

LAST CHANCE AGREEMENT #1 (Written 1998, Arbitration Decision 2001)

Labour arbitration case: Camcar Textron Canada Ltd., and United Steelworkers of America, Local 3222 (indexed as Camcar Textron Canada Ltd. and U.S.W.A., Loc. 3222 (Commerford). Volume 99 L.A.C. (4th), page 309)

Further to a discussion on _____ between the Company, Union representatives and (employee), the following three-party agreement will provide evidence demonstrating genuine motivation for rehabilitation from alcoholism which has been the root cause leading to the occurrences of lateness and absences.

All parties agree to the following conditions:

1. (Employee's) attendance and lateness record is unacceptable.
2. (Employee) will provide a Doctor's certificate stating that he has an alcohol dependency.
3. Except for this disability the Company would terminate for excessive lateness and absenteeism.
4. (Employee) agrees to enroll immediately and successfully complete a mutually agreeable rehabilitation program. He will be covered by all contractual benefits, including being in receipt of weekly indemnity while undergoing treatment and the cost of any treatment program will be paid by the Company.
5. (Employee) will supply a report from the Rehabilitation Agency certifying successful completion of the rehabilitation program and specifying any ongoing recommendations of the agency re: controlling his illness so that it will not cause absenteeism or lateness.
6. (Employee) will maintain an attendance and lateness record for twenty-four (24) months, following completion of the rehabilitation program, in which attendance and lateness is at least as good as the plant average except for innocent absenteeism for reasons other than the use of alcohol.
7. (Employee) agrees his employment will be terminated under the following circumstance:
 - (a) non-compliance with this agreement.In the event of such termination the power of an arbitrator will be limited to determining whether the circumstances in (a) have been proven. The arbitrator will have no authority to amend the penalty of discharge.
8. (Employee) has had opportunity to seek independent advice and to be advised by (name of union) and agrees that he was fairly represented by the Union in this matter.

Signed in _____, Ontario this _____ day of _____

(Employee name) _____

Union Representative _____

Company Representative _____

LAC Issues of lack of clarity and understanding between the parties on its intent due to:

Clause #6: provision requiring an absence and lateness record at least as good as the plant average discriminates against employee on the basis of disability (alcoholism). Also, the implication of the 24-month period is vague...employee has 24 months to clean up or the record has to be maintained during the full 24-month period. Should have been more clear; e.g., a requirement that the grievor maintain at least the plant average in every one-month, or three-month, or six-month period, over a total of 24 months (according to the actual intervals used in that workplace to monitor all employee absences)

There is some ambiguity concerning the phrase “innocent absenteeism.” There was no discussion between the parties as to what reasons would be accepted as legitimate excuses for lateness or absenteeism, and there was no practice in the workplace since a formal attendance review program did not exist.

LCA Arbitrator Discussion Issues:

Clause #6:

The arbitrator followed the analysis used in an Ottawa-Carleton case* where the arbitrator rejected the notion that the establishment of an “average” standard solves the problem of having a requirement to conform to a particular standard of attendance which is not imposed on other employees but is required of the alcoholic employee because of his disability.

The arbitrator noted that there is some general expectation that employees meet attendance averages over time, and where there is a formal attendance management policy, the particular standards required of a grievor in these circumstances are usually time limited and therefore more stringent, and also make the employee subject to “automatic” termination with only limited resource to arbitration. He further stated that even in a workplace where all employees were required to meet the same standard of attendance, discrimination might still be found, as an employee with a disability might have difficulty meeting that standard compared to employees with no such

* Re: Ottawa Civic Hospital and O.N.A. (Hodgins) (1995), 48 L.A.C. (4th) 388 , p. 397.

handicap...constituting discrimination and would require the employer to show that it had accommodated the disabled employee to the point of undue hardship.

On this case, the arbitrator decided that the standard required for the grievor was not required of any other employee in the workplace. Secondly, employees of the company were not subject to termination where they failed to maintain an average attendance and the union was unaware of a situation where an employee had been disciplined, much less discharged for above-average absenteeism or lateness. Thirdly, the grievor's alcoholism was the primary cause of the agreement and the goal was to provide evidence demonstrating genuine motivation for rehabilitation from alcoholism which has been the root cause leading to the occurrences of lateness and absences.

The company argued that given in this case there was no medical evidence linking the employee's absences to his drinking, the Human Rights Code provisions should not be considered. The arbitrator noted that the fact that the grievor was ultimately terminated for absences and lateness which may or may not have been caused by his alcoholism was not significant and that there was no doubt that the breach of a standard was the cause for the grievor's termination and the enforcement of the discriminatory standard, regardless of the reasons leading to its breach, must come under the scrutiny of the Code.

In the absence of medical evidence or evidence about the medical and psychosocial problems that a recovering alcoholic can expect to encounter and whether or not those aspects of the condition might result in increased levels of absenteeism, the arbitrator found the grievor's testimony about his difficulties in breaking old patterns relating to his drinking, his fear of a relapse and his slow recovery from chronic gastroenteritis to be credible in demeanor and in his description of his struggles.

The arbitrator ruled that the breach of the Code arises from the imposition upon the grievor, for reasons arising from his disability, of a standard, the breach of which for any reason not specifically excepted would result in the most serious consequences that were not imposed upon other employees. He concluded that the application of the last chance agreement therefore was unequal treatment as a result of a disability and under the protection of the Code. Whether the employer accommodated the grievor to the point of undue hardship was then reviewed, including evidence that the grievor demonstrated adequate commitment to his own rehabilitation and cooperation with the employer's accommodative efforts relative to the employee's understanding of the expectations communicated in the agreement.

LAST CHANCE AGREEMENT #2

(Written 2000, Arbitration Decision 2001)

Labour Arbitration Case: Slocan Group – Mackenzie Operations and Pulp, Paper and Woodworkers of Canada, Local 18 (Indexed as: Slocan Group – Mackenzie Operations and P.P.W.C., Loc. 18 (Paverlko) , Volume 97 L.A.C. (4th), p. 387)

You have taken the initiative to deal with your personal issues and you have given us reasons to believe that you can meet our expectations of regular full-time employees.

As a result of your actions, (Company Name) is prepared to reinstate your employment effective _____. However, given your history, we must establish the following conditions upon your return to work:

You must maintain weekly attendance at Alcoholics Anonymous and provide evidence of your attendance to your Supervisor (_____) each week. Failure to provide these attendance records will result in your termination.

If two (2) Company Representatives believe that you show objective signs of being under the influence of alcohol at work you will be terminated immediately. It will be your obligation to prove otherwise.

The Union (Name, Local) will not support any grievances related to the above issues.

The period of time from March 28, 2000 until September 11, 2000 will be considered a Suspension. All records will be adjusted to reflect this and your seniority will not be affected.

We, the undersigned, agree to the conditions for (Employee's) return to work on September 11, 2000. We understand that these conditions will remain in effect for a period of twelve (12) months.

Context: background given lengthy number of incidents in this case:

In this case the employee had previously asked the employer for assistance regarding his drinking problem and the employer had arranged attendance at a residential treatment center.

Prior to this event various letters had been issued to the employee. For example, a letter of warning stating the excessive alcohol consumption was impacting the employee's job performance and there had been several complaints from coworkers that indicated the employee showed up for work impaired and/or had been known to drink while on the site. The letter reviewed the company's and coworkers' concern

about the employee's actions as they create a safety issue for everyone involved, that no one wanted to see the employee hurt himself or a coworker because of impairment at work, the employee had to take the initiative to overcome the problem or disciplinary action would be taken, and company individuals were named for the employee to contact if assistance was required. It also asked the employee to consider counseling through the EAP program and likewise provided a contact name and phone number.

Another subsequent letter changed in tone stating further reoccurrences of specific behaviours could result in termination. However, the letter also stated: "...you are a valued member of ourteam and I personally wish to see you take action and seek treatment for your problem. Our EFAP program is there for you and if we can help you in any way please contact..... immediately. We want you to succeed." The next letter after a suspension outlined a discussion concerning the suspension, the dates of the suspension, and a request that as a condition of employment with the company the employee was required to attend an "Intake Counseling Session" at Mackenzie Counseling. "It will be mandatory that you abide by their professional recommendations. Any further incidents of this nature will most likely result in your termination."

Note:

Issues not discussed in arbitration probably exist regarding confidentiality; i.e., information about AA attendance to be provided to the supervisor. The new Private Sector Privacy Legislation may impose higher-level requirements.

LAST CHANCE AGREEMENT #3 (Written 1994, Arbitration Decision 1996)

Labour Arbitration Case: Alcan Rolled Products Company (Kingston Works) and United Steelworkers of America, Loc. 343. Volume 56 L.A.C. (4th), p. 187.

Provisions reported in the written case include the following versus a complete agreement:

1. The grievance shall be withdrawn.
2. (Employee) shall be conditionally returned to employment after serving an unpaid disciplinary suspension of six months running from the date of his original discharge and subject to satisfying the terms as contained herein.
3. (Employee) shall participate in any programme for alcohol addiction treatment, as determined and approved by the (Company) Medical Director and the Employee Assistance Counsellor, such programme may include a live-in programme for alcohol treatment. If such programme requires payment, it shall be by the Company.
4. (Employee) shall participate in the Employee Assistance Programme for as long as he continues in the Company's employ.
5. (Employee) shall maintain an attendance record which is not worse than the average attendance record in the plan, i.e. will not be absent for any reason in excess of the average absentee record in the plant.
6. (Employee) undertakes to refrain from the consumption of alcohol. (Employee) will provide the Company with written authority to obtain necessary release of E.A.P. information and medical information relevant to alcohol use. Such information must be sufficient to satisfy the Company that (Employee) has not used alcohol (blood alcohol screen test). The Company may request this information at any time during (Employee's) employ. The Company may demand that this test be performed by the Company's physician or any Company authorized medical facility, at Company expense.
7. Should (Employee) fail to satisfy any of the conditions contained herein or should he at any time in the future engage in any conduct, or commit any offence which would normally result in written disciplinary action, he will be immediately discharged and neither he nor the Union will initiate any grievance against the discharge.
8. (Employee) will not receive payment for any purpose with respect to the period of his suspension or for any period thereafter until he returns to work.
9. This agreement, shall not, in any way establish a precedent or prejudice the parties in the future.

This agreement is dated _____.

LCA Arbitrator Discussion Issues:

Clause #7 was potentially troubling given the clause allows for termination under a breach regardless of the circumstances. Also it made termination the automatic and inevitable consequence of any misconduct which would normally result in at least written disciplinary action. The arbitrator decided that the employer wanted it in because it felt that further drinking or disciplinable misconduct would irremediably undermine the employment relationship and not because it wanted to disadvantage the grievor because he was an alcoholic. However, he also stated that it would be ineffective in circumstances in which termination of the grievor's employment would infringe the grievor's rights under the Code.

Warnings on LCA's by Lawyer, Bill Phelps of Mathews, Dinsdale & Clark LLP
Fact Sheet issued at a Collingwood hospital's event for its foundation members, 11/03

Excerpt From the Fact Sheet:

Last Chance agreements can be very helpful in solving difficult discipline problems; however, they must be drafted very carefully...There are several issues, which the employer must consider...:

1. Will the Union and the employee forego any back pay which may be otherwise owing or forego any seniority as the price of getting the deal?
2. In the case of addiction does the agreement require the employee complete rehabilitation and comply with follow-up recommendations as his or her part of the agreement?
3. What is acceptable proof of such compliance?
4. Does the grievor understand what he or she has signed or will the employee turn around and challenge the settlement? It may be prudent for the employee to sign that he or she has had an opportunity to review the document with independent legal counsel, or alternatively that the agreement was explained to him or her by counsel or business representative for the union, and that the employee understands the agreement.
5. Where the agreement relates to future attendance, does that include innocent absenteeism? What is the comparator group to determine if future absenteeism is excessive? What is the time period for comparison? What is the standard of comparison? Does the company maintain adequate records to prove noncompliance? How closely should subsequent incidents of lateness or absenteeism be monitored and reasons recorded?
6. Does the agreement itself or the enforcement of the agreement violate the Human Rights Code? In the case of addiction, if the employee fails to seek

rehabilitation or fails to comply with follow-up recommendations, is that grounds for discipline?

7. Does an arbitrator have the jurisdiction to amend the penalty of discharge for non-compliance?

This lawyer also stated verbally that employers make the following common mistakes:

- Not diligently recording reasons for employee absenteeism.
- Supervisors sitting down with group of employees for recreational drinking and setting a poor example of managers/supervisors breaking rules.
- Referring to EAPs but not providing a clear message that “this is not good enough.”
- Not requiring doctor’s certificates that state the employee was absent on “X” because of a medical reason. They need to catch non-medical absences.

Source: Workplace Health Program, CAMH.