

IN THE MATTER OF AN ARBITRATION

BETWEEN:

YORK UNIVERSITY
(the “Employer”)

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 772
(the “Union”)

(Mahmood Shah Grievance No. 1905)

SOLE ARBITRATOR:

Margo R. Newman

APPEARING FOR THE EMPLOYER:

Karen Sargeant, Counsel
Jacob Wagner, Counsel

APPEARING FOR THE UNION:

Lisa Triano, Counsel

A hearing was conducted by videoconference on June 28 and October 4, 2022.

DECISION AND AWARD OF ARBITRATOR

This grievance protests the January 11, 2022 termination of the grievor, Mahmoud Shah, for benefits fraud. As the underlying facts are primarily undisputed, the parties submitted a Joint Book of Documents and entered into the following Stipulations of Fact.

Background

1. Mahmood Shah, the Grievor, is currently 30 years old. He commenced his employment with York University (“**York**”) in April 2016 as a 3rd Class Shift Engineer. At all material times, including at the time of his termination, he held the position of 3rd Class Maintenance Engineer.
2. As 3rd Class Maintenance Engineer, the Grievor was in the Facility Services, Energy Management Department, which is a continuous operation that is responsible for supplying York’s heating and cooling needs, generating approximately one-third of York’s electrical power, and operating and maintaining all of the infrastructure relating to these systems.
3. Sun Life Assurance Company of Canada (“**Sunlife**”) provides group benefits to all IUOE Local 772 employees.

Benefits Fraud

4. On January 11, 2022 the Grievor was terminated for the fraudulent claims made to Sunlife. A copy of the termination letter is attached at **Tab 2**. The Grievor acknowledges the fraudulent benefit claims to York.
5. Sunlife’s systems first detected suspicious activity when the Grievor submitted claims for benefits on July 23, 2021.
6. By email dated July 29, 2021, a copy of which is at **Tab 3**, Sunlife informed the Grievor that the documents he had provided as part of his claim submission were being assessed to ensure the accuracy of the claim.

7. Sunlife contacted the service providers identified in the July 23, 2021 claim submission, all of whom confirmed that they did not provide the services claimed by the Grievor.
8. On or around August 4, 2021, the Grievor, by way of letter, was questioned by Sunlife about fraudulent benefit claims submitted to Sunlife from April 29, 2017 through July 22, 2021. Sunlife informed the Grievor via this letter dated August 4, 2021, a copy of which is attached at **Tab 4**, that it had reviewed additional claims and asked the Grievor to provide any new receipts or proof of service by August 16, 2021.
9. As is outlined in more detail below, the Grievor stopped working effective August 18, 2021 and did not return to work prior to the termination of his employment.
10. Sunlife informed York of the above via the letter attached at **Tab 4** on August 4, 2021 and indicated it would share the outcome of its investigation with York when it was completed.
11. Sunlife received no new receipts or proof of services from the Grievor. Sunlife contacted all of the service providers for the additional claims and confirmed that they did not provide the services to the Grievor as claimed by the Grievor.
12. After concluding its investigation, Sunlife identified a total of \$24,910.10 in false claims, submitted by the Grievor between April 29, 2017 and July 23, 2021. As the list of false claims attached at **Tab 5** demonstrates, the Grievor submitted more than 90 false claims for more than 410 false service dates.
13. Sunlife informed York of the conclusion of its investigation by letter dated August 23, 2021, a copy of which is attached at **Tab 6**.
14. Sunlife informed the Grievor of its conclusions by letter dated August 23, 2021, a copy of which is attached at **Tab 7**, and told the Grievor that he must return \$24,910.10 to Sunlife on behalf of York.

15. Since Sunlife received no repayment from the Grievor, Sunlife followed up with the Grievor by letter dated September 9, 2021, a copy of which is attached at **Tab 8**.
16. By email dated September 17, 2021, a copy of which is attached at **Tab 9**, counsel for the Grievor informed Sunlife that the Grievor would not be proceeding with the repayment amount because it would impact a potential plea if he were charged.
17. By email dated September 21, 2021, also at **Tab 9**, counsel for the Grievor confirmed that the Grievor would not offer any refund.
18. By email exchange dated December 8, 2021, a copy of which is attached at **Tab 10**, Sunlife confirmed to York that it had not been successful in recovering the funds, the case had been sent to the police and they were awaiting the police to pick up the case and the case had been sent to Sunlife's collection agency.
19. York met with the Grievor following the December 8, 2021 email exchange, on December 15, 2021. In the presence of a Union representative, the Grievor:
 - (a) admitted that he made the false claims;
 - (b) indicated that he had an illness and had been to rehab to get treatment;
 - (c) indicated that he had an active addiction and had been dealing with it for the last six years; and
 - (d) said he was willing to pay back Sunlife.
20. When the Union representative indicated he did not feel equipped to move forward with the meeting, York paused the meeting and reconvened the meeting on December 20, 2021. York's notes of the meeting are at **Tab 11**. Among other things, the Grievor indicated that there had been a legal misunderstanding between his lawyer and Sunlife and that he was in a position to repay the funds. Notwithstanding the Grievor's assurances, the Grievor has not repaid the funds.

21. Following the holiday break, York terminated the Grievor's employment on January 11, 2022. A copy of the termination letter is at **Tab 2** and a copy of York's Fraud, Theft and Misappropriation of University Assets Policy is at **Tab 12**.
22. To date, the collection agency has not been able to collect any of the funds and the case is still with the police.

Earlier Discipline

23. In September 2019, the employer became aware that the Grievor's driver's license had been suspended in December 2018, and remained suspended at that time. The Grievor did not inform the employer at the time of the driver's license suspension, notwithstanding that a condition of the Grievor's employment was that he maintain a valid driver's license and that the Grievor was required, on occasion, to drive York vehicles.
24. York spoke with the Grievor on September 13, 2019 and informed him that he could not drive York vehicles until his license was restored and that he should have reported the suspension of his driver's license to York immediately.
25. The Grievor was forthcoming with the employer in September 2019, when questioned about the status of his driver's license.
26. York provided the Grievor with a disciplinary letter, a copy of which is attached at **Tab 13**, at a meeting on September 27, 2019, notes of which are attached at **Tab 14**. The disciplinary letter invited the Grievor to speak with York if he required any assistance, reminded the Grievor of York's confidential Employee Assistance Program ("**EAP**") and indicated that further incidents may result in disciplinary action, up to and including termination of his employment.
27. The Grievor received further discipline on December 4, 2019. The discipline was grieved and the one day suspension was reduced to a written warning. As the revised discipline letter, a copy of which is attached at **Tab 15** indicates, the Grievor failed to follow departmental policies, procedures and practices related to the requirement to check in immediately, in person,

at the commencement of the shift and check out immediately, in person at the end of the shift with the on-duty Shift Engineer, and failed to contact his relief at the required time of 6:00 a.m. or inform anyone he was leaving for the day. Again, the disciplinary letter invited the Grievor to speak with York if he required any assistance, reminded the Grievor of York's confidential EAP and indicated that further incidents may result in disciplinary action, up to and including termination of his employment.

28. On March 2, 2021, the Grievor was further disciplined, with a one day suspension, for attendance related reasons. As the March 2, 2021 discipline letter, a copy of which is attached at **Tab 16** indicates, the Grievor failed to follow proper protocol for switching shifts, failed to call in prior to the beginning of a shift or obtain approval to be absent and improperly used sick time on February 17, 2021. Again, the disciplinary letter invited the Grievor to speak with York if he required any assistance, reminded the Grievor of York's confidential EAP and indicated that further incidents may result in disciplinary action, up to and including termination of his employment
29. The one-day suspension was not grieved.

Driver's License Suspensions

30. On December 4, 2019, the Grievor requested a meeting with York's Employee Well-Being Office ("EWB") "to discuss, and I have a couple questions about forms that need to fill out".
31. Later that day, York informed the Grievor that it had called the EWB to set something up and provided the Grievor with the information for the contact in EWB.
32. In response to the Grievor's December 4, 2019 request, EWB met with the Grievor on December 9, 2019. A copy of the notes of the meeting is attached at **Tab 17**. As EWB's December 9, 2019 email, a copy of which is at **Tab 18**, indicated, the Grievor confirmed he had commenced the specific steps required to regain his driver's licence in November 2019 and was actively pursuing that at the time. The Grievor provided written consent for EWB to reach out to his health care providers to confirm that he was

participating in actions that would lead to reinstatement of his driver's license.

33. EWB received a response from the Grievor's attending physician Dr. Liu on December 12, 2019, a copy of which is attached at **Tab 19**. Among other things, Dr. Liu confirmed:
 - (a) the Grievor was projected to have his driver's license reinstated November 18, 2020; and
 - (b) there were no safety concerns with the Grievor performing the essential duties of his position excluding those requiring driver's license.
34. In early January 2020, the Ministry of Transportation informed the Grievor that his driver's license was approved for reinstatement effective January 10, 2020. A copy of the notification is at **Tab 20**.
35. Along with the notification, the Grievor received a note from the Ministry of Transportation, a copy of which is at **Tab 21**, indicating that he was required to file a further report from a specialist or treating physician on March 19, 2020. EWB followed up with the Grievor each month from January 2020 to December 2020, and then again in March 2021 and June 2021, to confirm that he had submitted the appropriate information and to determine whether he received any follow-up from the Ministry of Transportation. At no time did the Grievor provide York or EWB with any further documentation from the Ministry of Transportation.
36. Although York was not aware, York has no reason to dispute that on or around August 11, 2021, the Grievor's physician was concerned about the Grievor's ability to safely operate a motor vehicle and, as a result, the Grievor's driver's license was suspended again, effective September 6, 2021.

Fall 2021 Absence

37. On August 23, 2021, following several days of absence and a vacation request, the Grievor informed the employer that he was unwell and unable to attend work. As the Grievor's August 23, 2021 email, a copy of which is

at **Tab 22**, indicates, the Grievor indicated that he may have been exposed to COVID. EWB telephoned the Grievor following receipt of his email. The notes of the telephone conversation are at **Tab 23**.

38. By email dated August 24, 2021, a copy of which is at **Tab 24**, the Grievor provided EWB with a copy of his negative COVID test. The Grievor spoke with EWB later that day and indicated that he was told he could return to work on Thursday (August 26, 2021) if his symptoms had improved. A copy of the notes of the call are attached at **Tab 25**.
39. During a call on August 25, 2021, the notes of which are at **Tab 26**, the Grievor indicated that he was feeling congested and thought it best to remain at home for at least one more day.
40. The Grievor emailed EWB on August 27, 2021, the notes of which are at **Tab 27**, and indicated that he would rest up and return to work for Monday.
41. At no time did the Grievor indicate that he was suffering from anything other than a possible COVID-19 exposure and/or congestion.
42. The Grievor did not return to work on Monday, August 30, 2021 and instead, on August 30, 2021, the Grievor's father informed EWB that the Grievor had been admitted to the hospital because he continued to feel unwell. As the notes of the call, a copy of which are attached at **Tab 28**, indicate, the Grievor's father indicated to EWB that he was not sure what the doctor's recommendation would be, but if the Grievor was not cleared to return to work the following day or felt too unwell, the Grievor would call in sick.
43. On August 31, 2021, the Grievor's father contacted EWB and informed them that the Grievor had been admitted to a hospital in downtown Toronto and would undergo treatment. He reported that it was unknown when the Grievor would be able to return to work. A copy of the notes is at **Tab 29**. The letter attached at **Tab 30**, which was not provided to York prior to the termination of the Grievor's employment, indicates that the Grievor was admitted to CAMH and that he remained in hospital until September 10, 2021.

44. The Grievor's father called EWB on September 1, 2021 and indicated that it would be several weeks before the Grievor would be cleared to return to work. As such, EWB requested that the Grievor's doctor complete a Medical Absence/Accommodation Certificate. A copy of the notes is at **Tab 31**.
45. The Medical Absence/Accommodation Certificate was completed on September 3, 2021. The completed Medical Absence/Accommodation Certificate, a copy of which is at **Tab 32**, indicates that the nature of the illness/injury is "psychiatric" and that a tentative return to work date is October 17, 2021.
46. The letter attached at **Tab 33**, which was not provided to York prior to the termination of the Grievor's employment, indicates that on September 16, 2021, the Grievor attended Renascent rehabilitation program for substance use and addiction, that the program was an inpatient program and that the Grievor attended rehab from September 16 until October 21, 2021.
47. EWB received another completed Medical Absence/Accommodation Certificate, a copy of which is at **Tab 34**, dated October 4, 2021. For the first time, the nature of the grievor's illness/injury was listed as "substance abuse disorder – cocaine/alcohol" as opposed to the previous indication that the illness/injury was "psychiatric".
48. Because the return to work date on the Medical Absence/Accommodation Certificate was listed as November 15, 2021, EWB started a long-term disability application for the Grievor. The Grievor reports that on October 21, 2021, he made application for LTD benefits.
49. York was notified by letters dated October 21, 2021, November 4, 2021 and November 21, 2021, all attached at **Tabs 35, 36 and 37**, respectively, that the Grievor had not provided his completed Plan Member's Statement and Attending Physician Statement in support of his LTD claim. By email dated November 25, 2021, a copy of which is at **Tab 38**, EWB reminded the Grievor to submit his completed Plan Member's Statement and Attending Physician Statement in support of his LTD claim.

50. At no time did the Grievor submit his completed Plan Member's Statement and Attending Physician Statement in support of his LTD claim and, as such, his LTD claim was closed. A copy of an email from Sunlife to EWB confirming such closure is attached at **Tab 39**. The Grievor says he was waiting for his attending physician to complete the Attending Physician Statement and was in touch with Sunlife in that respect.
51. Unbeknownst to York or EWB, the Grievor's treating physician recommended a return to work ninety (90) days from the completion of his inpatient rehabilitation program to provide an opportunity to attend the two phases of the outpatient program and attend community support meetings. The intended return to work date was on or around January 12, 2022.
52. On January 4, 2022, Sunlife advised the Grievor that his LTD file, regarding his application, was being closed as Sunlife did not receive the attending physician statement. The Grievor remained on an approved unpaid medical leave.

Earlier Absences

53. The fall of 2021 was not the first time the Grievor did not call in to report an absence. As is outlined in the email dated July 22, 2019, attached at **Tab 40**, the Grievor did not show up for work or call in his absence on July 18, 2019 and had his father text message EWB a sick absence on July 19, 2019. In relation to the absence, the Grievor provided the medical note dated July 19, 2019 attached at **Tab 41**.
54. The Grievor was absent from work in August 2020. By email dated August 19, 2020, a copy of which is at **Tab 42**, York touched base with the Grievor and asked if the Grievor needed any assistance.
55. On December 15, 2020, the Grievor was spoken to about his attendance. When the Grievor was late for work on December 14 and 15, 2020, York emailed the Grievor, a copy of which is attached at **Tab 43**, and offered assistance.

56. York also offered assistance to the Grievor at the commencement of his fall 2021 absence, as outlined in the email to the Grievor dated August 25, 2021, a copy of which is at **Tab 44**.

Termination of Employment

57. On January 11, 2022 the Grievor was terminated for the fraudulent claims made to Sunlife.
58. The letter attached at **Tab 45**, which was not provided to York prior to the termination of the Grievor's employment, confirms that the Grievor attended and completed Phase 2 and Phase 3 of the rehabilitation program, and that he completed Phase 3 on March 31, 2022.
59. To date, the Grievor says he has not been contacted by the police regarding the fraudulent Sunlife claims.
60. To date, the Grievor says he remains clean and sober. The Grievor also says he currently attends a community support group two times weekly and has a sponsor that actively supports his sobriety.
61. To date, the Grievor says he has been unable to find work as a result of his suspended driver's license – which, to date, he says has not been reinstated.

Parties positions:

The Employer argues that there was just cause for the grievor's discharge since he committed insurance fraud on 90 separate occasions, over 104 different service dates, in a 2 1/2 year period of time, totalling over \$25,000, and the University bore the cost since it is self-insured. It notes that theft has long been held to be a breach of trust, and the presumptive penalty for dishonesty/theft is termination. The Employer contends that there are no mitigating factors supporting a reduction of the penalty in this case. It maintains that there is no evidence that the University improperly considered grievant's disability (when it ultimately was told about it) to be a factor in its decision to terminate his employment.

The University asserts that it is the grievor's burden to establish a causal link between his disability and his conduct, which he failed to do, emphasizing that, unlike in the cases relied upon by the Union, the grievor here provided no medical evidence supporting any link between his addiction and theft. It notes that its first knowledge of grievant's substance abuse issue was in his submitted October, 2021 medical, which occurred after he had been caught by Sun Life committing fraud by knowingly and repeatedly creating fictitious receipts over a lengthy period of time. The Employer points out that the grievor had a prior instance of dishonesty when he failed to inform the University that his driver's license had been suspended despite it being a condition of employment.

The University contends that it offered the grievor assistance on many occasions, in response to other inappropriate conduct, including referral to its EAP when he was previously warned or disciplined, as well as attempting to aid him getting LTD benefits, but on each occasion the grievor failed to take advantage of what was offered, including refusing to submit required documentation. If the grievor's prior actions leading to discipline were the result of his disability, as the Union asserts, it questions why the Union representative failed to bring that up at the time during the resulting grievance procedures. Additionally, the University notes that it did accommodate the grievor by permitting him to continue working after it discovered that he was doing so without a driver's license, as well as extending his leave during his absence from August through December, 2021. It points out that it made inquiries throughout that period of time, including sending and receiving medical forms, and there was nothing to suggest that further inquiry was required.

Whether a just cause or hybrid analysis is undertaken, the Employer argues that there are no mitigating factors present that would support a reduction in the penalty imposed. It stresses that the grievor was a short term employee with a prior disciplinary

record, including dishonesty, he only admitted his misconduct after he was caught and never claimed that he had a disability during the over 2 year period he engaged in a premeditated course of dishonest conduct. It asserts that an employer has no positive obligation to give an employee the opportunity to show that his employment obligations can be resolved, especially where the only evidence that he has completed part of his rehabilitation program came way after his termination. The University points out the absence of any evidence that the trust necessary in this employment context can ever be restored, noting that no repayment of the money has occurred, and there is no medical confirmation that the grievor should be considered rehabilitated.

The University relies upon the following precedent in support of its position that the grievor's discharge should be upheld. *In re Philips Cable*, 6 L.A.C. (2d) 35 (Adams, 1974); *Shaw Cablesystems G.P.* [unreported] (Kinzie, 2010); *Robert Theroux v. R.*, 2 S.C.R. 5 (1993); *Corporation of the City of Kingston*, 276 L.A.C 94th) 219 (Nyman, 2017); *TTC & ATU, Local 113*, 2020 CarswellOnt 14147 (Slotnick); *Utilities Kingston & IBEW, Local 636*, 2010 ONSC 1946 (Div Ct); *York University & YUFA*, 279 L.A.C. (4th) 117 (Gedalof, 2017); *CBC & CUPE*, 23 L.A.C. (2d) 227 (Arthurs, 1979); *TTC & CUPE Local 2*, 210 L.A.C. (4th) 268 (Stout, 2011); *Canada Post Corp.*, 251 L.A.C. (4th) 195 (M. Picher, 2014); *Cadbury Adams Canada*, 2007 CarswellOnt 7362 (Kennedy, 2007); *Canada Post Corp.*, 102 L.A.C. (4th) 97 (Christie, 2001).

The Union contends that the termination was unjust, unreasonable and discriminatory in violation of Sections 5, 9 and 17 of the *Ontario Human Rights Code (OHRC)*. It asserts that the grievor made out a *prima facie* case of discrimination, since there is no dispute he has a disability and terminating him while he was out on sick leave was adverse treatment, shifting the burden to the Employer. The Union posits that this case requires a HRC analysis, either based on non culpable conduct or a hybrid approach.

The Union argues that the Employer failed to meet both its procedural and substantive duties to accommodate. It alleges that the Employer knew of the grievor's disability in December, 2019, as he had a psychological referral when his driver's license was suspended, and that it has an affirmative duty to inquire as to the nature of his condition, diagnosis and prognosis, and failed to do any of those things or follow up from his psychological evaluation. The Union points out that the Employer sought no clarification about the nature of the grievor's absence from August 18, 2021 onward, despite knowing that he was hospitalized. It contends that the grievor's history of questionable conduct leading to his prior discipline should have sent up red flags to the Employer, and its offer of assistance is insufficient since denial is a known part of addiction mentality and his denial is not determinative.

The Union asserts that in the December 20, 2021 meeting, the grievor was asked about his medical condition, stated that he wasn't thinking straight during the period he submitted false claims, and was very remorseful. It notes that despite knowing that he was an in patient at CAMH from August 31 through September 10, the Employer did nothing to further inquire about his condition. The Union contends that the Employer never considered accommodation prior to making its termination decision, even though it knew of the significance of his disability when it raised the possibility of LTD months earlier. Since the Employer never ordered an IME or undertook any HRC analysis, the Union argues that the causal link between his disability and conduct can be imputed. It maintains that by the Employer's action in leaving the collection of monies to Sun Life, who turned it over to a collection agency and the police, the grievor's stated intention to repay what was owed was forestalled as a result of advice he received from his criminal attorney.

The Union points to many mitigating factors in this case, including the fact that the grievor continued to successfully complete rehabilitation on March 31, 2022, despite

the pressure being put on him by the Employer and Sunlife, demonstrating his commitment to sobriety. It notes that the grievor was given no opportunity to show that the employment relationship could be restored, he was forthcoming and cooperated with the Employer throughout and admits that his addiction impacted his conduct at all times, his conduct was not carried out in the normal course of his duties, he made an offer of restitution and was sincerely remorseful. The Union asserts that the grievor would not have known that the Sunlife benefits would directly impact the Employer, or that it was self-insured, and there is no evidence of his intentional effort to harm the University.

In arguing that the grievor's termination was excessive and should be set aside, the Union relies upon the following precedent: *Molson Brewery BC Ltd.*, 25 L.A.C. (3d) 82 (Ready, 1985); *City of Surrey*, 265 L.A.C. (4th) 186 (Burke, 2006); *Krieger & TPSB*, 2010 HRTO 1361; *HSAS v. Regina Health Region*, 184 L.A.C. (4th) 97 (Pelton, 2009); *Mellon & HRDC*, 2006 CHRT 3 (Doucet); *ADGA Group Consultants Inc. v. Lane, et. al.*, 91 O.R. (3d) 649 (OSCJ Div. Ct, 2008).

Discussion and Findings

The commencement of the analysis of the legitimacy of the grievor's termination in this case, must be the accepted principle that benefits fraud, like other types of dishonesty, provide just cause for termination, absent sufficient mitigating factors to support a reduction in penalty. See, e.g. *Corporation of the City of Kingston*, supra; *TTC & ATU Local 113*, supra; *York University*, supra. Those factors include:

1. bona fide confusion or mistake by the grievor as to whether he was entitled to do the act complained of;
2. the grievor's inability, due to drunkenness or emotional problems, to appreciate the wrongfulness of his act;
3. the impulsive or non-premeditated nature of the act;

4. the relatively trivial nature of the harm done;
5. the frank acknowledgement of his misconduct by the grievor;
6. the existence of a sympathetic, personal motive for dishonesty, such as family need, rather than hardened criminality;
7. the past record of the grievor;
8. the grievor's future prospects for likely good behaviour; and
9. the economic impact of discharge in view of the grievor's age, personal circumstances, etc.

See, e.g. *TTC & CUPE*, supra, quoting *CBC & CUPE* (1979), 23 L.A.C. (2d) 227, 230 (Arthurs).

Consideration of those factors in this case do not support a mitigation of the penalty. There was no mistake or confusion as to the grievor's entitlement to the fraudulent benefits claimed and he could appreciate the wrongfulness of his actions which were premeditated, and included manufacturing and submitting 90 claims covering 104 service dates over a 2 1/2 year period of time. The loss to the University was about \$25,000, which is not a trivial amount. The grievor only acknowledged his actions after they were proven false by Sunlife and there was no evidence concerning the grievor's motive for dishonesty. The grievor had a past disciplinary record including two warning letters and a one day suspension, one of which concerned his dishonesty in failing to report the revocation of his driver's license. The grievor was a short term employee of less than 4 years and was 30 years old at the time. The only evidence concerning his future prospects was an after-the-fact letter indicating that he had participated in a rehabilitation program and "should remain clean and sober as long as he willingly practices the principles of the recovery process he was introduced to at Renascent." Additionally, the grievor failed to make restitution, despite assuring the University of his ability and willingness to do so.

The Union does not argue that the conduct was acceptable or is not grounds for discipline. Rather, it raised an affirmative defense that the termination was *prima facie* discrimination under the *OHRC* based on the Employer's failure to meet its procedural and substantive duty to accommodate the grievor's disability. It primarily relies upon the Employer's duty to further investigate the grievor's condition when it found out (as early as 2019) that he had a health issue, to inquire into whether his disability was part of the reason for his actions, and to engage in an accommodation analysis prior to terminating his employment while he was out of work on an unpaid medical leave of absence (MLOA). See, e.g. *ADGA Group*, supra; *City of Surrey*, supra; *Mellon*, supra.

There is no issue that alcohol and cocaine dependence qualifies as a disability under the *OHRC*. It is also clear, however, that such disability does not automatically shield an employee from the consequences of his actions unless there is proof of *prima facie* discrimination or a causal connection between the disability and the misconduct. *TTC & CUPE*, supra at pars 102 & 103. In order to establish *prima facie* discrimination, the Union must prove that the grievor had, or was perceived to have, a physical or mental disability, that he received adverse treatment, and that disability was a factor in the decision to terminate the grievor. The decision itself is insufficient to meet the burden of proving *prima facie* discrimination. See, e.g. *BCPSC v. BCGEU* [1999] 3 SCR 3 ("Meiorin"). It must be shown that the prohibited ground (disability) was a factor in the decision to terminate.

The Union contends that the Employer knew as early as December, 2019 that the grievor had a medical condition, and should have enquired further of its nature. The only medical evidence in the record is the December 12, 2019 Dr. Liu letter, sent in response to EWB's request concerning the revocation of the grievor's driver's license, indicating that there were no safety concerns with the grievor performing the essential duties of his position excluding driving, and that he was projected to have his driver's license

reinstated in November, 2020. The medical note contained no diagnosis or further indication of any ongoing condition of the grievor. In the disciplinary letters sent to the grievor in September and December, 2019, the grievor was reminded of the existence of the confidential EAP, and that he should speak with the Employer if further assistance was needed. EWB also followed up with the grievor monthly between January and December 2020 to confirm that he had complied with the Ministry of Transportation's required filings.

It was not until the commencement of the grievor's absence in August, 2021 that any specific medical information was furnished to the Employer's EWB office. Initially the University was told that the absence related to possible Covid exposure, and then that the grievor was in the hospital with an uncertain return to work date. He was placed on a MLOA. During the period of his absence in the Fall of 2021, the EWB received two Medical Absence/Accommodation Certificates (MAAC), and the Employer first learned of the nature of his illness. On September 3, 2021 the nature of his illness was listed as "psychiatric" and a return to work date projected for October 17. On October 14, 2021, for the first time, the nature of the grievor's illness is listed as substance abuse disorder - cocaine/alcohol, with an anticipated return to work date of November 15. The grievor, in conjunction with EWB, initiated the process to apply for LTD. The University was notified on October 2, November 4 and 21 that the insurance company was waiting for the grievor and his doctor to supply the required documentation to support the application. Eventually, the file was closed on January 4, 2022 for failure to provide documentation to support the application.

Although a letter dated October 20, 2021 from Renascent Counsellor Ryan was placed into evidence, it was admitted that it was never furnished to the Employer prior to the termination. That letter indicates that the grievor had completed phase 1 (inpatient) of 3 for rehabilitation from his addiction on October 21, 2021, and that the other phases of

the program were to be completed on an outpatient basis. The additional medical documentation placed into evidence - dated June 27 and July 6, 2022, months after the termination - reveals that the grievor was seen in patient at CAMH between August 31 and September 10, 2021, and has been in continuing treatment with his addiction psychiatrist since then. It also reveals that the grievor completed phases 2 and 3 of the rehabilitation program with Renascent on March 31, 2022.

When the grievor was questioned on December 15 and 20, 2021, it was the first time he raised his disability, admitting he filed false claims, that he had an active addiction for 6 years and made some bad decisions, acknowledged that he was offered help in the past and never took it, but indicated that he was in rehab for treatment. At the meeting he stated that he was willing to reimburse the University for the value of the false claims, and had the means to do so, but that he was following his lawyer's advice not to repay once Sunlife informed the University of his fraudulent activity. According to the notes of the meeting, the grievor was remorseful and apologized for the trouble he caused.

Unlike the cases relied upon by the Union, e.g. *City of Surrey*, supra; *Molson Brewery*, supra, there is very little in the way of expert medical opinions in the record, and nothing directly linking the grievor's decision-making or intentional fraudulent conduct to his addiction. Neither is there evidence indicating that the University was made aware of the nature of the grievor's condition prior to mid-October, 2021, unlike the situation in *Krieger*, supra. I am unable to accept that the grievor's prior conduct resulting in his past discipline was a red flag requiring further investigation, or that his absences and the information provided prior to October 4 should have revealed a potential connection to a disability. Instead, the record reflects that in all situations involving past discipline or the Fall, 2021 absence, the University repeatedly offered the grievor access to help, which he did not take advantage of until his contact with EWB in

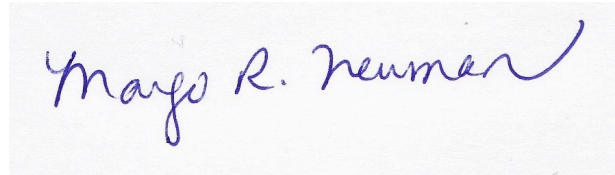
the summer of July, 2021. EWB followed up with the grievor on all information he furnished or was requested to furnish, including during the period of his driver's license suspension, and attempted to help him with the LTD application process.

There is no doubt that the University knew that the grievor had a disability when it made its termination decision in January, 2022. However, there is no direct evidence from which it can be said, or even inferred, that his fraudulent conduct for the 2 1/2 year period, upon which it relied in terminating his employment, was causally linked to his disability. Neither is there any evidence that shows that the grievor's disability was a factor considered by the University when reaching its termination decision. On this record, the Union has failed to establish either *prima facie* discrimination, or the requisite causal connection between his misconduct and his disability. See, e.g. *TTC & CUPE*, supra; *Canada Post (Picher)*, supra; *Cadbury Adams*, supra. Under such circumstances, the Employer was not required to consider accommodation for the grievor's disability prior to effectuating his termination.

The remaining consideration is whether the grievor's disability is a sufficient mitigating factor to support modifying the penalty imposed. See, e.g. *HSAS*, supra. As noted above, the only evidence concerning the grievor's rehabilitative potential is the July 6, 2022 letter indicating that a continuation of his rehabilitation program would help to keep the grievor clean and sober, and his psychiatrist's June 27, 2022 note confirming his ongoing treatment. Absent some type of causal link between the grievor's addiction and his 2 1/2 year period of manufacturing and submitting fraudulent claims to Sunlife, or evidence that the University considered his disability as a factor in making its termination decision, the record is insufficient to support a mitigation of the penalty in this case. This is especially true when the grievor has failed to make restitution, despite his assurances of his desire and ability to do so. See, e.g. *York University*, supra; *TTC & CUPE*, supra.

On the specific facts of this case, I find that the Company has established just cause for the grievor's termination, the Union failed to prove a *prima facie* case of discrimination in violation of the *OHRC*, and there are an absence of sufficient mitigating factors to cause me to reduce the penalty and return the grievor to work. See, e.g. *Canada Post (Christie)*, supra. Therefore, the grievance is denied.

Dated at Toronto, Ontario this 1st day of February, 2023



Margo R. Newman, Arbitrator