

Amcan Castings v. United Steelworkers of America, Local 4153 (Porebski Grievance)

Ontario Labour Arbitration
M.L. Tims (Arbitrator)

June 9, 2006

Brent Foreman, Counsel for the Company
Bill Baker, Advocate for the Union

AWARD

¶ 1 The grievor's employment with the Company was terminated effective November 16, 2005, and the grievance before me alleges unjust discharge.

¶ 2 The Company takes the position that the grievor occupied a safety sensitive position in the workplace and reported to work in an inebriated state on November 15, 2005. In the Company's view, the grievor thereby engaged in serious misconduct that warrants discharge in all of the circumstances. The Union does not contest that the grievor was intoxicated at work on the day in question and that this gave rise to significant safety issues. It suggests, however, that the grievor may suffer from a handicap, namely alcoholism, within the meaning of the *Human Rights Code*, and that the Company failed to accommodate him to the point of undue hardship in accordance with the *Code*.

¶ 3 There were no objections regarding the arbitrability of the grievance or my jurisdiction to hear it.

THE EVIDENCE

¶ 4 The grievor, Mr. Andrew Porebski, commenced his employment with the Company September 1995. As of the time of termination, he held the position of Melter.

¶ 5 By letter dated November 16, 2005, the Company advised the grievor that his employment was terminated due to the violation of Hamilton Plant Rule #19. Such rule provides:

"The acts and practices here listed are subject to disciplinary action:

...

19. Possession or use of alcoholic beverages, narcotics or hallucinogenic drugs on Company property or when reporting for work or working

under the influence of the above.

¶ 6 Company Counsel described the Company's operation as a heavy manufacturing plant, producing automotive parts through a die casting process using molten metal.

¶ 7 The evidence clearly establishes that the workplace in issue is hazardous, and there was no dispute between the parties in this regard. Mr. Gavin Baillie, the Foundry Supervisor, testified that pots or crucibles holding approximately 15,000 pounds of molten aluminum are shipped to the plant at a temperature of 1580-1600 degrees Fahrenheit. Aisles are congested and busy with both pedestrian and vehicular traffic, mostly forklifts. Mr. Baillie indicated that the risk of serious personal injury is not merely theoretical but real, noting that the grievor has been burned on two occasions, and that he himself suffered burns to seventy-five per cent of his lower body when working as a Melter. Mr. David Schram, Production Supervisor, and Mr. Vince Clark, Director of Operations, each confirmed Mr. Baillie's description of the workplace as "extremely hazardous." In addition to the factors addressed by Mr. Baillie, Mr. Schram noted the use of a pressurized die cast process with "heavy duty machines," while Mr. Clark commented on the "fast paced" environment with "a lot of hustle and bustle."

¶ 8 Against this backdrop, Mr. Baillie, Mr. Schram, Mr. Clark, and Mr. Scott Armstrong, Vice-President, Human Resources, all testified that the Company has a strictly enforced zero tolerance policy with respect to intoxication in the workplace. Mr. Baillie identified a notice revised February 4, 2005 posted on all bulletin boards in the plant stating as follows:

ALCOHOL & SUBSTANCE ABUSE POLICY

Amcan Castings will take every step within its legal bounds to ensure a safe working environment. Therefore, anyone working under the influence will be automatically terminated.

ZERO TOLERANCE

The Company is offering any and all employees assistance. We encourage you to speak to Human Resources or contact Lifeworks. The circumstances surrounding your assistance will be held in the strictest of confidence.

WHEN WORKING UNDER THE INFLUENCE, NOT ONLY IS YOUR EMPLOYMENT AT STAKE, BUT ALSO, MOST IMPORTANTLY, YOUR LIFE IS JEOPARDIZED ALONG WITH THE LIVES OF YOUR FELLOW CO-WORKERS.

¶ 9 Although there was no suggestion by the Union that the grievor was unaware of the Company's stance regarding intoxication in the workplace, the Company called evidence of a two day refresher course in which he participated in October 2005. Mr. Baillie testified that after the grievor suffered his second workplace burn, the Company felt it appropriate to review its practices and procedures with him while he was on light

duties. Mr. Baillie identified documentation reviewed and signed by the grievor as part of this program. The grievor therein acknowledged his review of plant rules, including rule #19 referenced in his letter of discharge, and his “understanding” that “some of the most common burn hazards are molten metal and bull ladles ...” Also pertinent for present purposes is the grievor’s written acknowledgement of the Company’s Procedure for Tapping Crucibles, including the following:

Procedure

1. Using a Forklift truck, carefully position the bull ladle under the pour chute ...
2. Install one new cone on a regulator and place the unit in ready position. There should always be a second regulator with a cone on hand in case the first regulator is dropped into the molten metal flow or ladle. This will allow the Melter to quickly plug the hole with the second regulator.
- ...
4. Remove the plug by gently tapping the end with a hammer ...
5. Once the plug comes loose, pull it out, backing away from the chute at the same time, thereby protecting you in the event that the molten metal starts to flow prematurely.
- ...
9. Once the bull ladle is full, close the crucible pour hole with the regulator and cone.
10. Use a hammer to firmly secure the regulator ensuring that it is tight, with no signs of leakage.
- ...
13. Before leaving the area, make a final check of the hole for a proper seal with no signs of leakage.

¶ 10 Mr. Armstrong gave evidence as well with respect to the Company’s Employee Assistance Program, Lifeworks, offered through an independent third party. He indicated that such program has been in effect for five to six years and is paid for by the Company. It provides support to employees on a confidential basis for a number of issues including drug and alcohol abuse. Mr. Armstrong testified that information sessions regarding Lifeworks have been offered in the plant and at Union meetings, and he noted that the EAP is referenced in Letter of Intent #18 appended to the parties’ collective agreement. Mr. Frank Arcuri, the Local Union President, also gave evidence and spoke of a Union Accommodation Committee, with a trained counsellor available to help access assistance for a variety of problems.

¶ 11 The evidence pertaining to the events of November 15, 2005, while undisputed, warrants careful consideration. A number of witnesses testified for the Company in this regard. The grievor did not testify and the Union did not call any evidence with respect to the events leading to discharge.

¶ 12 Mr. Baillie testified that the grievor worked in his area as a Melter. He spoke with him briefly at approximately 3:05 p.m. on November 15, 2005. Mr. Baillie's evidence was that the grievor was "loud and agitated."

¶ 13 Following their exchange, Mr. Baillie carried on with other duties, and the grievor got on a forklift, and took a ladle heading towards the small end machines in his designated work area to draw metal from pots. Between ten and twenty-five minutes later, while walking toward the "small end," Mr. Baillie again saw the grievor driving a forklift. As Mr. Baillie arrived at the pots, he noticed that the grievor had left a bull ladle unattended, filling with molten metal. He noted that the molten metal was within 1.5 inches from the top of the pot at the time. Mr. Baillie testified that he grabbed a regulator, and as there was no cone on it, he put one on it, and closed the pot ensuring that it was sealed. According to Mr. Baillie, the grievor appeared on his forklift with "a grinning manner" seconds later. Mr. Baillie gave evidence that the pot would have overflowed but for his intervention, as the "stream was coming up very fast." While he acknowledged that there was no one else in the area at the time, he explained that 15,000 pounds of overflowing molten metal posed a dangerous situation, particularly taking into account the fact that a propane station was located approximately twenty-five yards away.

¶ 14 Mr. Baillie testified that he instructed the grievor to stay where he was and not to pour the ladle. He then proceeded to the Foreman's office and requested a Union Steward as well as relief staff, indicating that he was sending the grievor home.

¶ 15 Mr. Baillie headed back to the small end where he intended to wait with the grievor until the grievor's replacement arrived in the area. When he reached the main aisle, he saw the grievor's forklift at #11 machine with the ladle in the rotating position. The grievor's forklift was running and the brake was not on. Mr. Baillie stated that the proper procedure when leaving a vehicle, whether running or not, is to engage the hand brake. He engaged the brake and rotated the ladle to the neutral position. Mr. Baillie also testified that the grievor was at #11 cleaning up metal that had spilled from #10.

¶ 16 The grievor's replacement arrived in the area, and Mr. Baillie ordered the grievor to leave the spill and come to the Foreman's office with him. He testified that he recognized by this point that the grievor was "under the influence." Present at the meeting in the office with the grievor and Mr. Baillie were Mr. Mark Filipcic, Union Steward, Mr. Schram, and two other individuals, Mr. Greg St. Laurent and Mr. Rick Schultz. The evidence establishes that Mr. Baillie advised the grievor that he was suspended for having committed an unsafe act. Mr. Schram recalled that the grievor and his Union Steward were told that the grievor had left a ladle unattended.

¶ 17 Both Mr. Baillie and Mr. Schram testified that the grievor appeared unsteady on his feet, and that his speech was slurred and incoherent. Mr. Schram's evidence was that he too believed the grievor to be drunk.

¶ 18 A decision was made to call upon Mr. Clark, who was paged to the office. Mr. Clark joined the meeting, as did a second Union Steward, Mr. Daryl Mauthe. Mr. Clark told the grievor that he could smell alcohol on his breath and believed that he was intoxicated. The grievor was sent home in a cab.

¶ 19 Mr. Arcuri, the only witness to testify for the Union, gave evidence that approximately fifteen minutes after the grievor's departure on November 15, he spoke to Mr. Clark, and asked him for the opportunity to "work something out" for the grievor. He testified that he told Mr. Clark that the grievor was "going into a program," and that Mr. Clark indicated that he wanted to "think about it." Mr. Clark acknowledged having a conversation with Mr. Arcuri about the grievor at some point after November 15. Although he did not recall Mr. Arcuri saying that the grievor would be going to "rehab because of his problems," he acknowledged that he may have made such statement.

¶ 20 Mr. Armstrong testified that he became involved in the grievor's situation the morning of November 16, and after being updated on the incident of November 15, decided to terminate the grievor's employment. Mr. Armstrong's evidence was that the work environment in issue is dangerous, that he is responsible for the safety of all, and that he was not prepared to have the grievor or a co-worker "hurt or killed."

¶ 21 Mr. Armstrong gave evidence that he considered a Disciplinary Action Report dated January 3, 2005 on the grievor's file reflecting a one day suspension served in December 2004 for insubordination. While both parties' representatives made submissions during the course of the hearing with respect to the contractual sunset clause, the Union accepted that such discipline was properly relied upon here by the Company. Mr. Armstrong testified that such record "negatively impacted" on his decision as to how much he "wanted to give the individual another chance."

¶ 22 Mr. Armstrong also referred to a document entitled Terms of Settlement signed July 18, 2003. The parties agreed to delete certain provisions from the said document before placing it before me, and both accepted that it was properly entered into evidence in that form. The parties' representatives concurred as well that the July 2003 settlement is properly considered here despite the fact that it was entered on a "Without prejudice, without precedent" basis. The Company and the Union acknowledge, however, that the May 2003 disciplinary action that was the subject of the July 2003 settlement does not form part of the grievor's disciplinary record, by virtue of the contractual sunset clause.

¶ 23 Mr. Armstrong testified that the grievor fell asleep in the workplace in May 2003 in an intoxicated state, with a thermos full of wine. His employment was terminated at that time, and eventually, at mediation, the Company agreed to reinstate him on terms. The July 18, 2003 Terms of Settlement which the parties entered in evidence state as follows:

The Union and the Grievor ... hereby agree to withdraw from arbitration the grievance dated 16 June 2003 alleging unjust discipline, subject to the following terms and conditions:

1. The grievor will be returned to work on his regular shift on the week of 21 July 2003.
2. (deleted by parties)
3. The above return to work is with the understanding that the grievor will complete the treatment program plus any follow up and also confirm his attendance to the Employer.
4. The Employer will make arrangements for the grievor to attend the treatment program as outlined but with the clear understanding and agreement that the Employer will not make any monetary compensation to the grievor.
5. This settlement is made without prejudice or precedent to either party in any other matter.

¶ 24 Mr. Armstrong explained that once the Company decided to return the grievor to work, it made sense for him to have some “rehab to get his life back again,” and “to help with his problem of drinking.” He was not aware of the grievor having any previous issues involving alcohol. Mr. Armstrong testified that the Company understood in July 2003 that the grievor would see a counsellor at the “Hamilton Wentworth Regional Drug and Alcohol Department,” and that the Company subsequently received reports confirming attendance on specified dates. Although Mr. Armstrong acknowledged awareness that the grievor attended such counselling, he testified that he had no information that he suffered from alcoholism, noting that the Company received no medical reports relating to alcoholism and no diagnosis of alcoholism. He further gave undisputed evidence that the grievor has never indicated to the Company that he is an alcoholic. There is no evidence before me as to the nature or the duration of the 2003 counselling sessions.

¶ 25 Both Mr. Schram and Mr. Clark testified in cross-examination that they were unaware of any alcohol related issues with the grievor since July 2003.

¶ 26 The parties through their representatives also stipulated as a fact the following: “Without prejudice to the Company’s position that post-discharge evidence is not relevant, the Company acknowledges that since the time of the grievor’s (November 2005) termination, the grievor has sought treatment.” The parties were clear that their agreement in this respect did not address the nature of the treatment sought and no additional evidence was called on this point.

THE ARGUMENT

¶ 27 The Company asks me to conclude based on all of the evidence that the grievor's employment was terminated for just cause.

¶ 28 Counsel argues that the grievor engaged in serious misconduct in attending at work intoxicated on November 15, 2005. In doing so, the Company submits that he put his own safety and that of his co-workers at risk. He referred specifically to the evidence that the grievor drove his forklift while inebriated, he left the forklift unattended without engaging the safety brake, and he left a ladle unattended with molten metal. The fact that nobody was injured, Counsel suggests, was simply a matter of luck.

¶ 29 The Company emphasizes that the grievor's conduct must be considered in the context of a very hazardous workplace. Counsel submits that the Company has a clear and consistently enforced substance abuse policy, and there can be and is in fact no suggestion here that the grievor was under any misapprehension regarding the Company's position in this regard. He refers to the decision in *Re Stelco Inc. and USWA, Local 1005* (2003) 2003 Carswell Ont 4919 (Luborsky) for its discussion of the importance of deterrence when fashioning the appropriate disciplinary response to workplace safety infractions. The Company also refers to *Re Toronto Transit Commission and ATU* (1997), 72 L.A.C. (4th) 109 (Shime) in support of the proposition that driving under the influence of alcohol warrants discharge. Counsel suggests that the fact that it was a forklift as opposed to a bus that the grievor drove here does not alter the seriousness of his actions, and the appropriateness of discharge as a disciplinary response.

¶ 30 Counsel further argues that the grievor's disciplinary record within the twelve month period contemplated by the contractual sunset clause is not "exemplary." The Company asks me to note Mr. Armstrong's evidence that the grievor's December 2004 suspension for insubordination was considered in assessing the appropriate discipline to be imposed in the present circumstances.

¶ 31 The Company suggests as well that there is no evidence before me of mitigating factors which would justify interfering with the penalty of discharge. Counsel notes that the grievor did not testify in these proceedings, and thus, there is no evidence before me relating to his personal circumstances, no explanation for his conduct on the day in issue, and no evidence of any rehabilitative potential. While the Company acknowledges that the grievor's service is "substantial," Counsel suggests that his ten years with the Company is not in itself reason to modify the penalty imposed here.

¶ 32 In the Company's submission, discharge must be upheld in the circumstances before me, and the grievance denied. In the alternative, should I decide otherwise, Counsel asks that reinstatement be subject to the sorts of stringent conditions addressed in *Re AFG Industries Ltd. and Aluminum, Brick and Glass Workers International Union, Local 295G*, [1998] O.L.A.A. No. 291 (Springate).

¶ 33 The Union does not dispute the Company's characterization of the grievor's misconduct on November 15, 2005, and specifically, that the grievor was intoxicated at work that day. It further accepts the Company's assertion that this gave rise to serious safety issues in the workplace.

¶ 34 The Union argues, however, that the Company has an obligation under the provisions of the *Human Rights Code* to accommodate the grievor to the point of undue hardship, and that it failed to comply with such duty. It is on this basis alone that the Union submits that the grievor should be reinstated.

¶ 35 The Union does not suggest that the evidence establishes that the grievor suffers from a "handicap" within the meaning of the *Code*, and that the duty to accommodate arises from this. The Union expressly acknowledges that there is no evidence before me upon which I can determine that the grievor suffers from alcoholism or that he is receiving treatment for alcoholism. Rather, the Union submits as follows: "We don't know if there is a disability. Nobody took the initiative to find out. There is something there that needs to be addressed." It is on this basis that the Union argues that the grievor should be "accommodated" and reinstated in his employment with restrictions so that the parties can ascertain "if there is a disability there."

¶ 36 The Union relies upon the parties' 2003 settlement, reinstating the grievor into the workplace after an alcohol related incident. While the Union takes the position that the sunset clause of the collective agreement precluded the Company from relying upon such incident as part of a disciplinary record, its representative agrees that such earlier circumstances are properly considered in assessing whether the Company has complied with its statutory duty to accommodate the grievor.

¶ 37 The Union submits that the November 2005 incident giving rise to discharge represents the grievor's first relapse after maintaining sobriety for over two years. It suggests that there is no evidence before me that the Company sought to determine if the grievor suffered from a disability in November 2005, or whether he was undergoing treatment of any sort. The evidence before me, entered by way of stipulation by the parties, establishes only that the grievor has "sought" treatment of an unspecified nature since his November 2005 discharge. The Union's representative acknowledges that the Union did not call evidence elaborating upon this, noting that "everything that happened with the grievor is post-discharge," and that the Union did not feel it appropriate in this specific case to "pursue post-discharge evidence." In these circumstances, the Union argues that the Company has failed to accommodate the grievor. It submits that the Company has incurred no cost and has not reorganized the workforce, and that accommodation to the point of undue hardship has thus not been established. The Union refers to article 15.09 of the parties' collective agreement which provides for the formation of a joint Accommodation Committee "to discuss the possibility of the accommodation of employees with disabilities in the workplace ..." suggesting that the Company has not met its obligation to accommodate the grievor here. It also relies upon the decision in *Re Slocan Group and Pulp, Paper and Woodworkers of Canada, Local 18* (2001), 97 L.A.C. (4th) 387 (Taylor) in support of such position.

¶ 38 The Union further argues, subject to the Company's objection, that the grievor was not given the opportunity to access the Employee Assistance Program upon discharge. The Union asserts that the grievor should have the chance to participate in programs such as Alcoholics Anonymous without the need for medical evidence, and that the Company must recognize that when an employee "is in trouble," there are "programs" which they must be given the opportunity to attend.

¶ 39 In conclusion, the Union asks that I uphold the grievance and reinstate the grievor with restrictions "so that if there is a disability, it can be dealt with properly."

¶ 40 The Company responded to the Union's position, emphasizing that there is in its view no evidence that would permit me to conclude that the grievor suffers from a disability. Counsel submits as well that there is no obligation on the Company to presume that the grievor was disabled, and that it would not be appropriate to reinstate the grievor simply on the basis of speculation so as to permit the parties to "figure it out." The Company argues that the grievor has had ample opportunity to address an alleged disability up to and including the time of these proceedings and has failed to do so. Counsel points out that the grievor did not testify in these proceedings, and that the Company's evidence is undisputed that it has never been advised that the grievor suffers from alcoholism.

¶ 41 According to the Company, the evidence before me establishes only that the grievor was under the influence of alcohol at work once in 2003 and then again in November 2005. After he was reinstated on the first occasion, the evidence demonstrates that the Company was aware that he met with a counsellor on specific dates. The parties also stipulated in these proceedings, without prejudice to the Company's position that post-discharge evidence is not relevant, that since his November 2005 discharge, the grievor "sought treatment" of an unspecified nature. This by itself does not justify a finding that the grievor is an alcoholic, in the Company's submission, or that the Company was under a statutory obligation to accommodate him. Counsel suggests that in the absence of evidence establishing a condition of alcoholism, one cannot presume that two episodes of excessive drinking are a manifestation of such disease.

¶ 42 In the alternative, the Company argues that even if I am prepared to find that the grievor suffers from a disability here on the basis of what it asserts to be the Union's speculation, that it does not follow that the grievor's misconduct in November 2005 is excusable on this basis. In the absence of any evidence regarding the alleged role of alcoholism in the grievor's behaviour, he remains accountable for his actions on the day in issue in the Company's submission. Counsel refers to the decision in *Re City of St. Catharines and CUPE, Local 150*, [2001] O.L.A.A. No. 744 (Rose) in this regard.

¶ 43 Again in the alternative, the Company suggests that even if I conclude that the grievor is an alcoholic and that his conduct on November 15, 2005 is not properly viewed as culpable, there is no basis upon which I can properly order reinstatement into an admittedly hazardous workplace where there is no evidence before me of treatment or prognosis.

¶ 44 Finally, in the further alternative, the Company suggests that even if I find that the grievor suffers from a disability which the Company was obliged to accommodate to the point of undue hardship, the evidence establishes that the Company has already fulfilled any such duty. The Company relies upon the July 2003 settlement reached between the parties. Counsel was clear that although this did not form part of a disciplinary record relied upon by the Company in November 2005 given the contractual sunset clause, it is properly relied upon in assessing the efforts made to assist the grievor to date, and in addressing the grievor's understanding of the seriousness of this issue and of the Company's willingness to assist where appropriate. In the Company's submission, it has already fulfilled any duty it may have to accommodate the grievor, bearing in mind the dangerous nature of the workplace in which employees must be able to safety function. Counsel expressly disputes the Union's assertion that the grievor was unable to access assistance through the EAP, suggesting that only evidence regarding such program establishes otherwise.

¶ 45 In the absence of any evidence of treatment received and a positive prognosis, Company Counsel argues that it would constitute undue hardship to order the Company to take further steps to accommodate the grievor in the circumstances before me. He refers to the following authorities: *Re Alcan Rolled Products Company and USWA Loc. 343* (1996), 56 L.A.C. (4th) 187 (Gray); and *Re General Electric Canada Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 524*, [2004] O.L.A.A. No. 348 (MacDowell).

THE DECISION

¶ 46 The grievor's employment was terminated effective November 16, 2005 for "reporting for work or working under the influence" of alcohol contrary to Hamilton Plant Rule #9. The Union concedes that the grievor contravened such rule.

¶ 47 The Company's evidence establishes that it has a zero tolerance policy with respect to intoxication in the workplace which is posted in the workplace, and there is no suggestion that the grievor was unaware of the Company's position in this respect.

¶ 48 Similarly, the evidence before me is clear that the Company offers an Employee Assistance Program which provides support to individuals experiencing a variety of problems including those related to substance abuse. The EAP is referenced in the parties' collective agreement, and there have been information sessions provided both in the plant and at Union meetings. While the Union suggested in argument that the grievor was unable to access assistance through the program upon discharge, there is no evidence before me which supports such assertion.

¶ 49 There is no dispute that the workplace in which the grievor performed his duties as a Melter is hazardous. The evidence is clear that it is a "fast paced" work environment, with congested aisles, heavy machinery, pedestrian and forklift traffic, and pots holding 15,000 pounds of molten aluminum shipped at a temperature of approximately 1600

degrees Fahrenheit. Mr. Baillie's uncontested testimony established that the risk of serious burns is a real one, and that both he and the grievor have suffered such injuries.

¶ 50 Given the nature of the workplace, the Union accepts the Company's assertion that the grievor's intoxicated state on November 15, 2005 gave rise to significant safety concerns. The evidence is clear that the grievor left a ladle unattended, and that the molten aluminum would have overflowed but for Mr. Baillie's intervention in sealing the pot. Mr. Baillie addressed this with the grievor on November 15, and the Union does not dispute that this posed a dangerous situation. While Mr. Baillie acknowledged in cross-examination that there was nobody in the area at the time, the Union does not seek to diminish the seriousness of the grievor's actions on this basis, but accepts that they nonetheless potentially compromised safety. The evidence before me further establishes that information regarding burn hazards in the plant and the proper procedure for sealing pots before leaving them unattended was reviewed with the grievor approximately one month prior to his discharge.

¶ 51 During these proceedings, Company Counsel suggested that the grievor committed other safety infractions as well on the day in question. He asked me to conclude that the grievor drove a forklift in the plant under the influence of alcohol, that he left the forklift without engaging the hand brake, and that he failed to have a cone on a properly placed regulator while the ladle was being filled with molten aluminum. While the Company's undisputed evidence establishes that the grievor did conduct himself accordingly, I note that there is no evidence that these additional concerns were raised by Mr. Baillie on November 15 or by the Company at any time prior to these proceedings.

¶ 52 The Company asks me to find, based on the undisputed evidence before me, that it has established just cause for the grievor's discharge. I have no difficulty in accepting, and the Union in no way disputes, that the grievor engaged in serious misconduct in working in an intoxicated state on November 15, and that in doing so, he risked his own safety and potentially the safety of others in the plant. Leaving aside for the moment the Union's argument that the provisions of the *Human Rights Code* apply in the present circumstances, there can be no doubt that discipline is warranted, and the Union does not suggest otherwise.

¶ 53 The evidence further establishes that the Company considered the grievor's disciplinary record within the preceding twelve months in accordance with the sunset clause, and that this consisted of a one day suspension served in December 2004. The Union accepts that such record was properly considered in light of the contractual language.

¶ 54 The grievor did not testify before me, and I heard no evidence therefore regarding the circumstances surrounding his intoxicated state in the workplace on November 15, or with respect to the impact of discharge. I note as well, and will further address below, that the Union does not assert here that the grievor suffers from an illness, alcoholism, and that this is properly considered as a mitigating factor here. I have

considered the grievor's significant service with the Company, and the fact that he did not in any way attempt to trivialize the Company's concerns in these proceedings.

¶ 55 In all of the circumstances, however, leaving aside at this juncture the Union's position that the Company has failed to comply with the provisions of the *Human Rights Code*, I am of the view that the Company has established just cause for discharge. Working in an intoxicated state can only be regarded as extremely serious in the hazardous work environment in issue, and the Union does not attempt to suggest otherwise. When such misconduct is viewed in light of the grievor's disciplinary record, I accept that discharge was warranted. While I have considered the grievor's lengthy service and the fact that he implicitly accepted the seriousness of the situation insofar as he in no way sought to minimize the Company's concerns in these proceedings, in the circumstances before me, this is not sufficient to lead me to exercise my discretion to vary the penalty of discharge.

¶ 56 While the Union did not directly address the Company's zero tolerance policy with respect to alcohol in light of the *Human Rights Code*, it argues that the Company in the present circumstances failed to comply with its statutory duty to accommodate the grievor to the point of undue hardship. It is on this basis that the Union asserts that he should be reinstated with restrictions here.

¶ 57 Although the relevant statutory language was not expressly referenced in these proceedings, there is no dispute as to the statutory context in which the Union advances its position. Certain key provisions of the legislation are set out as follows:

- s. 5(1) Employment - Every person has a right to equal treatment with respect to employment without discrimination because of handicap.
- s. 9 Infringement prohibited - No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
- s. 10(1) Definitions - In Part I and in this Part,

...

“because of handicap” means for the reason that the person has or has had, or is believed to have or have had,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness

...

- s. 11(1) Constructive discrimination - A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances ...

s. 11(2) Idem - The Commission, the board of inquiry 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.

...

s. 17(1) Handicap - A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) Accommodation - The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person 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.

¶ 58 It is important to clearly articulate the Union's position here. Unlike a number of the cases referred to in argument, the Union does not suggest that the evidence before me establishes that the grievor suffers from alcoholism, a "handicap" within the meaning of the *Code*, and that the statutory duty to accommodate him to the point of undue hardship arises on such basis.

¶ 59 What the Union candidly asserts in the circumstances before me is that it is possible that the grievor may suffer from alcoholism. The Union argues on that basis that the grievor should be reinstated in order that the parties may determine if this is so, and to permit the grievor access to programs which may be of assistance to him. No submissions were made as to what would transpire in this scenario if it were ultimately determined after such reinstatement that the grievor does not suffer from alcoholism.

¶ 60 The Company does not contest that alcoholism may properly be considered a "handicap" within the meaning of the *Code*, but argues that the evidence does not establish that the grievor is so afflicted.

¶ 61 The parties' positions must be considered in the context of the evidence. The grievor's employment was terminated in 2003 after he was intoxicated and asleep in the workplace with a thermos containing wine. A grievance was filed and the parties entered into terms of settlement which involved the grievor's return to work, and attendance at a "treatment program." Mr. Armstrong acknowledged that the Company was made aware

that the grievor did in fact see a counsellor at the “Hamilton Wentworth Regional Drug and Alcohol Department” and that the Company felt that it “made sense” for him to have some “rehab to get his life back again,” and “to help with his problem of drinking.” He was clear, and his evidence was undisputed in this regard, that the grievor has never advised the Company that he is an alcoholic, and the Company has received no medical report or indeed any report suggesting a diagnosis of alcoholism. There is no evidence before me as to the nature or duration of the 2003 “treatment,” or with respect to prognosis for the future. Similarly I have no information as to what transpired between the 2003 settlement and November 2005, other than the indication of Company witnesses that they were unaware of any intervening incidents involving the grievor and alcohol.

¶ 62 The evidence further establishes that the grievor was intoxicated in the workplace on November 15, 2005. I accept Mr. Arcuri’s evidence that he asked Mr. Clark if the parties could “work something out” for the grievor, advising that the grievor would be “going into a program.” Subject to the Company’s position that post-discharge evidence is not properly considered here, the evidence as stipulated by the parties, establishes only that the grievor “has sought treatment” since discharge. There is no evidence before me regarding the nature of such “treatment,” where such treatment has been provided, the duration of such treatment, the nature of the condition for which “treatment” has been sought, or of any prognosis.

¶ 63 I accept the positions of both parties here that the evidence before me does not establish that the grievor is an alcoholic or that he is receiving treatment for such condition.

¶ 64 The Union’s position here, however, is that the grievor may suffer from alcoholism, that the Company in all of the circumstances should have ascertained if he is indeed an alcoholic and that he should be reinstated to allow for such determination. The Union suggests that the Company has failed in its duty to accommodate the grievor.

¶ 65 The Company argues that it was under no obligation to presume that the grievor suffers from alcoholism after he was found intoxicated in the workplace for the second time in two years. Counsel asserts that the grievor has had ample opportunity to adduce evidence that he suffers from alcoholism if he is indeed so afflicted, but that these proceedings have come to an end with “nothing but speculation.” The Company notes that there has not been any suggestion by the grievor at any time that he is an alcoholic. The Company asserts that under the circumstances of this case, in the absence of evidence of “handicap” within the meaning of the *Human Rights Code*, it was under no statutory duty to accommodate to the point of undue hardship. In the Company’s submission, there is thus no evidentiary basis upon which I can properly order that it must accommodate the grievor and reinstate him.

¶ 66 After careful consideration of the parties’ submissions, I must accept the Company’s position and deny the grievance before me. I emphasize once again that this is not a case in which the sufficiency of evidence adduced to establish “handicap” as contemplated by the *Human Rights Code* is in issue. The Union’s position is that the

grievor may be an alcoholic, but as candidly acknowledged, “we don’t know” if this is so. Again, to be clear, the Union does not assert here that the grievor suffers from alcoholism and that the Company ought to have been aware of this in November 2005. The Union accepts that the evidence to date does not substantiate a claim of alcoholism, but argues that it was incumbent upon the Company to pursue such issue at the time. While I make no finding here with respect to the admissibility of post-discharge evidence in the present circumstances, I merely note that in the absence of any evidence clearly establishing that the grievor suffers from a condition properly regarded as a “handicap” within the meaning of the *Code*, I am unable to accept that reinstatement is justified in order to ascertain whether or not the grievor is so afflicted. With respect, I cannot find that the Company bears a statutory obligation to accommodate the grievor in these circumstances, where there is no suggestion that the claim of handicap is anything but speculative at this point. As I am not satisfied based on the evidence before me that the Company was in fact subject to a statutory duty to accommodate, it is not necessary to address the parties’ arguments relating to the sufficiency of any steps taken to date.

¶ 67 In short, I am satisfied that the Company has established on all of the evidence that the grievor was discharged for just cause, and in the absence of evidence of compelling mitigating factors, I am not convinced that there is any basis upon which my discretion to reduce such penalty would be properly exercised. I have considered the Union’s position that the Company was subject to a statutory duty to accommodate the grievor here and that it has failed to comply with such obligation. I am unable to accept that the Company was subject to a duty to accommodate the grievor here in the absence of evidence of “handicap,” or that reinstatement should be ordered in light of the Union’s acknowledgement that the evidence does not establish that the grievor suffers from a “handicap” within the meaning of the *Human Rights Code*.

¶ 68 For all of the above reasons, the grievor’s discharge is upheld and the grievance before me is denied.