Date: 20050520

File(s): 166-02-32401

Citation: 2005 PSLRB 46

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

RONALD CASEY

Grievor

and

TREASURY BOARD
(Public Works and Government Services Canada)

Employer

Indexed as
Casey v. Treasury Board (Public Works and Government Services Canada)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Guy Giguère, adjudicator

For the Grievor(s): David Landry, Public Service Alliance of Canada

For the Employer: Richard E. Fader, Counsel

Heard at Halifax, Nova Scotia,
April 6 to 8 and September 21 to 24, 2004.

Grievance referred to adjudication

[1] On October 5, 2001, Ronald Casey, a custodian at Public Works and Government Services Canada (PWGSC), grieved his termination of employment. Mr. Casey explained in his grievance that his termination was unjust and without cause and that he did not participate in any way in the employer's administrative review that led to his termination. Mr. Casey asked, as a corrective action, to be reinstated and deployed to a suitable position within the PWGSC, as previously agreed.

[2] The final grievance hearing was held on February 27, 2003, as the bargaining agent representative Robert Kipper wanted to do some research on this case and establish a demonstrative period of time to show that the grievor had rehabilitated.

[3] On April 25, 2003, Melvern B. Skinner, Assistant Deputy Minister, Human Resources, issued a response at the final level to Mr. Casey's grievance. He explained that he had considered the grievor's representative's arguments made on February 27, 2003. He denied the grievance, as he considered the termination to have been made with just cause and that it was the right decision based on the information on hand.

[4] On June 6, 2003, the grievance was referred to adjudication by the Public Service Alliance of Canada (PSAC). On October 20, 2003, as PSAC had requested, this case was put in abeyance pending a decision by the Canadian Human Rights Commission (CHRC) with respect to a direction under section 41 of the *Canadian Human Rights Act (CHRA).*

[5] Paragraph 41(1)(b) of the *CHRA* reads as follows:

> *...the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> *(...) (b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act...*

[6] On January 7, 2004, the PSAC wrote to the Board to indicate that the CHRC had decided that Mr. Casey ought to exhaust the grievance process, pursuant to paragraph 41(1)(b) of the *CHRA,* and, therefore, requested that the matter be scheduled as soon as possible.

[7] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, I continue to be seized with this reference to adjudication, which must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*").

Summary of evidence

[8] Mr. Casey began working with the federal government in 1988 for the Department of Supplies and Services, as it was then known. He was first employed as a warehouse store man, and four months later he was transferred to a position of equipment operator. In 1992, he was appointed to the position of custodian, GS-STS-04, at the Dartmouth Production Centre.

[9] Rick Grimes, Regional Manager, responsible for the Production Centre, explained that when he started with Mr. Casey, in September 1995, he had been told that Mr. Casey was reliable and a very good worker. However, he started to notice early on that there were some problems with him. He found Mr. Casey asleep in the shredding room, the material area for which he was responsible was disorganized and he would frequently take sick leave on Thursdays and Fridays. Mr. Grimes talked to Mr. Casey about these problems in October 1995.

[10] Mr. Grimes explained that prior to working with the federal government, he had worked in a halfway house for drug addiction and alcohol abuse, where he did some counselling with the residents to help them deal with their problems. After talking with Mr. Casey, he referred him to Judy Manchester, of the Employee Assistance Program (EAP).

[11] In mid-November 1995, Mr. Casey had a serious car accident and was on sick leave until January 1996. Mr. Casey fell asleep and drove into a lamp-post (Exhibit G-12, p. 3). Mr. Casey was drunk at the time, but was not charged. He was in a coma for several days. He was away from the workplace for several months and during that time, he consumed drugs. After returning to work, Mr. Casey had frequent absences without notice. In February 1996, he openly admitted to Mr. Grimes that he had an alcohol problem. Mr. Grimes referred him again to the EAP.

[12] On March 4, 1996, Mr. Grimes was in his office when he received a phone call. At first, he did not recognize that it was Mr. Casey. Mr. Casey had been absent for a period of time without notifying the employer. Mr. Grimes told him that he might have to suspend him. Mr. Casey replied: "You might not have to do so". Mr. Grimes asked him why and he replied, "You will know by the end of the day."

[13] Later that afternoon, Mr. Grimes received a call from Mr. Casey's mother, informing him that the police had come to arrest her son. Mr. Casey came out with a gun and the police had to disable him; the gun was not loaded. Mr. Grimes believes that these events appeared in the newspaper.

[14] Mr. Casey did not come back to work for a while and he was off for 8 to 10 days, but there is no indication of this on his record of leave (Exhibit E-4). Mr. Grimes explained that Mr. Casey was not charged for his absences. This happened for many years, as Mr. Casey did not have sufficient leave credits to cover his many absences and the employer tried to accommodate him by not charging his absences.

[15] On March 12, 1996, Mr. Grimes received a call, informing him that Mr. Casey would be at a treatment centre in Kentville. Again, the employer accommodated Mr. Casey by having Mr. Brown, the shift chief, drive him to the treatment centre and no leave was charged against Mr. Casey for this absence. After the first week, Mr. Casey checked himself out of the program. Mr. Casey returned to work in better shape but then was off again. On April 2, 1996, he called Mr. Grimes and told him he wanted to come back to work. Mr. Grimes replied that if he was sober (drugs and alcohol), he could come back to work. Mr. Grimes informed Mr. Casey that he would be in Ottawa the following week and that he would have to report to Mike MacIsaac. Mr. Casey did not want to report to Mr. MacIsaac and he asked to take annual leave. Mr. Grimes authorized this and told Mr. Casey that he would have to be sober upon his return to work.

[16] On May 1, 1996, Mr. Grimes received a call from Mr. Casey, asking for help to get into a "detox" program. Mr. Grimes called several people to help Mr. Casey, including Mike Lavery, the union representative, who agreed to try to help Mr. Casey.

[17] On May 5, 1996, Mr. Grimes received another call from Mr. Casey, who said he was fine but was in the hospital. Mr. Casey indicated that he wanted to come

back to work. Mr. Grimes replied that he should seek advice from the program counsellor and not attempt a return to work on his own.

[18] A few days later, Mr. Casey came to see Mr. Grimes in his office. Mr. Grimes told him that he looked too weak to come back to work and that he should see his doctor. Mr. Casey replied that the doctor would just say, "When do you want to go back to work?". Mr. Grimes insisted that he go see his doctor and he replied, "He will do what I ask him". Mr. Casey also told Mr. Grimes that, "I know that if I screw up another time, I am gone right"?. Mr. Grimes replied, "You're pretty close".

[19] Mr. Grimes telephoned the Drug Dependency Centre and made an appointment for Mr. Casey for the following Friday. He made an arrangement that if Mr. Casey did not show up, the Centre would call Mr. Grimes. The Centre also informed him that they would evaluate Mr. Casey in order to enroll him in the Kentville rehabilitation program. Mr. Casey asked Mr. Grimes if the employer would help him, covering his salary while he was in rehabilitation. Mr. Grimes replied that if he went to the interview for the rehabilitation program, he would discuss it with him. Mr. Grimes explained at the hearing that often, Mr. Casey would miss these appointments and there was an understanding between them that Mr. Grimes would wait for his attendance sheet before he would make such a commitment.

[20] Mr. Grimes also explained that there were similar arrangements made whenever Mr. Casey engaged in some form of therapy for his addiction problem. The employer would pay for books and arrange for transportation and, if Mr. Casey did not have sick leave credits, he would not be charged for his absence.

[21] On May 12, 1996, Bob Laperrière, a counsellor in the rehabilitation program, called Mr. Grimes to explain that Mr. Casey wanted to go back to work. Mr. Grimes replied, "Every time that Ron has a meal and a rest, he wants to take over his therapy but that has failed. What he needs is full-time supervision".

[22] On May 13, 1996, Mr. Grimes received a call from Mr. Casey's mother, who told him that Mr. Casey was on drugs and had been acting foolishly again. She asked Mr. Grimes not to give her son any money, as it would go toward drugs. She also told him that she had called the police and that they would pick up Mr. Casey that afternoon to take him to the Nova Scotia Hospital for treatment of mental illness.

[23] At 12:30 p.m. that day, Mr. Casey telephoned Mr. Grimes, asking him if there was any way he could release his paycheque early, as he really needed to pay some bills. Mr. Grimes told Mr. Casey that he could hear in his voice that he was on drugs or alcohol and he was not to come to the workplace until the following day.

[24] On May 15, 1996, Mr. Grimes got a call from Mr. Casey, who explained that he was checking himself into the Kentville rehabilitation program that same day. Mr. Grimes replied that he had thought that Mr. Casey was being admitted as a patient at the Nova Scotia Hospital. Mr. Casey replied that he was not able to. Mr. Grimes asked him to notify him when he entered the Kentville program so as to let him know who would be his contact.

[25] Mr. Grimes explained at the hearing that while Mr. Casey was in the hospital, the employer would pay his salary, but if Mr. Casey checked himself out without a doctor's approval, he would then be placed on annual leave or leave without pay.

[26] Mr. Casey asked for some money to pay his bills, but Mr. Grimes replied that he would check with the Compensation Section. Later that afternoon, Mr. Casey called back and said that he did not have any money or transportation to get to Kentville. Mr. Casey asked if he could take a cab and charge it to the Department. Mr. Grimes agreed to a charge to the Department and that Mr. Casey's cheque could be recovered, the following day, at the Compensation Section.

[27] On May 21, 1996, Mr. Casey's mother phoned Mr. Grimes and explained that her son had been picked up by the police for being drunk and disorderly. This incident occurred on Friday, May 17, 1996, and he was held in jail until the following Monday, May 20, 1996. He was arrested again on Tuesday, May 21, 1996, because he had failed to respect one of the conditions of his release, which was to attend his treatment at Kentville. She informed Mr. Grimes that Mr. Casey would be in court again on Wednesday, May 22, 1996, and that she would call back in to let him know what the result was.

[28] Mr. Grimes explained at the hearing that at the time, Mr. Casey was quite upset because several people were after him. Mr. Casey owed them money for drugs. At one point, Mr. Grimes received a phone call at the office from somebody asking for Mr. Casey. Mr. Grimes replied that Mr. Casey was not there. The caller's message to Mr. Casey was that if he found him, he was a dead man. Mr. Grimes

reported this to security and a security guard was hired to guard the front door of the workplace.

[29] On May 21, 1996, a driver from Yellow Cab called Mr. Grimes and explained that he had driven Mr. Casey to Sackville the previous day, and Mr. Casey had left him his ID as guarantee for payment. Mr. Casey was supposed to meet the driver the next morning at the office and give him a taxi chit but he did not show up. Mr. Grimes told the driver that PWGSC would not pay him because it was a personal ride. Later that afternoon, Mrs. Casey phoned Mr. Grimes to tell him that her son had received a 60-day sentence for the earlier incident.

[30] On May 26, 1996, Mr. Casey phoned Mr. Grimes from jail, inquiring as to his situation at work after his incarceration. Mr. Grimes replied that he would not pursue this for now but if one more incident occurred, he would recommend his dismissal. Mr. Casey was relieved and said, "Good, I am clean and getting back into shape. They will keep me for about 40 days and then I will ask if I can still go to Kentville". Mr. Casey asked if, in the meantime, he could be put on annual leave or leave without pay. Mr. Grimes confirmed that he would authorize leave without pay and he would inform the Labour Relations Section of these events.

[31] On July 2, 1996, Mr. Casey came under the medical care of Dr. Ahmed (Exhibit G-15). She saw him several times in July and in the following months. Her diagnosis was Substance Use Disorder. Mr. Casey explained in his testimony that Dr. Ahmed, a general practitioner, was his "family physician". His mother was a patient of Dr. Ahmed and had referred him to her. Dr. Ahmed advised him to consult with Dr. Janet Campbell, a general practitioner, as she specialized in addiction, and also recommended that he get acupuncture treatment.

[32] By the month of August 1996, Mr. Casey had returned to work. Mr. Grimes had adjusted Mr. Casey's shift from 10:00 a.m. to 6:00 p.m. to accommodate his treatment. Mr. Casey was able to exercise in the morning and go for treatment in the afternoon, for an hour or an hour and a half. The employer assumed the taxi charges for Mr. Casey to get to and from the treatment centre.

[33] On August 13, 1996, Mr. Casey went to speak to Mr. Grimes in his office. Mr. Casey felt that he did not need the treatments anymore and was not getting anything out of them. Mr. Grimes replied that he was just feeling overconfident

and that he had made progress only when in jail and since he had been back, he had been regressing. Mr. Grimes advised Mr. Casey that he should follow the road to recovery, which meant that he had to drop his cocky attitude and had to participate in his group and to listen to his counsellor with an open mind. Mr. Casey was very angry. Mr. Grimes suggested to him that he go see Judy Manchester of the EAP.

[34] On August 16, 1996, Mr. Casey came to see Mr. Grimes once again and indicated that he was frustrated with the program; he did not feel any benefit and he wanted to come back to work on a full-time basis. Mr. Grimes was against this decision and told him to stay in the program.

[35] On September 12, 1996, the police called Mr. Grimes to report that Mr. Casey had been arrested for driving without a license. Mr. Casey was in jail and he would be unable to come to work. At the time, Mr. Casey was again not showing up for work and not calling in.

[36] On September 13, 1996, Mrs. Casey called Mr. Grimes to tell him that her son was completely drunk and had tried to kill himself.

[37] On September 19, 1996, Mr. Casey met with Mr. Grimes. He was very apologetic and wanted another chance. Mr. Grimes told him that he was out of chances and that he would receive a disciplinary note with a suspension.

[38] On September 20, 1996, Mr. Casey talked to Mr. Grimes again and asked him for a chance to prove himself. The Production Centre was going to operate during the weekend and he asked to work on the Saturday and Sunday. At first, Mr. Grimes said that he did not want him to work weekends but eventually agreed to give him the opportunity to prove that he had changed. However, Mr. Casey did not show up and Mr. Grimes had to get someone else to replace him.

[39] On Monday, September 23, 1996, Mr. Casey called and left a message at the Production Centre, saying he would not be in. Later in the afternoon, he called Mr. Grimes and admitted that he had misbehaved again. Mr. Casey explained that he had requested that his doctor get him into the CORE program and that he would stay there until he was admitted into the Kentville program. Mr. Grimes told him that he could do this but that his continued absences were becoming a problem.

[40] On September 26, 1996, Mr. Casey failed to show up at a meeting with Mr. Grimes and his union representative. Mr. Casey later called and left a message for Mr. Grimes. Mr. Grimes explained that Mr. Casey would regularly call late, sometimes at 2:00 a.m., to leave messages for him.

[41] A few days later, Mr. Casey called and asked Mr. Grimes if he could get a "package". The federal government was cutting back on a number of positions at the time and the affected employees could receive a severance "package". Mr. Grimes advised Mr. Casey against this as it was not in his best interest to resign from his position, but referred him to the Personnel Section.

[42] Mr. Casey called back in the afternoon, wanting his paycheque. Mr. Grimes told him that he had only worked a day or so in the last two weeks. Mr. Casey asked about his suspension and Mr. Grimes replied that he would have to serve it. Mr. Casey called back in the afternoon and asked again if he could be paid if he went to the CORE program. Mr. Grimes said no because Mr. Casey had made a commitment to go to a rehabilitation program several times in the past but had not followed through.

[43] On September 30, 1996, Mr. Casey called again to ask for a paycheque. Mr. Grimes answered that he had been overpaid in the last pay period and told him: "Ron, the policy is no work, no pay. You have not done your part and from now on, this is how it is going to be".

[44] Mr. Grimes explained at the hearing that he had lost one of his notebooks during a move, which covered the period from mid-October 1996 to January 1998. He testified that a number of issues had occurred during that period; "Ron would come back, and then slip. He would be surly with his colleagues, goading them, threatening them. He did not perform his duties well. He did not keep inventory and supplies at a proper level. Other people would have to pull in for the slack. He would take taxis and charge them to the Department".

[45] On December 23, 1997, a meeting between Messrs. Casey and Grimes was held to discuss the use of taxi vouchers by Mr. Casey (Exhibit E-6). Also present at the meeting were Mike Lavery, a union representative, and Shawn Brown, a supervisor. After reviewing Mr. Casey's arguments and the taxi usage log, Mr. Grimes determined that Mr. Casey had misused the taxi vouchers for his own benefit. As a result, Mr. Casey had to return the unused taxi vouchers and

surrender the Mastercard provided to him for Production Centre purchases. Mr. Casey was to pay back the employer an amount of $154.65 for the inappropriate use of taxi vouchers. A written reprimand (Exhibit E-6) was placed on Mr. Casey's personal file. Mr. Casey was warned that any further misconduct would result in more severe disciplinary action, up to and including termination of employment.

[46] On January 21, 1998, Mr. Casey asked to meet Mr. Grimes to discuss his upcoming performance evaluation. Mr. Casey wanted to know if the incident with the taxi vouchers would affect his performance evaluation. Mr. Grimes answered that it would not, as it had already been dealt with by a disciplinary measure.

[47] Mr. Casey asked where he currently stood, in terms of his performance evaluation. Mr. Grimes responded, "Less than satisfactory". They argued back and forth and eventually Mr. Casey agreed that his performance was probably less than satisfactory. He asked Mr. Grimes if there was anything he could do to improve this. Mr. Grimes answered that if he did a good job and stayed out of trouble until the end of May, he would give him an entirely satisfactory rating. There would be no second chance and there could be no incidents.

[48] Mr. Casey then inquired about his classification. Mr. Grimes answered that this was a separate issue but that he had some concerns about his ability to supervise, especially since there were incidents where he had showed aggression, belligerence, hostility and an attitude problem. Mr. Grimes told him that he would need to work on these problems before he would be considered for a supervisor's position. Mr. Grimes recalled a time where Mr. Casey was busy downloading information on his computer and an employee had asked for an envelope. Mr. Casey did not do it immediately and the employee complained. Mr. Casey then started threatening "to take it out" on this employee. Mr. Grimes explained to Mr. Casey how he should have handled this situation without resorting to threats.

[49] In cross-examination, Mr. Grimes indicated that he was not present when this threat was made and Mr. Casey was not disciplined. Mr. Grimes explained that when he read the description of this incident to Mr. Casey, he did not object.

[50] On March 26, 1998, Mr. Grimes met with Mr. Casey, as he had been charged with cocaine possession. Mr. Grimes advised him that he could no longer drive the

departmental vehicle. Mr. Grimes explained at the hearing that this meeting was not disciplinary.

[51] They met again on March 27 and 28, 1998. Mr. Casey told Mr. Grimes that the charges against him would probably be dismissed, as it was a misunderstanding. He indicated that he was taking medication to control his craving for cocaine. He enquired if he might take some leave to receive medical supervision. Mr. Grimes replied that he would support any leave to correct this problem. Mr. Casey offered to be tested for drug consumption. If he was found to have taken drugs, he would leave the workplace and go on leave without pay. Mr. Grimes decided not to take him up on this but instead offered to stop taking notes, to "close the book".

[52] In cross-examination, Mr. Casey's performance evaluation was entered as an exhibit (Exhibit G-1). It was signed by Mr. Casey's immediate supervisors, Shawn Brown and Ian Gosse, and it covered the period from April 1, 1997, to March 30, 1998. Mr. Grimes explained that this document was prepared to support Mr. Casey and to encourage him. The deal made with Mr. Casey was that he had to work hard until May 1998 to get a fully satisfactory evaluation. Mr. Casey testified that afterwards, his immediate supervisors congratulated him on his performance report.

[53] In December 1998, Mr. Grimes decided to "reopen the book" and document Mr. Casey's performance, as there had been several incidents in the past few months where Mr. Casey demonstrated a lack of judgment. Mr. Casey treated contractors in an abusive manner; he was getting into arguments with colleagues and failed to report inventories two months in a row. Mr. Grimes had observed serious relapses and advised Mr. Casey of his concerns. There were frequent absences and Mr. Casey had failed to show up at a conference on addiction in Fredericton, New Brunswick, where the Department had paid for his hotel room, conference fees and transportation, and even provided an advance for his expenses.

[54] On December 22, 1998, a meeting was held with Mr. Grimes, Mr. Casey, his union representative and a staff relations advisor. Mr. Casey's frequent absences from work and failure to notify his supervisor was discussed (Exhibit E-7). Mr. Grimes informed Mr. Casey that he would impose a one-day suspension as discipline.

[55] Lee Allen Bushell, a former colleague of Mr. Casey, explained that he received a summons from the employer but he would have preferred not to have to testify.

Mr. Bushell described an incident after work, where employees gathered at a bar (the Rodeo Lounge). Mr. Bushell's recollection was that the incident occurred around 1999. Mr. Bushell explained that he might have teased Mr. Casey about losing his house; they were not drunk at the time. Later, in the washroom, Mr. Casey wanted to fight with Mr. Bushell. The next day, Mr. Casey called Mr. Bushell at home and told him, "Next time, I will punch you when I see you again." Mr. Bushell proceeded to complain to the Royal Canadian Mounted Police (RCMP). After this incident, Mr. Bushell tried to avoid any contact with Mr. Casey. However, Mr. Casey later threatened him at the workplace. They were walking together in the Production Centre; Mr. Casey was upset and told him, "Don't worry, I'll get you yet".

[56] On January 18, 1999, Mr. Casey asked to see Mr. Grimes. He was an emotional wreck and was almost in tears. He told Mr. Grimes that he was entering the Kentville program on January 22, 1999, but he did not have any sick leave credits. He asked Mr. Grimes if the employer could advance him sick leave credits. Mr. Grimes said yes but only as long as he attended and that confirmation was given that he attended the program. If he did not show up, he would be considered on leave without pay. On January 20, 1999, Mr. Casey advised Mr. Grimes that he had an appointment with a doctor to get into the CORE program.

[57] On January 21, 1999, Mr. Grimes received a call from a manager of a Canadian Tire store. The manager explained that on January 16, 1998, Mr. Casey had used a government's purchase order to buy a Sony Play station and games. On January 18, 1999, he returned the Sony Play station and paid the store cash for the games. Mr. Casey returned to the store on January 21, 1999, with another purchase order and bought a VCR. Mr. Grimes advised the manager that these purchases had not been authorized and told the manager to refuse any future purchase orders from Mr. Casey.

[58] Mr. Casey did not show up for his shift that day or the following day and did not notify the employer of his absence. Mr. Grimes decided to suspend Mr. Casey. As Mr. Grimes had security concerns, he asked that the locks on the building be changed, that Mr. Casey's electronic access be cancelled and that the lock on the vault be changed since that was where the cheques were kept. Mr. Grimes also requested an audit for all of Mr. Casey's purchases made in the last six months. He

also asked that the Personnel Section prepare another assignment for Mr. Casey away from the Production Centre.

[59] On January 25, 1999, Mr. Casey called Mr. Grimes to request annual leave and to make arrangements to get into the CORE program. Mr. Grimes told Mr. Casey that he was facing a three-day suspension for his absences from work and for not advising anyone prior to them. Mr. Casey agreed that this was fair. Mr. Grimes asked him about the purchase orders at Canadian Tire. Mr. Casey expressed some surprise that Mr. Grimes would know about this. Mr. Casey asked him if he would be fired and Mr. Grimes responded that it was a definite possibility and there could also be criminal charges. Mr. Grimes advised him to get in touch with his union.

[60] Shortly after, Mr. Grimes received a call from Dr. Tahira S. Ahmed. Mr. Casey and his mother had seen her. She asked if there was anything Mr. Grimes could do since it was Mr. Casey's first offence. Mr. Grimes replied that it was far from his first offence. There was the inappropriate use of taxi vouchers in 1997. There was also the lost or stolen credit card in 1997 that had been issued to Mr. Casey. Mr. Grimes suspected some involvement by Mr. Casey and asked him to surrender his credit card. Mr. Casey had a poor record for the last three years and had violated his position of trust with Mr. Grimes.

[61] Mr. Casey called later to ask for four days of annual leave, which were granted. Mr. Casey also asked if Mr. Grimes could phone Dr. Ahmed and Judy Manchester, of the EAP, as he wanted to make sure he was not fired.

[62] Later, Mr. Grimes got a call from the Radio Shack store advising him that there had been a purchase order by Mr. Casey for a television/VCR combo valued at $600. Mr. Grimes testified that several invoices kept coming in for VCRs, televisions and electronics after the initial January 21, 1999 call from the Canadian Tire manager.

[63] On January 28, 1999, Mr. Grimes wrote Mr. Casey (Exhibit E-7). He indicated that, initially, the letter was to confirm the date of the one-day suspension that Mr. Casey faced for failing to notify his supervisor of his absence from work in November and December of 1998. However, in view of Mr. Casey's unauthorized expenditures by way of purchase orders, as he had informed him in the morning, Mr. Casey was suspended pending the outcome of an investigation.

[64] Dr. Ahmed, who testified as an expert witness at this hearing, explained that she had been seeing Mr. Casey since July 1996 (Exhibit G-15), at that time for substance abuse and some history of depression. However, in January of 1999, she diagnosed Mr. Casey with Attention Deficit Hyperactivity Disorder (ADHD) when he started to explain the cognitive impairments and other problems he had faced as a youth.

[65] Dr. Ahmed explained how an adult is diagnosed with ADHD. She stated that the inability to sequence information is the main problem: "You cannot diagnose ADHD until they explain that they had problems as a youth, in school, society and interpersonally". She felt at the time (Exhibit G-15, p. 3), that "since he had been in the CORE Program at the Nova Scotia Hospital and had not been without substance", the symptoms that he was describing more closely resembled ADHD. She administered a test that is used among ADHD specialists such as she is. This test takes seven hours or more to complete and it is not used by psychiatrists. Mr. Casey gave her a history that was unequivocal and she changed her diagnosis to primary ADHD and secondary substance abuse and mood disorder.

[66] Dr. Ahmed explained that those who suffer from ADHD and have not been treated as children are very likely to abuse some substance, whether it is coffee, cigarettes, alcohol or drugs. She testified that it is quite common for people who suffer from ADHD to get into problems with the law.

[67] Dr. Ahmed started to treat Mr. Casey for ADHD on February 8, 1999. She had prescribed an antidepressant in the past, but when he was diagnosed with ADHD, her first treatment was to prescribe a stimulant, and Mr. Casey received education about the disability and counselling toward behaviour modification.

[68] On February 18, 1999, a meeting was held and was attended by Mr. Casey, his union representative, Mr. Grimes and other employer representatives. Mr. Casey apologized; he said he had been doing this for a while. He was purchasing electronics with purchase orders to support his crack cocaine habit.

[69] Mr. Casey would purchase electronics with government purchase orders, sell them back and with that money, he would buy drugs. Initially, he would go back to the store when he had money and would pay them and recuperate the purchase orders. Eventually, things got out of hand. Mr. Casey was not sure how many of those purchases he had made.

[70] After this meeting, Mr. Grimes went to the Staff Relations Section, as he considered these severe breaches of trust on Mr. Casey's part and for security reasons, he wanted him out of the Production Centre. He asked staff relations if there were grounds for dismissal. He was advised that there were probably grounds but, under the circumstances, they could consider a "Last Chance Agreement".

[71] On March 12, 1999, Mr. Casey and PWGSC entered into a so-called "Last Chance Agreement" (Exhibit E-9). This agreement reads as follows:

> *The parties to this agreement, without prejudice to any position they may take in future cases involving similar or identical circumstances, hereby agree to the following binding settlement:*
>
> *1. Mr. Casey agrees to settle all outstanding invoices as a result of unauthorized purchases made in the amount of $2,417.80 in increments of $100.00 per pay until the debt is paid.*
>
> *2. A disciplinary measure of thirty (30) days suspension is to be served by Mr. Casey for misconduct. The suspension will be served when Mr. Casey returns to the workplace after his authorized sick leave without pay period.*
>
> *3. Mr. Casey and his union representative agree not to present a grievance with respect to his suspension and also agree to withdraw the grievance dated February 12, 1999.*
>
> *4. Mr. Casey and his union representative agree to a deployment to an acceptable position at a comparable group and level with no loss of salary or benefits.*
>
> *5. Mr. Casey agrees to undergo a rehabilitation treatment program in a recognized facility that specializes in substance abuse and will continue follow-up counseling as required by that rehabilitation facility.*
>
> *6. Mr. Casey must provide records to PWGSC demonstrating proof of attendance at a recognized substance abuse facility.*
>
> *7. Mr. Casey agrees to avail himself to [sic] the services provided by the Employee Assistance Program.*
>
> *8. These provisions will be implemented under the principle of a "Last Chance Agreement". This "Last Chance Agreement" constitutes the final attempt by management to accommodate Mr. Casey in the workplace provided that the conditions set forth in this Memorandum of Understanding are stringently adhered to.*

> *9. Any violation or failure to meet any of the conditions set forth above may result in immediate termination of employment action by the Department.*
>
> *This agreement is entered into with the proviso that it will receive no publicity, nor will it be considered as setting a precedent.*

[72] In a letter (Exhibit E-8) of the same date to Mr. Casey, Norm Boudreau, Regional Director, Atlantic Government Telecommunications and Informatics Systems, explained that the period between January 28 and February 19, 1999, when Mr. Casey had been suspended pending the outcome of the investigation, would be considered time served of 17 days. The balance of the suspension, 13 days, would be served when Mr. Casey returned to work after the conclusion of his current sick leave without pay period.

[73] Mr. Grimes testified that what had been agreed to at the meeting, as found at clause 5 of the "Last Chance Agreement", was that Mr. Casey would enter and complete a 28-day program similar to the one in Kentville. It was also agreed that when he had finished this program, he would do a follow-up at a program similar to the CORE rehabilitation program. Mr. Casey was asked to stay away from the workplace. His contact would be the EAP personnel, where he would provide proof of attendance at different programs. Mr. Grimes would retain responsibility for Mr. Casey until he was deployed to another position.

[74] Mr. Casey explained at the hearing that he never returned to work after that. He had agreed to be deployed to another position but meanwhile he was getting some treatment for his addiction. He applied for disability insurance from Sun Life, and he attended different self-help groups and Alcoholic Anonymous (AA) sessions. He continued to keep in touch or meet with Judy Manchester, of the EAP (Exhibit G-22), initially on a weekly basis until the end of September 1999, then on a bi-weekly basis until January 2000. He attended daily programs where he would get his attendance sheet signed (Exhibit G-24). He provided these to Mrs. Manchester or others when necessary. He consulted, as well, with many physicians and psychologists during this period.

[75] On April 15, 1999, Dr. Ahmed wrote a letter to Rose Toteda, a claims specialist at Sun Life (Exhibit E-25). She explained that she had started seeing Mr. Casey on a weekly basis starting on January 21, 1999, in relation to the diagnosis of

substance dependency and depressed mood. She stated in her letter that alcohol abuse and dependency had been his major problem. Mr. Casey was prescribed Revia as a treatment, but he was not always compliant with taking this medication and would return to drinking. She wrote that he was supposed to enter the Crosbie Centre program on March 15, 1999, but when he had problems at work, this led him to start to drink and delayed his attendance at the program. She stated that Mr. Casey had not touched alcohol or street drugs for at least four weeks.

[76] He was also seen by Dr. Campbell, a general practitioner, whose expertise is drug and alcohol abuse. Some new medication was prescribed in the latter part of March 1999 by Dr. Campbell, after a second diagnosis revealed that Mr. Casey suffered from ADHD (Exhibit E-25). These included Sentraline, Naltrexone, Wellbutrin, Clonidine and Methylphenidate (Ritalin). Mr. Casey explained in his testimony that the ADHD diagnosis was made by Dr. Ahmed and that Dr. Campbell had prescribed Ritalin because of its success in combating cocaine addiction in ADHD patients. Mr. Casey was now taking his medication and being seen on a weekly basis.

[77] Mr. Casey was going to CORE, a drug dependency program and attending AA (Alcoholics Anonymous) support groups, as well as going to the ADHD clinic run by Dr. Ahmed. Dr. Ahmed felt that the prognosis for recovery was excellent if Mr. Casey was compliant with his treatment program (Exhibit E-25) and took his medication on a regular basis.

[78] Edith Short, a Health Care caseworker from the Central Regional Health Board of Nova Scotia, followed up regularly with Mr. Casey and reported to Mrs. Manchester, of the EAP (Exhibits G-6, G-7, G-8, G-9 and G-10).

[79] In May of 1999, there was an incident after Mr. Casey broke up with his girlfriend, Vanessa Burgess (Exhibit E-14). He went back to her apartment, yelling at her to let him in, alleging that she had items that belonged to him. About 6:30 a.m., he went through the apartment window using the balcony (Exhibit E-14). He took a key ring and a black bag full of Ms. Burgess's hairdressing supplies, as she is a hairdresser. Later, Mr. Casey was arrested and charged with theft.

[80] Dr. Ahmed spoke in June 1999 to Dr. Campbell (Exhibit G-15, p. 4), who was counselling Mr. Casey for drug abuse. Dr. Ahmed noted that Dr. Campbell was not supportive of Mr. Casey being prescribed stimulant medication.

[81] On July 18, 1999, Mr. Casey phoned Ms. Burgess and left a message that he was in jail and that it was her fault. At the time, he had an undertaking to remain away from her apartment and not to have any contact or communication with her. After that, he was in contact with her, and some of the contact was consensual. However, by July 29, 1999, Ms. Burgess indicated that she wanted to end the relationship. Mr. Casey told her to have the charges dropped or her windows would be smashed out (Exhibit E-16, page 4). He told her that she had better have the charges dropped that same day or he was going to come after her or pay someone to do it. He made those threats at her home. He then left but continued to call and pressure her to drop the charges. He was placed on probation for one year and was ordered not to have any contact or communication by any means with Ms. Burgess, except when attending an AA or Narcotics Anonymous (NA) meeting.

[82] On January 19, 2000, Mr. Casey pleaded guilty to the offence of theft of Ms. Burgess's property in May of 1999 (Exhibit E-14).

[83] In February 2000, Mr. Casey returned to the medical care of Dr. Ahmed (Exhibit G-5). Dr. Campbell had insisted that Mr. Casey be taken off Ritalin (Exhibit G-15, p. 5) and Dr. Ahmed felt that she had no other choice but to agree. She noted that Mr. Casey had started taking cocaine again and was not taking Revia to control his craving for alcohol. Dr. Ahmed testified that Mr. Casey was taken off stimulants because of Dr. Campbell's opposition to this treatment, but that in "May, I put him back on it".

[84] On May 2, 2000, Dr. Ahmed saw Mr. Casey and diagnosed Substance Use Disorder and ADHD (Exhibit G-13).

[85] On June 2, 2000, Mr. Casey again phoned Ms. Burgess, five times, contrary to his order of January 19, 2000 (Exhibits E-23 and E-16, page 4).

[86] On June 7, 2000, Dr. Ahmed saw Mr. Casey. He told her that he had been going to the CORE Program and had started detox on a 10-day outpatient program (Exhibit G-13). She told him to continue to be compliant and started him again on a Ritalin treatment in a controlled fashion.

[87] On June 9, 2000 (Exhibit E-16, page 4, and Exhibit E-24), Mr. Casey was driving while intoxicated. At an intersection, he jumped onto a traffic island,

narrowly missing a vehicle and a group of pedestrians. He continued driving his vehicle out of control, with two flat tires in the front, and drove back to his parents' house. When the police arrived, Mr. Casey had a strong odour of alcohol on his breath. He was belligerent with the police, refused to blow into the breathalyser machine and ended up breaking part of the machine. At the time, he was under a recognizance not to consume or possess alcohol or any other intoxicating substance.

[88] Mr. Casey was arrested and charged under section 253(a) of the *Criminal Code* for driving under the influence, under section 249(1)(a) of the *Criminal Code* for operating a vehicle in a manner that was dangerous, under section 254(5) of the *Criminal Code* for refusing to provide a sample of breath for a breathalyser test, and under section 430(4) of the *Criminal Code* for breaking the breathalyser. He was also charged with breaching his recognizance before a Justice of the Peace on June 5, 2000, and for possession and consumption of alcohol or any other intoxicating substances, contrary to section 145(3) of the *Criminal Code* (Exhibit E-24).

[89] On June 15, 2000, Dr. Ahmed wrote to Ms. Toteda, of the Sun Life Company (Exhibit G-5), as Mr. Casey had returned to her care in February 2000. She reported that Mr. Casey had been attending a CORE program for the last several weeks and that he was on a waiting list for an in-house program. She reiterated that Mr. Casey's undiagnosed ADHD had led him to abuse substances and she indicated that Mr. Casey should be able to return to work once he took part in behavioural modification and learned to control the symptoms of ADHD, of which Substance Use Disorder is a very important symptom.

[90] On June 16, 2000, Mr. Casey took a cab back to his parents' house. He did not have any money to pay the driver, so while the cab driver was waiting he went inside and came out with a machete, waiving it in the air at approximately 15 feet from the cab. The cab driver, fearing for himself (Exhibit E-15, page 1), backed out of the driveway in order to avoid any trouble and then called the police. When the police arrived, they found the machete in the house. Mr. Casey was highly intoxicated and was jailed. Mr. Casey was charged with committing an assault by using a weapon under section 267(a) of the *Criminal Code,* with unlawful possession of a weapon under section 88 of the *Criminal Code*, and breaching of recognizance of June 5, 2000, to keep the peace and be of good behaviour.

[91] On July 12, 2000, Dr. Ahmed saw Mr. Casey and she noted his anxiety and diagnosed him again as having Substance Use Disorder and Attention Deficit Disorder (Exhibit G-13). She suggested he increase the Ativan while he was attending the CORE program. She observed that he gets extremely anxious when he appears in court.

[92] On July 20, 2000, Mr. Casey was at the Bayers Road Liquor Commission, in Halifax, and stole three 40-oz bottles of vodka. He was charged with theft under section 334(b) of the *Criminal Code* and for breaching his recognizance under section 145(3) of the *Criminal Code* (Exhibit E-16, page 5).

[93] On July 27, 2000, Mr. Casey went to see Dr. Edwin Rosenburg, a psychiatrist. Dr. Rosenburg testified at the instant hearing as an expert witness for the employer. He met with Mr. Casey, as he was evaluating Mr. Casey's file and providing an independent psychological evaluation for Sun Life. Dr. Rosenburg's evaluation was sent to Mrs. Toteda, of Sun Life, on August 1, 2000 (Exhibit G-12).

[94] Mr. Casey indicated to Dr. Rosenburg that he had been referred by his mother to her family physician, Dr. Ahmed, who diagnosed him as suffering severe depression, substance abuse and attention deficit disorder.

[95] Mr. Casey indicated to Dr. Rosenburg that he had been abstinent from alcohol for the past 30 days or so and that he had been abstinent from cocaine for months. He explained to Dr. Rosenburg that he had been scheduled to enrol in a 28-day stay in Kentville, Nova Scotia, but was not admitted when cocaine was detected through a routine pre-admission test. He vaguely described frequent problems with the law. He reluctantly admitted that he would probably be charged with theft, as of a week ago; he had been apprehended in a local liquor store, with a friend, who had apparently stolen some alcohol.

[96] Dr. Rosenburg saw Mr. Casey for one hour and 15 minutes. He did a multi-axial assessment of Mr. Casey's psychiatric difficulties (Exhibit G-12, page 5) and did not conclude that Mr. Casey suffered from ADHD or mood disorder. Dr. Rosenburg explained, at the hearing, that an adult cannot develop ADHD, as it would have been present as a child or an adolescent. In general, a child would have had some difficulties with his/her attention span, conduct, hyperactive behaviour and aggression. The information he had from Mr. Casey was that he completed grade 11 without failing any grades. He dropped out of Grade 12 and he started

drinking. He did not find any evidence from Mr. Casey that he had suffered, in the past or present, symptoms that would have been typical of ADHD. He reviewed Dr. Ahmed's report and noted that she had not indicated any symptomatology that would have been typical of ADHD.

[97] Dr. Rosenburg wrote in his report (Exhibit G-2) that in order to ascertain the diagnosis of either ADHD or mood disorder, Mr. Casey would have to be in a state of abstinence from all substances he had abused and be observed by trained mental health professionals for a period of at least 30 to 60 days.

[98] Dr. Rosenburg clarified that to assess symptoms of major depression properly, a doctor would have to examine the individual when that person is drug and alcohol free. Dr. Rosenburg explained that all substance abuse will contribute to symptoms of depression. Alcohol is a depressant when taken in excess. Cocaine in large doses will disturb the thinking process, bringing paranoia of delusional proportions to the subject. Dr. Rosenburg stated that you cannot accurately diagnose a patient's for depression or ADHD if they are using alcohol and cocaine.

[99] Mr. Casey indicated to Dr. Rosenburg that he was taking Ritalin for ADHD, as well as Paxil and Revia. Dr. Rosenburg noted in his report (Exhibit G-12, page 6) that Ritalin may be used as a drug of abuse and since the evidence that Mr. Casey was suffering from ADHD was not convincing, withdrawal of this medication would be appropriate. He also suggested that Paxil be withdrawn gradually, as Dr. Rosenburg noted in his report that Mr. Casey was in the early stages of abstinence and would benefit best from a formal rehabilitation program, preferably on an in-patient basis, before returning to the workplace.

[100] Dr. Rosenberg did a Global Assessment of Functioning (GAF) of Mr. Casey and assessed him at 60. The GAF is a psychiatric rating scale from 0 to 100 which measures in global terms the psychological and social functioning of individuals. Dr. Rosenberg commented in his report (Exhibit G-12, p. 5) on Mr. Casey's GAF that he showed "moderate symptomatology of substance abuse, only recently undergoing remission, with moderate difficulty in social and occupational functioning".

[101] On July 28, 2000, Dr. Ahmed saw Mr. Casey. He was given a prescription for Paxil and continued on his Ritalin (Exhibit G-13).

[102] On July 31, 2000, Dr. Ahmed wrote to Mr. Grimes (Exhibit G-2) to report on Mr. Casey's progress in rehabilitation. She indicated that Mr. Casey, for the past year or so, had been seeing Dr. Campbell, who had expertise in addictive behaviour. Dr. Ahmed noted that she referred Mr. Casey to a 28-day in-house CORE program on June 26, 2000, but that because of a "court appearance on breach of probation which was pending from the past and he was incarcerated, hence resulting a cancellation of his bed" *(sic).* She also stated that due to the impulsive nature of his problem and the long history of ADHD, he had been treated with a slow release of Ritalin. "His best time and avoidance of impulsive behaviour, and substance use was when he was on Ritalin for a period of five months". She concluded her letter by confirming that Mr. Casey could return to work in the next two weeks on a part-time basis and as he improved, he could go back on a full-time basis.

[103] On August 7, 2000, Mr. Grimes saw Mr. Casey for an update meeting (Exhibit G-13, p. 2). Mr. Casey looked great, was very calm and produced a lot of documents showing attendance at different self-help groups and CORE programs. He explained to Mr. Grimes that he had not been able to follow the 28-day program because while he was taking the medication prescribed by his physician, he could not attend the in-house program.

[104] On August 14, 2000, Mr. Casey was admitted as an in-house registered patient to the CORE program. Mr. Casey explained that the program was now a three-week program and that he had completed it successfully. However, since Mr. Grimes wanted him to participate in a four-week program, as had been agreed to in the Last Chance Agreement, he stayed on for another week.

[105] However, on September 6, 2000, which was on Mr. Casey's fourth week, James Borden, a new patient, arrived. Mr. Borden started asking Mr. Casey for some money for drug debts that Mr. Casey owed him. Mr. Casey explained at the hearing that he responded to Mr. Borden by saying, "You want to fight with me, come outside and I will kill you". A counsellor overheard them and called the police and Mr. Casey was discharged from the CORE program (Exhibits E-10 and G-21). Mr. Casey was charged with uttering a death threat under section 264-1(1)(a) of the *Criminal Code* (Exhibit E-28) and of being in violation of his probation order issued on the July 26, 2000, to keep peace and be of good behaviour, under section 733-1(1)(a) of the *Criminal Code* (Exhibit E-29).

[106] The following day, September 7, 2000, Mr. Casey went over to visit Cheryl Johnson, an ex-girlfriend, to ask her to speak to Ms. Burgess about dropping the charges against him (Exhibit E-16, page 6). Ms. Johnson eventually found him insulting and asked him to leave. She pushed him out the door and an altercation started in the hallway between Mr. Casey and Jesse, a guest of Ms. Johnson. Mr. Casey was kicking Jesse, who was on the floor of the hallway. Ms. Johnson grabbed a pole to attack Mr. Casey but he managed to take it from her, pushed her onto the floor and kicked her on the left side of the head. She escaped and called 911. Mr. Casey was arrested (Exhibit E-20) and was charged under section 266(a) of the *Criminal Code* with assault.

[107] On September 13, 2000, Mr. Casey consulted Dr. Maynes. Dr. Ahmed had recommended him to Mr. Casey for psychiatric evaluation on his Major Mood Disorder and Substance Use Disorder (Exhibit G-2). Dr. Maynes agreed with Dr. Ahmed's diagnosis of Substance Use Disorder (Exhibit G-13); however, he did not agree with the ADHD diagnosis.

[108] Mr. Grimes contacted Mr. Casey in September 2000 to set up a meeting. Mr. Casey did not show up; Mr. Grimes phoned him back and Mr. Casey claimed that he had something else that prevented him from attending their planned meeting. They set another time but he did not show up. A memorandum was sent to his house asking him to contact Bonnie Whyte, of the Production Centre, to set up an appointment.

[109] On September 29, 2000, Dr. Ahmed wrote to Denise Bird, of Sun Life Canada, to report on Mr. Casey's progress (Exhibit G-13). She indicated that Mr. Casey was planning to return to work on November 1, 2000. She indicated that both she and Dr. Maynes felt that he could return to work on November 1, 2000.

[110] A few weeks after a memorandum had been sent to Mr. Casey to set up a meeting, he came to meet with Mr. Grimes and Ms. Whyte. Mr. Grimes explained that this was in October 2000 and that Mr. Casey was not in a good shape; he was unshaven, his hair was not washed and he had a raspy voice. Mr. Grimes suspected that Mr. Casey was off or on something. Mr. Casey stated that he had not taken cocaine in a month but he had had some beer two weeks ago and had gotten drunk.

[111] Bonnie Whyte questioned Mr. Casey about his statement that he had gotten drunk, saying that this was in violation of the Last Chance Agreement. Mr. Casey

replied with a threatening statement. When Mr. Casey was asked about the threatening statement, he responded that, "I was just joking; I was wondering if I could get a rise out of you".

[112] Mr. Casey had documents with him; they were his diary and attendance sheets from different support groups. Mr. Casey also showed Mr. Grimes a memorandum (Exhibit E-10) from the CORE program where he had been an in-house registered client between August 14 and September 7, 2000. The memorandum explained that Mr. Casey was discharged for inappropriate behaviour and that after discharge Mr. Casey continued with his inappropriate behaviour and was now barred from accessing services until further notice. Mr. Grimes and Ms. Whyte talked to Mr. Casey about his discharge. Mr. Casey's response was that in order to get into the program in Toronto, he had to ensure that Nova Scotia would not be able to provide him with any other program. This was his way of ensuring that he would be eligible for the program in Toronto.

[113] Mr. Grimes reminded Mr. Casey that as part of the "Last Chance Agreement", he was not supposed to come into the Production Centre but that he had done so on at least two occasions. On one occasion, he wanted his GST cheque. Mr. Casey started harassing the mail clerks; he was told to leave and he did so. Mr. Grimes explained at the hearing that they are printed at the Production Centre but they are never given directly, under any circumstances.

[114] On another occasion, he had sold his golf clubs to an employee and he wanted to collect his money. He came into the Production Centre and started making intimidating comments to one of the operators. Mr. Casey laughed and told Ms. White and Mr. Grimes that he wanted this employee, whom he did not like, to know that he was there and was coming back. He said to Mr. Grimes, "Sometimes when you are on these drugs, they make you do things that you are not supposed to". Mr. Grimes replied to Mr. Casey that he was not allowed to come to the workplace.

[115] Mr. Grimes explained, in cross-examination, that when he met Mr. Casey in October 2000, he indicated that he wanted to go back to work. His disability insurance was running out and, at the same time, his doctors were saying that it was time to reintegrate him into the workforce. Mr. Grimes replied that Mr. Casey would have to be assessed by Health Canada before he was to be reintegrated.

[116] On October 16, 2000, Mr. Casey was visiting a woman he had met through a chat line (Exhibit E-16, page 6). Also present was the woman's niece, an 18-year old. At about 3:00 a.m., an incident occurred involving the niece and Mr. Casey. The niece was awakened by Mr. Casey who was shaking her arm. She told him to stop, fell back asleep but was awakened again by his shaking her arm. She was upset and ran into another room. The police were called about this incident and Mr. Casey was charged with sexual assault (Exhibit E-16). This charge was later reduced to a first count of common assault, contrary to section 266(b) of the *Criminal Code*. He was also charged with breaching several probation orders, contrary to sections 145(3) and 733.1(1) of the *Criminal Code*.

[117] Dr. Karen MacDonald, of Health Canada, met with Mr. Casey on November 10, 2000, to assess his fitness for work (Exhibit E-26). She testified that she was not able to file an assessment report because Dr. Maynes, the treating psychiatrist, did not provide the information she had requested. Mr. Casey had told her that he had consulted Dr. Maynes two or three times in the past two months. She had received from Mr. Grimes two reports from Dr. Ahmed to Sun Life Insurance (June 15, 2000, Exhibit G-5, and April 15, 1999, Exhibit E-25). Dr. MacDonald explained that this was not sufficient because a specialist had been treating Mr. Casey, Dr. Maynes, and his report was required. Mr. Casey indicated to her that Dr. Maynes felt that his main problem was substance abuse and was not sure about a diagnosis of ADHD. Dr. Maynes had advised Mr. Casey to come off the Ritalin. Mr. Casey told Dr. MacDonald that he followed up on this advice and did stop taking Ritalin, which made him feel better. Mr. Casey said that he felt that the Ritalin made him more agitated and very moody. Dr. MacDonald wrote to Dr. Maynes on November 23, 2000 and January 8, 2001, asking for his report, but he never replied to her.

[118] Mr. Casey indicated to Dr. MacDonald that he had not had any alcohol for the past three months and had not used cocaine in the past seven months. He also indicated that his family doctor and Dr. Maynes thought that he was fit and motivated to go back to work. He informed Dr. MacDonald that he had various criminal charges pending but most of these were for various breaches, such as drinking or having contact with his previous girlfriend.

[119] On November 15, 2000, Mr. Casey approached some workers, who were installing phone cables. Mr. Casey, who was intoxicated, asked to use their phone

to call the Hell's Angels. The workers were disturbed by this and called the police. When the police arrived at Mr. Casey's house, they detected an odour of liquor. He was arrested for being outside his house, as he was on house arrest, and breaching his recognizance not to consume alcohol. Mr. Casey struggled violently with the police and tried to break free of them. He was then taken into a police car where he attempted to kick out the rear side window and he spit in the Constable's face. During the entire incident, he threatened both Constables and continued his threats at the police station.

[120] Mr. Casey was charged with assaulting a Constable, contrary to section 270(1)(a) of the *Criminal Code*, uttering a death threat to the Constable and his family, contrary to section 264-1(1)(a) of the *Criminal Code*, having violated two recognizances (home arrest; keep the peace), contrary to section 145(3) of the *Criminal Code* and a probation order contrary to section 733.1(1)(a). Mr. Casey was jailed on November 15, 2000, and had to stay in jail until a hearing was held.

[121] Between December 6 and 12, 2000, Mr. Grimes was on travel status to Winnipeg. As he had to change planes in Toronto, he received a call from Mr. Casey on his cellular phone. Mr. Casey informed him that he was in jail again, as a result of a number of charges. At the hearing, Mr. Grimes explained that Bonnie Whyte had found out earlier that Mr. Casey had been in jail and could not be released before his hearing in March 2001.

[122] On December 18, 2000, Dr. Maynes wrote to the employer (Exhibit E-12): "Mr. Ron Casey is presently off work and will be unable to work from December 2000 to June 2001, due to problems related to his medical diagnosis".

[123] On December 21, 2000, Dr. Ahmed wrote to Mr. Grimes (Exhibit E-11), saying that Mr. Casey had, at this time, increased stress and she was trying to enrol him in the detox program in Ontario. She indicated the following:

> *[...]*
>
> *I think it would be appropriate for Ron to have 10-12 weeks off to be able to sort things out and also have all of the necessary requirements done to be enrolled in this program in Ontario. I am requesting about 10-12 weeks off from work.*
>
> *[...]*

[124] Mr. Casey testified that he had asked his mother to see Dr. Maynes to tell him that he had had a relapse and that he was in jail. His mother got Dr. Maynes to write this letter to Mr. Grimes. Mr. Casey explained that he spoke directly to Dr. Ahmed over the telephone and got her to send the letter to Mr. Grimes.

[125] Mr. Grimes wrote back to both doctors and indicated that it was inappropriate to give sick leave to Mr. Casey as he was in jail.

[126] On February 19, 2001, Mr. Grimes wrote to Mr. Casey (Exhibit E-13) that he was not approving his request to be granted unpaid sick leave and that his decision was to put him on leave without pay, pending the outcome of his criminal charges. At that time, a decision would be made regarding his case.

[127] Mr. Grimes and Ms. Whyte both attended Mr. Casey's hearing on March 1, 2001, where he was sentenced for different charges he faced and where he received a total sentence of 18 months. Mr. Grimes explained that it was difficult at the hearing to understand what was being discussed between counsel and the judge. He understood better when he later received a copy of the court decision. After reading the decision, he became concerned about his operations and realized that Mr. Casey was out of control.

[128] He went to see his Director, Norm Boudreau, and expressed his concerns. Mr. Casey had not respected the terms of the Last Chance Agreement, and he was an embarrassment to the Department. Mr. Grimes was also concerned about the impact this had on the authority of the employer, as an employee had mentioned that if Mr. Casey could get away with this, "you can get away with anything". Mr. Grimes recommended that Mr. Casey be dismissed. Mr. Casey had showed belligerence in the past with staff, and now Mr. Grimes was concerned that Mr. Casey was increasingly violent. Mr. Grimes did not want an assault to take place in the workplace.

[129] While in jail, Mr. Casey wrote to Mr. Grimes and Ms. Whyte, on June 25, 2001 (Exhibit G-4). In this letter, Mr. Casey acknowledged that his behaviour in society and in the workplace was totally unacceptable. He asked to be given a chance to redeem himself at the workplace and referred to the Last Chance Agreement.

[130] On August 16, 2001, Mr. Grimes wrote to Mr. Casey (Exhibit G-26) to inform him that he was recommending that his employment be terminated. He explained

that given his actions, Mr. Casey had fundamentally and inoperably damaged the relationship of trust with the employer. Mr. Casey came out of jail at the end of August 2001. He then went to a halfway house in Cape Breton. In September 2001, he received a letter from Janice Cochrane, Deputy Minister of PWGSC, informing him that he was dismissed. Her letter (Exhibit E-3) reads as follows:

> *This is further to our administrative review of your present situation with respect to your employment with Public Works and Government Services Canada.*
>
> *When management last met you, in October 2000, the status of your rehabilitation efforts was discussed, and you provided written confirmation that you had been discharged from the Drug Dependency Services program in September 2000 for inappropriate behavior. It was later learned that you were incarcerated in November 2000 pending a criminal court appearance in March 2001, where you were sentenced under numerous criminal charges for acts committed in the year 2000. Moreover, it was discovered that during the period of sick leave without pay accorded to you for the purposes of rehabilitation, you were also sentenced on January 19 and June 23, 2000, without ever informing management of the situation. Your criminal convictions mainly relate to reckless behavior while intoxicated, and they include acts of theft, dangerous operation of a vehicle, failure to comply with an undertaking to refrain from intoxicating substances, obstructing justice, uttering threats, assault on individuals and assaulting a peace officer.*
>
> *Your actions amount to a breach of the "Last Chance Agreement" dated March 12, 1999, which was implemented as a last resort effort to help you. The history of your case shows that management has invested considerable time and effort towards your rehabilitation since 1996. You have not amended your behavior, in spite of all these efforts. This failure constitutes a culminating incident causing management to lose all trust in your potential for rehabilitation. Moreover, your conduct, both on and off-duty, has had a negative impact on the department and has rendered you unsuitable for continuing employment.*
>
> *Therefore, by virtue of section 11(2)(f) of the Financial Administration Act, you are hereby terminated from the Public Service, for cause. Your termination is effective September 5, 2001 at the close of business.*

[131] About five days after receiving the termination letter, Mr. Casey went to a tavern and drank a couple of beers. When he went back to the halfway house, he told the counsellors that he had drunk some beers. They understood, as it was

normal in the rehabilitation process for a substance abuser to have a slip. Mr. Casey testified that this was the last time he has drunk alcohol.

[132] At the suggestion of Dr. Ahmed, Mr. Casey got transferred to a halfway house in Dartmouth so she could treat him for ADHD. His treatment consisted of attending classes every two weeks and receiving individual counselling the other week.

[133] Mr. Casey testified that since November 2001, he has not taken any medication, including Ritalin. However, he does take Revia to control his craving for alcohol.

[134] He has been working full-time and has held several jobs after his incarceration. However, these jobs do not offer the level of stability and financial remuneration that he had in the Production Centre.

[135] Mr. Paul Cashman testified as an expert on substance abuse. Mr. Casey came under his care in November 2001, as it was a condition of his probation that he would seek therapy for addiction. He was a patient until February 2002. Mr. Cashman saw him again in March and September 2004, as Mr. Landry asked him to do an evaluation of Mr. Casey. Mr. Cashman believes that Mr. Casey has a high chance of maintaining his sobriety if he continues his current lifestyle. The probability would be higher if he entered treatment.

[136] Laboratory reports were tabled in evidence (Exhibits G-27, G-28, G-29, G-30, G-31, G-32, G-34, G-36 and G-37), covering the period from October 2001 to February 2002. Mr. Casey explained that these were random rests that were done while he was on probation. These showed that the grievor tested negative for drug or alcohol consumption. Mr. Casey testified that he is rehabilitated and does not consume alcohol or drugs anymore.

Summary of the arguments

For the Employer

[137] Mr. Fader submitted that Mr. Casey's termination was justified as indicated in the employer's letter of September 5, 2001 (Exhibit 3), either because his off-duty conduct was incompatible with the continuation of employment or because he breached the terms of the "Last Chance Agreement".

[138] Mr. Fader referred to the Millhaven tests as set out by Arbitrator Anderson in *Millhaven Fibres Ltd. Millhaven Works, and Oil, Chemical and Atomic Workers Int'l. Union, Local 9-670* (1967), 1 (A) Union-Management Arbitration Cases 328, as found in the *Jalal v. Treasury Board (Solicitor General-Correctional Service Canada)*, PSSRB File No. 166-2-27992 (1999):

> *[...]*
>
> *...if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that:-*
>
> *the conduct of the grievor harms the Company's reputation or product*
>
> *the grievor's behaviour renders the employee unable to perform his duties satisfactorily*
>
> *the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him*
>
> *the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees*
>
> *places difficulty in the way of the Company properly carrying out its functions of efficiently managing its works and efficiently directing its working forces.*

[139] Mr. Fader argued that if only one of the Millhaven tests was met, it would be sufficient to justify termination. However, Mr. Casey's behaviour could qualify under all five of the Millhaven tests. Mr. Fader submitted an argument for each of the corresponding tests:

1. A reasonable person would consider that the reputation of the employer has been harmed by Mr. Casey's conduct. As well, Mr. Grimes testified that it had a negative impact on the reputation of the employer.

2. The inability of Mr. Casey to work as a team member with other employees, as well as his numerous failures to comply with probation, shows his inability to follow instructions.

3. There is clear evidence that other employees would refuse or be reluctant to work with Mr. Casey under the third test.

4. Mr. Casey was convicted of serious breaches of the *Criminal Code,* rendering his conduct injurious to the general reputation of the employer.

5. Fellow employees would be reluctant or refuse to work with Mr. Casey, and therefore it would be difficult for the employer to carry out its function properly in managing its works.

[140] Mr. Fader argued that there is a clear connection with Mr. Casey's off-duty behaviour and his prior conduct at the workplace. It is quite reasonable for Mr. Grimes to worry about the health and safety of the workplace if Mr. Casey returned. Mr. Grimes testified that many employees would not want to work with Mr. Casey if he came back.

[141] Furthermore, there is clear evidence that Mr. Casey was violent and threatening while he was at the workplace. There was an incident on May 21, 1996, where a threat against Mr. Casey was received at the workplace by Mr. Grimes and he had to post a security guard at the building's door. Mr. Bushell testified that Mr. Casey threatened him both at work and outside of the workplace. During his suspension in 1999, under the "Last Chance Agreement", he was to stay away from the workplace, but he came back on two occasions, harassing employees and even threatening one operator. In the fall of 2000, when Mr. Grimes and Ms. White met with Mr. Casey, he became upset and threatening.

[142] Mr. Fader also argued that breach of the last-chance agreement justified Mr. Casey's termination. Under the "Last Chance Agreement", Mr. Casey had to undergo a rehabilitation program. When Mr. Casey got kicked out of the program (Exhibit E-10), he clearly breached the last-chance agreement, as per Mr. Grimes's testimony.

[143] Mr. Fader explained that under section 41.1(b) of the *Canadian Human Rights Act,* Mr. Casey's complaint that he was discriminated against on the basis of his disabilities when the employer terminated his employment was referred to the Public Service Staff Relations Board. The burden of establishing a medical defence is on the grievor. The only independent evaluation done on Mr. Casey was done by two psychiatrists, Dr. Rosenburg and Dr. Maynes, and they both concluded that the grievor did not have ADHD. Now the medical defence is not that Mr. Casey's problem is with alcohol and drug use, but that the ADHD led him to substance

abuse. However, it has not been established that people with ADHD commit criminal offences, nor has it been established that alcohol or drug abusers commit criminal offences.

[144] Mr. Fader submitted that the test to be applied is the following: Could Mr. Casey appreciate the nature and consequences of his actions, and could he differentiate between right and wrong? When the offences occurred in the fall of 2000, there was clear evidence that the grievor was being treated for ADHD. Mr. Fader argued that not every person suffering from drug addiction, alcoholism and ADHD engages in a criminal act. Dr. Ahmed testified that the grievor, at the time of the terminating incident in the fall of 2000, knew the difference between right and wrong. The grievor was held responsible under criminal law and should be held responsible in the employment relationship. The duty to accommodate does not extend to this type of behaviour. As well, the employer has accommodated past the point of undue hardship. Mr. Fader submitted, finally, that there was no evidence at the time of termination that the grievor was rehabilitated. The issue is whether there was cause at the time of termination.

[145] In support of his arguments, Mr. Fader relied on the following cases: *Faryna* v. *Chorny,* [1952] 2 D.L.R. 354 (B.C.C.A.); *Tipple* v. *Canada (Treasury Board),* [1985] F.C.J. No. 818 (C.A.) (QL); *Batiot* v. *Treasury Board (Justice Canada)*, PSSRB File No. 166-2-28540 (1999); *Canadian Postmasters and Assistants Assn.* v. *Canada Post Corp.* (2001), 102 L.A.C. (4th) 97; *Re: Canada Safeway Ltd.* v. *B.C.T., Loc 252* (2002), 113 L.A.C.(4th) 385; *Re: Canada Safeway Ltd.* v. *U.F.C.W., Loc. 401* (2000), 94 L.A.C. (4th) 86; *NewTel Communications* v. *Communications, Energy and Paperworkers Union of Canada, Local 410 (Stockley) (Re)* (1998), 71 L.A.C. (4th) 73; *Toronto Transit Commission* v. *Amalgamated Transit Union, (Geobey) (Re)* (1997), 72 L.A.C. (4th) 109; *Cie minière Québec Cartier* v. *Québec,* [1995] 2 S.C.R. 1095; *Funnell* v. *Treasury Board (Department of Justice),* PSSRB File No. 166-2-25762 (1995); *Gannon* v. *Treasury Board (National Defence),* 2002 PSSRB 32; *Toronto (City)* v. *C.U.P.E. Local 79,* 2003 SCC 63; *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.,* [1999] 3 S.C.R. 3; *Slocan Group - Mackenzie Operations and Pulp and Paper Woodworkers of Canada, Local 18 (Pavelko) (Re)* (2001), 97 L.A.C. (4th) 387; *Ottawa-Carleton (Regional Municipality)* v. *Ottawa-Carleton Public Employees Union, Loc. 503 (Lance) (Re)* (2000), 89 L.A.C. (4th) 412; *Brewery, Beverage & Soft Drink Workers, Local 250* v. *Labatt's Alberta Brewery, a division of Labatt's Brewing Co.,* [1996] A.J. No. 339 (QL); *Toronto*

District School Board and Canadian Union of Public Employees (G.(P.)) (Re) (1999), 79 L.A.C. (4th) 365; *Alcan Rolled Products Co. (Kingston Works)* v. *United Steelworkers of America, Loc. 343, Re* (1996), 56 L.A.C. (4th) 187; *National Steel Car Ltd.* v. *United Steelworkers of America, Local 7135 (Demedeiros Grievance),* [1999] O.L.A.A. No. 182 (QL); *Jalal* v. *Treasury Board (Solicitor-General-Correctional Service Canada) (supra); Re Corporation of the City of Calgary* v. *Amalgamated Transit Union, Local 583* (1981), 4 L.A.C. (3d) 50; *Re Government of the Province of British Columbia* v. *British Columbia Government Employees' Union* (1984), 15 L.A.C. (3d) 329; *Re Bundy of Canada Ltd., Sinterings Division* v. *United Steelworkers Local 6012* (1975), 9 L.A.C. (2d) 141; *Spawn* v. *Parks Canada Agency,* 2004 PSSRB 25; *Douglas* v. *Treasury Board (Human Resources Development Canada),* 2004 PSSRB 60 and *Toronto District School Board* v. *C.U.P.E. (G.(P.)) (Re)* (1999), 79 L.A.C. (4th) 365.

For the Grievor

[146] Mr. Landry first reviewed the evidence and arguments of the employer. He then submitted an argument for each of the corresponding five Millhaven tests:

1. There was no evidence that the reputation of PWGSC had been harmed by Mr. Casey's off-duty conduct. Furthermore, he was terminated two years after he had last worked.

2. The Last Chance Agreement provided that Mr. Casey would be transferred to a different position, but this never materialized. Therefore, there is no evidence that he was not able to perform his duties, as those duties were never reassigned to him.

3. When employees were asked if they would be willing to work with Mr. Casey now that they were aware that he had a mental disability and that he had changed, all three took note of the fact that he had a mental disability.

4. The grievor was found guilty of breach of the *Criminal Code*, but these were not serious criminal offences, such as murder, and did not involve firearms.

5. There was no evidence that the employer's functions have been hurt as the result of Mr. Casey's off-duty conduct.

[147] Mr. Landry also submitted that the Last Chance Agreement was to give an opportunity for Mr. Casey to rehabilitate and that there was no time limit put on

this period of rehabilitation. Now that he has been rehabilitated, he should take on some new duties, as agreed on in the Last Chance Agreement. Mr. Casey did successfully complete three weeks at the in-house program at Kentville (Exhibit E-10). The evidence is that the duration of the program was three weeks at a time and that Mr. Casey asked to stay for an additional week. The termination letter does not indicate which of the terms of the Last Chance Agreement Mr. Casey breached.

[148] Mr. Landry submitted that if it were not for substance abuse and ADHD, none of this would have happened. Mr. Landry reviewed the four elements that Arbitrator Ish found necessary to be established before an arbitrator may consider reinstatement, *Canada Safeway v. RWDSU (MacNeil) (Re)* (1999), 82 L.A.C. (4th) 1. This case dealt with discharge due to serious wrongdoing which was attributed to illness.

[149] Mr. Landry argued that these four elements are found in the instant case. It has been established that there was a condition of illness experienced by the grievor, namely ADHD, of which he was diagnosed, and also substance abuse. There is clearly a linkage or nexus between ADHD and substance abuse in the abhorrent conduct of Mr. Casey. Mr. Casey has been successfully rehabilitated and his past behaviour has stopped; therefore, his off-duty conduct could not be held against him. The diagnosis of substance abuse is not in question here; it is only the ADHD diagnosis that is questioned. However, Dr. Rosenburg's experience, as he testified, is very limited on ADHD. He also acknowledged that in order to diagnose ADHD properly, Mr. Casey would have to be in a state of abstinence from all substance abuse and be observed over a period of at least 30 to 60 days. Dr. Ahmed has an established practice mostly concerned with ADHD. She has seen Mr. Casey for such a long period in order to diagnose him properly.

[150] In support of his arguments, Mr. Landry relied on the following cases: *Maritime Paper Products Ltd.* v. *Canadian Paperworkers Union, Local 1520 Re* (1991), 19 L.A.C. (4th) 1; *Nicholson* v. *Treasury Board (National Defence),* PSSRB File No. 166-2-20448 (1991); *Fontaine-Ellis* v. *Treasury Board (Health Canada),* PSSRB File No. 166-2-27804 (1998); *Maan* v. *Treasury Board (Transport Canada),* 2003 PSSRB 100; *Flynn* v. *Treasury Board (Environment Canada),* PSSRB File No. 166-2-23369 (1993); *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.), [1999]* 3 S.C.R. 3 and *British*

Columbia (Superintendent of Motor Vehicles) v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

Reasons

[151] As indicated in the letter of termination, there are two main reasons why Mr. Casey was dismissed. His conduct, both off-duty and at work, had a negative impact on the Department, which rendered him unsuitable for continuing employment. Secondly, his actions amounted to a breach of the Last Chance Agreement, dated March 12, 1999.

On-Duty and Off-Duty Conduct

[152] As it is generally established in arbitral jurisprudence, it is not necessary for the employer to prove that all five of the Millhaven tests have been met. Proof of only one of the tests is sufficient to justify imposing disciplinary measures. The first question to be determined is whether Mr. Casey's off-duty conduct meets one or more of the Millhaven tests. The five Millhaven tests are the following:

> *the conduct of the grievor harms the Company's reputation or product*
>
> *the grievor's behaviour renders the employee unable to perform his duties satisfactorily*
>
> *the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him*
>
> *the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees*
>
> *places difficulty in the way of the Company properly carrying out its functions of efficiently managing its works and efficiently directing its working forces.*

[153] The first and fourth tests both address off-duty conduct harming the reputation of the employer. The first test appears to deal with actual harm and would thus require some evidence that the employer's reputation was damaged by the off-duty conduct of Mr. Casey. There is very little objective evidence of harm to the reputation of the employer. Mr. Fader argued in essence that the test is whether a fair-minded and informed member of the public would find that the off

duty conduct has harmed the reputation of the employer. Nevertheless, the evidence of serious breach of the Criminal code is best addressed in the fourth test.

[154] Mr. Casey pleaded guilty to all the offences of which he was accused. The original convictions have been admitted and they themselves are proof that he committed the acts of which he was accused. See *Toronto (City)* v. *Canadian Union of Public Employees, Local 79,* [2003] 3 S.C.R. 77. Some of these are serious criminal convictions, such as obstructing justice, driving a vehicle dangerously, uttering threats, assault and assaulting a peace officer. Moreover, Mr. Casey committed several of these criminal acts one after the other, which showed a pattern of escalating violence and recklessness. These convictions must be looked at in their entirety and certainly as a whole are serious breaches of the *Criminal Code.*

[155] In the fourth test, it is implied that when an employee has been found guilty of a serious breach of the *Criminal Code,* this conduct by itself is injurious to the reputation of the employer and its employees. Even if it wasn't implied, I am convinced that a fair-minded and well informed member of the public would be quite concerned to have an individual convicted of such serious criminal acts, working in the Production Center where government cheques and bonds are printed and kept. I therefore find that the fourth test has been met, as the employer's reputation has been harmed as a result of the conviction of the grievor for this serious breach of the Criminal Code. See *Nova Scotia Community College and Nova Scotia Teachers' Union (Re)* (2003), 121 L.A.C. (4th) 159, and *Lethbridge (City) and Amalgamated Transit Union, Local 987 (Grant) (Re)* (2000), 98 L.A.C. (4th) 264.

[156] For both the second and third tests, the employer argued that other employees would be reluctant or would refuse to work with Mr. Casey. I find that the third test is best suited for this argument. The evidence is that Mr. Casey had, in the past, threatened several co-workers at the workplace or off-duty. Evidence was presented that several employees would refuse or be reluctant to work with Mr. Casey as they had had felt threatened by him at the workplace or off-duty in the past. Several of the criminal offences for which Mr. Casey was convicted are similar in nature to his past behaviour. Thus, I find that the third test has been met.

[157] Finally, the fifth test would also be met, as reinstating Mr. Casey would make it very difficult for the employer to carry out its operation properly. Mr. Casey's position was at the Production Centre, where government cheques are printed and

kept. On two occasions, Mr. Casey was found to have stolen from the employer by misappropriating taxi chits and purchase orders. Subsequently, Mr. Casey was found guilty of two charges of stealing. Mr. Grimes testified that the bond of trust between the employer and Mr. Casey has been broken. He would not trust Mr. Casey to be in the Production Centre and he needs to trust people using this authority. Also crucial for the carrying out of its operations is that employees are reluctant or would refuse to work with Mr. Casey.

[158] In summary, the third, fourth and fifth Millhaven tests have been met. As a result, I find that the employer had just and reasonable cause for taking disciplinary measures against Mr. Casey.

Appropriate Disciplinary Measure

[159] Having concluded that three of the Millhaven tests have been met, I must now determine the next question: what disciplinary measure is appropriate taking into account the nature of the offence, the charges and the impact that they have on the employer's interests?

[160] I have reviewed arbitral case law where grievors had been terminated for off-duty conduct after being convicted of criminal offences. In *Re Dorr-Oliver-Long Ltd and U.S.W., Local 4697* (1973), 3 L.A.C. (2d) 193, a crane operator had been suspended while facing charges of trafficking in marijuana. The suspension was found not to be justified as there was nothing to indicate that the grievor used narcotics at work or was impeded in his ability to operate the crane safely. However, the arbitrator noted that his imprisonment for four months was not an excuse for his absence from work, suggesting that it would be reason for discipline.

[161] In *Alberta and A.U.P.E. (Morrison) (Re)* (1988), 72 L.A.C. (4th) 403, the grievor was convicted of theft; however, there was no evidence that co-workers would refuse or be reluctant to work with the grievor. The arbitrator found no linkage between the grievor's crime and the duties of her job, as it was unlikely that she would steal again and the job did not expose her to an opportunity to steal. A warning letter was substituted for the discharge, as it was found that the crime was completely out of character and was motivated by loyalty towards a friend rather than greed.

[162] In *Port Moody (City) v. Canadian Union of Public Employees, Local 825 (Re)* (1996), 63 L.A.C. (4th) 203, the determining factor for the employer's decision to terminate the grievor's employment was that other employees refused to work with the grievor. Arbitrator Lang found that it was clear from the evidence that these employees' refusal to work was not because they were afraid or concerned for themselves, but because they were repelled by the crime that the grievor had committed. Arbitrator Lang wrote:

> *...Only if there is reliable objective evidence that employees could be injured or harmed in some way by the grievor can their refusal to work with the grievor be considered as a proper factor in deciding on his continuing employment.*

[163] In *Lethbridge (City) and Amalgamated Transit Union, Local 987 (Grant) (Re)* (*supra*), Arbitrator Tettensor analysed case law on this issue and noted that where arbitrators had reinstated employees convicted of off-duty conduct, the incidents were isolated and resulted often from an abuse of alcohol or stress that was quite out of character.

[164] In the instant case, there is "reliable objective evidence, that employees could be injured or harmed in some way by the grievor" so that the refusal or reluctance to work with the grievor by co-workers can be considered. Mr. Casey's criminal convictions are not isolated and out-of-character incidents. Starting as early as 1996, he has been arrested for numerous incidents. He was also found to have stolen from the employer, as he had used taxi chits and purchase orders for his personal benefit. He made several intimidating comments or threats at the workplace and showed increasingly aggressive and intimidating conduct. These offences were all related to the further incidents of 2000, where Mr. Casey's off-duty behaviour showed an escalating pattern of reckless and dangerous behaviour. Mr. Grimes testified that when he read the decision on these criminal convictions, he realized that Mr. Casey was becoming a threat to the employer's operations and his employment had to be terminated. There was a clear nexus between the grievor's conduct and his employment relationship. I therefore find that Mr. Casey's off-duty behaviour justified the employer's disciplinary measure of termination.

Last Chance Agreement

[165] I do not find it necessary to go into the details of the employer's second argument to justify the termination, that is, Mr. Casey's violation of the Last Chance Agreement. It can be argued that the last chance agreement was breached because Mr. Casey was thrown out of the Kentville program after he had completed three weeks without completing a fourth week. He was also drinking alcohol and abusing drugs during a period where he was supposed to be rehabilitating. However, the determining factor for the employer in terminating Mr. Casey's employment was Mr. Casey's numerous criminal convictions, which are dealt more appropriately as off-duty conduct justifying termination.

[166] Arbitral deference must be shown to last chance agreements. Otherwise, employers would give up this practice. If that were so, both the employee and the employer would be losing a valuable tool in resolving disciplinary matters. However, irrespective of whether there has been a breach of a last change agreement or an off-duty conduct which warrants discipline, the employer has a duty to accommodate disabilities under the *Canadian Human Rights Act.* See *In Mainland Sawmills and I.W.A. - Canada, Local 2171 (Kondola) (Re)* (2002), 104 L.A.C. (4th) 385.

[167] The next step is therefore to address Mr. Casey's claim that he suffers from a disability under the *Canadian Human Rights Act* that was not accommodated by the employer before the termination.

Medical Defence

[168] Mr. Landry presented a two-fold medical defence. He submitted that Mr. Casey's mental illness explained his off-duty conduct and that it should not be held against him. Mr. Landry also submitted that substance abuse was also diagnosed and was not disputed by the employer. According to Mr. Landry, the issue then becomes whether the employer was and is obligated to accommodate the grievor by placing him in another position, as had been envisioned in the Last Chance Agreement.

[169] Mr. Fader submitted that the medical defence of the grievor is that ADHD led him to substance abuse. Mr. Fader argued that the grievor has not met the burden of establishing that he suffers from ADHD. As well, it has not been established that individuals with ADHD or those who abuse substances commit criminal offences.

ADHD

[170] I reviewed the medical evidence and I find that it has not been proven that the grievor suffered from ADHD. There are too many discrepancies in the evidence to support a finding that Mr. Casey has ADHD. There was divergence among the medical practitioners who assessed the grievor, and Dr. Ahmed was the only one who diagnosed ADHD. I have noted the following:

a) The golden rule:

[171] Dr. Rosenberg wrote in his report on Mr. Casey, that in order to properly diagnose ADHD, Mr. Casey would have to be abstinent and be observed for a period of 30 to 60 days. Dr. Ahmed testified that she agreed with Dr. Rosenberg and stated that in order to diagnose ADHD properly, the golden rule is abstinence for 60 days. Therefore, Mr. Casey would have had to be in a state of abstinence from all substances he abused and be observed by her for a period of 60 days.

[172] As Dr. Rosenberg stated, all substance abuse will contribute to symptoms of depression. As well, cocaine in large doses disturbs the thinking process, bringing paranoia of delusional proportions. Depression or ADHD cannot accurately be diagnosed if the patient is using alcohol or cocaine. As well, the symptoms would have to be present for a number of weeks. However, in the two of the three times on record that Dr. Ahmed diagnosed Mr. Casey as suffering from ADHD, the evidence is that Mr. Casey was not abstinent.

[173] Dr. Ahmed first diagnosed Mr. Casey as suffering with ADHD late in January 1999. However, at the time, Mr. Casey's crack cocaine habit was out of control and he was supporting his habit by misusing purchase orders. It is likely that he was not abstinent until March 1999, as Dr. Ahmed wrote (Exhibit E-25) that Mr. Casey had been abstinent from alcohol or street drugs for four weeks prior to April 15, 1999. Therefore, Mr. Casey was using alcohol and drugs not only at the time of Dr. Ahmed's first diagnosis of ADHD in January 1999, but also in the weeks following when Dr. Ahmed saw him.

[174] After some interruption in Dr. Ahmed's medical care, Mr. Casey returned to see Dr. Ahmed in February 2000. On May 2, 2000, she diagnosed ADHD again (Exhibit G-13). We can assume that Mr. Casey was abstinent prior to this second diagnosis as there is no evidence to the contrary. However, on June 9, 2000, he was arrested while driving under the influence, and on June 16, 2000, he was arrested

Canada that Ritalin made him agitated and moody and that he felt better when he stopped taking this medication. Since Mr. Casey was incarcerated in November 2000, he has not taken Ritalin and he testified that he has been rehabilitated.

[184] His poor reaction to Ritalin does not support the diagnosis of ADHD and would sustain the diagnosis of Drs. Maynes and Rosenberg that Mr. Casey did not suffer from ADHD. The record shows that for the period starting in June 2000, when Mr. Casey started again taking Ritalin, he was arrested for different violent criminal acts while being drunk. The Ritalin treatment did not improve his impulsive behaviour or his substance abuse.

d) Independence of expert witness:

[185] Dr. Ahmed has been a family doctor for the Caseys for many years and had the grievor under her care since 1996. She intervened several times to try to help Mr. Casey keep his job. Most notably, on December 21, 2000, she wrote to Mr. Grimes to explain that Mr. Casey would not be able to return to work, as she recommended that he would need 10 to 12 weeks to sort things out and in order that he enrol in the detox program in Ontario. He testified that he spoke with Dr. Ahmed on the telephone to get her to send the letter to Mr. Grimes. Dr. Ahmed was not truthful in her letter to the employer, as Mr. Casey was in jail. I understand that Dr. Ahmed wanted to help Mr. Casey; however, this indicates that she is acting more as an advocate of Mr. Casey and supports the claim made by the employer that she is not an independent expert witness. It is true that Dr. Maynes wrote a similar letter to the employer. However, he did not testify as an expert witness.

[186] Therefore, on a balance of probabilities, I am not satisfied that the grievor suffered from ADHD. However, I am satisfied that the grievor is an alcoholic and a drug abuser, namely, cocaine. There was no dispute from the employer that alcoholism and drug abuse are illnesses that are recognized as a disability. Therefore, this part of the medical defence applies.

<u>Linkage Between Disability and Off-Duty Conduct</u>

[187] Mr. Landry submitted that there was clearly a linkage between the ADHD and substance abuse and Mr. Casey's abhorrent conduct. Mr. Fader, on the other hand,

argued that it has not been established that people with ADHD or alcohol or drug abusers commit criminal offences.

[188] Dr. Ahmed explained that when she determined that Mr. Casey was fit to go back to work in November 2000, he had a GAF of 70 or greater. She testified that he could distinguish between right and wrong.

[189] Dr. Ahmed stated that it is common for people suffering from ADHD to get into problems with the law. I have already determined that it has not been established that Mr. Casey suffered from ADHD. Nevertheless, I received no substantial evidence to the effect that people suffering from ADHD would commit crimes because of lack of control due to their disability.

[190] As for alcohol and drug addiction, there has been no evidence presented at the hearing between these illnesses and committing criminal acts such as Mr. Casey committed, nor can I draw such an inference. This disability did not displace the grievor's responsibility, as he knew what he was doing.

[191] I agree with counsel for the employer that such a linkage has not been established through the evidence. At the time of all the serious incidents in the fall of 2000, Mr. Casey knew the difference between right and wrong.

Accommodation

[192] I am satisfied that the employer has discharged its duty to accommodate Mr. Casey's disabilities up to the point of undue hardship. The employer was very patient with and helpful to Mr. Casey, starting as early as 1996 to take accommodation measures. Through a series of actions, the employer accommodated Mr. Casey, providing him with leave, time and payment for treatments, transportation, etc. Mr. Grimes's experience as a counsellor for drug and alcohol addiction was put to good use. Mr. Casey's chronic absenteeism, his thefts of the employer's property or threats against co-workers were put aside as the employer accommodated his disabilities. The accommodations provided to Mr. Casey were beyond what would be expected in the workplace in such circumstances and are evidence of the employer's determination in providing accommodation measures for Mr. Casey.

[193] However, when Mr. Grimes read the decision in 2001, concerning Mr. Casey's convictions, he realized that Mr. Casey had become dangerous to the workplace.

The level of violence and recklessness that he showed would be a threat to the safety of his co-workers. This health and safety issue could not be accommodated by putting Mr. Casey in a different position.

[194] It was not established that Mr. Casey suffered from ADHD; nevertheless, the employer accommodated Mr. Casey up to the point of undue hardship as it was determined that he constituted a substantial risk for the safety of the workplace.

[195] The evidence is that following his termination, Mr. Casey has been rehabilitated. After being incarcerated in 2001, he changed the course of his life and this is quite an accomplishment. However, I have to consider all the facts in existence at the time of his dismissal, as indicated in *Cie minière Québec Cartier* v. *Québec (supra).* Post-termination evidence is only admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal. As S.P. Chotalia found in *Quigley* v. *Ocean Construction Supplies*, [2002] C.H.R.D. No. 9:

> *...it would lead to the absurd conclusion that a decision by the company to dismiss an alcoholic employee could be overturned whenever 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 discuss the employee.*

In this case, the post-termination evidence demonstrates that the grievor has changed his behaviour from the time of his dismissal. However, the fact that he has since rehabilitated does not make it unreasonable or inappropriate for the employer to have terminated him at the time. He represented a risk to the safety of the workplace when he was terminated and the employer has accommodated his disabilities up to the point of undue hardship.

[196] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[197] The grievance is dismissed and the termination maintained.

May 20, 2005

Guy Giguère,
adjudicator