out of the Province of Quebec, it is the regulatory environment in that Province that is germane to our inquiry.

[27] *An Act respecting* owners *and operators of heavy vehicles* (Bill 430) came into force in Quebec in 1998, as a result of the tragedy at Les Éboulements - a bus accident that took some 40 lives. The Bill was designed to increase road safety, and introduced an administrative registration system for owners and operators of heavy equipment, including buses. Amongst other things, this

regulatory scheme calls for on-going conduct reviews. The Quebec Transport Commission is authorized to impose administrative measures on operators who have been assigned conditional or unsatisfactory safety ratings. In particular, the Commission has the power to cancel the operating licences of companies who are found to have operated in an unsafe manner, effectively putting them out of business. As will be described further on in this decision, in 1999, Autocar Connaisseur was itself the subject of safety-related proceedings before the Transport Commission, and was at risk of losing its operating licence.

[28] Amongst other safety measures implemented as a result of Bill 430, motor coach company registration forms require bus companies to advise whether the company has a plan in place to control the consumption of alcohol and drugs by bus drivers.

[29] There are numerous other statutory obligations imposed on bus operators, including obligations under the *Canada Labour Code*, the federal *Motor Vehicle Transport Act, 1987*, and the *Québec Civil Code*.

[30] Cross-border travel presents a particular challenge for bus operators, as operators providing services to the United States are also subject to American laws, including laws relating to drug testing.

[...]

[32] American law requires that bus drivers operating vehicles in the United States be subjected to pre-employment, random, post-accident and for-cause drug testing. The testing process is subject to strict regulation, and there are stringent protocols in place regarding the collection and analysis of samples.

[33] Several witnesses testified that the use of drug testing in the transportation industry was introduced as a part of the American "War on Drugs".

Whatever the reasons for the enactment of the legislation, as of July 1, 1996, commercial motor vehicle operators driving in the United States are subject to Federal Department of Transportation Alcohol and Drug Testing Regulations. This legislation also applies to Canadian companies driving in the United States, as well as to any Canadian driver who has "the reasonable potential for crossing the border". According to Ms. Butler [qualified as an expert in policy development and implementation for issues relating to alcohol and drugs in the workplace], this means any driver "... who can, will or does cross the border".

[34] Ms. Butler testified that infractions of the law are treated very seriously by the American authorities: companies are liable to fines of up to $10,000 (US), per driver, per trip, if drivers enter American territory without having been tested for alcohol or drugs. American government auditors regularly visit bus companies in Canada, in order to ensure that any cross-border travel is carried out in accordance with the American regulatory regime. Flagrant violations of U.S. law can result in the cancellation of the certification that bus companies require to drive in the States.

[...]

[40] As was previously noted, the bus industry in Quebec is under the supervision of the Quebec Transport Commission. In late 1997, Mr. Devlin became aware that the Société de l'assurance-automobile du Québec (or SAAQ) had commenced proceedings before the Transport Commission against Autocar Connaisseur. SAAQ was evidently seeking to have Autocar Connaisseur's operating license cancelled because of the way that the company was conducting its business. Autocar Connaisseur's new owners discovered that the company had previously lost its right to certify the roadworthiness of its buses, because of earlier problems with the Transport Commission. According to Mr. Devlin, at this point, serious consideration was given to simply shutting the company down, although ultimately the decision

was taken to work with the SAAQ, to try to turn the situation around.

[41] Mr. Devlin testified that he attended a show-cause hearing before the Transport Commission in January of 1999. At the hearing, Mr. Devlin explained the different programs that he was going to implement at the company, dealing with bus safety and driver education. Mr. Devlin advised the Commission that it would take six to nine months before the company would be in total compliance with the applicable regulations. The hearing resulted in a warning to Autocar Connaisseur that any further infractions would result in the automatic cancellation of the company's operating licence. Such a step would mean the end of Autocar Connaisseur.

[42] One of the measures taken by Autocar Connaisseur to satisfy the commitments made to the Transport Commission was a review of the implementation of the company's drug testing policy. [...]

[...]

[104] The onus is on Autocar Connaisseur to establish that its refusal to tolerate employees having drug metabolites in their system while at work is reasonably necessary to accomplish the company's goal of promoting road safety, by preventing driver impairment. To show that the zero tolerance standard is reasonably necessary, it must be demonstrated that it is impossible for Autocar Connaisseur to accommodate disabled employees who test positive for drugs, without imposing undue hardship on the company.

[105] In examining whether Autocar Connaisseur's drug testing policy is reasonably necessary to promote road safety, consideration must first be given to the employment context in which Autocar Connaisseur's bus drivers operate.

[106] Mr. Devlin described the duties associated with driving a motor coach, explaining that

alertness, as well as an ability to `multi-task' are essential. In addition to having to navigate a large vehicle through traffic, drivers have to be aware of the passengers at all times. By way of example, Mr. Devlin says a driver has to be aware if a passenger gets up to use the washroom, as a quick manoeuver by the driver could result in serious injury to the passenger.

[107] Further, the environment in which motor coach drivers work makes it very difficult for bus companies to ensure that drivers are always up to the task.

[108] Unlike the situation in previous drug testing cases, where employees worked under fairly close supervision inside bank offices (*TD Bank*), petroleum processing plants (*Entropy*) or the administrative offices of an Indian Band (*Elizabeth Métis Settlement*), bus drivers at Autocar Connaisseur spend a considerable portion of their time on the road, away from the watchful eye of their superiors. Drivers doing casino and airport runs would be on the road much of each day, whereas drivers taking charter groups on tour could be away from the Autocar Connaisseur offices for as much as thirty days at a time. While drivers check in with Autocar Connaisseur dispatchers each day by telephone, the company is unable to verify that the driver had actually carried out the necessary pre-trip inspections, or to properly assess if the driver is indeed fit to drive.

[...]

[110] This inability on the part of Autocar Connaisseur management to closely supervise its workforce presents particular challenges for the company in monitoring employee performance. These difficulties are compounded by the somewhat transient nature of much of Autocar Connaisseur's workforce, with many drivers working for the company on a seasonal basis.

[111] Mr. Crowe described the precarious economic position of the Canadian motor coach industry,

indicating that the situation at Autocar Connaisseur was no different than that at other Canadian motor coach companies. As Mr. Devlin explained, Autocar Connaisseur's ability to monitor its workforce was also limited by the financial constraints under which the company operated. Mr. Devlin testified that in 1999, Autocar Connaisseur had a fleet of 125 buses. Although the company generated gross revenues of $10 million in 1998, in fact, Autocar Connaisseur was losing substantial sums of money. Mr. Devlin quickly realized that the charter market in Quebec was simply not there to support a fleet of that size. The decision was thus made to reduce the size of Autocar Connaisseur's fleet, and the company currently operates 29 vehicles.

[...]

[119] Dr. Baker and Dr. Chiasson each gave testimony with respect to the effects of cannabis consumption on the human brain, and once again were in substantial agreement on many points. The active ingredient in cannabis is Nine Delta tetrahydrocannabinol or 9THC. The level of 9THC in the cannabis available in Canada today is significantly higher than in the past, and the drug accordingly that much more potent.

[...]

[125] Dr. Baker and Dr. Chiasson agree that individuals employed in safety sensitive positions - that is, positions where an employee could put his own safety or the safety of others at risk -should not be performing tasks such as driving motor vehicles while their ability to drive is impaired by the use of cannabis.

[...]

[128] Insofar as the transportation industry is concerned, Ms. Butler testified that the Canadian government's lack of involvement in regulating alcohol and drug testing means that there is a limited amount of Canadian research available in this area. She did refer to a study conducted by the

British Columbia Trucking Association in 1989. According to Ms. Butler, three-quarters of the drivers surveyed reported that alcohol had compromised safety, with one in nine drivers admitting that his or her own alcohol use had compromised safety at work. Seven out of ten drivers reported having worked while affected by alcohol, and half of the drivers reported knowing other drivers who drank at work. With respect to drugs, three-quarters of the drivers surveyed reported that drug use had compromised safety, *with one in twelve drivers admitting that his or her own drug use had compromised safety at work.*

[129] This evidence certainly suggests that the use of drugs by drivers in the transportation industry is a real problem, with significant implications for public safety.

[...]

[168] It is clear from the testimony of Dr. Baker and Dr. Chiasson that there is no single, ideal means of detecting employee impairment, or of identifying those who are at increased risk of being intoxicated in the workplace. While the approach advocated by Dr. Baker is a good one, in principle, it is clear from the evidence of Dr. Chiasson that it will not necessarily catch all of those employees who are at risk of putting the lives of passengers in jeopardy. We are also not persuaded that, in the specific context in which Autocar Connaisseur found itself during the summer of 1999, that Dr. Baker's method would have been all that workable.

[169] First of all, Dr. Baker's approach relies to a large extent upon the observations of supervisors. While such an approach may work well in a factory or office environment, where employees are closely supervised, it is less useful in a work environment such as that at Autocar Connaisseur, where bus drivers are unsupervised for much of the time.

[...]

[171] Although a positive drug test does not indicate that a bus driver was actually impaired while on the job, for the reasons discussed earlier in this decision, we are satisfied that a positive test result is a `red flag', to use Dr. Chiasson's term. The presence of cannabis metabolite in an employee's urine does assist in identifying drivers who are at an elevated risk of accident.

[172] We have also found that the presence of a drug testing policy will serve to deter at least some employees from using alcohol or drugs in the workplace, in a manner that would put themselves or others in danger.

[173] For these reasons, we find that Autocar Connaisseur's drug testing policy is reasonably necessary to accomplish the company's legitimate work-related goal of promoting road safety.

[174] There is one further reason why we have concluded that Autocar Connaisseur's drug testing policy is reasonably necessary, and that is the company's obligation to comply with American drug testing legislation. [...]

[175] For these reasons, we find that Autocar Connaisseur has met the burden on it of establishing that subjecting its employees to pre-employment and random drug testing is a legitimate way to promote road safety.

[176] That is not the end of the matter, however. According to the Supreme Court decisions in *Meiorin* and *Grismer*, in order to satisfy the third element of the *bona fide* occupational requirement defense, Autocar Connaisseur must also show that it is impossible for it to accommodate employees who test positive for drugs, and who suffer from a drug-related disability, without imposing undue hardship on the company.

[...]

[186] At the very minimum, however, a company such as Autocar Connaisseur should be able to

> extend the same opportunity to a substance-dependent driver who has tested positive as it does to drivers who come forward voluntarily with substance abuse problems. That is, these individuals should be afforded the opportunity to rehabilitate themselves, and to return to work when they are fit to do so. In our view, the company would also be justified in implementing appropriate follow-up monitoring measures to ensure that the individual continues to abstain from the use of alcohol or drugs. Finally, Autocar Connaisseur may also be able to terminate the employment of those individuals who fail to rehabilitate themselves after being afforded the reasonable opportunity to do so, although each of these situations would have to be carefully considered, on a case-by-case basis.
> [...]
>
> [189] Before turning to the question of remedy, we wish to make a brief comment with respect to Autocar Connaisseur's new alcohol and drug testing policy. It will be recalled that this policy, which only came into force in March of this year, applies not just to bus drivers, but to bus mechanics as well. This policy is not the subject of Mr. Milazzo's complaint, and, in our view, we would be overstepping our jurisdiction if we were to extend the scope of our inquiry to include a consideration of the legality of testing mechanics. Accordingly, we make no finding regarding Autocar Connaisseur's new policy, and specifically with respect to the question of whether the testing of Autocar Connaisseur's bus mechanics is reasonably necessary.

IV. THE DECISION

[17] We will deal first with the issue of the definition of "safety-sensitive position." In its proposed policy, the Respondent suggested that it apply to "employees who are required to operate a motor vehicle in the care or control of the company, either as part of their regular duties or from time to time." The Commission suggested that the following words be added to this definition: "and are not under regular supervision."

[18] We do not agree with the Commission that those words are necessary in the present context. The evidence submitted at the initial hearing clearly established that one of the reasons why the Respondent wanted to submit its bus drivers to drug and alcohol testing was because bus drivers spend a considerable portion of their time on the road, away from the watchful eye of their superiors. Drivers can be on the road much of each day or longer. In these situations, the company is unable to properly supervise their drivers. We feel that adding the words suggested by the Commission would do nothing more than create uncertainty as to the meaning of "regular supervision".

[19] It has been well established in the evidence given at the initial hearing that the inability of the Respondent to closely supervise its workforce presents particular challenges for the company. Furthermore, it was also established that the Respondent's ability to monitor its workforce is limited by the financial constraints under which the company operates.

[20] Before turning to the other issue, we wish to add that the definition of "safety-sensitive position" applies only to those employees who are licensed to drive a bus and who are required to operate a bus, either as part of their regular duties or from time to time. It thus applies to bus mechanics who are licensed to drive a bus and called upon to drive a bus in the performance of their work.

[21] This said, we reiterate that the Tribunal would be overstepping its jurisdiction if it were to extend the scope of its inquiry to include a consideration of the legality of testing the mechanics or other employees not licensed to drive buses. Accordingly, we make no finding with respect to the question of whether the testing of these employees is reasonably necessary.

[22] With regards to the second issue, it has to do with Part IX of the Policy entitled "Consequences of a Policy Violation". The last sentence of that section states that "Failure to meet these conditions, including a second violation of this policy, will result in termination of employment in accordance with the agreement."

[23] It is the Tribunal's opinion that the use of the word "will" imposes an inflexible consequence for a second violation of an addiction type disability. In our initial decision, we indicated clearly, at paragraph 186, that the Respondent "may also be able to terminate the employment of those individuals who fail to rehabilitate themselves after being afforded the reasonable opportunity to do so, although each of these situations would have to be carefully considered, on a case-by-case basis." [Emphasis added] It is clear that, although we felt that the Respondent might be justified in terminating an employee who failed to rehabilitate himself/herself, we were of the opinion that every situation needed to be considered and justified on a case-by-case basis. Consequently, in order to

comply with our initial ruling, we order that "may" be substituted for "will" in the last sentence of the section entitled "Consequences of a Policy Violation" of Part IX of the "Alcohol and Drug Policy."

[24] This matter also raises the issue of the "last chance agreement." As the evidence submitted at the hearing established, the Respondent now requires employees who return to work after going through a drug and alcohol rehabilitation program to sign a "last chance agreement", also referred to as a "Memorandum of Settlement". The "last chance agreement" states that if an employee fails another alcohol or drug test after having gone through a rehabilitation program, no further accommodation will be considered and employment with the Respondent will be terminated.

[25] The Canadian Human Rights Tribunal has not dealt with such agreements in the past. "Last chance agreements" have been considered, however, by arbitrators and provincial human rights tribunals and commissions.

[26] The Ontario decision in *Re: Ontario Human Rights Commission et al and Gaines Pet Foods Corp. et al* (1993), 16 O.R. (3d) 290 sets out the basic law on this subject. In that decision, a last chance agreement was considered illegal and unenforceable in the context of an employee coping with a disability on returning to the workplace. There, the Court was concerned with an employee with cancer who was returning to the workplace after a lengthy absence due to her cancer treatment. Upon her return to work, the employer imposed a restrictive condition on her continued employment, which stated that she must maintain a level of attendance "equal to or better than the average for the hourly rated employees in the plant". Her failure to meet this standard at any time would result in the termination of her employment.

[27] The Court concluded that "the proximity if not primary cause of the restrictive condition... arose directly from Ms. Black's absence due to her disability... the imposition of the restrictive condition was discriminatory, stemming as it did directly from her absence due to handicap... It was a condition not required of any other employee and it carried with it the sanction of immediate termination for non-compliance."

[28] The Court further added that "even if it could be said that she agreed to the restrictive condition, such agreement would be unenforceable", as provided by the Supreme Court of Canada dictum in *Ontario (Human Right Commission) v. Etobicoke*, [1982] 1 S.C.R.202 where the Supreme Court held that "[Human Rights legislation] has been enacted by the Legislature...for the benefit of the community at large and of its individual members and clearly falls within the category of enactment which may not be waived or varied by private contract..."

[29] The issue of an alcohol addicted employee and "last chance agreement" was also considered in the arbitration decision *Re: Camcar Textron Canada Ltd. and United Steelworkers of America Local 0222 (Commerford)* (2001) 90 L.A.C. (4th) 305. In that case, an employee had returned to work under a last chance agreement concerning lateness and attendance. Following arguments concerning the ultimate reason for the termination of the employee and whether any of the absences or lateness were due to alcoholism, the arbitrator concluded:

> ...for the reasons reviewed in the *Ottawa-Carleton* case, and arising from the approach taken in *Gaines Pet Foods*... this issue is of limited consequence, as the breach of the Code arises for the imposition upon the grievor, for reasons arising from his disability, of a standard, the breach of which for any reason not specifically excepted would result in the most serious consequences, which was not imposed upon other employees. There can be no doubt that the breach of that standard was the cause, indeed here the only cause asserted, for his termination, and thus the enforcement of the discriminatory standard, regardless of the reasons leading to its breach by the grievor, must come under the scrutiny of the Code provisions concerning discrimination on the basis of handicap.

[30] Although these decisions are in some ways quite different from the one before us, they do raise important issue concerning the legality and enforceability of "last chance agreement" and the possibility for the parties to contract out or waive certain rights contained in human rights legislation.

[31] In *Re: Canadian Pacific Railway Company and Canadian Counsel of Railway Operating Unions (United Transportation Union)* (2002), C.R.O.A. Decisions No. 3269 (Picher), the arbitrator notes that while "last chance agreements" have an important role as an instrument in rehabilitation and in some circumstances as a form of accommodation for an addicted employee, the violation of such an agreement cannot lawfully result in automatic dismissal. Each case must be reviewed on its own merits and a finding of accommodation to the point of undue hardship must have been reached in order to justify termination of a disabled employee.

> Canadian jurisprudence does not, however, confirm that the violation of an agreement of the type which is the subject of this grievance must automatically result in an employee's termination. It is well established that each case must be reviewed on the merits of its own particular facts, and that in any event the application of any such agreement cannot be in violation of the duty of accommodation owed to an employee with a disability, in keeping with human rights codes such as the Canadian Human Rights Act (Re Toronto Transit Commission and Amalgamated Transit Union, Local 114, (1990) 75 L.A.C. (4th) 180 (Davie); Re

> Regional Municipality of Ottawa-Carleton and Ottawa-Carleton Public Employees Union, Local 503 (2000) 89 L.A.C. (4th) 412 (Mitchnick); Re Camcar Textron Canada Ltd. and United Steelworkers of America, Local 3222 (2001) 99 L.A.C. (4th) 305 (Chapman)).
>
> As the jurisprudence reflects, in many cases arbitrators will conclude that the history of employees' treatment, culminating in a last chance agreement, reflects a sufficient degree of accommodation to support the conclusion that any further continuation of the employment relationship would be tantamount to undue hardship upon the employer. That is the analysis which has to be made in each case. The mere fact of a last chance agreement does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation of general application, legislation which the parties cannot contract out of as determined by the Supreme Court of Canada (Re Etobicoke (Borough) v. Ontario (Human Rights Commission), [1982] 1 S.C.R. 2002 at p. 213.

[32] It is also the opinion of this Tribunal that, even without a last chance agreement having been signed, in many cases the history of the employees' treatment, the context of the employment environment for bus drivers, the importance of promoting road safety and the regulatory environment of the transportation industry, as they were put in evidence during the initial hearing, will reflect, in the words of the decision in *Re: Canadian Pacific Railway Company and Canadian Counsel of Railway Operating Unions (United Transportation Union)*, "a sufficient degree of accommodation to support the conclusion that any further continuation of the employment relationship would be tantamount to undue hardship upon the employer." But again, we repeat that this analysis must be made on a case-by-case basis.

[33] The fact that the parties have agreed to a "last chance agreement" which states that they have decided that it would be unreasonable for the employer to further accommodate the employee beyond the first accommodation and that any further accommodation by the employer would be undue hardship under the Canadian Human Rights Act, "does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation of general application, legislation which the parties cannot contract out." (*Re: Etobicoke (Borough) v. Ontario (Human Rights Commission*), [1982] 1 S.C.R. 2002 at p. 213.

[34] Accordingly, the "last chance agreement" is in the Tribunal's opinion unenforceable in regards to the Act. As the case law indicates, an analysis must be made in each case to determine whether or not it is impossible for the employer to accommodate the needs of the employee to the point of undue hardship. While it is certainly open to the Respondent to warn employees returning to work after

rehabilitation that any relapse could result in termination of there employment, the imposition of a last chance agreement cannot serve to nullify the duty of accommodation established under human rights legislation.

[35] The Tribunal agrees that the concept of accommodation has its limits. This view was recently expressed by Madame Justice Heneghan of the Federal Court in *City of Ottawa v. Desormeaux* and *City of Ottawa v. Parisien,* [2004 FC 1778]. There, the Court endorsed what had been said by the Federal Court of Appeal on the issue of accommodation in relation to absenteeism in *Scheuneman v. Canada (Attorney General*), (2000) 266 N.R. 154 (F.C.A.), where leave to appeal to S.C.C. was refused, [2001] C.C.C.A. No. 9:

> "( ) It is a basic requirement of the employment relationship that an employee must be able to undertake work for the employer or, if temporarily disabled by a medical condition from so doing, must be able to return to work within a reasonable period of time. Dismissing a person who cannot satisfy this requirement is not, in the constitutional sense, discrimination on the ground of disability."

Madame Justice Heneghan went on to say that "there comes a point when the employer can legitimately say that the bargain is not completely capable of performance."

[36] Thus, as an employer, the Respondent is not subject to an endless rehabilitation process. It might well be that a second violation of the policy will entail the end of one's employment with the company. As stated earlier, this determination will have to be made on a case-by-case basis.

V. CONCLUSION

The Tribunal therefore finds:

(1) That the definition of "Safety-Sensitive Position" which states that a "Safety-Sensitive Position" is as a "position in which individuals have a key and direct role in an operation where performance limitations due to substance use could result in a significant incident or accident causing fatalities or serious injury, significant property damage or significant environmental damage. For the purposes of this policy, employees who are required to operate a motor vehicle in the care or control of the company, either as part of their

regular duties or from time to time are considered to hold a "Safety-Sensitive Position", is in accordance with the Tribunal's initial ruling.

(2) Although the Tribunal feels that the Respondent might be justified in terminating an employee who has failed to rehabilitate himself/herself, it is also of the opinion that every situations needs to be considered and justified on a case-by-case basis. Consequently, the Tribunal orders that the word "may" be substituted to the word "will" in Part IX of the Respondent's "Alcohol and Drug Policy" entitled "Consequences of a Policy Violation".

"*Signed by*"
Pierre Deschamps, Chair

"*Signed by*"
Michel Doucet, Member

OTTAWA, Ontario

January 28, 2005

PARTIES OF RECORD

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Louise Baillargeon/ Philippe-André Tessier Reference: 2003 CHRT 37 November 6, 2003	For the Respondent