

HUMAN RIGHTS PANELS OF ALBERTA

BETWEEN:

Donald Luka

Complainant

-and-

Lockerbie & Hole Inc.

- and -

Syncrude Canada Ltd.

Respondents

DECISION

Panel Chair: Beth Bryant

Decision Date: February 15, 2008

File Number: N2004/09/0206

Human Rights and Citizenship Commission
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Appearances

Donald Luka
Complainant

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)

Director of the Human Rights
& Citizenship Commission

)Arman Chak
)Legal Counsel

Lockerbie & Hole Inc.
Respondent

)Daniel C.P. Stachnik, Q.C.
)Legal Counsel

Syncrude Canada Ltd.
Respondent

)Barbara Johnston
)Legal Counsel

Respondents' witnesses:

Donelda Patterson
Dave Sutherland
Monica Scheel
Dr. Louis Francescutti
Dr. P. Colbourne
Dr. Leo Kadehjian
Norm Ingram
Ray Dunphy
Sean Cassault
Sandra Clarke
Neil Tidsbury
Chuck Brenton
Arlene Good
Doug Kelly
Dr. Vernal McCann
Roland LaBossiere
Peter Dunfield
Pat Atkins

[1] On August 30, 2004, Mr. Donald Luka (the complainant) filed a complaint against Lockerbie and Hole Inc. (Lockerbie) and Syncrude Canada Ltd. (Syncrude) (the respondents). Mr. Luka alleged that he suffered discrimination in the area of employment on the ground of physical disability contrary to section 7(1)(a & b) of the *Human Rights, Citizenship and Multiculturalism Act* (the *Act*).

Issues

1. Preliminary Objection: Is Syncrude an employer under the *Act*?
2. Has the complainant established prima facie discrimination?
3. Is the pre-access alcohol and drug testing standard a BFOR?
4. Was the complainant accommodated to the point of undue hardship?

1. Preliminary Objection

[2] Syncrude alleged that the Panel has no jurisdiction to adjudicate this claim against them as Syncrude is not an employer under section 7 of the *Act*.

Evidence

[3] Mr. Luka testified that he named Syncrude as his employer because they set out the procedures for him to work on their site.

[4] From January 5, 2004 to July 2004, Mr. Luka worked for Lockerbie as an electrical foreman at the Epcor power plant expansion at Genesee. On approximately July 21, 2004, Lockerbie asked Mr. Luka to transfer to their project at the Syncrude Upgrader Expansion Site (UE-1). Mr. Luka was to be promoted to the position of nightshift superintendent. Lockerbie told Mr. Luka that to work on the UE-1 site, he would have to successfully complete a pre-access alcohol and drug test as this was a Syncrude requirement.

[5] This requirement was formalized in an amendment to Syncrude's existing Work Protection Code (WPC#6) which Syncrude issued to its contractors on May 3, 2004. The amendment *specifically requires its contractors' workforce to have successfully completed an alcohol and drug test, as set forth in the amendment enclosed, prior to being allowed access to any and all of Syncrude's work sites.*

[6] This amendment was effective immediately with compliance to the requirements required by August 1, 2004.

[7] The amendment set out: 1) which workers must take the test 2) who would administer and pay for the tests 3) what the test must conclude 4) when the test must be completed, and 5) the effects of non-compliance. Specifically, if a worker did not pass the alcohol and drug test according to the requirements set out by Syncrude, *the contractor organization shall not deploy a worker to a Syncrude site if that worker has*

been in non-compliance to an alcohol and drug policy unless after a minimum of six months from the date of non-compliance and upon approval from Syncrude.

[8] In evidence is a memo to Peter Dunfield, Syncrude from Mark McCullough, Alberta Building Trades. He writes *“we absolutely believe that a policy of an automatic six-month ban respecting violation of the alcohol and drug work rule is contrary to human right legislation and counter to the intent of the work rule which is based on a rehabilitative mode.....we would like to re-emphasis that the first step subsequent to a violation being established should be an assessment by a qualified professional, then a requirement to follow the recommendations that arise from the assessment. Return to work is often an integral part of the rehabilitation process.”*

[9] The Panel notes that after experience with this policy and feedback from stakeholders, like Mr. McCullough, parts of this policy were amended by Syncrude in October 2004. Specifically, the six month ban clause associated with the pre-access standard was removed.

[10] Mr. Luka took the pre-access alcohol and drug test at Dynacare Kasper Laboratories in Red Deer on July 30, 2004. On August 4, 2004 he was informed by the lab that he had tested positive for the presence of marijuana in excess of the screening cut off concentration.

[11] In discussion with Mr. Chuck Brenton, Lockerbie operations manager at the time, Mr. Luka was informed that in accordance with the Syncrude policy, he could not be dispatched to the UE-1 site because he had failed the drug test.

[12] Mr. Luka did not work for Lockerbie on the Syncrude site in 2004. However, in February 2005, having successfully completed the pre-access alcohol and drug test, he did work for Casca Electric on the Syncrude site.

[13] The Panel notes that if a contractor such as Lockerbie required electrical workers, they would be dispatched from the union hall. In this regard, Mr. Luka was hired to work on the Genesee site out of the local union hall 424. Mr. Luka did not take an alcohol and drug test then as Lockerbie did not have a pre-access alcohol and drug testing requirement.

[14] In instances where pre-access alcohol and drug testing was required, Ms. Arlene Good, administrative assistant to the loss control manager at Lockerbie, stated that a worker would book their test directly and would show up at the Dynacare Kasper Laboratories with a union clearance slip and photo identification. Their test results would be forwarded to Lockerbie and Dynacare Kasper would provide the results to the worker. For those workers who failed the test, their paperwork was filed and no further action was taken. Those workers who passed were dispatched to the site.

[15] In this case, Mr. Luka was a Lockerbie employee who they were seeking to transfer to the Syncrude site. While there is a union clearance slip in evidence, it was

signed by someone for Mr. Luka, and he stated that he had never seen this slip before this hearing. While a failed alcohol and drug test meant he could not be utilized at the UE-1 site, he remained a Lockerbie employee.

[16] Mr. Dave Sutherland, operations manager at Lockerbie, testified that Lockerbie was a heavy industrial company. UE-1 was a mega project with Lockerbie building two plants with 85 modules constructed in Sherwood Park.

[17] Mr. Sutherland described the contract process. He stated that Syncrude first sent out a notice of interest to various contractors. Lockerbie had to provide their safety manual and safety statistics among other things. If Syncrude determined that these met their standards, Lockerbie would get to bid on aspects of the UE-1 project. As Syncrude had hired Kellogg, Brown and Root (KBR) to manage the UE-1 project on their behalf, all bids were received by them. Successful contractors were determined in consultation with the owner, Syncrude.

[18] Mr. Sutherland stated that electrical workers were dispatched from the local 424 union hall for the UE-1 project as Lockerbie could not hire directly. Lockerbie managed all their own work; their employees were identifiable and Lockerbie had no on-going relationship with Syncrude. When asked if Syncrude could ask to have a worker removed from the site, Mr. Sutherland stated that there would have to be a good reason, as Lockerbie would be subject to the grievance procedure.

[19] Mr. Sutherland testified that Lockerbie did not have a pre-employment alcohol and drug testing requirement for its workers. With regard to individual pre-access alcohol and drug testing results, he said that Syncrude did not require or receive the results.

[20] Although the Panel does not have in evidence a copy of the contract between Lockerbie and Syncrude for the UE-1 project, Mr. Sutherland confirmed it is a cost plus contract which includes the fee for every worker on site.

[21] Ms. Donalda Patterson, the manager of workplace policies and services for Syncrude, stated that there is no record of Mr. Luka ever having been a Syncrude employee. Syncrude did not receive any information regarding Mr. Luka's test results, and Syncrude never banned Mr. Luka from their site. She confirmed that Mr. Luka did work for Casca Electric in 2005 at the Syncrude site.

[22] Ms. Patterson stated that Syncrude is not a party to any collective agreement, as Syncrude's entire workforce is non-union. Unionized workers operate on site as part of the contractor workforce. She confirmed that there is no corporate relationship between Syncrude and their contracting companies such as Lockerbie. Contracting companies are responsible for managing their own employees.

Argument

Syncrude

[23] Syncrude argued that while human rights legislation is to be interpreted broadly, the *Act* does not cover all relationships, *Cormier v. Alberta Human Rights Commission*.¹ Not everyone is an employer and falls within section 7 of the *Act* even given a broader interpretation of the *Act*, *Bugis*.² It is for the deciding body to examine the nature of the relationship between the employee and the employer.

[24] Syncrude raised the case of *Maycock v. Canadian Tire Corporation Limited*³ where the tribunal found that there was no employment relationship between Canadian Tire and its franchisee, as “there are no CTC policies with respect to the hiring or direction of the franchisee’s employees.”

[25] Further, in *Andrews v. Chili House Thai Bistro and Chen*⁴ Syncrude stated that a professional contractor had entered into an agreement with Chili House. This contract was one of many and did not affect the contractor’s ability to make a living. For this and other reasons, the complainant was found not to be in an employment relationship with Chili House.

[26] Syncrude argued that the Panel must look at the nature of the relationships between Mr. Luka, Lockerbie and themselves by analyzing the totality of their interaction.

[27] Syncrude and Lockerbie’s relationship on the UE-1 site was arms length. Syncrude was in the business of operating a refinery, while Lockerbie was in the construction business. Lockerbie had successfully bid on part of the construction work on UE-1.

[28] There was no corporate relationship between them. Lockerbie had their own safety program, supplied their own labour and materials, were signatories to the collective agreement with local union 424, their employees were visibly identifiable, and as a company they were not dependent on Syncrude for their income.

[29] With regard to Mr. Luka, Syncrude argued that they had no direct relationship with him. Mr. Luka never attended the Syncrude site in 2004 and Syncrude was not a party to the union dispatch process upon which Mr. Luka was dependent for his livelihood. In fact, relying on the *Lockerbie and Hole Co. v. United Association of*

¹ *Cormier v. Alberta (Human Rights Commission)* [1984] A.J. No. 621 at para.59.

² *Bugis (Re)* [1989] A. J. No. 203 (Q.B.), aff’d [1990] A.J. No. 445 (C.A.) at p. 2 and *Re Prue* [1984] A.J. No. 1006 at para 35 (Q.B.)

³ *Maycock v. Canadian Tire Corporation Limited and another*, 2004 BCHRT 33 at para 48 & 53

⁴ *Andrews v. Chili House Thai Bistro and Chen* (No.2), 2007 BCHRT 88 at para 63 & 67

*Journeyman and Apprentices of the Plumbing and Pipefitting Industry, Local 488*⁵ case Syncrude alleged that Mr. Luka would not even be considered a Lockerbie employee until he passed the pre-access alcohol and drug test.

[30] Syncrude argued that it was Lockerbie that directed Mr. Luka to take the pre-access alcohol and drug test and to go for an assessment upon receiving the test results. They also determined that Mr. Luka could not be dispatched to the Syncrude site.

[31] In addition, Syncrude was not a party to the collective agreement, did not issue a T4 to Mr. Luka, had no involvement in his hiring and dismissal, did not receive the results of his pre-access alcohol and drug test, did not ban him from their site, and did not pay him.

[32] In fact, it was the union through its collective agreement that determined Mr. Luka's rate of pay, hours of work, payment schedule, his benefit plans, and his accommodation when working on site.

[33] In this case, Mr. Luka's relationships were exclusively with the union and Lockerbie.

[34] Syncrude concluded that for the Panel to have jurisdiction, there must be some evidence that Syncrude refused to employ Mr. Luka or that Syncrude was an employer in this circumstance. They alleged that the evidence in this case did not support this conclusion.

The Director

[35] The director argued that the question of interpreting the meaning of "employ" is within the expertise of the Panel. The *British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board)*⁶ case recognized that interpretation was at the "heart of the specialized jurisdiction" that an administrative tribunal has and that the tribunal is "called upon not only to find facts and decide questions of law but also to exercise its understanding of the body of jurisprudence that has developed."

[36] The director maintained that the Human Rights and Citizenship Commission's (the Commission) role is public and the ultimate goal is the elimination of all discrimination from Alberta. In this regard, the functions of the Commission give it wide powers to assess and attack that goal. Further, human rights legislation is powerful and has paramountcy over all law that is being applied in Alberta.

[37] Consequently, the removal of a respondent must be done by consent or with the clearest evidence that the *Act* does not apply to them.

⁵ *Lockerbie and Hole Co. v. United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry, Local 488* (Cable Grievance), [2005] A.G.G.A. No. 93 at para 45

⁶ *British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board)*[1996] B.C.J. No. 1531 para 74

[38] In this case, the director argued that Syncrude is asking the Panel to apply a master/servant relationship test in the examination of the nature of the relationship between itself and Mr. Luka.

[39] *Cormier* (supra) has established that there is a much broader interpretation of “employer” within the context of human rights legislation. In this decision, Justice McDonald of the Alberta Court of Queen’s Bench stated:

that a liberal interpretation of the meaning of the verb ‘employ’ justifies application of the broad definition of the verb found in the Oxford English Dictionary ‘to use the services of [a person] ... in the transaction of some business.’

[40] In *Re Prue*⁷ Justice Miller stated:

The ancient common law master-servant relationship cannot have been intended to apply to define the meaning of these words (‘person and employer’) in a manner allowing technical legal rules to limit the rights of any Albertan.

[41] In *Pannu, Kang and Gill v. Prestige Cab Ltd.*⁸ Justice Laycraft confirmed the use of the term “to utilize” in the broad sense of “to employ.”

[42] Likewise, in *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*⁹ a decision of the Federal Court of Canada, Iacobucci, C.J. reviewed the authorities mentioned above and agreed that there should be a broad meaning to the word “employee” beyond that afforded by the technical master/servant relationship. The director argued that this case is identical to the current case in that the court found the employer to be the group that was in control of the work site, not the actual company that was contracted to provide the services.

[43] In this case, Syncrude sought to utilize the services of Mr. Luka in the course of their business operations through their contract with Lockerbie. The money to pay for his labour would have come directly from Syncrude through their contractor, Lockerbie.

[44] This complaint is about Syncrude’s pre-access alcohol and drug testing policy which affected Mr. Luka and Lockerbie in their attempt to transfer him to the Syncrude site. Lockerbie did not have this testing requirement for their workers on other sites such as Genesee, where Mr. Luka had worked. It is Syncrude’s policy which is alleged to be discriminatory which was used by Lockerbie to deny Mr. Luka employment as well as to discriminate against him.

⁷ *Re Prue* (1984), 57 A.R. 140

⁸ *Pannu, Kang and Gill v. Prestige Cab Ltd.* (1986), 73 A.R. 166

⁹ *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C.571 para 13-14

[45] The director asked that costs be awarded in favour of Mr. Luka for the jurisdictional challenge brought by Syncrude. The awarding of costs is covered under Section 32(2) of the Act.

Decision on Preliminary Objection

[46] In determining whether Syncrude is an employer as defined by the *Act*, the Panel is mindful of the comments of Justice McDonald in the *Cormier* decision (supra para 44), where he states:

The first premise is that words used in stating a legal rule in one context may not mean the same where the words may be used to express a legal rule in another context. The meaning of the same rules may be found to be different if the two legal rules reflect different policy conditions and reflect different social functions.

[47] In this case, the Panel finds that there is a difference in the definition of “employer” as used in the human rights context versus its use in the labour relations context. This difference is a result of the different purposes for which the respective legislation was developed.

[48] In reaching its conclusions regarding the meaning of “employer” in the human rights context, the Panel considered the following provisions of the *Act*:

(1) *Preamble*

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status:

Effect of Act on provincial laws

1(1) Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act.

(2) *Discrimination re employment practices*

7(1) No employer shall

- (a) *refuse to employ or refuse to continue to employ any person, or*
- (b) *discriminate against any person with regard to employment or any term of condition of employment, because of race, religious beliefs, colour, gender, physical disability, mental disability,, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.*

Functions of the Commission

16(1) It is the function of the Commission

- (a) *to forward the principle that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status,*
- (b) *to promote awareness and appreciation of and respect for the multicultural heritage of Alberta society,*
- (c) *to promote an environment in which all Albertans can participate in and contribute to the cultural, social, economic and political life of Alberta,*
- (d) *to encourage all sectors of Alberta society to provide equality of opportunity,*
- (e) *to research, develop and conduct educational programs designed to eliminate discriminatory practices related to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status,*
- (f) *To promote an understanding of, acceptance of and compliance with this Act,*

- (g) *To encourage and co-ordinate both public and private human rights programs and activities, and*
- (h) *To advise the Minister on matters related to this Act.*

[49] The Panel agrees with the director's submission that the functions of the Commission give it broad and varied powers to eliminate discrimination in Alberta. Further, human rights legislation has paramountcy over any Alberta law that authorizes or requires the doing of anything prohibited by this *Act*. Consequently, while the word "employer" is not defined in this *Act* as it is in the British Columbia Human Rights Code, the very context in which this term exists is broad and encompassing. This context does not invite a definition of "employ" or "employer" that is narrow and linear. Thus the definition of "employer" that reflects only a master/servant relationship is not compatible with the purposes of the *Act*.

[50] *Re Prue, Comier, and Canadian Pacific Ltd.* (supra), all support the notion of a broad interpretation of the term "employer" within the human rights context.

[51] In *Cormier*, Justice McDonald found that lacking a definition, the word "employ" and its derivatives are ambiguous. As a result of this ambiguity, the *meaning attributed should be liberal as far as it is consistent with the purpose of the Act. ... a liberal interpretation of the verb employ justifies the broad definition ... 'to use the services of.'*

[52] This definition of "employ," meaning "to utilize" has been accepted in the decisions of *Pannu, Bugis* (supra), and *Wadhwa v. Syncrude Canada Ltd. and Casca Electric*¹⁰.

[53] The Panel accepts this definition of "employer" as one who intends to utilize the services of a person in the transaction of their business.

[54] In this case, Syncrude stated that they had no relationship with Mr. Luka. However, Mr. Luka worked for Lockerbie, whose services Syncrude was utilizing to build plants on the UE-1 site. Syncrude inserted itself into this employment relationship through its pre-access alcohol and drug testing policy which set out conditions for access to the UE-1 site. This is in contrast to *Maycock* (supra) in which it was found that there were no CTC policies with respect to the hiring or direction of the franchisee's employees.

[55] Mr. Luka was an employee of Lockerbie. They were looking to transfer him from their Genesee site to the Syncrude site. This is in contrast to workers referred for pre-access alcohol and drug testing by the union prior to commencing their work. Lockerbie directed Mr. Luka to test only because it was a prerequisite for working on the UE-1 site.

¹⁰ *Devinder Wadhwa and Syncrude Canada Ltd. and Casca Electric Ltd.*, Alberta Human Rights Panel Decision, December 16, 2005

Lockerbie had no pre-access alcohol and drug testing policy and Mr. Luka had not been tested prior to working at Genesee.

[56] Syncrude stated that they could not have banned Mr. Luka from their site because they did not know he had tested or the results of his test. This is a very literal and unreasonable response.

[57] Their policy, which they downloaded on their contractors, prevented those who had failed the test from working at UE-1 for a six month period. Lockerbie knew who had failed the test and they could not dispatch them to UE-1 for six months regardless of any assessment or rehabilitation initiatives undertaken. This was the argument of Alberta Building Trades which contributed to the removal of the six month ban in the October 2004 revision of WPC#6.

[58] Syncrude argued that Mr. Luka's union was responsible for setting out the terms and conditions of his employment and that he depended on the union for his livelihood. The Panel rejects this argument because unions simply bargain the terms and conditions of employment. They do not direct the workforce or set policy.

[59] Every organization has a set of values that are fundamental to its operation. While the Panel does not have a copy of the contract between Lockerbie and Syncrude, it would be reasonable to assume that in order to maintain and further Syncrude's corporate values, there would be terms and conditions which would necessarily influence and impact the employees hired by the contractor.

[60] The Panel has heard from a number of witnesses that safety was Syncrude's number one priority on the UE-1 site, as this was a monumental project where construction was occurring in a live operating environment.

[61] As such, all contractors had to submit their safety policy and safety record prior to even being allowed to bid on the UE-1 project. This safety value was also the reason why WPC#6 was amended to include pre-access alcohol and drug testing. WPC#6 required "the commitment on the part of contractor organizations and contract workers to accept the responsibility for their own safety and the safety of others" while on the UE-1 site. As a result, the contractors and their workers were required to take on the responsibility for implementing Syncrude's safety policy.

[62] The Panel finds that the onus for the implementation of its safety policy rests with Syncrude, not its contractors, thereby creating a direct link between Syncrude, the contractors and the contractors' workers.

[63] In conclusion, the Panel has difficulty imagining how Syncrude can deny its status as an employer when it sets out stringent conditions for the workers it utilizes to have access to its site. It would be an organization façade to think that a company could circumvent human rights legislation by inserting a contractor between the company and the workers it requires to build its project. The Panel would not be adjudicating this

claim if Lockerbie had not wished to transfer Mr. Luka to the Syncrude site to help build Syncrude's project.

[64] For all these reasons, the Panel finds that Syncrude is an employer as defined in section 7 of the Act.

[65] If the parties are unable to settle the matter of costs a teleconference may be held with the Panel.

2. Has the complainant established prima facie discrimination?

[66] The onus is on Mr. Luka to show that he has been discriminated against by Lockerbie and Syncrude on the basis of a physical disability as a perceived physical disability.

Relevant Evidence

Mr. Donald Luka

[67] Mr. Luka testified that he had worked for Lockerbie since January 2004 as an electrical foreman on their Genesee site. During that time he was never impaired at work, did a good job and there were no accidents with his crew.

[68] On approximately July 21, 2004, Lockerbie requested that he transfer to their project on the Syncrude UE-1 site. They were going to elevate his status to superintendent which would have made him part of their management team. In this position he would be doing no hands-on work. Mr. Luka was excited about this opportunity.

[69] In order to work at the UE-1 site, Lockerbie told Mr. Luka he must take a pre-access alcohol and drug test. He was told that this was a new Syncrude requirement and that he had to pass it in order to work at the site.

[70] While Mr. Luka testified that while he questioned the value of pre-access alcohol and drug testing, he decided to take the test because he wanted the superintendent job. He stated that he never had a concern that he would fail the test.

[71] In evidence is a document signed by Mr. Brenton of Lockerbie, dated July 29, 2004. It is entitled *Instructions to Workers for Pre-access Drug and Alcohol Testing*. Mr. Luka testified that he never received this document prior to testing on July 30, 2004.

[72] Also in evidence is a union clearance slip dated August 3, 2004 and signed by someone on behalf of Mr. Luka. Mr. Luka testified that he had not seen this slip prior to this hearing. The Panel notes it is this slip that Ms. Good testified would be presented to Dynacare Kasper at the time of testing.

[73] On July 30, 2004, Mr. Luka was tested at Dynacare Kasper Laboratories in Red Deer. He stated that he was told he would receive the results in approximately four hours. He checked with the lab on Friday, Saturday, and Sunday, and was told his results were inconclusive and were being sent to their lab in Edmonton. On Monday, August 4, 2004, he was called by the medical review officer (MRO) and told that he had tested positive for marijuana. Mr. Luka stated that in speaking with the MRO he did not deny drug use, only recent drug use. He also questioned the delay in receiving his results. He stated that the MRO did not tell him that his sample was dilute.

[74] Mr. Luka defined a drug user as a person who frequently uses drugs to alter their perceptions. Mr. Luka testified that he was not a drug user.

[75] Under cross-examination, Mr. Luka stated that he had used marijuana about two weeks before the test. He did not know that he would have to test at that time. He testified that he smoked one cigarette with two individuals. A co-worker supplied the cigarette and he did not know its potency. Prior to this incident, his last use had been approximately two years prior.

[76] Mr. Luka stated that the effect of the marijuana was to relax him and to make a social event more fun. He believed that his motor skills were not affected because he and others climbed an abandoned trestle bridge which he had climbed before when he was not smoking.

[77] With regard to his dilute sample, Mr. Luka stated that it was very hot on the day of his test and he drank three to four bottles of water.

[78] Mr. Luka was shown an exhibit which was part of the Construction Labour Relation's supervisor training program entitled *An Alcohol and Drug Policy that Works*. Part of it dealt with how long drugs stay in the body. It indicated that "cannabis (marijuana) can remain from one day to four weeks." Mr. Luka stated that he was surprised at this information.

[79] After receiving his results from the MRO on August 4, 2004, Mr. Luka called Mr. Brenton at Lockerbie. Mr. Luka stated that Mr. Brenton was aware of his test results but told him that as this was a new program, he was not sure what was required for him to return to work. He told him to sit tight.

[80] Mr. Luka stated that he was not offered another job or employment assistance at this time. He also stated that he was stunned by this reaction because he had a good work record and no one seemed to be taking this in to account.

[81] On August 10, 2004, Mr. Brenton called Mr. Luka to state that they now had guidelines for dealing with positive test results of employees. Mr. Luka testified that Mr. Brenton wanted to send him to a company to assess his drug addiction. Mr. Luka stated that he was outraged and insulted. He believed that his work record should have proven that he had no addiction.

[82] Mr. Luka stated that Mr. Brenton did not seem to know how the assessment would work. He said that the substance abuse program was new and they were breaking new ground. No one explained the process to him and Mr. Luka stated that he had little confidence in what Lockerbie was offering. Further, he told Mr. Brenton that what he did on his own time was his business. Mr. Luka stated that he was not a drug addict and only used marijuana recreationally from time to time. It was not an on-going situation.

[83] Mr. Luka testified that as a result of having little information about what an assessment involved and having lost money during this process, he could not afford to wait around. Therefore he refused to go for an assessment. Consequently, he was released from his position by Mr. Brenton on that day. On August 17, 2004, he received a letter from Lockerbie stating that as a result of his refusal "to participate in the CEFAP substance abuse assessment," Lockerbie had no recourse but to terminate his employment. Mr. Luka stated that he did not know the meaning of the Construction Employee & Family Assistance Program (CEFAP) at that time.

[84] Mr. Luka spoke of the stigma attached to failing the drug test. He stated that he received a call from a colleague at Lockerbie, telling him he had failed the test prior to his conversation with the MRO. He believed that because he did not show up on the Syncrude site, the assumption of his co-workers was that he had failed the test. As a result he was looked upon as a drug user and a safety concern. Mr. Luka stated that he did not take issue with the test results, but with the assault on his character.

Mr. Chuck Brenton

[85] Mr. Brenton testified that in 2004, he worked as the operations manager at Lockerbie. He was one of three people who set up the system for pre-access alcohol and drug testing. The other two were Ms. Arlene Good and Ms. Leanne Aysan, human resources manager. Mr. Brenton stated that Lockerbie was a member of the Construction Owners Association of Alberta and as such subscribed to the Canadian Model for Providing a Safe Workplace and its alcohol and drug work rules.

[86] Mr. Brenton testified that WPC #6 was a Syncrude initiative for pre-access alcohol and drug testing to be implemented August 1, 2004 or sooner if possible. He stated that Fort McMurray was a remote site with transient workers, who lived in camps far away from home and that some workers resorted to alcohol and drugs.

[87] Mr. Brenton stated that the information sheet he issued to workers regarding pre-access alcohol and drug testing was intended to be a reminder to the union halls and their members. It was to be handed out with the clearance slips from the union for workers dispatched to Lockerbie.

[88] Lockerbie had a contract with Dynacare Kasper to conduct the pre-access alcohol and drug testing. Individual results would be faxed to Lockerbie on a secure line. Mr.

Brenton testified that only he, Ms. Good and Ms. Aysan would be able to access the results. Only the names of those who passed the test would be forwarded to Syncrude.

[89] Mr. Brenton stated that when he spoke with Mr. Luka on August 4, 2004, Mr. Luka told him that he had failed the test. He also accused Lockerbie of distributing this confidential information to both the Genesee and Syncrude sites. Mr. Brenton said that he was surprised. Under cross examination, he stated that at this time he did not know Mr. Luka, he was unaware of his work record, and he did not know he had been offered a superintendent position at the UE-1 site.

[90] With regard to the test results, Mr. Luka told him that he was a recreational user on his own time. Mr. Brenton understood that he used marijuana to relax after a stressful day. As this was the first time an employee who was transferring to UE-1 had failed the test, Mr. Brenton stated that he would get back to Mr. Luka but in the interim he could not go to the UE-1 site. Mr. Brenton stated that his role at this time was to work with Mr. Luka to get him on site in Fort McMurray.

[91] After this conversation, Mr. Brenton said he spoke with his manager and consulted with the EHS manager and it was decided to offer Mr. Luka the CEFAP. There was no discussion with the human resources manager who was out of the office at the time.

[92] On August 10, 2004, Mr. Brenton testified that he contacted Mr. Luka and told him that the company wanted him to go to CEFAP for an assessment. Mr. Luka became agitated and said that he did not have a drug problem and did not want to participate in the CEFAP. When asked if he used the words “drug addiction” to characterize Mr. Luka during this conversation, Mr. Brenton stated that he did not know, and he was not trained in this area.

[93] Mr. Brenton stated that the conversation degenerated and they never got to the point of discussing options, such as being on disability or light duty while undertaking an assessment, or any resulting program as Mr. Luka’ refused to participate.

[94] Mr. Brenton testified that Mr. Luka was offered the CEFAP because he was a good employee, well respected on the site, and it would be a loss to the company to lose him. Mr. Luka’s termination papers indicated that he was eligible for re-hire with conditions, namely that he would go for an assessment.

[95] As Lockerbie adhered to alcohol and drug guidelines in the Canadian model, Mr. Brenton said that there was no consideration to putting him on another work site. Putting him on another site after a positive alcohol and drug test would have undermined their alcohol and drug policy.

[96] Mr. Brenton agreed that once assessed, Lockerbie could have dispatched Mr. Luka to any site, but this was not communicated to Mr. Luka at this time.

Dr. Vernal McCann

[97] Dr McCann testified that he is a medical doctor and that in 2004 he was a medical review officer (MRO) with Dynacare Kasper Laboratories.

[98] He stated that one of his responsibilities was to review the results of an alcohol and drug test with the donor. In this capacity he would have contacted Mr. Luka on August 4, 2004. The purpose of his interview was to provide for a medical review.

[99] In evidence is a MRO telephone interview form related to the conversation with Mr. Luka and a MRO/donor interview checklist. Dr. McCann testified that he did not recall the specifics of the conversation with Mr. Luka.

[100] On the checklist, various sections were checked such as: 1) identifying yourself, 2) confirming the donor's identity, 3) informing the donor that medical information discussed is confidential, 4) telling the donor you are calling regarding the specific drug test taken on a specific date, 5) obtaining quantitative values from the lab if the donor requests, 6) informing the donor that the appropriate employer will be notified, and 7) offering to answer further questions.

[101] The areas not checked were 1) asking for a recent medical history, 2) requesting the donor provide medical records or copies of prescriptions, 3) requesting the donor to undergo a medical examination, and 4) informing the donor that he/she may have the split specimen tested.

[102] Dr. McCann explained that the screening part of the testing process was done in Red Deer. If a substance was found, the split specimen would be sent to Edmonton for a confirmation test. He did not know if this was explained to Mr. Luka.

[103] Dr. McCann's notes state that the donor denies any drug use, accuses the staff of tampering with his specimen because he was difficult with the collector and phoned repeatedly, was informed his sample was dilute and claims a lawyer will contact us. Dr. McCann stated that telling a donor his sample is dilute provides him an opportunity to explain.

[104] Dr. McCann said that they could offer to re-analyze the specimen or send it to another laboratory. However, there was no indication that Mr. Luka was made aware of this, Dr. McCann's recollection was only of Mr. Luka's comments regarding having a "lawyer fix it."

[105] When asked if there was any type of sensitivity training for MROs, Dr. McCann stated that an orientation was provided by the director of service. He said that they frequently end up with people who are upset with the results. The training focused on not responding to provocations. However, the expectation was that as a physician, one is sensitive to persons having some sort of illness.

Dr. Leo J. Kadehjian

[106] Dr. Kadehjian is a forensic toxicologist with a PhD in biochemistry from Stanford University. He is currently a biomedical consultant having established his independent biomedical consulting business in 1989. His work deals with the clinical, scientific, legal, regulatory and international business aspects of healthcare diagnostics, especially drugs of abuse. Dr. Kadehjian is broadly published and has extensive experience with work place drug testing programs in the United States, Canada and Australia. The Panel qualified him as an expert in this hearing.

[107] The respondents provided Dr. Kadehjian with Mr. Luka's urine drug test results which they asked him to review. In summary, the following is his opinion.

(1) Reliability of the Test Results

“Given the chain of custody documentation, the laboratory’s Department of Transportation (DOT) certification demonstrating their expertise and performance, and the test methods utilized, my review of testing documents leads me to conclude that the reported cannabinoid and specimen validity test results for Mr. Luka’s urine specimen appear accurate and reliable.”

(2) Interpretation of Mr. Luka’s Results

“Given the established effect of urine dilution on urine cannabinoid, the level (THC carboxylic acid 22.3 ng/mL) would have been on the order of 10 times greater, or over 200 ng/mL. Such urine cannabinoid levels are those observed within a few hours of smoking for an occasional user. This is also within the time frame after cannabis use where there are demonstrated psychomotor and cognitive impairments. For chronic users, such levels may be observed for a few days after cessation of chronic use. However, even for chronic users who may have much higher levels as soon as ceasing cannabis use, these levels decline very rapidly that the levels are below 200 ng/mL within the first few days after cessation of chronic use. Again this time frame is within that which for chronic users’ cannabis withdrawal effects have been demonstrated.”

[108] Dr. Kadehjian stated, *“in my opinion, if Mr. Luka is an occasional user of cannabis, then his urine cannabinoid and validity test results demonstrate use of cannabis within a few hours of providing a urine specimen. If Mr. Luka is a chronic user, then his urine cannabinoid and validity test results are consistent with cessation of use within a few days prior to provision of the urine specimen. In either case the test results give rise to concerns about possible impairments.”*

(3) Interpretation of Drug Test Results

“Urine drug test results can provide information about recent drug use and associated likelihood of impairment, creating a “red flag” for employers.”

“Once drugs have been identified in a specimen, demonstrating recent exposure to the drug in question, there may be a further need for clinical interpretation of

the test result; that is, making an assessment of the possible and likely dosing scenarios and likelihood and extent of impairing effects.”

[109] Dr. Kadehjian testified that drug tests are not intended to catch people but are a useful clinical tool to help identify those people most in need of help. He stated that what happens after a clinical analysis may be punitive, but he believes in rehabilitation and education.

[110] Dr. Kadehjian testified that employers have no responsibility to police an employee’s behaviour when off work but they have a justifiable concern when an employee’s off the job behaviour affects their on the job functioning. He said that there are residual effects of drug use that, like alcohol, and can have a hangover effect.

[111] It was Dr. Kadehjian’s opinion that drug use is associated with a wide variety of psychomotor and cognitive deficits inconsistent with a safe workplace.

Monica Scheel

[112] Ms. Scheel is a team leader for the Employee and Family Assistance Program (EFAP) at Syncrude. She testified about how Syncrude dealt with employees with substance abuse issues.

[113] Ms. Scheel testified that an employee may minimize or deny a problem or blame others. Consequently, the first interview focuses on developing a rapport with the employee and explaining and getting their permission for a screening and assessment. The assessment usually takes place during the second interview and lasts approximately five hours. Assessments are carried out by trained personnel.

[114] As a result of the assessment, a plan is developed which will reflect the unique needs of each employee. The plan could range from attendance at a treatment program to a five day education program, counseling or stress and anger management. All programs are fully paid for by Syncrude.

[115] Access to the EFAP program is by a manager referral or an employee request. She stated that 71% of the people in programs are still employed by Syncrude.

Argument

The Director

[116] The director stated the following general principles surrounding human rights law and alcohol and drug testing.

- i. Drug addiction is accepted as a disability in *Entrop v. Imperial Oil Ltd.*¹¹

¹¹ *Entrop v. Imperial Oil Ltd.* [2000] O.J. No. 2689, para 89

- ii. Employees may claim the protection of the Act if adverse employment action is taken against them due to perceived disabilities, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand*.¹²
- iii. It is the effect, rather than the intention of an allegedly discriminating policy which determines if the policy is discriminating (*Boisbriand, para 78*).
- iv. Drug Testing policies which sanction all users of drugs are usually prima facie discriminatory in that adverse employment related action is taken against all employees, whether casual or drug dependent (*Entrop, para 92*).
- v. “A policy which requires current employees to undergo testing for drug or alcohol use where potential consequences for testing positive include the loss of employment, treats those employees as if they were disabled by drugs or alcohol”, *Alberta v. Elizabeth Métis Settlement*¹³

[117] The director acknowledged that Mr. Luka stated that he did not have a drug addiction. He was a recreational user and therefore would not be found to have a disability. However, the director maintained that Mr. Luka was perceived to have a disability as a result of testing positive for marijuana on the pre-access alcohol and drug test as outlined in Syncrude’s WPC #6.

[118] The director argued that WPC#6 excludes from employment on the Syncrude UE-1 site all those who test positive. This is a blanket policy which treats everyone the same regardless of their position. The policy has no form of accommodation and an individual was banned from the site for testing positive.

[119] Further the recent decision of the Court of Appeal of Alberta in *Chiasson (Alberta Human Rights & Citizenship Commission) v. Kellogg Brown & Root Co.*¹⁴ re-affirmed that the Panel can decide if a complaint is broad enough to address the question of systemic discrimination as a result of this policy.

[120] In Mr. Luka’s case, the director argued that Lockerbie did not take into account his five years of experience in the industry and his exemplary work record. Mr. Luka was perceived to be an unsafe and unfit worker because of his past use of marijuana.

[121] After failing the pre-access alcohol and drug test Mr. Luka was not treated with respect by Lockerbie. No one met with him to explain his options. All information was transmitted by telephone. Mr. Brenton referred to Mr. Luka as having a “drug addiction” prior to issuing an impersonal termination letter.

[122] The director argued that even though Mr. Luka may not be drug dependent, WPC #6 operates to treat him as such. The requirement that he be tested for drugs with an

¹² *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)* [2000] 1 S.C.R. 665, para 81

¹³ *Alberta (Human Rights & Citizenship Commission) v. Elizabeth Métis Settlement* [2003] A.J. No. 484 para 1

¹⁴ *Chiasson (Alberta Human Rights & Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426

automatic standard sanction for a positive test is prima facie discriminatory (*Entrop*, (supra) Para 92).

The Respondents

[123] Lockerbie and Hole set out the following principles

- i. The onus is on the complainant to show that he has been discriminated against based on one of the enumerated grounds, *Milazzo v. Autocar Connaisseur*¹⁵
- ii. The burden of the complainant was confirmed by the Supreme Court of Canada in *Boisbriand*, para 84:

...the applicants will have the burden of proving (1) the existence of a distinction, exclusion or preference, in this case the dismissal and refusal to hire; (2) that the distinction, exclusion or preference is based on a ground enumerated in s.10, in this case handicap, and (3) that the distinction, exclusion or preference has the effect of nullifying or impairing the right to full and equal exercise of human rights and freedoms.

[124] The respondents argued that the director failed to establish either the existence of a distinction or that there is a distinction based on enumerated grounds. All the director established was that Mr. Luka had used drugs not that he had a disability.

[125] Lockerbie argued that while drug addiction is a protected ground under human rights legislation, drug consumption constitutes an illegal activity in contravention of the criminal law of Canada. Their decisions related to Mr. Luka were not made on any belief that he had a drug addiction. Lockerbie and Syncrude had no information to this effect.

[126] Syncrude argued that a finding of discrimination based on perceived disability requires the establishment of the employer's subjective belief that the complainant had a disability, *Weyerhaeuser Company Ltd. v. Ontario Human Rights Commission*¹⁶. Mr. Luka and the director have not met this burden in this case.

[127] Syncrude stated that they could not have perceived Mr. Luka to have a disability because they had no contact with him, they were not aware he had taken a pre-access test and they did not receive his test results.

[128] Further, Syncrude argued that the director was relying on the *Chiasson*¹⁷ decision to argue there is a perceived disability. In this regard, Justice Martin's comments have

¹⁵ *Milazzo v. Autocar Connaisseur Inc.*, 2003 CHRT 37 para 60 and 61

¹⁶ *Weyerhaeuser Company Ltd. v. Ontario Human Rights Commission* 2007 Can. LII 4790 (Ont. S.C.), para 28

¹⁷ *Alberta(Human Rights & Citizenship Commission) v. Kellogg Brown & Root (Canada) Company* 2006, ABQB 302, para 61

been distinguished in several cases. In *Bantrel*¹⁸, Arbitrator Smith concluded that the mere existence of a pre-access alcohol and drug testing policy is not prima facie discriminatory on the basis of perceived disability. This is consistent with the conclusion in *Weyerhauser* (supra).

[129] Lockerbie referred to the recent decision of the Court of Appeal of Alberta in *Chiasson* (supra). In this decision the Court of Appeal expressly rejected the notion that casual drug use equates to perceived disability and is therefore discrimination. Both respondents also referred to the comments in this decision that “extending human rights protection to situations resulting in placing the lives of others at risk flies in the face of logic.”

[130] The respondents also addressed the issue of systemic discrimination as referenced in the *Chiasson* (supra) decision. They noted that the Court of Appeal stated that “section 20 of the Act does not result in a general complaint automatically arising every time a complaint is lodged.” Further, they stated that the language of the complaint must be reviewed to determine if an issue of general discrimination is raised. Both respondents argued that Mr. Luka was not making a complaint on behalf of persons other than himself.

[131] Lockerbie raised the issue of Mr. Luka’s credibility. Specifically, Dr. Kadehjian’s interpretation of Mr. Luka’s test results was not reflective of Mr. Luka’s testimony. Mr. Luka testified that he smoked one marijuana cigarette with two co-workers, two weeks before the test. Dr. Kadehjian opined that Mr. Luka’s test results demonstrate use of cannabis at a minimum within the previous few days or the previous few hours prior to providing a specimen. If he was a chronic user he could test positive for 2 -3 weeks. Lockerbie referred to the testimony of Ms. Scheel who stated that as individuals are often not forthcoming about their drug use and its extent, an assessment is very important.

[132] Further, Mr. Luka accused Lockerbie of releasing his test results because he had heard from a co-worker that he had failed prior to receiving his results from Dynacare Kasper. Lockerbie stated that the process and timing of results would not support this allegation.

[133] Mr. Luka also testified that he was not told of his dilute sample while Dr. McCann’s records indicate otherwise. Further, his recollection of the dates of his test and when he was informed of his transfer are inconsistent.

[134] Lockerbie argued that there is no evidence of a subjective belief on their part that Mr. Luka was disabled. They had offered Mr. Luka a transfer to the Syncrude site because he was a good worker. When Mr. Luka tested positive, Lockerbie perceived him to have consumed drugs and wanted to refer him to the CEFAP for an assessment in

¹⁸ *The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 488, et al. v. Bantrel Constructors Co.*, March 21, 2007, (Alta.) Arb.Bd (Smith)

order to determine if he needed help to get back to work. Lockerbie argued that they support the alcohol and drug guidelines of the Canadian Model and its emphasis on treating employees fairly and supporting rehabilitation if necessary. Lockerbie stated that Mr. Luka's employment was terminated because he refused to participate in the CEFAP assessment.

Analysis

Credibility

[135] Lockerbie has raised the issue of the credibility of Mr. Luka's testimony.

[136] In assessing credibility, the Panel considered the test for assessing credibility as set out in *Faryna v. Chorny*¹⁹. It states "In short, the real test of the truth of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place or in those conditions."

[137] The Panel also considered a number of factors, including the time that had lapsed between the filing of this complaint and the hearing, the witness' motives, any inconsistencies between Mr. Luka's testimony and that of other witnesses and the internal consistency of his testimony.

[138] With regard to differences related to the date on which he was informed of the transfer and his testing date, the Panel accepts Mr. Luka's response that he was confused about the dates because it was four years ago. Further, there was no significant deviation in these dates.

[139] While Mr. Luka denies that he was told his sample was dilute, Dr. McCann testified that the issue of a dilute sample would be raised in order to provide the donor with the opportunity to explain. There is no indication on Dr. McCann's interview form that Mr. Luka provided any explanation. The Panel prefers Mr. Luka's testimony as Dr. McCann had no actual recollection of his conversation, four years had passed and his notes were incomplete.

[140] Mr. Luka had accused Lockerbie of releasing his test results to employees at the Genesee and Syncrude site. Their response was that both the timing and process of receiving the results would not support this allegation. The Panel agrees. However, information can be obtained both formally and informally. In this case, the fact that Mr. Luka did not show up at the Syncrude site could have led to his co-workers to assume that he had failed the test. His close colleagues would have known that he was excited about his new position at UE-1 and could very likely have assumed that he failed the drug test when he did not report for work at Syncrude.

¹⁹ *Faryna v. Chorney* [1952] 2 DLR 354, page 357

[141] With regard to Mr. Luka's testimony regarding his drug use, the Panel prefers Dr. Kadehjian's evidence. Mr. Luka stated that he was a casual user who had shared a cigarette with two persons approximately two weeks prior to the test. This evidence is inconsistent with the test results as interpreted by the expert witness.

[142] Dr. Kadehjian opined that if Mr. Luka was a casual user then his test results demonstrate use of cannabis within a few hours of providing a urine specimen. If Mr. Luka was a chronic user, then his results are consistent with cessation of use within a few days prior to the provision of a urine specimen. In all other aspects the Panel accepts the testimony of Mr. Luka.

Disability

[143] The Panel agrees that it is well established that alcoholism and drug dependency falls within the meaning of a disability under the Act.

[144] Neither the director or Mr. Luka allege that Mr. Luka has a drug addition or dependency, although Dr. Kadehjian's opinion raised some issues that only an assessment could have determined.

[145] However, given Mr. Luka's testimony that he was not a drug user, that he never thought he would fail the test and that he passed the pre-access alcohol and drug test in 2005 to work for Casca Electric on the Syncrude site, the Panel accepts the director and Mr. Luka's position that he is not drug dependent and as such does not have a physical disability under the Act.

Perceived Disability

[146] Syncrude and Lockerbie argue that there is no evidence of a subjective belief or perception on their part that Mr. Luka was disabled. The Panel agrees.

[147] Mr. Luka had a good performance record while working at the Genesee site. Lockerbie wanted to transfer him to the UE-1 site where he would have been promoted to the position of superintendent.

[148] When Mr. Luka failed the pre-access alcohol and drug test it was apparent that Lockerbie did not know what to do. This was a new testing program that they were implementing on behalf of Syncrude and they did not have guidelines for dealing with a failed test of an employee they wished to transfer. Mr. Brenton testified that after being informed of Mr. Luka's test result he felt that it was his job to find a way to get Mr. Luka to Fort McMurray. However, Lockerbie could not ignore the fact that Mr. Luka had tested positive for marijuana. Consequently, Mr. Brenton consulted with Lockerbie staff and it was agreed to suggest to Mr. Luka that he be assessed under the CEFAP.

[149] This course of action was suggested in order to try to get Mr. Luka back to work but it required Mr. Luka's co-operation. At this point the only information Lockerbie had

was that Mr. Luka had tested positive and that he said he was a recreational user. They did not know the extent of his use or how this may or may not affect his work in a safety sensitive environment. They did not know if any prescription medications may have influenced his results or even if there could have been an error in the original test results.

[150] Further, no one at Lockerbie had the training to try to assess the impact of drug use on Mr. Luka's life. For this reason, a confidential assessment by trained professionals would have helped Lockerbie to determine how to either get Mr. Luka on to the Syncrude site or any of their other project sites. The Panel finds that this is a justifiable response to a positive drug test. However, Mr. Luka refused to be assessed.

[151] Mr. Brenton stated that Mr. Luka was offered the CEFAP because he was a well respected employee and if he were to leave it would be a loss to the company. Mr. Brenton agreed that once assessed Lockerbie could have dispatched Mr. Luka to any site.

[152] Mr. Cassault, human resources manager with Lockerbie since 2005, also testified that workers who had failed a pre-access alcohol and drug test had been brought back to work after an assessment. Consequently, Mr. Luka would have been able to continue his employment upon satisfying the conditions of an assessment. Mr. Luka was terminated because he did not provide Lockerbie with the information it required to continue his employment.

[153] Mr. Luka testified that Mr. Brenton told him that Lockerbie wanted to send him for an assessment of his drug addiction. While Mr. Brenton has no memory of using the term "drug addiction," he also acknowledged that he had no training in managing such a sensitive conversation. It appears to the Panel that Mr. Brenton may well have said these words and that Mr. Luka took offence.

[154] The Panel considers these words to be inappropriate and not helpful in encouraging Mr. Luka to go for an assessment. However, this conversation took place in the context of a positive drug test and an attempted referral for further assessment. In the circumstances, the Panel does not find that these inappropriate words amount to discrimination.

[155] While Mr. Luka felt that the company should have known that his work performance did not reflect any form of drug addiction, he took no action to follow-up his conversation with Mr. Brenton. He did not contact his supervisor at Genesee, the human resources manager or anyone else in the company. He also did not request any information on the CEFAP or pursue how this assessment might affect him in terms of time, money and further employment. The Panel finds that his rejection of Lockerbie's offer of assessment with no follow-up on his part led to his termination

[156] The Panel acknowledges that CEFAP was offered to Mr. Luka, however, it has concerns about the way this process was handled. The Panel heard from Ms. Scheel as to how Syncrude handled employees who may have substance abuse issues. She outlined a process whereby an employee would attend an interview where the goal would be to try

to make the employee feel comfortable and to get their permission for screening or access. This initial step was important because the employee may minimize or deny any problem. The assessment itself would be scheduled at another time and take approximately five hours from which a plan would be developed to suit the individual needs of the employee. Trained personnel were involved in all stages of this process.

[157] In this case, there was no face to face meeting between Mr. Luka and any Lockerbie personnel who had training in this area. Mr. Brenton as operations manager had little information about the CEFAP and how it might affect Mr. Luka's employment and no one from human resources ever met with Mr. Luka. Mr. Brenton testified that the telephone conversation degenerated when Mr. Luka got angry and frustrated and so no options were pursued. There was no recognition that a person testing positive may deny or minimize any problem or be upset with the result as noted by Dr. McCann. Further, there was no follow-up with Mr. Luka in the 10 days leading up to the termination letter. Consequently it is reasonable to see why Mr. Luka might have been feeling angry, ill informed and undervalued as an employee.

[158] It is fine to suggest that the CEFAP is available to employees but if the systems are not in place to counsel employees so that they understand the program and how it may impact them and their employment, then they may never make the decision to enter the program.

[159] While it was Lockerbie's employees that must bear the responsibility for handling Mr. Luka's case in this manner, it is the Panel's view that Syncrude also had a role to play.

[160] The contractor work force on the UE-1 site numbered over 12,000 at its peak. At that time there were approximately 4,000 full time Syncrude employees. Consequently Syncrude assigned the hiring of over 50% of its workforce to outside contractors. Does Syncrude have a legal or moral responsibility to these employees?

[161] The Panel is certain that Syncrude would argue that they have fulfilled all legal responsibilities but the Panel believes that there is also a moral and ethical responsibility. That responsibility is to ensure that their contract workers are treated in a manner reflective of Syncrude's standards and values.

[162] The Panel has in evidence notes from a September 12, 2004 meeting between Syncrude and its stakeholders where the implementation of WPC#6 was discussed. Under a category of concerns entitled "consequences" it states "1) 6 month ban – should it be automatic or should there be discretion, 2) what happens with positives (a) where is the responsibility (b) process to assist them (c) process/time limit to retest."

[163] It is apparent that these were concerns dealing with means of accommodation which were either not addressed or inadequately addressed when the policy was initiated. As such employees like Mr. Luka and contractors such as Lockerbie were ill equipped to deal in this new environment with the consequences of this policy.

[164] Syncrude must accept this responsibility. It was their policy that affected persons who they utilized to perform work for them. If they had reasonable accommodation practices for their employees why did they not ensure their contractor workforce was equally accommodated?

[165] With regard to determining whether this complaint is broad enough to address the question of systemic discrimination as a result of the pre-access alcohol and drug testing policy, the Panel has determined that this complaint is specific to Mr. Luka. The Panel has reviewed his human rights complaint form and notes that Mr. Luka wrote “the request of the drug and alcohol testing and the resulting diagnoses discriminated against me and ensured that irreparable damages had been caused to myself as an individual.”

[166] For all these reasons, the Panel finds that the complainant and director have not established any disability or perceived disability. As a result there is no need to determine if there is a Bona Fide Occupational Requirement in this case.

[167] Over a period of 11 days the Panel heard from many witnesses all of whom had experience in subject matters related to the issues of this case.

[168] There were two expert witnesses, Dr. Kadehjian who the Panel has quoted in this decision, and Dr. Francescutti, an authority in the area of injury prevention and control.

[169] In his concluding testimony Dr. Francescutti raised what this Panel believes is the fundamental question that needs to be considered by all parties dealing with issues of substance abuse. He opined that the real issue is why are Albertans the highest consumers of drugs, alcohol and tobacco. What is missing in our lives to make us have a chemical dependency?

Conclusion

[170] The Panel concludes that the actions taken by the respondents did not constitute prima facie discrimination on the ground of physical disability in the area of employment practices. As a result this complaint is dismissed.

February 15, 2008

Beth Bryant
Panel Chair