

2019 CarswellOnt 7226
Ontario Arbitration

Toronto Transit Commission and ATU, Local 113 (Smith), Re

2019 CarswellOnt 7226

**The Toronto Transit Commission (The "TTC" or the "Employer")
and The Amalgamated Transit Union, Local 113 (The "Union")**

Janice Johnston Member

Heard: November 9, 2015; February 1, 2016; May 25, 2016; June 2, 2016; September 22, 2016; October 21, 2016; January 13, 2017; February 1, 2017; February 27, 2017; March 8, 2017; April 4, 2017; June 20, 2017; October 11, 2017; November 17, 2017; December 20, 2017; March 26, 2018; June 5, 2018; November 6, 2018; November 22, 2018; January 10, 2019; January 16, 2019; January 31, 2019; February 9, 2019

Judgment: April 23, 2019

Docket: None given.

Counsel: Lucy Siraco, for Employer
Simon Blackstone, for Union

Subject: Labour; Public

Headnote

Labour and employment law

Janice Johnston Member:

1 This case is a termination case. The Grievor, Mr. David Smith, was discharged on April 17, 2015, for events that occurred on April 8, 2015. I note that the events that gave rise to the termination spilled over into the early morning hours of April 9, 2015, but for simplicity's sake I will refer to April 8th as the relevant date. The reasons given by the Toronto Transit Commission for the termination of the Grievor are set out in the Step 1 Interview Memorandum. The Grievor was dismissed for violating several TTC policies and the collective agreement. The policies were: Conditions of Employment; Fitness For Duty (FFD) Policy; Operating Excellence Guidelines; and Article 1 Section 8 (c) of the collective agreement.

BACKGROUND

2 The first hearing date in this matter was November 9, 2015. At that time, I heard the parties' opening statements and was advised that there was an ongoing union policy grievance that had been referred to arbitration by the union regarding the TTC's Fitness For Duty Policy (the "FFD Policy"), which is one of the policies it is alleged that the Grievor violated. In the policy grievance arbitration, the union is challenging the FFD policy on several grounds, including the reasonableness of the policy as well as the validity of the policy. The union is asserting that the policy was contrary to the collective agreement, the Human Rights Code and/or the Charter of Rights and Freedoms.

3 The parties agreed and this case proceeded on the basis that the policy challenge would continue and that the validity of the policy would not be an issue before me. In other words, we would proceed on the basis that the policy was valid, but that this was without prejudice to the positions being taken and the arguments being made by the parties in the other arbitration. Without prejudice to any of the positions the union was taking in the policy grievance, the union was pursuing the grievance regarding Mr. Smith's dismissal concurrently with the policy grievance.

4 Therefore, the issue before me is the application of the FFD policy to the incident involving Mr. Smith on April 8. Nothing in this decision should be taken as either an endorsement of, or a condemnation of, the policy itself. The validity of the policy is still a live issue pursuant to the policy grievance arbitration.

5 The questions that I must answer are: Did the employer have reasonable grounds to request that the Grievor submit to a fitness for duty test to determine if alcohol or drug use was a factor on April 8, 2015; and was the discharge of the Grievor for refusing to submit to the test and sleeping on the job the appropriate disciplinary penalty.

6 Central to this case is the commission's Fitness For Duty Policy. It is a lengthy document so I will only set out a few excerpts from it. The more relevant portions read as follows:

2.0 PURPOSE

2.1 The Toronto Transit Commission ("Commission") has an overriding obligation to protect the health and safety of all individuals affected by our work as well as the environment in which we live and operate. This includes ensuring employees are fit for duty, which means reporting for work mentally and physically fit to perform their assigned tasks safely and reliably. In light of this obligation, and recognizing the safety-sensitive nature of our operations, this policy outlines the standards and expectations associated with fitness for duty. This policy is intended to:

2.2 Ensure the health and safety of Commission employees and the safety of Commission customers and members of the public by requiring employees to report fit for duty, which includes being free from the negative effects of alcohol and other drug use, the misuse of and/or failure to take prescribed medications and extreme fatigue.

...

7.0 STANDARDS

To minimize the risk of unsafe performance due to illicit drug or alcohol use, improper use of medication or extreme fatigue, employees are expected to comply with the following standards, and to report fit for duty and remain fit for duty throughout their work day or shift and/or when in an issued uniform/identifiable clothing when on duty, or off duty in public, and when on stand-by for work.

7.1 *Illicit Drugs*

The following are prohibited when on Commission business, premises, and worksites and/or when in issued uniform/clothing when on duty, or off duty in public:

- reporting for duty or remaining on duty under the influence of illicit drugs;
- having illicit drugs in the body at a concentration which would result in a positive drug test; or
- the use, possession, distribution, offering or sale of illicit drugs or illicit drug paraphernalia.

7.2 *Alcohol*

The following are prohibited when on Commission business, premises, and worksites and/or when in issued uniform/clothing when on duty or off duty in public:

- reporting for duty or remaining on duty under the influence of alcohol from any source;
- consuming any product containing alcohol during the work day including during meals or other breaks;
- having any presence of alcohol in the body at a concentration level which would result in a positive test;

- the use, possession, distribution, offering or sale of alcohol; or
- the use of alcohol after an incident until tested or advised by the Commission that a test is not required.

...

7.4 Extreme Fatigue

Employees are expected to report to work fit for duty and are responsible for taking appropriate action to avoid extreme fatigue at work. When on Commission business, premises and worksites, employees are prohibited from reporting for duty or remaining on duty when suffering from extreme fatigue.

7.4.1 All employees are responsible for:

- ensuring sufficient rest periods prior to starting work and utilizing breaks provided within and between shifts to rest and recuperate; and
- learning to recognize the symptoms of fatigue and reporting incidents of extreme fatigue to their supervisor.

7.4.2 Where an employee reports that he or she is suffering from extreme fatigue, or where a supervisor has reasonable grounds to believe that an employee is suffering from extreme fatigue, the employee will be removed from duty for the remainder of their shift. The employee's supervisor will discuss with the employee any issues that may have caused the extreme fatigue or that may contribute to future incidents of extreme fatigue. The supervisor may consult with Occupational Health staff or suggest EFAP counselling where appropriate. Where the extreme fatigue can be substantiated as a medical illness, it will be accommodated.

8.0 INVESTIGATIVE PROCEDURES

...

8.2 Unfit for Duty Situations

In all situations when there are grounds to believe an employee is unfit to be at work, the employee will be escorted to a safe place, interviewed, and given an opportunity to explain why they appear to be in a condition unfit for work. Unionized employees will be entitled to union representation in accordance with their collective agreement.

The employee will be given an opportunity to provide a reasonable explanation for their behaviour or condition, and the supervisor will take action appropriate to the situation. If the explanation is not reasonable, and/or the supervisor conducting the interview still believes the employee is in a condition unfit for work, they may take any of the following actions, after consultation with and agreement of a second level of supervision or management whenever possible:

- if there are immediate medical concerns, arrangements for medical attention e.g. health centre, local hospital or clinic;
- if there are grounds to believe alcohol or drug use may be a factor, and the employee holds a safety-sensitive, specified management or designated executive position, referral for a reasonable cause test as per 8.3 a;

...

8.3 Alcohol and Drug Testing - Safety-sensitive, Specified Management or Designated Executive Position

Employees holding these positions are subject to testing in the following circumstances.

8.3.1 Reasonable Cause

Alcohol and Drug testing will take place whenever a supervisor has reasonable grounds to believe that the actions, appearance or conduct of an individual while on duty are indicative of the use of drugs or alcohol. The decision to test shall be made by the supervisor after contacting Transit Control and receiving confirmation from a Chief Supervisor or a Cab Supervisor. The referral for a test will be based on such indicators as:

- observed use or evidence of use of a substance (e.g. smell of alcohol);
- erratic or atypical behaviour of the employee;
- changes in the physical appearance, behaviour or speech patterns of the employee; or
- any other observations that suggest alcohol or drug use may be a factor.

...

8.6 Failure to Test

This is considered a violation of this policy and includes:

- failure to report directly for a test;
- refusal to submit to a test;

7 A document entitled Supervisor Procedure Fitness For Duty was also put before me. The introduction reads in part:

This procedure falls under the Toronto Transit Commission's ("Commission") Fitness for Duty Policy ("Policy"). This procedure is intended to guide supervisors, forepersons as well as members of management in:

...

- investigating unfit for duty situations and taking appropriate action under the circumstances;
- making referrals for reasonable cause alcohol and drug testing when behavior indicates alcohol or other drug use;

...

Specifically, this procedure describes in detail when reasonable cause and post incident alcohol and drug testing are required and what steps a supervisor, foreperson or other member of management must follow in order to refer an employee for an alcohol and drug test. Any reference to "supervisor" in this procedure includes forepersons and other members of management that may be involved in the decision making process including Assistant Superintendents and Superintendents.

8 Section 3 of the document entitled Unfit for Duty Investigations reads:

3. UNFIT FOR DUTY INVESTIGATIONS

An employee can be unfit for work for a number of reasons, (fatigue, illness, injury etc.) Not every unfit for work situation will result in an alcohol and drug test. When an employee is observed in a condition unfit for work, supervisors are expected to take the following steps:

- a) **Remove the Employee** - Remove the employee from their work location immediately and escort the employee to a safe/private place; do not have them report on their own and do not leave them unattended.
- b) **Explain** - Explain to the employee that s/he appears to be in a condition unfit for work.
- c) **Listen** - Give the employee an opportunity to explain their behaviour.
- d) **Take Appropriate Action** - If the explanation is reasonable and there is no reasonable cause to believe the employee is under the influence of alcohol or other drugs, take action appropriate to the situation. For example:
 - if there are immediate medical concerns, make arrangements for medical attention by calling Transit Control at (416) 393-3555.
 - if the person is exhibiting signs of extreme fatigue that would make them unable to do their job safely, remove from duty and ensure safe escort or
 - take any other action that appears appropriate under the circumstances.

Note: If the explanation given by the employee is not reasonable, and you believe that the actions, appearance or conduct of the employee indicates alcohol or other drug use, refer to the reasonable cause testing procedures on the next page.

9 As noted, the next page of the document is entitled Reasonable Cause Testing Procedures and it has the subheadings: check the list; call transit control; provide union representation (if unionized); and get confirmation from the Chief/Cab Supervisor and inform the employee. Under the last subheading, there is a note that reads:

NOTE: The decision to require a test can not wait until the next day. It should be made as soon as possible after the concerns are identified. If there is a delay in sample collection, any attempts to collect samples should cease after 8 hours (breathalyzer) 8 hours (oral fluid) and 32 hours (urine). If there is any delay in sample collection, remind the employee that they can not use any product containing alcohol until the test is completed. If there is resistance, the employee should be advised that refusing to test is grounds for discipline up to and including termination. If there is continued resistance, relieve the employee from duty.

10 As noted previously, the Grievor was dismissed for violating several TTC policies and the collective agreement. The policies were: Conditions of Employment; Fitness For Duty (FFD) Policy; Operating Excellence Guidelines; and Article 1 Section 8 (c) of the collective agreement. The specific terms of the policies and collective agreement language allegedly violated by the Grievor are referred to in the Step One Interview Memorandum and read as follows:

Conditions of Employment:

3.3 To familiarize themselves with and obey the TTC's rules, regulations, corporate policies and instructions.

3.4 To conform to all working conditions that may be in effect throughout the period of employment.

3.7 To devote themselves full time to TTC business while on Duty.

3.10 To arrive for work fit for duty, which means unaffected by the use of or after affects of alcohol, illicit drugs or medication, which impair or may impair the employee.

TTC Fitness for Duty Policy:

8.6 Failure to Test

This is considered a violation of this policy and includes:

- failure to report directly for a test;
- refusal to submit to a test;
- failure to provide a valid specimen absent a documented medical condition;

9.4 A positive drug test, or an alcohol test result of .04 BAC or higher, or a failure to test, are all considered a violation of this policy and may constitute grounds for immediate termination of employment.

TTC's Operating Excellence Guidelines:

Sleeping is not permitted. Violations where it is determined that the employee was "nesting" or deliberately set out to sleep will result in a Last Chance Agreement, the wording would be specific to "nesting" only. Where it is determined that the employee "dozed off" violation will progress as follows: Step 2, Step 3 (on a Last Chance Agreement).

TTC/Local 113 Collective Bargaining Agreement:

Article 1 Section 8

c) Being impaired while on duty by reason of consumption of an intoxicating beverage, or drug for other than medicinal purposes.

11 In essence, the Grievor was terminated for sleeping in his car when he was supposed to be working and for refusing to take a FFD test. A refusal to test is deemed by the commission to be the same as a positive test.

12 The following persons testified on behalf of the TTC: Assistant Foreperson Tom Konstantinidis; Assistant Foreperson Ryan Simpson; Foreperson Paul Wells (he was the Acting Roadmaster at the Greenwood Yard on April 8); Chief Supervisor Janet Weller; and Acting Manager - Subway and SRT Track Mo Ghaus. The Grievor and Greg Prialux, a union shop steward, testified for the union.

13 Mr. Smith was employed as a Subway Track Mechanic in the TTC's subway and SRT track section. He has a seniority date of November 18, 2000. Therefore, at the time of his dismissal he had approximately 14.5 years of service with TTC. He was assigned to and worked out of the Greenwood Yard on night shift. There are approximately seventy bargaining unit employees, five to six Assistant Forepersons, three Forepersons and a Roadmaster working out of the Greenwood yard on nights. Mr. Smith's hours of work were 10:30 p.m. to 7 a.m. and he worked Sunday through Thursday evenings, with off days on Fridays and Saturdays. The Grievor's off days had been changed to these days as an accommodation, based on his personal needs.

14 As a Subway Track Mechanic, the specific duties, responsibilities and requirements of his position included:

Summary of duties

This is maintenance, inspection, troubleshooting, and repair work performed on tangent, curved and special track work, track switches and switch components, track bed, and track accessories. The work will involve the performance of scheduled, running, and emergency repairs to the trackwork and/or components such as turn-outs, frog castings, rails, slip switches, mechanical and electromechanical switching equipment and the trackbed/invert. The work will also involve maintenance and trouble shooting on defective or inoperative track lubrication systems/equipment, small tools and snow removal components.

This will require minor shop or bench repairs of defective units, and arrange for major repairs in order to keep lubricating systems operating 24 hours per day.

...

Responsibilities

Perform scheduled and emergency repair maintenance and construction work on tangent, curved and special track work, track bed/invert, and track accessories, roadways, walkways, air compressors, mechanical and electro-mechanical equipment.

...

May be assigned to track maintenance and construction duties which will include:

- excavating track/road bed, assisting with the placing of ties, rail, and related components; installing track drains; spreading and tamping ballast; replacing/resurfacing track/road bed;
- assembling new switches and turnouts, or rebuilding units with new or used parts when necessary;
- manually lifting, moving, stock piling, loading and unloading a variety of excavation, construction and/or track materials by hand or with mechanized equipment or cranes;
- operating various types of electrical and pneumatic equipment, required for the removal and installation of track and track bed materials;
- preparing thermite welding equipment and assisting with thermite welding of rails and special trackwork;

...

Care must be exercised when working to avoid injury from power rails and vehicular traffic.

15 Greenwood Yard has electrified rail tracks in and around it as well as overhead cranes and other large equipment and tools in and around the shop. Subway trains are stored at Greenwood when they are not in service and they arrive and leave the yard through a tunnel, travelling on the electrified rail tracks.

16 The Grievor's work assignments are generally at track level at various subway stations throughout the TTC. Work is performed when the trains are not in service and operating. Subway service to the public ends at 1 a.m. Subway track workers are expected to report for work at 10:30 p.m. and roll call occurs at this time. Workers are assigned work based on their crews. Crews generally consist of five to eleven workers, but the makeup of the crew can change frequently. Employees spend the first part of their shift getting ready to go out to do work at track level. Getting ready entails gathering all of the necessary material and tools and loading them on flatbeds or work cars and into vehicles in and around Greenwood Yard, There are different work cars tailored for different jobs.

17 Once this is completed, usually around 12 to 12:30 a.m., lunch is taken. Employees take lunch early as the time available to work on the track is very short. During the week, the crews are able to work only for about three hours between 2 and 5:15 a.m. On the weekends, a bit more time is available. After lunch, track workers proceed to the locations where they will be working. One or more subway track workers operate work cars, which are stored in the yard, and drive them on the rail to the various assignments. Some employees travel in the work cars to get to the various work assignments throughout the night and others travel by vehicles operated on the road.

18 It was not in dispute that track workers working in and out of Greenwood work in an inherently safety-sensitive environment and that the job held by the Grievor is considered to be a safety-sensitive position.

19 Mr. Smith has a history of discipline for sleeping when he is supposed to be working. He has been disciplined in June, 2012, April, 2014, and December, 2014, for this conduct. In addition, he has been disciplined for lateness on more than one occasion.

20 In the period of time leading up to April 8, the Grievor had been dealing with a number of personal issues. He and his wife had separated and his mother, with whom he had been living, had recently passed away. As a result, he was having trouble sleeping. Given that Mr. Smith worked nights and finished work at 7 a.m., he slept during the day. He testified that he could not usually fall asleep before 12 or 12:30. At the time of his discharge, Mr. Smith was living with his sister.

21 Around the time of his dismissal, because he had concerns for their safety, Mr. Smith was seeking custody of his children. To facilitate his attempts to obtain custody of his children, he was attending parenting classes offered by the YWCA Toronto. The Grievor attended parenting classes once a week on Wednesday evenings from 6:30 to 8:30 p.m. for approximately one year. The classes were in Scarborough. As he lived in Mississauga/Malton, to get to the class on time, he had to get up around 4 p.m. and leave for the class no later than 5:30 p.m. His routine was to attend the class, then go get something to eat and go to work from there rather than driving all the way back home. He would eat in his car in the parking lot at Greenwood and wait for his shift to start at 10:30 p.m. On the days that he attended parenting classes, he would generally only get three or four hours of sleep.

THE EVENTS OF APRIL 8TH

22 I would now like to turn to the events that led to the termination of the Grievor. Much of what occurred on April 8 is not in dispute.

23 The Grievor testified that during the day of April 8, prior to going into work, he was not able to get any sleep. He had to clean his house before attending work as Children's Aid was coming to do an inspection on April 9 as part of his endeavour to obtain custody of his children. He cleaned his house and as it was a Wednesday he left around 5:30 p.m. to go to his parenting class. He was at the class from 6:30 to 8:30 p.m. and then went to Subway to get something to eat. He ate half of the sub on the way to work and arrived at Greenwood around 9:40 p.m. He parked his car, turned on the radio and ate the rest of his sub. At this point, Mr. Smith made a very bad decision. He decided to nap as he had forty-five minutes until his shift started. He reclined his driver's seat and set the alarm on his cell phone for 10:20 to wake him up in time to report for work. Needless to say, he did not wake up and what unfolded that evening is a direct result of the Grievor's irresponsible and reckless decision to try to sleep for a mere forty-five minutes, given how tired he was.

24 On April 8, Mr. Smith was assigned to work in the crew being supervised by Assistant Foreperson Ryan Simpson. Although he noticed that the Grievor was not at roll call at 10:30 p.m., Mr. Simpson did not immediately do anything about it as he was more concerned with preparing for the job ahead that evening.

25 Shortly after 11 p.m., Mr. Simpson and Mr. Tom Konstantinidis, another Assistant Foreperson, went out into the yard or parking lot to look for some material they needed that night. They were in a truck heading for the north end of the yard when they noticed the Grievor asleep in his car. He was illuminated by the lights in the yard. He was sitting in the driver's seat with the seat reclined. They went past him slowly and neither of them got out of the vehicle. They then went to the end of the lot and turned around to come back to Mr. Smith's vehicle as Mr. Simpson wanted to wake him up. As they were driving back towards Mr. Smith's vehicle, they noticed Roadmaster Paul Wells standing at the south end of the yard approximately ten feet from the building. They drove past Mr. Smith and over to where Mr. Wells was standing as Mr. Simpson wanted to talk to him. At this point, Mr. Konstantinidis thought that they were about forty feet from the Grievor's car.

26 Mr. Simpson, who was driving, parked the truck and then got out and went over to Mr. Wells and started talking to him. Mr. Konstantinidis remained in the truck. Although he could not hear what was said, Mr. Konstantinidis agreed in cross-examination that as Mr. Wells was the acting Roadmaster and Mr. Simpson's boss, he was likely telling Mr. Simpson what to do. While he was sitting in the truck, Mr. Konstantinidis observed Mr. Wells talking on the phone.

At the hearing, a tape was produced of a telephone call between Transit Control and Mr. Wells that took place at 11:15 p.m. Mr. Konstantinidis, after listening to a replay of a tape recording of the call during the hearing, concluded that it took place while Mr. Wells and Mr. Simpson were talking outside the truck and was the call he observed. He agreed that Mr. Wells must have been talking to Transit Control.

27 After speaking to Mr. Wells, Mr. Simpson got back into the truck and indicated that they needed to go wake up Mr. Smith. He did not tell Mr. Konstantinidis what he and Mr. Wells had spoken about. Just as they were about to go back and wake up the Grievor, Mr. Konstantinidis noticed in the side mirror that Mr. Smith was walking towards the truck and the side entrance to the building. The truck was stopped beside the entrance to the building. They got out of the truck and approached Mr. Smith. Mr. Simpson told Mr. Smith to go to the conference room and that a shop steward would meet him there.

28 Mr. Konstantinidis observed that at this point the Grievor was very groggy, could barely open his eyes and was slurring his words. Mr. Smith asked why he needed to go to the conference room and if he was being relieved of duties. Mr. Simpson testified that he told him to just go to the conference room and that he would be in to talk to him shortly. Mr. Konstantinidis had seen Mr. Smith when he was tired on previous occasions, but during this interaction he thought that Mr. Smith looked a lot worse than normal.

29 Mr. Simpson agreed in cross-examination that Mr. Smith was not walking slowly but was walking normally as he approached. He also agreed that, given only a few seconds had passed since he spoke to Mr. Wells, Mr. Wells must have seen Mr. Smith outside his vehicle before he went back into the building. Mr. Simpson indicated that when he spoke to Mr. Smith in the parking lot, he noticed that Mr. Smith was exhibiting a high level of fatigue and drowsiness and was slurring his speech. However, he agreed that Mr. Smith's speech was not confused or fragmented and that he did not smell alcohol or marijuana either outside or in the conference room.

30 Mr. Simpson felt that the level of fatigue or drowsiness was more extreme than usual and atypical of Mr. Smith's normal behaviour. He agreed with union counsel that mainly what he observed was deep, deep fatigue, Mr. Simpson noticed that Mr. Smith was speaking very slowly and was hard to comprehend. Even though their interaction was brief, Mr. Simpson was concerned. Mr. Simpson did not observe Mr. Smith's eyes at this point, but later when they were in the conference room he noticed that they were bloodshot. Mr. Konstantinidis accompanied the Grievor to the conference room and Mr. Simpson went to the office to speak to Mr. Wells.

31 Mr. Wells was the acting Roadmaster at Greenwood Yard on April 8, 2015. The Roadmaster is the senior manager on site on the night shift. The Assistant Forepersons and Forepersons report to him. He was told by Mr. Simpson that Mr. Smith was not present for roll call at 10:30 p.m. After he found out that Mr. Smith had not reported for work, he went out into the yard and found Mr. Smith sleeping in his car. He went up to the front of the car and shone his flashlight inside of the car. He observed Mr. Smith sleeping in the driver's seat, which was slightly reclined. He then walked over to the driver's side of the vehicle and knocked on the window a couple of times. Mr. Smith appeared to be breathing normally, but he did not wake up.

32 Mr. Wells testified that when he could not wake the Grievor up, he proceeded back towards the office and called Transit Control. He requested that a FFD test be arranged for Mr. Smith. Mr. Wells stated that the purpose of the test is to check an employee for alcohol or drug use. He testified that he wanted to test Mr. Smith because he felt that he was under the influence, as his sleeping was an ongoing issue and because he had a hard time waking him up. It is important to note that Mr. Wells decided to arrange for a FFD test without observing Mr. Smith when he was awake or speaking to him.

33 Mr. Wells testified that conducting a FFD test entails getting in touch with a tester and arranging for that person to come to the site. On nights, it sometimes takes two to three hours for the tester to arrive. Mr. Wells also contacted the shop steward, Greg Priaulx, and asked him to come to Greenwood Yard. Mr. Wells testified that at this point he ran into Mr. Simpson and Mr. Konstantinidis and asked them to wake up Mr. Smith and take him to the conference room.

After he spoke to Mr. Konstantinidis and Mr. Simpson, he started back to his office. On his way back to the office, Mr. Wells testified, he noticed that Mr. Smith had woken up and had exited his vehicle.

34 Mr. Smith testified that he woke up to see Mr. Wells outside his car on the driver's side at the front of the vehicle. He didn't remember hearing a knock or seeing the flashlight, but he conceded that might have been what woke him up. Mr. Smith looked at his car radio and realized it was a little after 11. At that point, he knew he was in trouble as he had been caught sleeping by Mr. Wells when he should have been working. He thought that he had been relieved of duties by Mr. Wells on at least five other occasions so he knew Mr. Wells was going to take action and relieve him of duty.

35 Mr. Smith's evidence as to what happened next is different from the version of events given by Mr. Wells. The Grievor testified that he got out of the car and spoke to Mr. Wells. He said Mr. Wells asked him what time his shift started and he replied 10:30. At this point he testified that Mr. Wells told him to go to the conference room and walked away. Mr. Smith said he followed after him and asked to talk to him. Mr. Wells refused to talk to him and repeated that he was just to go to the conference room. At this point, Mr. Smith fell behind and started to go to the conference room.

36 Mr. Wells testified that the Grievor followed him into the office and wanted to speak to him. Mr. Wells refused to speak to him and told him that he was too busy and that Mr. Konstantinidis and Mr. Simpson would meet him in the conference room. According to Mr. Wells, Mr. Smith left the office at this time.

37 This evidence is at odds with the testimony given by all the other witnesses, who have Mr. Smith proceeding directly to the conference room from the parking lot. Therefore, assuming that this conversation did occur, I accept the testimony of Mr. Smith that it happened in the yard. Frankly, nothing turns on whether I accept Mr. Smith's version of his attempts to speak with Mr. Wells or this one. The bottom line is Mr. Wells did not speak to him despite Mr. Smith's attempts to engage him and did not give him an opportunity to provide an explanation as to why he was sleeping before requesting a FFD test. Nor did Mr. Wells take the time to carefully observe Mr. Smith so that he might have been in a position to make an informed decision regarding Mr. Smith's condition that night.

38 Mr. Smith testified next that as he was going towards the entrance to the building and the conference room, he saw Mr. Konstantinidis and Mr. Simpson exit the truck. They approached him. Mr. Smith testified that he and Mr. Simpson did not speak other than when Mr. Simpson told him to go with Mr. Konstantinidis to the conference room. Mr. Konstantinidis said he was to come with him to the conference room so they then walked together. As they were going into the conference room, Mr. Smith asked Mr. Konstantinidis if he could go see if he could get him "a single day". Mr. Smith explained this to mean that he would be given the day off, like a vacation day, and it would be as if the incident never happened. He had been given this option in the past as had others in similar circumstances. Mr. Konstantinidis agreed to try and left the conference room. Mr. Smith testified that he understood he had been sent to the conference room as he was going to be relieved of duty for sleeping in his car after the shift had started.

39 Mr. Simpson went into Mr. Wells's office and told him what he had observed of the Grievor in his very brief interaction with him. Mr. Wells told Mr. Simpson that he had ordered a FFD test and that a Chief Supervisor was on the way. In cross-examination, Mr. Simpson indicated that he was not aware that Mr. Wells had made the decision already to perform a FFD test on Mr. Smith and that he was "taken aback a little bit" by this news.

40 Mr. Simpson waited in the office for Janet Weller, the Chief Supervisor, to arrive. He did not go to the conference room. When Ms. Weller arrived, she brought with her a document entitled "Reasonable Cause Testing Documentation," which Mr. Simpson and Ms. Weller filled out. It is a lengthy document, therefore I have attached it as Appendix "A" to this award. All of the writing on this form is that of Mr. Simpson's, except for the comment on the second page "Employee refused to be tested and was advised a refusal is tantamount to a failed test". When questioned in cross-examination as to why he did not check off "slurred speech" on the form but was now maintaining that Mr. Smith was slurring his words, Mr. Simpson indicated that it was a "mistake".

41 In reviewing the form, it is important to note that the only questions that were answered in the affirmative were that Mr. Smith was speaking slowly, was drowsy and was exhibiting weariness, fatigue and exhaustion. There was nothing filled out on the form that suggested that alcohol or drug use by the Grievor was a factor that evening. It is also important to keep in mind the first point under the heading instructions for use; "Testing is only required when there is reasonable cause to believe alcohol or drug use is a factor in an unfit for work investigation for someone holding a designated position."

42 Ms. Weller testified that on April 8, 2015, at approximately 11:30 p.m. she received a telephone call from Mr. Wells requesting a FFD test on Mr. Smith as he had been found sleeping in his car around 11:10-11:15 when he should have started his shift at 10:30. Mr. Wells asked her to come to Greenwood, so she did. When she arrived, she went to the office and met with Mr. Simpson.

43 Ms. Weller sat with Mr. Simpson while he filled out the Reasonable Cause Testing Document checklist. She testified that she relied upon Mr. Simpson's judgment as he was the usual supervisor of Mr. Smith and knew what his normal behaviour was. She testified that after she and Mr. Simpson discussed his observations, concerns and the fact that the Grievor did not report for work, he convinced her that a FFD test was warranted. Ms. Weller testified that Mr. Simpson told her that he had reason to believe that Mr. Smith was not fit for duty as his behaviour was different this time than on other occasions when he had been woken up. However, Mr. Simpson testified that he had never woken Mr. Smith up before and when this was put to Ms. Weller in cross-examination she agreed that at the time she was led to believe that Mr. Simpson had dealt with the Grievor on one or more occasions. Also in cross-examination, Ms. Weller agreed that Mr. Simpson did not tell her how brief his conversation with Mr. Smith was. When she was told that the conversation was only 10 to 20 seconds, she agreed that it was not very long. She also agreed that she was not told that it took place outside in the parking lot.

44 Ms. Weller testified that Mr. Simpson told her that he believed Mr. Smith was "under the influence" but when Mr. Simpson was testifying as to what they discussed he did not use those words. Mr. Simpson testified that he and Ms. Weller discussed Mr. Smith's symptoms and what he had observed in his brief interaction with Mr. Smith. When Ms. Weller asked Mr. Simpson why he felt a FFD test was warranted, he testified that he told her that he felt Mr. Smith's severe level of drowsiness and fatigue was abnormal. After filling out the form, Mr. Simpson and Ms. Weller went into the conference room.

45 In cross-examination, it was put to Mr. Konstantinidis that it was not appropriate to make a decision regarding Mr. Smith's fitness for duty based on observations made from one car to another and Mr. Konstantinidis agreed. When asked if it was fair to say sleeping without anything else is not just cause to order a FFD test, Mr. Konstantinidis responded that it was his practice to interview a person before requesting a FFD test. When it was put to him that ordering a FFD test based on observing someone sleeping is not based on the training he had received, Mr. Konstantinidis agreed. He also agreed that in the past when he had found Mr. Smith sleeping he had not thought to order a FFD test.

46 I would now like to deal with what occurred in the conference room. Mr. Konstantinidis escorted Mr. Smith to the conference room. At some point, Mr. Smith came over to Mr. Konstantinidis and told him:

...that he was in a parenting class and that he arrived at Greenwood yard at 10:10pm and that he had a lot on his mind with Children's Aid coming to his house for a home inspection in the morning and that he had nodded off. At approximately 11:55pm Mr. Smith asked me to ask Mr. Ryan Simpson if he could give him a single day vacation.

47 Phone records indicate that Mr. Konstantinidis called Mr. Simpson while in the conference room, but he wasn't sure if he got through to him. However, he did go look for him. As he approached the office Mr. Simpson and Ms. Weller were just coming out. Mr. Simpson indicated to Mr. Konstantinidis that Mr. Smith was going to be tested under the Fitness For Duty policy because he had slurred speech, was drowsy and had bloodshot eyes.

48 In cross-examination, Mr. Konstantinidis agreed that no one asked his opinion of Mr. Smith's fitness for duty even though he had spent a half-hour with him in the conference room and had had experience waking Mr. Smith up before. He stated, "I think it was already decided". He did not tell Mr. Simpson or Ms. Weller what Mr. Smith told him he had done that day and why he was tired. Mr. Simpson and Ms. Weller were not aware of this before the decision to test was made. Mr. Konstantinidis indicated that was not able to observe Mr. Smith's eyes in the parking lot because he was squinting but noticed them when he was waiting with him in the conference room.

49 When Mr. Konstantinidis was out of the room, Mr. Smith spoke with the shop steward Greg Priaulx. Mr. Priaulx was asked if when he was talking to Mr. Simpson he observed anything in the Grievor that gave him concerns with regard to his fitness for duty and he answered no. He testified that in this kind of situation he always looks carefully at the employee. He indicated that when he goes into a situation like this, he doesn't want to look not credible so he checks carefully for the smell of alcohol or marijuana. He assesses the employee's motor skills and checks to see if the employee's pupils are dilated or if the person is sweating profusely. He testified that he doesn't want his member to make him look stupid so he assesses the employee carefully. He stated, "To be honest, some employees tell the truth and others don't". If he is satisfied that the employee is being honest and is not impaired, then he reviews what happened with the employee and in the meeting with management argues in the person's defence. In his view, Mr. Smith was not exhibiting any signs of impairment due to alcohol or drug consumption when he was meeting with him in the conference room. He testified that Mr. Smith "seemed perfectly sober" and his speech "was totally fine — not slow or anything".

50 Mr. Konstantinidis came back into the conference room with Ms. Weller and Mr. Simpson. Ms. Weller introduced herself and indicated that Mr. Smith was going to have to do a FFD test. Mr. Smith was shocked by this news and questioned what they were testing him for. He did not know why they were testing him on this occasion as he had been relieved of duties for sleeping many times and never tested. Mr. Smith got very upset at this point. Although Mr. Priaulx did not remember making the statement, all of the other people in the conference room testified that Mr. Priaulx spoke up and said that Mr. Smith cannot be forced to do the test as it was a violation of his Charter rights. Mr. Smith then refused to do the test, stating that it was a violation of his rights. He testified that he also refused because he had been relieved of duty before for sleeping and he didn't see how this situation was any different than the other times. He felt that there was no reason to order a test. Ms. Weller responded by saying that refusing to do the test is the same as a failure.

51 Mr. Konstantinidis agreed in cross-examination that at this point Mr, Smith was upset and irate and not exhibiting sleepiness anymore. He agreed that Mr. Smith was not speaking slowly, that he was speaking clearly and that his words were no longer slurred. Mr. Konstantinidis described him as "pissed off when he was told he was going to be tested". Mr. Simpson described Mr. Smith as agitated and confrontational. Mr. Smith testified that he was initially dumbfounded when he was told he was going to be tested and agreed that he quickly became very upset, frustrated and angry.

52 Mr. Smith asked if he was being relieved of duties and when Mr. Simpson said yes, he stormed out of the room. Mr. Simpson indicated that the conversation took only a couple of minutes. At no time did Ms. Weller or Mr. Simpson ask Mr. Smith why he was so tired or give him an opportunity to explain or give his side of the story.

53 In cross-examination, Mr. Simpson was questioned about the process found in the Supervisor Procedure Fitness For Duty Policy. He agreed that Mr. Smith was not given an opportunity to explain before the FFD test was ordered, which is a requirement of the policy. He agreed that before a FFD test is to be ordered, an employee is to be given an opportunity to explain and that this response is supposed to be considered by management before a decision to test is made. Mr. Simpson agreed that as far as he knew, Mr. Wells had not spoken to or interacted with Mr. Smith at all before the decision to request a FFD test was made and that therefore he had no reason to call for a test. When asked if based on his knowledge of the FFD policy, it would be wrong to call for a test when you had not seen an awake Grievor, Mr. Simpson replied, "I wouldn't have made the call — no".

54 Ms. Weller was also cross-examined on the fact that Mr. Wells requested a FFD test based solely on observing Mr. Smith asleep. Although she was quite reluctant, she eventually agreed that it was unusual for a manager to request

a FFD test based only on observations made of a sleeping employee. Ms. Weller testified that she had assumed that Mr. Simpson had told Mr. Smith that he was going to be tested and that Mr. Simpson had explained that he had concerns about his fitness for duty. When it was put to her that the Grievor found out only when she told him in the conference room, she agreed that she had not known that he had not been told. She acknowledged that she observed Mr. Smith's dramatic reaction when she indicated that he was to do a FFD test.

55 Mr. Simpson and Ms. Weller both tried to downplay the fact that the procedure was not followed and that Mr. Smith had not been given an opportunity to explain his behavior by stating that he could have spoken up in the conference room and explained himself. They both indicated that if he had offered an explanation that satisfied them, the test could have been called off at anytime. However, both Mr. Simpson and Ms. Weller agreed in cross-examination that Mr. Smith was not asked any questions or for his side of the story.

56 At the time that the events of April 8 occurred, Mr. Simpson had been an Assistant Foreman only for approximately a year and had never ordered someone to submit to a FFD test before. He had never filled out a Reasonable Cause Testing Documentation form before.

57 Mr. Wells and the Grievor have a long history. This was not the first time Mr. Wells had either found Mr. Smith sleeping or been involved in an incident where Mr. Smith was found sleeping either in his vehicle or a TTC vehicle. This was the third or fourth incident. Mr. Wells testified that it was always "a chore" to wake him up.

58 On May 31, 2012, Mr. Wells (who was an Assistant Foreperson at the time) found Mr. Smith sleeping and sent him the following memo:

On May 31st 2012 at approx. 2:50am. You were found sleeping in van 281 by Ast. Foreperson Paul Wells.

The crew was working at Vic Park to Warden on the WB track doing a rail defect. Once to job had started Mr. D. Smith #54041 was found not at track level with the crew. Mr. Wells went to go look for Mr. Smith at the other crew working on the EB tracks but was unable to find him. Mr. Wells asked Ast. Foreperson T. Easter to come and help locate Mr. Smith.

We had located Mr. Smith sleeping in van 281 parked at the side of the tracks at Warden Stn. We had tried to wake Mr. Smith up but were not successful. I Paul Wells sent Troy Easter to go to RT-28 to grab M. Smith to be Mr. D. Smiths union representation. I Paul Wells tried to wake Mr. D. Smith again but was still unsuccessful. Mr. Wells called transit control to advise them of the situation and have them call for an ambulance to have Mr. Smith checked out for any medical problems that he might be have at this time. When Mike Smith arrived at the van he was told about what was going on and he also witnessed Mr. D. Smith sleeping. Mike Smith opened up the door again to van 281 and Mr. D. Smith awoke from his seat. Mr. D. Smith was advised that an ambulance was coming to check him out for any medical conditions he may have.

The ambulance crew cleared Mr. Smith and said that he was fine. After this ast. Foreperson P. Wells relieved Mr. D. Smith #54041 of duties. Mr. Smith was taken back to greenwood yard by a cab supervisor.

59 As a result of this incident, Mr. Smith received a fifteen-day suspension for sleeping/nesting while on duty. The union grieved on his behalf and it was settled by reducing it to a five-day suspension and reimbursing Mr. Smith for ten days pay.

60 On April 7, 2014, Mr. Wells (who was now a Foreperson) Issued the following memo to Mr. Smith:

On April 7th, 2014 at 6:00 am we had a meeting at the Greenwood Track and Structure building in the conference room. Present at this meeting was you D. Smith, Shop Steward Greg Priaulx, Foreperson Paul Wells and Foreperson Glen Melville.

I set up my work zone at Vic Park and made sure my crew's tasks were under way at 2:55am. I made my way over to Warden X-Over to see the crew that working on removing a RSZ on the east bound track. When I was walking toward the work car I noticed Mr, Smith with his hat over his face in the passenger seat of the work car sleeping. I was pointing my flashlight in that direction to grab his attention but he didn't move. When I arrived at the work car and hit the side of the cab he woke up. I went over to talk to the welder in charge K. Spencer and made sure he was ok, and made sure that he was able to remove the RSZ. Then I made my way back to Vic Park, I had contacted G, Priaulx and asked him to have a meeting with him and Mr. Smith when we arrived back at Greenwood yard.

You were advised at 6:20am that you were being relieved of your duties for sleeping on Rt- 85. You were advised by Greg Priaulx that the Union would be in contact with you to set up a step 1 interview as soon as he could.

61 On December 24, 2014, Mr. Wells again found Mr. Smith sleeping and issued him the following Memorandum:

On December 22, 2014 at 11:55 pm I held a meeting with you at the Greenwood Track and Structure building in the conference room. Present at this meeting was Shop Steward Greg Priaulx and Asst. Foreperson Tom Konstantinidis.

These are the events that occurred during the course of the night:

- 10:30 pm on the above date I went upstairs in the greenwood track lunch room while doing roll call and giving out the nightly jobs I noticed that you were know where to be found.
- 10:40pm I called IMC and asked if you had booked off also asking the staff if they have heard from you regarding being late.
- Between 10:45 pm and 11:30 pm myself and Tom Konstantinidis searched the yard to see if you had arrived.
- 11:40 pm I called transit control and advised them to send down a Chief Supervisor to assist with waking an employee who was sleeping in his vehicle with his sweater covering his face and his seat totally in the reclined position. We shined the flashlights in the window of the vehicle as well as knocked on your door until you awoke from your sleep. We informed you that we were looking for you and that we found you sleeping in your vehicle and advise that you proceed to the conference room with your shop steward.
- 11:55pm myself and Tom Konstantinidis entered the conference room and you stated that you were under a lot of stress at home and that you had spent the day dealing with issues with your kids.
- I advised you that you should have called IMC and booked off sick because you were unfit due to lack of sleep to perform your nightly duties. I offered you and gave you a family assistance pamphlet and at that time advised you that you were being relieved of duties for sleeping during work hours.

At 12:15 am on December 23, 2014, I relieved you of duties.

62 Mr. Smith received a nine-day suspension for this incident.

63 In cross-examination, Mr. Wells confirmed that he had received training with regard to the FFD Policy and testing procedures. He indicated that he had ordered FFD testing on two or three previous occasions.

64 Mr. Simpson is related to Mr. Wells by marriage and he has known him since he was sixteen years old. in cross-examination, Mr. Simpson agreed with the suggestion that Mr. Wells had "a history of problems with the Grievor". When asked what the problems were, Mr. Simpson indicated that Mr. Wells had previously disciplined Mr. Smith and that he had heard shop talk that Mr. Smith had complained to Human Resources that Mr. Wells had a racial bias against him. He understood that Human Resources had come and discussed the issue with Mr. Wells. Because of this claim of racial bias on the part of Mr. Wells by Mr. Smith, Mr. Simpson stated that Mr. Wells wouldn't want to be involved in

the discipline of Mr. Smith. Although Mr. Wells did not say anything specific to Mr. Simpson that night, he felt that Mr. Wells did not want to be involved because of the past history between himself and Mr. Smith. If he could avoid it, Mr. Wells would not want to be the one to take action against Mr. Smith.

65 Mr. Wells testified that he did not personally deal with Mr. Smith on April 8 as he was too busy and had other duties to perform. He indicated that he delegated responsibility for dealing with the situation to Mr. Simpson and Mr. Konstantinidis. In cross-examination, Mr. Wells was asked if there was any other reason why he did not deal with the situation personally other than because he was busy and he said no. He was asked if in the period before April, 2015, if he had any problems with Mr. Smith and he said no. Mr. Simpson's evidence that Mr. Wells wouldn't want to be involved in the discipline of Mr. Smith because he had "a history of problems with the Grievor" was put to him. Mr. Wells testified that he was surprised by that and didn't recall talking to Mr. Simpson about any problems he may have had with the Grievor.

66 Telephone calls between operations and Transit Control are tape-recorded. At some point in the evening, a conversation between Mr. Wells and Pat Honan in Transit Control was recorded and the recording was played in the hearing. Mr. Wells identified his voice. In the call, Mr. Wells is heard saying that he had a history with "this guy", meaning Mr. Smith, that he had asked his assistants to deal with it and that he was staying away or out of it. When asked in cross-examination if this "history" he referred to was actually the reason why he didn't want to deal with Mr. Smith, he initially denied any "history" with Mr. Smith. Although he eventually admitted to it, he continued to deny that the "history" was a factor in his decision to "stay away" and continued to insist that the only reason he did not deal with the Grievor was because he was too busy with other duties.

67 Mr. Wells's attempts to get around the tape were frankly offensive. He was evasive, argumentative, unresponsive and dishonest in his testimony. He was at times hostile and contemptuous of the process. Even in the face of the tape, he persisted in his dishonesty and repeated over and over that the reason he did not get involved was because he was too busy and had two assistants who could deal with it.

68 I find the evidence of Mr. Wells to be quite problematic. Although Mr. Wells said that it was always a chore to wake Mr. Smith up, on April 8, because he could not wake him up, he testified that he "figured this time there was obviously something else going on with him other than just being tired because he was right out of it and hard to wake up". Mr. Wells concluded that Mr. Smith was under the influence of drugs or alcohol and that was why he was having trouble waking him up. However, in cross-examination, he agreed that when he observed Mr. Smith in his vehicle he did not observe any indicia of impairment. He agreed that he had no reasonable cause at that point to think that Mr. Smith was impaired. Mr. Wells had experienced trying to wake Mr. Smith up on other occasions and he testified that it was always very difficult to wake him up. When asked how he would compare trying to wake up Mr. Smith on April 8 to other occasions, he responded that it was the same. Therefore, there is no evidence as to why this situation was any different than the other occasions when he had found Mr. Smith sleeping on the job. He testified that he felt Mr. Smith was under the influence of drugs or alcohol, but he jumped to this conclusion without even talking to him.

SUBMISSIONS

69 Counsel for the employer pointed out that Subway Track Mechanics work outside their work vehicles, removing, replacing, and rehabilitating rail. The rail could be electrified if power cuts are not done appropriately. They are also operating heavy machinery and using other potentially dangerous tools, which could cause significant injury if one or more employees are not alert or paying appropriate attention to their tasks and to others. She stressed that track workers working out of Greenwood, such as the Grievor, because of the nature of the position, work in highly safety-sensitive environments (either while they are at Greenwood, while they are travelling to their various assignments and while at track level) with significant hazards posing dire consequences if workers are not fit for duty and their judgement is impaired.

70 In addition, counsel suggested that if employees are not fit for duty, the risk is that they may make mistakes or overlook tasks that could result not only in accidents or injuries at the time, but also in the future. If rail track is not properly rehabilitated, repaired or replaced, the end result could be subway trains, including those carrying thousands of customers a day or work cars travelling on the track, having accidents or getting derailed with significant injuries and damage.

71 In this case, the Grievor was dismissed on the basis that he was found sleeping at work during his shift, TTC supervisory personnel believed that he was impaired and not fit for duty so he was directed to take the FFD test under the TTC's FFD Policy. He refused and left the workplace. The Grievor was then dismissed at Step 1 of the grievance procedure. The Step 1 memo dated April 17, 2015, states that the Grievor was being dismissed for violating several TTC policies; Conditions of Employment; FFD Policy; Operating Excellence Guidelines; and the collective agreement.

72 Employer counsel pointed to the evidence given by Mr. Konstantinidis and Mr. Simpson, who attested to their observations of the Grievor asleep or passed out in driver's seat of his car in the parking lot at Greenwood Yard. She suggested that both of these supervisors had some level of interaction with Mr. Smith and that both felt that the Grievor exhibited high level of fatigue, drowsiness, slurred speech and bloodshot eyes. Both felt that he was not fit to maintain a level of alertness to safely perform his duties in his safety-sensitive role.

73 The Grievor went to the conference room where he met with his shop steward and later with Ms. Weller. Based on the information provided to her, Ms. Weller felt there were reasonable grounds to test the Grievor. She did rely on information provided by Mr. Simpson, including his assessment that the Grievor was really out of it — more so than on other occasions when he had woken up — and that unlike those previous occasions, he did not appear to snap out of it. Ms. Weller relied on this information as Mr. Simpson was more familiar with the Grievor. Having said this, Ms. Weller made it clear in her evidence that she also made her own observations of the Grievor and that she believed testing under the FFD Policy was warranted as there was a legitimate concern that he might be under the influence of drugs or alcohol. She also made it clear that had she felt otherwise, she could have called off the test and that in her experience, this had been done. She further articulated that it was not odd to call for a tester to be dispatched early, particularly during the night, because it could take some time for him to arrive and that at any time after making the call, the tester could be called off.

74 Counsel referred to the evidence with regard to the safety-sensitive nature of the workplace in this case. She suggested that there is no industry that is more safety-sensitive than mass public transit and the TTC is Canada's largest public transit system. The FFD Policy is one of the key tools the TTC uses to ensure that its employees are reporting to work fit for duty, free from fatigue and the effects of drugs and/or alcohol. The purpose of the FFD Policy is to ensure the health and safety of TTC employees, customers and members of the public. The FFD Policy requires that employees and senior management be mentally and physically fit to perform their work, without limitations arising from (among other things) the effects of drugs or alcohol or extreme fatigue.

75 It was pointed out by counsel that the policy allows for the identification of employees who create safety risks in the workplace due to drug or alcohol use or extreme fatigue and for treatment and return to work of employees with substance abuse disorders. It provides for disciplinary action against employees in defined circumstances. The policy provides for drug and alcohol testing of employees in safety-sensitive positions where there is reasonable cause to believe alcohol or drug use resulted in the employee being unfit for duty. She urged me to accept that the TTC is able to apply the FFD Policy to the Grievor and he cannot object to the application of the policy to him. A failure to test is considered a violation of the policy (s. 8.6). This includes the refusal to submit to a test, which is what we are dealing with here. Inherent in this provision is that it is a violation of the FFD Policy to refuse to test without reasonable excuse.

76 Counsel suggested that in the circumstances, particularly in light of the ongoing Policy Grievance litigation, what Mr. Smith ought to have done if he felt the request to test was a violation of his rights was to "work now, grieve later" by taking the test and then grieving the fact that he was required to do so. Mr. Smith could have sought damages for

his belief that the request to test served to violate his rights. Counsel referred to Section 9.1 and 9.2 of the FFD Policy, which provide that any violation of the provisions of this policy will result in discipline up to and including dismissal and that management has the authority and discretion to remove employees from duty if believed to be in violation of the policy pending the results of the investigation. The appropriate discipline in a particular case depends on the nature of the policy violation and the circumstances surrounding the situation.

77 An employee who refuses to test on the basis that there are no reasonable grounds is taking a real risk and counsel conceded that there are significant consequences for the TTC if the employee is successful in showing there were, in fact, no reasonable grounds. She agreed that if no reasonable grounds are found, it may result in the evidence of the refusal being thrown out, and therefore no discipline based on the refusal. However, on the other side of this, she stressed that there *must* be significant consequences for employees if they refuse to test without reasonable excuse. Therefore, if there were reasonable grounds, the consequence must be at least as severe as - it cannot be less than - discipline for a positive test. Otherwise, why would an employee who thinks he might fail ever participate in testing? Refusing presents that employee with a win-win situation. That would be absurd. All the Grievor in this case had to do was participate in the testing to prove that there were no reasonable grounds. Counsel suggested that he could have done that easily.

78 On April 8, 2015, there is no dispute that Mr. Smith missed roll call and instead was sleeping in his vehicle in the Greenwood Yard parking lot during his shift. His decision to sleep was premeditated. He did not merely doze off. He remained in his vehicle, where he was comfortable in a reclined seat, and closed his eyes, intending to sleep. The union cannot suggest that the Grievor did not know that by engaging in this conduct, if he failed to wake up in time, that he was unaware he would be disciplined. Both the documentary and viva voce evidence clearly demonstrates that Mr. Smith has a history of sleeping at work and that on several occasions, where he was found doing so, he was disciplined.

79 In particular, just three or so months prior to April 8, 2015, Ms. Smith was found sleeping in his personal vehicle on Dec 22, 2014. The Step One Memorandum regarding that incident describes the incident as follows:

- You appeared to be sleeping in your vehicle with your seat reclined ... Mr. Wells directed a flash light... knocked on the window several times ...
- The Grievor's explanation — he said he was dealing with a number of personal issues and had not always gotten the sleep he needed during the day.
- Grievor also said he did not intend on missing roll call, that he arrived early for his shift, remained in his car and fell asleep.

80 Counsel pointed out that this all sounded very familiar. Also in the December 31, 2014, Memorandum, it was noted that Mr. Smith expressed that he was sorry for the incident, he claimed he knew what the expectations were for a TTC employee like himself, and that if given a second chance, this would not happen again. Counsel suggested that it was reasonable for the employer to understand that "this" meant that Mr. Smith would not sleep in his car and miss roll call again. Nor would he attend work in such a sleep-deprived state that he could not stay awake. Thus, it cannot be said that Mr. Smith was not under specific and clear notice that if he engaged in similar conduct, he could be dismissed. Counsel questioned how many chances does the Grievor get?

81 Mr. Smith has on several occasions relied on personal issues and his receipt of EFAP counselling to justify his behaviour. At some point, however, it is simply not reasonable to expect the employer to tolerate misconduct on this basis for the same reasons. It was Mr. Smith's responsibility to address whatever issues he claimed were preventing him from being alert and fit for duty at all times during his shift. Based on this, counsel argued that discharge was a fair and appropriate penalty for the Grievor's conduct in arriving at work and sleeping/nesting in his vehicle on April 8, 2015.

82 In support of her argument, counsel referred to: *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078; *R. v. McKinlay Transport Ltd.*, 1990 CarswellOnt 802, 1990 CarswellOnt 992, [1990] 1 S.C.R. 627; ONSC 2078 *Canadian National Railway and CAW, Local 100 (CAW12-2011-00071)*, Re [2013] C.L.A.D.

No. 248; *Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Jabar Grievance)*, [2012] O.L.A.A. No. 271 (Johnston); *Penauille Servisair and IAMAW, Transportation District 140 (Blake)*, [2006] CarswellBC 4326, 86 C.L.A.S. 200 (Munroe); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 and *Sheraton Ltd. v. Hotel & Club Employees' Union, Local 299*, 1980 CarswellOnt 1169, 26 L.A.C. (2d) 122

83 Union counsel started his submissions by stressing that the issue before me was not whether or not Mr. Smith had a reasonable excuse to refuse to take the FFD test but whether the employer had reasonable grounds to require him to take the test. Counsel suggested that the employer grossly mismanaged the manner in which they carried out their duties that night. They totally failed to follow their own policies and procedures in the situation. He suggested that even if I was to conclude that it was reasonable to test the Grievor, given the irregularities in the testing decision and the circumstances of this case, it is open to me to say the penalty of discharge is excessive. I have the jurisdiction, which is not fettered, to substitute a lesser penalty than discharge. The Grievor acknowledged his fault and misconduct in sleeping and missing the start of his shift. The question is what is the appropriate disciplinary penalty for this behaviour.

84 Counsel for the union stressed that it was important to remember that in this case Mr. Smith spoke to Mr. Simpson for 10-20 seconds outside in a parking lot moments after he had just awoken from a deep sleep. Based on observations made in this brief period, he reached his conclusions with regard to Mr. Smith's fitness for duty. That is a big problem as he is required under TTC policies to investigate, listen to the Grievor's explanation and explain to the Grievor that he appears to be unfit for duty and why. There is no evidence before me that any manager engaged in this conversation with Mr. Smith either before or after the FFD test was ordered. The Grievor did not remember speaking to Mr. Simpson other than that he told him to go to the conference room with Mr. Konstantinidis. Counsel suggested that Mr. Simpson could not recall any details of the conversation, not a single word.

85 Union counsel pointed out that the FFD policy articulates two distinct situations. Section 7.4 addresses what to do when an employee is exhibiting extreme fatigue and Section 8.2 and 8.3 addresses drug and alcohol testing. In our case, we were dealing with a case of extreme fatigue and the process set out in Section 7.4.2 should have been followed but it was not. The FFD policy and the Supervisor Procedure-Fitness For Duty set out a specific process that must be followed and was not on this occasion.

86 Counsel argued that this is a huge substantive procedural problem for the employer. The decision to call for a FFD test by Mr. Wells was wrong and violates the policy. However, this violation could have been remedied if between the time the call was made and the tester shows up, any supervisor had done any of the things he/she was supposed to do, such as interview the employee and get his explanation. There was nothing standing between them and doing a proper investigation. Nothing stopped them from asking questions of the Grievor and doing a proper investigation. They simply didn't. The indicia they relied upon: speaking slowly; was drowsy; was exhibiting weariness, fatigue and exhaustion; and later on slurred speech and bloodshot eyes, were equally consistent with someone being extremely fatigued as impaired. In this case, it is even more important to investigate and listen to the employee's explanation or reasons. There were two plausible explanations and they simply refused to consider the obvious one.

87 Before testing an employee, it is incumbent upon the TTC to make a considered, responsible, reasoned and reasonable decision, having conducted an investigation and gathered all the relevant evidence. It is not about ticking boxes on a form. The failure to listen to the Grievor and afford him an opportunity to explain fundamentally undermines the decision to test and makes it unreasonable. Before asking an employee to submit to an invasive test, the commission has to seek an explanation from the employee as to the nature and cause of the behaviour based on fairness, reasonableness and common decency.

88 Union counsel pointed out that all of the witnesses agreed that after Mr. Smith was told he was going to be tested, he became quite upset and was no longer speaking slowly or slurring his words. If the employer was correct and he was impaired, slow and slurry speech cannot be turned on and off like a faucet.

89 In support of his arguments, union counsel relied upon the following authorities: *FirstBus Canada Ltd. v. A. T. U. Local 279*, 2007 CarswellNat 1786; *National Gypsum (Canada) Ltd. v. I.U.O.E., Locals 721 & 721B*, 1997 CarswellNS 554; *Halifax (Regional Municipality) and C.U.P.E., Local 108 (Jeffery)*, Re. 2012 CarswellNS 1051; *C.H. Heist Ltd. v. E.C.W.U. Local 848*, 1991 CarswellOnt 6419; *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 v. Mechanical Contractors Assn. of Sarnia (Drug and Alcohol Policy Grievance)*, [2008] O.L.A.A. No. 621 and *Toronto District School Board v. ETFO*, 2013 ONSC 594, 2013 CarswellOnt 2134.

90 In summary, union counsel argued that as the request that the Grievor submit to a FFD test was unreasonable in the circumstances, no discipline should flow from it. Should I conclude that the request was reasonable, the denial of his right to give an explanation or to understand why he was being tested should mitigate against the penalty of termination. I have the jurisdiction to substitute a penalty less than discharge and should do so.

91 In terms of the possible discipline for sleeping and failing to report for the start of his shift, whether I characterize it as "nesting" or merely "dozing off" in both situations a final warning or last chance agreement is required by the TTC's Operating Excellence Guidelines. The Grievor was not given an final warning and LCA. The parties have recognized and agreed to the appropriateness of an LCA in these circumstances and that should inform my decision.

92 In reply, counsel for the commission argued that it was reasonable in the circumstances for Mr. Wells to contact Transit Control and initiate the process for a neutral party to attend the workplace and assess the situation. It was also appropriate for him have delegated responsibility for the investigation to Mr. Konstantinidis and Mr. Simpson in conjunction with Transit Control.

93 Counsel referred to the Supervisor Procedure-Fitness For Duty and suggested that the procedures set out are only guidelines to be followed by management. There is no requirement to absolutely follow the steps in the sequence in which they are laid out.

94 She also argued that Mr. Smith had ample opportunity to speak up and explain his behaviour. Had he done so to the satisfaction of management, the decision to test could have been called off. Had Ms. Weller and Mr. Simpson concluded that he had provided a reasonable explanation for his behaviour and no longer believed he might be under the influence of drugs or alcohol, the test would have been cancelled, Counsel suggested that one question I must answer is whether Mr. Smith provided a reasonable explanation on April 8, 2015, for his behaviour. She urged me to conclude that he did not.

95 In answering whether or not the TTC had reasonable cause to test the Grievor, counsel requested that I review Mr. Simpson's evidence. She stated that he was consistent throughout and felt that the Grievor was exhibiting a severe level of fatigue, that his conduct was abnormal, more severe and atypical of his regular behaviour. The fact that the conversation between Mr. Simpson and Mr. Smith was 10-20 seconds long is irrelevant in her view. As she put it, a lot can be said in 20 seconds. She suggested that Mr. Simpson was honest and forthcoming about his failure to initially record the slurred speech and bloodshot eyes.

96 In terms of his sleeping, counsel stressed that despite having been given second and third chances, Mr. Smith was again found asleep in his car when he was supposed to be working. Discipline is intended to be corrective, but he has had many chances and has failed to correct his behaviour. Mr. Smith's behaviour has been characterized as nesting before and as recently as December, 2014. He deliberately set out to sleep in his car on April 8, 2015, and exhibited a pattern of recklessness in terms of sleeping and the requirement that he must report for work fit for duty. Counsel requested that I uphold the discharge and dismiss the grievance.

DECISION

97 On April 8, 2015, Mr. Smith was witnessed asleep in his vehicle by Mr. Konstantinidis and Mr. Simpson and found asleep in his vehicle by Mr. Wells. When he first spoke to Mr. Simpson and Mr. Konstantinidis, it was clear that he had just woken up. He was exhibiting weariness, fatigue, exhaustion and appeared drowsy. His speech was slow. It was important at this time for management to determine if he was fit for duty given the state he was in. It could well have been that he was unfit for duty due to extreme fatigue. Or he could have been unfit for work because of drug or alcohol impairment. As was pointed out by union counsel, the FFD policy articulates two distinct situations. Section 7.4 addresses what to do when an employee is exhibiting extreme fatigue and Section 8.2 and 8.3 addresses drug and alcohol testing.

98 The Reasonable Cause Testing Documentation form was filled out by Mr. Simpson and co-signed by Ms. Weller. Under the heading "Instructions For Use" the first point states, "Testing is only required when there is reasonable cause to believe alcohol or drug use is a factor...". Neither Mr. Simpson, Mr. Konstantinidis nor Ms. Weller testified that he or she was convinced or certain that Mr. Smith was under the influence of alcohol or drugs. Mr. Konstantinidis testified that Mr. Smith "just wasn't himself". But that could have been related to exhaustion. Mr. Simpson suggested that Mr. Smith "could have" been impaired by drugs or alcohol. But he never testified that he felt certain or had concluded that Mr. Smith had been drinking or had used drugs. Those words were never used and absolutely nothing was checked off on the Reasonable Cause Testing Documentation form relating to alcohol or drug use.

99 Mr. Simpson suggested that he was concerned and suspicious because Mr. Smith was exhibiting such a severe level of drowsiness and fatigue. The reason employees are tested is because there is reasonable cause to believe that alcohol or drug use is a factor in an unfit for duty investigation. However, in this case, Mr. Smith was consistently described as extremely fatigued, drowsy, weary, groggy and exhausted. He was exhibiting slow and slurred speech when he first woke up but not later on in the conference room. Nor was he still sleepy when the discussion was occurring about his taking the test. At that time, he was described as upset and irate. He was not sleepy or speaking slowly anymore and was speaking clearly. He was clearly angry and very alert. I heard a great deal of evidence in this case and having carefully reviewed it I have come to the conclusion that on April 8, 2015, the employer did not have reasonable grounds to demand that Mr. Smith submit to a FFD test.

100 Based on his numerous experiences, Mr. Wells said that it was always a chore to wake Mr. Smith up. And when he asked how he would compare trying to wake up Mr. Smith on April 8, 2015, to other occasions, he responded that it was the same. But on April 8, for some reason, when he could not wake him up, he testified that he concluded that Mr. Smith was under the influence of drugs or alcohol and that was why he was having trouble waking him up. Even though he did not observe any indicia of impairment and did not even speak with Mr. Smith he requested that a FFD test be done.

101 Given Mr. Wells's demeanour, dishonesty and total lack of candour while testifying and in the face of the testimony given by Mr. Simpson, I am satisfied that Mr. Wells did in fact have a history with Mr. Smith. As it is clearly a negative history, it is not out of the question that Mr. Wells was not fair to Mr. Smith that evening. I believe that this negative "history" was one of the reasons why he requested a FFD test without making any attempt to determine if one was or was not warranted. This decision was completely unreasonable and the actions of Mr. Wells that night put into play a process that was ultimately unfair and inappropriate.

102 Mr. Konstantinidis was a very reliable and credible witness. He remembered more detail with regard to the events in the parking lot than either Mr. Simpson or Mr. Wells did. Therefore, where they either don't remember or their evidence contradicts that given by Mr. Konstantinidis, I prefer the evidence of Mr. Konstantinidis and accept it as likely more accurate. The fact that Mr. Konstantinidis had a clearer memory could also be because he started giving his evidence at the commencement of the hearing in 2015 while other were testifying years later. Mr. Simpson was also quite candid and generally believable. He testified to the best of his recollections. Although I must say his recollections of what occurred in the parking lot were very vague and not particularly helpful. I also am concerned that in his Relief of Duty Memo to Mr. Smith he states that "I ordered a fitness for duty test." Clearly that is not true as the test was ordered by Mr. Wells.

103 On the night in question, although Mr. Konstantinidis spent the most amount of time with Mr. Smith, as he was the one waiting with him in the conference room, Mr. Konstantinidis did not play any role in the decision to test Mr. Smith. No one asked his opinion regarding Mr. Smith's fitness for duty.

104 Mr. Smith testified as to his activities that day. On the night in question, he attended a parenting class at the YWCA from 6:30 to 8:30, then reported for work. He was asked if he had consumed any alcohol or drugs that evening and he denied having done so. In my view, the fact that Mr. Smith attended a parenting class immediately before attending at the workplace reinforces the likelihood that he was sober and clean that night. I found Mr. Smith to be a credible witness and I accept his testimony that he had not consumed any alcohol or drugs that evening. I accept that his speaking slowly or slurring and that he was drowsy and exhibiting weariness, fatigue and exhaustion when Mr. Konstantinidis and Mr. Simpson spoke to him in the parking lot was because he had just woken up from a deep sleep and was exhausted.

105 However, having said that, my findings are based on testimony given by Mr. Smith long after the events occurred. But what is important, and why I have set out my conclusions, is if the management involved in this case had taken the time to properly investigate, spoken to Mr. Smith and asked for an explanation of his conduct, they may have come to the same conclusions as I have and either not ordered the test in the first place or called it off. Unfortunately, that did not occur and in my view management did not have reasonable grounds, based on the scant information that they had to demand that the Grievor submit to a FFD test.

106 Much was made about the fact that test could have been called off, therefore it didn't matter if a FFD test was requested by Mr. Wells before Mr. Smith had been given the opportunity to give his side of the story. I disagree. This argument misses the point. Management in this case insisted that he submit to the test in a manner that violates their policies and procedures. Mr. Smith was ordered to take the test without any investigation into why he was sleeping or him ever having been asked for any explanation as to why he was sleeping.

107 Counsel for the employer argued that Mr. Smith had ample opportunity to speak up and explain his behaviour. Had he done so to the satisfaction of management, the decision to test could have been called off. Had Ms. Weller and Mr. Simpson concluded that he had provided a reasonable explanation for his behavior and no longer believed he might be under the influence of drugs or alcohol, the test could have been cancelled. Therefore, counsel suggested that one question I must answer is whether Mr. Smith provided a reasonable explanation on April 8 for his behaviour. It was suggested that the Grievor should have spoken up and provided an explanation for his conduct that evening. He should have explained why he was sleeping.

108 While it is true that Mr. Smith could have reacted differently than he did when he was told that he was going to be tested, whether or not it was reasonable for him to refuse to take the test is not a question that I must answer. I agree with counsel for the union that the issue before me was not whether or not Mr. Smith had a reasonable excuse to refuse to take the FFD test, but whether the employer had reasonable grounds to require him to take the test. The issue before me is whether or not it was reasonable for management to demand that he take an intrusive and invasive test based on the information that they had at the time and in the circumstances of this case. The onus is on management to establish that there was just cause for discipline and that the decision to insist that the Grievor take a fit for duty test was based on legitimate and objective concerns. Before making either of these decisions, management must investigate the situation and follow the policies, practices and procedures put in place to ensure a fair process. That was not done in this case.

109 Counsel for the employer suggested that the procedures set out in the Supervisor Procedure-Fitness For Duty are only guidelines to be followed by management. She argued that there is no requirement to absolutely follow the steps or to follow them in the sequence in which they are laid out. I think that the procedures are more than mere guidelines. In the Introduction to the Procedure it states, "... this procedure describes in detail when reasonable cause and post incident alcohol and drug testing are required and what steps a supervisor... *must follow* in order to refer an employee for an alcohol and drug test." In my view, the use of the word "must" makes it clear that following the procedure outlined is

something that a supervisor should do except in extraordinary circumstances. Generally speaking, another reason why the procedures should be followed is because they create a fair and reasonable process.

110 All of the management witnesses indicated that Mr. Prialux told Mr. Smith that for the TTC to demand that he submit to a FFD test was a violation or against his Charter rights and that Mr. Smith also said this. Mr. Prialux did not remember saying this and Mr. Smith testified that he said it, not Mr. Prialux. Mr. Smith was discharged in part because he refused the test. Although I have concluded that management did not have reasonable cause to demand that Mr. Smith submit to a test based on the unique circumstances of this case, this should not be seen as a general endorsement of employee's refusing to be tested. In hindsight, it would have been better for Mr. Smith to have agreed to the test, as I believe he would have passed the test and he would not have lost his job. His discharge and the consequences flowing from it and this lengthy proceeding could have been avoided.

111 I have concluded that the commission did not have reasonable grounds to insist that Mr. Smith submit to a FFD test. However, the fact that the Grievor was found sleeping when he was supposed to be working did merit a disciplinary response. He had been disciplined on numerous occasions for lateness or sleeping on the job and in December, 2014, a mere four months previously, he had been warned that further incidents of sleeping on the job may result in discipline up to and including dismissal. Based on the events of April 8, the Grievor was terminated for failing to take the test and sleeping on the job. Given my conclusions with regard to the decision to require Mr. Smith to submit to a FFD test, termination is too severe a penalty. However, in the circumstances a significant disciplinary response is appropriate for the fact that in spite of having been warned on numerous occasions the Grievor was once again found sleeping when he was supposed to be working. His decision that night reflected a flagrant disregard for the consequences.

112 I had the opportunity to observe the Grievor over many days of hearing. At times, he was very volatile and quick to anger. Based on my observations I am not surprised at his angry and dramatic reaction to the news that he was to be tested to determine if he was fit for duty. However, it is unfortunate that he could not control his temper and stormed out of the conference room. Things might have unfolded differently had he stayed. While testifying, he was also argumentative and disrespectful towards employer counsel at times. That was inappropriate and if he continues to exhibit this type of attitude towards management he will get into trouble again. I truly hope Mr. Smith has learned from this experience, realizes that he has been given one more opportunity in his employment relationship and does not keep making the same mistakes.

113 In my view, a thirty-day unpaid suspension and the imposition of a last chance agreement for a violation of the TTC's Operating Excellence Guidelines is appropriate. The parties have a long history with regard to the utilization of LCAs, therefore I will refer the writing of the exact terms and conditions to be included in the LCA back to the parties. In the event that they cannot agree, the issue can be brought back to me for resolution.

114 Accordingly, subject to the above, the grievance is upheld in part and I direct the employer to reinstate the Grievor. Based on the agreement of the parties, all remaining issues, including the issue of the compensation of the Grievor, are also remitted back to the parties.

115 In the event that there are any difficulties with regard to the implementation or interpretation of this award, I shall remain seized.

Appendix

Reasonable Cause Testing Documentation

FILE

Instructions for use:

1. Testing is only required when there is reasonable cause to believe alcohol or drug use is a factor in an unit.
2. Contact Transit Control.
3. Confirm with a Chief/Cab Supervisor that testing is appropriate and advise the employee they are being referred for an alcohol and drug test.
4. Fill out and fax the **Reasonable Cause Testing Documentation** form and the checklist below. You can use items 1-26 to identify the **combination of indicators** that you believe provided grounds for the test. The 14 Supplements Comments would not trigger a test, but should be checked if they are applicable.
5. **NOTE:** No single factor listed below will necessarily constitute an automatic test.

Questions		Yes	No	Questions		Yes	No
1. Smell of alcohol on breath of person?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	16. Mood	Religierent?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
2. Speech:					Moody?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Slurred?	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Ecstatic?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Confused?	<input type="checkbox"/>	<input checked="" type="checkbox"/>		More nervous than usual?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Fragmanted?	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Ciddy?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Slow?	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Talkative?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Unusually Soft?	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Drowsy?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Unusually Loud?	<input type="checkbox"/>	<input checked="" type="checkbox"/>				
3. Disorientation:				17. Weariness, fatigue or exhaustion?		<input checked="" type="checkbox"/>	<input type="checkbox"/>
Is the employee confused about:				18. Deteriorating physical appearance?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Where he or she is?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	19. Yawning excessively?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
	What day it is?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	20. Blank stare or expression?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
	What time it is?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	21. Sudden and/or unpredictable change in energy level?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
4. Apparent inability to focus on work?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	22. Unusually energetic?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
5. Unusual or unexpected resistance to authority or refusal to follow reasonable directions?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	23. Shaking or trembling of hands?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
6. Lack of motor coordination?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	24. Sunglasses worn at inappropriate times?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
7. Skin Colour:				25. Change in appearance prior to nonbreak?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Pale?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	26. Breathing difficulties?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Flushed?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	27. Needle marks on arms?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
8. Excessive perspiration?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	28. Other signs or explanations?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
9. Bloodshot eyes?		<input type="checkbox"/>	<input checked="" type="checkbox"/>				
10. Dilated pupils?		<input type="checkbox"/>	<input checked="" type="checkbox"/>				
11. Pinpoint pupils?		<input type="checkbox"/>	<input checked="" type="checkbox"/>				
12. Traces of alcohol in any containers?		<input type="checkbox"/>	<input checked="" type="checkbox"/>				
13. Confession that employee:							
	Was drinking alcohol?	<input type="checkbox"/>	<input checked="" type="checkbox"/>				
	Was ingesting drugs?	<input type="checkbox"/>	<input checked="" type="checkbox"/>				
	May not be able to pass test?	<input type="checkbox"/>	<input checked="" type="checkbox"/>				
14. Presence of substances with appearance of drugs?		<input type="checkbox"/>	<input checked="" type="checkbox"/>				
15. Smell of marijuana?		<input type="checkbox"/>	<input checked="" type="checkbox"/>				

Graphic 1

End of Document

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