2020 CarswellNat 144
Canada Adjudication (Canada Labour Code Part III)

Deering abd Cougar Helicopters Inc., Re

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IN THE MATTER OF an Adjudication under Division XIV - Part III of the Canada Labour Code-complain of alleged unjust dismissal

Christopher J. Deering (Complainant)
and Cougar Helicopters Inc. (Respondent)

Peter Lederman Adjud.

Judgment: January 14, 2020
Docket: YM2707-11467

Counsel: Gregory A. French, Q.C., Maria Clift, for Mr. Deering
Stephanie Sheppard, for Cougar Helicopters Inc.

***Peter Lederman Adjud.*:**

1 This is an adjudication of a complaint filed by Christopher Deering against his former employer, Cougar Helicopters Inc., under section 240 of the *Canada Labour Code*. Section 240(1) provides that any person who has been employed continuously for twelve consecutive months by an employer and who is not a member of a group of employees subject to a collective agreement "may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust". Mr. Deering fits within the parameters of that definition and filed the requisite written complaint on April 9, 2018. In it he noted that he was employed by Cougar Helicopters since March 27, 2012, and was dismissed on March 9, 2018. His complaint was referred to me as adjudicator by letter dated December 10, 2018, from the Director General of the Federal Mediation and Conciliation Service, and the hearing on this matter was held on November 20, 21 and 22, 2019, in St. John's, NL. Mr. Deering was represented by Greg French, Q.C., and Maria Gift. Cougar Helicopters was represented by Stephanie Sheppard.

2 My duties as an adjudicator are set out in section 242(3), and require me to "consider whether the dismissal of the person who made the complaint was unjust and render a

decision thereon". If I find that the dismissal was unjust, section 243(4) provides that I may require the employer to:

> (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (b) reinstate the person in his employ; and
>
> (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

3 I initially invited counsel for the parties to outline their respective positions. Ms. Sheppard stressed the importance of safety to the company, and said that the cornerstone of the drug and alcohol policy was to ensure that an employee was fit for duty when he came on shift. Working with helicopters can involve huge risks, and no such risks can be allowed. Mr. Deering was employed as an aircraft maintenance engineer. On March 4, 2018, there was a serious incident while a helicopter was being towed. She explained that at least two people are involved in towing: the operator of the "tug", which is the tractor pulling the aircraft, and the brake rider, who sits at the controls of the aircraft to operate the brakes. While being towed a blade of the rotor of the helicopter struck the roof the tug, causing some $12,000 in damage to the blade and putting the helicopter out of commission for 12 hours. Management invoked its right to demand a "post incident" drug and alcohol test, since human error could not be ruled out as a contributing cause of the accident. Mr. Deering refused any test other than the alcohol test. He admitted using cannabis recently and said that he would fail a drug test. He denied that he had any substance abuse problem and therefore the employer had no duty to accommodate. In short, she stated that the dismissal was justified. Should I conclude otherwise, she argued that Mr. Deering should not be reinstated.

4 Mr. French summarized his position by saying that Mr. Deering did all that was required of him under the company's drug and alcohol testing protocol as it existed at the time of the incident. He did not decline a drug test per se, he declined a urine drug screen. Under the existing policy the company only had the right to demand a "swab" test. The existing policy allowed the use of cannabis if it occurred more than eight hours before the start of a shift. Mr. Deering had a joint about twelve hours before the start of his shift. In any event, under the policy a refusal of a test is deemed to be a failed test and termination is not the first step in such a situation. He said that Mr. Deering does not want to be reinstated, but does want compensation for lost income, aggravated and punitive damages, and costs.

5 The first witness for the employer was Edward White, avionics supervisor, a position which he has held for four and one half years. Prior to that he was with Cougar Helicopters for nine and one half years as an aircraft maintenance engineer, the same position which Mr. Deering filled. Cougar Helicopters employed 18 aircraft maintenance engineers at that time. Their main task was to maintain the structural and electrical systems of the aircraft. He explained how the shift system worked and said that overtime was not a "big requirement". He referred to the Cougar Maintenance Policy Manual, reproduced at tab 9 of the book of consent documents, to explain the basic duties of an aircraft maintenance engineer and the chain of command applicable to the position. He explained that search and rescue is part of the contract Cougar has with the offshore oil companies and that the helicopter involved in the incident on March 4th was the dedicated aircraft for that task. He outlined the role of the tug operator and brake rider, noting that that they act as a team and communicate with hand gestures. When an aircraft is being moved out of or into a hangar spotters are also employed to ensure that the rotor blades do not hit anything during the maneuver. Spotters are not necessary when an aircraft is being moved outside of a hangar, which was the case when the incident of March 4th occurred. Sean Oliver acted as the tug operator. The craft was parked outside the main hangar and it was to be moved to the search and rescue hangar, where spotters would have been waiting to guide it in. The company maintenance procedures manual, reproduced at tab 10 of the consent book of documents, indicated that a brief risk assessment was to be done by the team prior to towing the aircraft.

6 Mr. White went on to explain what happened after the incident and the alleged refusal of Mr. Deering to take the drug test. Mr. Deering had been sent home and a conference call was arranged on March 7th involving himself and Mark Broderick of Cougar Human Resources. Mr. Deering admitted to having smoked cannabis earlier on the day of the incident, and said that he would have failed a drug test, although what he was asked to do, the urine drug screen, was not what he called an "impairment test". He agreed to meet with a medical review officer of Atlantic Offshore Medical Services ("A.O.M.S."), which performed the alcohol and drug testing for Cougar, but that organization indicated that without the results of any test there was nothing to discuss. Mark Broderick and Edward White then met with Mr. Deering on March 9th, the day after the report on the "tow incident" was released, and handed him his termination letter. The decision to terminate was made by both of them because of the admission of using cannabis during the day of work, refusal of the drug test and the absence of any alternative course of action given the absence of a test result and Mr. Deering's own declaration that he did not have a substance abuse problem. The termination letter, reproduced at tab 6 of the book of consent documents, stated as

follows: "This decision has been made as a result of your actions related to a workplace incident on March 4, 2018, when you were required to participate in a post incident alcohol and drug test. You performed the alcohol test but refused to participate in the required drug test. You also explained that you would fail the test due to having consumed cannabis earlier that day prior to reporting to work".

7 Mr. White referred to a lengthy e-mail sent by Mr. Deering on March 5th, reproduced at tab 4 of the consent book of documents, in which he set forth his version of events leading up to the damage to the rotor blade of the search and rescue helicopter. Mr. Deering cited the placement of the lights on the tug, which shone in his eyes and made it difficult for him to see what was happening with the tug, and the difficulty in communicating with the tug driver by the use of hand signals.

8 On cross examination by Ms. Gift, Mr. White was referred to the Cougar drug and alcohol policy and procedures manual, reproduced at tab 2 of the consent book of documents. In clause 1.2 the policy states that the company will test any employee for reasonable cause or after a significant work related incident/accident including near miss incidents. Other relevant portions of the policy include the following definitions found in clause 1.4. An illicit drug is defined as "any drug or mood altering substance that is not legally obtainable and whose use, sale, possession, purchase or transfer is restricted or prohibited by law (e.g. street drugs such as marijuana, cocaine, heroin, LSD, crack, meth, ecstasy)." Clause 1.5 provides that employees are expected to report fit for duty. "Possession of any of Alcohol, or Mood Altering substances on the Company or Customer premises is a direct violation of this Policy and will normally result in loss of employment. Fitness for duty/work, in the context of this Policy, means being able to safely and acceptably perform assigned duties without impairment due to the use or aftereffects of Alcohol, Illicit Drugs or Mood Altering Substances." "Mood altering substances" are defined in Clause 1.4 as follows: "Any product that is legally or illegally used, resulting in cognitive or physical limitations that negatively impact performance on the job (including but not limited to: tranquilizers, depressants, barbituates, synthetic marijuana, natural marijuana, medical marijuana, mescaline, 'bath salts', doda, Ecstasy, products containing codeine, opiates, and/or other similar substances".

9 The policy goes on to define "safety sensitive positions", which are positions in which impaired performance could result in catastrophic incidents. Aircraft maintenance engineers are included in this category. The policy goes on to state that the "use, possession, offering for sale or selling ... of Illicit Drugs, Mood Altering Substances or Drug paraphernalia while on Customer or Company business or premises is prohibited and will usually result in loss of employment" (section 3.1) It stipulates that alcohol cannot be used within eight hours of reporting to work, and there is a zero tolerance policy for safety sensitive positions, i.e zero percent alcohol is required.

10 Clause 4.1.1 defines reasonable cause for requiring a drug or alcohol test, which occurs when the appearance or conduct of an employee leads the company to believe that drugs or alcohol have been used. Mr. White conceded to Ms. Gift that there was no evidence of this nature with regard to Mr. Deering on the day of the incident. The demand to Mr. Deering was made under the provisions of clause 4.1.2., headed "Post accident/Incident", which states that the company "must request an employee to submit to an alcohol and drug test if the supervisor or manager have reasonable grounds to conclude that the employees performance either contributed to the accident/ incident/near-miss or cannot be completely discounted as a contributing factor". Mr. White indicated that the demand was made because of the inability to conclude that Mr. Deering's performance did not contribute to the incident. The decision to demand the test was made by the company safety manager, Will Jacobs.

11 The next, and most crucial section of the policy, is clause 4.3, which sets forth the rules for drug testing. Section 4.3.3 clearly states that the type of test to be used in a post incident situation is "oral fluid/saliva" and not "urine specimen". Mr. White agreed with Ms. Clift that under this policy Mr. Deering was not required to submit to a urine drug screen. He stated that this issue was discussed by Mark and Chris and "there was some confusion, yes".

12 Clause 5 deals with the consequences of violating the Drug and Alcohol Policy. Clause 5.1 provides *inter alia* that "a worker who refuses to comply with a testing demand will be considered to be in violation of this Policy and dealt with in a manner consistent with a positive test result." Clause 5.2 states that such a worker will be removed from company premises, be subject to an investigation by a supervisor or appropriate safety officer, provided with information about substance abuse assessment and treatment resources available locally, referred to a Substance Abuse Professional (S.A.P.) to undergo an assessment. His return to work will depend on the outcome of the S.A.P. assessment and the accident investigation. Clause 4.3.6. sets out a flow chart indicating the sequence of events following a oral fluid swab test. A positive test leads to a Medical Review officer (M.R.O.) review, discussion with the employee, a report to the company and then an S.A.P. assessment. If that assessment establishes that treatment is not required a return to duty test follows and presumably the worker is cleared to return to work. If the assessment indicates that treatment is required, this leads to follow up treatment and further S.A.P. assessment, and then a return to duty test and further follow-up testing. Clause 4.3.7. sets out a similar regime for the urine drug screen testing process.

13 Mr. White explained to Ms. Gift that Mr. Deering was not referred to an S.A.P. assessment because the M.R.O. was of the opinion that without a test result there was

nothing to discuss with him. Mr. White confirmed that Mr. Deering was dismissed because he admitted to using cannabis. He agreed that the cut off level for a positive THC test, as set out in Clause 4.3.4 of the policy, is 4 ng per ml. He agreed that this does not amount to zero tolerance. He commented that "we thought it was zero tolerance" and that the policy has been changed since. He was referred as well to Clause 6.1 of the policy, which requires an employee to refrain from the use of alcohol or mood altering substances for a period of eight hours prior to reporting for scheduled duty. Mr. White said that Mr. Deering had simply said that he consumed cannabis "that day" without indicating exactly when.

14 The next witness for the employer was Will Jacobs, safety and quality manager. He explained that he had been with Cougar for five years and has seven full time people working under him. He stated that the company has a very strong safety culture, with safety being regarded as critical. He related how he had received a call on the evening of March 4th about the incident. He drove in and went to the S.A.R. building, where work was being done to repair the damaged rotor blade. He made the determination that human error could not be ruled out as a cause of the incident and decided that drug and alcohol testing would be conducted. The decision was made to test both the tug driver and the brake rider. A.O.M.S. was called and a nurse was to be sent to the site. Mr. Jacobs said that he talked with Mr. Deering, who protested that substance use had nothing to do with the accident and that he did not agree with the company policy. He said he would not take the test because he would fail, having smoked a joint between 5 and 6 a.m. that day. He asked if the test would be a test for impairment. Mr. Jacobs told him to discuss that with the nurse. The nurse showed up after 9 p.m. Mr. Deering went upstairs to meet with the nurse. Mr. Jacobs then instituted what he called a "level 2" investigation of the incident itself. He explained that there are three levels of report: level 1 is for minor incidents, level 2 deals with damage or injury, while level 3 deals with really serious incidents involving fatality or crashes. The resulting report is reproduced at tab 5 of the consent book of documents, and indicated that the damage was the product of the slight grade leading towards the S.A.R. hangar, the fact that the blades were not in the right position, and the characteristics of the tractor that was being used.

15 On cross examination, Mr. Jacobs was asked when he found out that a urine drug test was going to be administered. He replied that he learned this when the nurse arrived. When it was pointed out to him that such a test was not called for by the policy, he replied that he recognized A.O.M.S. as being in charge of the post incident testing. He agreed that this is not called for in the policy, but the policy "was in transition". He was of the view that a urine drug sample could still be demanded. He remarked that there was zero tolerance for THC in safety sensitive positions. He agreed that this standard is not in the policy but he stated that Mr. Deering was aware of it.

16 The next witness was Mark Broderick, the H.R. manager of the company. He stated that the key principle of the safety policy was that the employee had to report to work "fit for duty". He referred to the concluding statement found in Clause 1.5 of the Policy: "Fitness for work/duty, in the context of this Policy, means being able to safely and acceptably perform assigned duties without impairment due to the use or aftereffects of Alcohol, Illicit Drugs or Mood Altering Substances." He understood that Mr. Deering had refused to take the test before he knew what type of test it would be. He had a telephone conversation with Mr. Deering during which he asked if Mr. Deering had a substance abuse problem. Mr. Deering replied that he did not. Mr. Broderick then spoke with A.O.M.S. and was told that the medical review officer will only meet with an employee if there is a test result to discuss. He stated that the decision to terminate was made by himself and Mr. White, based on the following reasoning. They concluded that the testing was legitimately required because human factors could not be ruled out as contributing to the accident. Mr. Deering refused to do the drug test even before he knew what the test would be. His position was that he would only do a test for current impairment, not past usage. But all tests deal with past usage only. There is no test for "current impairment". Mr. Deering also admitted to cannabis use prior to the start of his shift and the aftereffects of such use have to be considered. There was no duty to accommodate because Mr. Deering said that he did not have a substance abuse problem. Therefore the chain of events set forth in Clause 4.3.7 of the Policy was not applicable.

17 Mr. Broderick stated that Mr. Deering's base salary was from $102,000.00 to $104,000.00, not including overtime.

18 On cross examination, reference was made to the A.O.M.S. form that was completed by the nurse on March 4 th . The nurse wrote that Mr. Deering refused testing, "willing to do 'current impairment test' only". In his own hand writing, Mr. Deering wrote: "not willing to do test that checks for past usage". Mr. Broderick emphasized that notwithstanding the eight hour rule set out in Clause 6.1 (2) of the Policy, an employee cannot be suffering from the aftereffects of mood altering substances and be considered fit for duty.

19 The final witness for the employer was Dr. Melissa Snider-Adler, who was qualified as an expert in the field of drug testing, cannabis consumption and the standards applicable to being fit for work. She explained that THC, the best known active ingredient in cannabis, is stored in the fat cells, including those in the brain, and travels back and forth from those fat cells to the blood stream. And although the acute effects of intoxication can wear off in a few hours, there can be aftereffects that effect cognition, including attention, focus and memory. The length of time that this residual impairment can last will vary. It is relevant to note that the concentration of THC in

cannabis today is much higher than it was in the relatively recent past, 15-25% compared to 1-3%. She noted that everyone is different and it is impossible to predict how quickly the effects of THC use will wear off. She said that chronic THC users become tolerant of the physical effects of the drug and can appear to be normal, but their cognitive functions are still affected. Chronic THC users always have THC coming into and out of their fat cells. She estimated that it could take as long as 24 to 31 days for cognition to come back to normal after THC use. She said that the current recommendations regarding drug use and safety sensitive positions is that there should be no use for "at least" 24 hours, while some jobs may require much longer times. She presented in evidence a number of current policies from various employers, including the Department of National Defence. She said that there is no test that detects current impairment in the workplace. With regard to the Cougar policy, which she described as being typical of corporate policies for safety sensitive positions prior to the legalization of cannabis use, she said that the oral swab test would capture cannabis usage up to 24 hours in the past. She also made a crucial distinction between what we know about the elimination of alcohol from the body and the aftereffects of THC. Alcohol is eliminated from the body at a relatively constant rate applicable to everyone. As noted in her previous comments, this cannot be said of THC. She said that if cannabis had been used twelve hours before a shift, the likelihood of impairment would be "very high".

20 On cross examination, Dr. Snider-Adler agreed that the documents presented by her outlining current policies for dealing with cannabis are all post legalization. She did not agree that cannabis was a "mood altering substance" as defined in the Cougar policy, but rather should be classified as an illicit substance, and she therefore concluded that the tolerance level for THC was zero.

21 Mr. Deering then testified, stating that he had been recruited by Cougar after working since 2001 with PAL airlines. He agreed that he had signed the Drug and Alcohol Policy. It was his understanding that any use of cannabis was permissible so long as it occurred more than eight hours before the start of a shift, as stated in Clause 6.1. (2). He stated that he has used cannabis recreationally since the age of 14 or 15. He said that there was no set pattern to his cannabis use, which he described as "random". With regard to self awareness of intoxication, he said "you kind of know if you're high or not". He also said that he had in the past done two oral drug swabs and had no disciplinary record. After the incident on March 4 th , he knew that a drug test was in the works. He told Mark Jacobs that he would be willing to do a swab test. He agreed that he told Ed White and Mark Broderick that he did not have a substance abuse problem, but that he was willing to sit down with a medical officer.

22 After his termination, Mr. Deering approached PAL for a job, but their H.R. department asked about the circumstances of his termination and would not hire him.

Thereafter, he did contract work out of province until he was hired by PAL in 2019. He reviewed his income situation as set forth in Exhibit 8, "Damages Documents of the Plaintiff". At one point he had to cash in an R.R.S.P. investment worth $10,000.00.

23 On cross examination, Mr. Deering denied saying to Will Jacobs that he would fail the test because he had smoked a joint. His version of what he said was "if I fail it, it won't prove anything." He did admit to smoking a joint. He also confirms that he relied on the eight hour rule set out in Clause 6.1.(2) and remarked that the general consensus of opinion among the employees of Cougar was that this was the governing standard. He said that he was "fit for duty" under the terms of the policy. He denied that there was anything in the policy that required him to consider the "after effects" of cannabis use and said that he would have talked to a S.A.P. because it would have been his chance to give his side of the story.

24 Ms. Sheppard then summed up for the employer. She argued that safety is critical in the position occupied by Mr. Deering, and zero risk can be tolerated. He refused to do any test. It is acknowledged that "post incident" testing was appropriate. He admitted to smoking a joint on the day of the incident and he was a long standing and chronic user of cannabis. Such frequent use is inconsistent with a safe work place. She cited the testimony of Dr. Snider-Adler outlining the residual cognitive impairment associated with chronic usage. She stated that in the opinion of Dr. Snider-Adler there is a direct correlation between cannabis use and being fit for duty. Even with the swab test, which captures usage up to 18 to 24 hours in the past, a positive test would establish that Mr. Deering had residual impairing effects.

24 Ms. Sheppard referred to the Drug and Alcohol Policy, describing it as a typical corporate policy pre-legalization. Mr. Deering was familiar with the policy, including its reference to "after effects" in Clause 1.5. She stated that he violated this policy by using cannabis 12 hours before his shift. Cannabis was illegal at the time and therefore the cut off level for the presence of THC in the body is zero. There was no duty to refer for assessment of substance abuse, no duty to accommodate, because Mr. Deering said that he did not have a substance abuse problem. She remarked that there is no test for current impairment, and that all tests for THC test past usage only, thereby questioning the logic of what Mr. Deering told the nurse when asked to take the urine drug test.

25 Mr. French addressed the substance of Mr. Deering's case while Ms. Gift addressed the issue of damages. Mr. French argued that the key reason for the termination was as stated in the termination letter, i.e. Mr. Deering's refusal to take the "required drug test". Mr. French then stated that the company had no right to ask for a urine drug test under the explicit terms of its own policy, as set out in the table forming part of Clause 4.3 of the Policy. The employer is bound by the terms of its own policy. He

referred to the well known decision of the Supreme Court of Canada, *Irving Pulp & Paper Ltd. v. CEP, Local 30* [2013] 2 S.C.R. 34, in which Justice Abella, speaking for the majority, while acknowledging the importance of safety in a dangerous work place, addressed the invasion of privacy involved in mandatory drug testing: "Early in the life of the *Canadian Charter of Rights and Freedoms,* this court recognized that 'the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of human dignity' (*R. v. Dyment* [1998] 2 S.C.R. 417 (S.C.C.), at pp. 431-32. And in *R. v. Shoker*, [2006] S.C.R. 399 (S.C.C), it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the 'seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards to meet constitutional requirements" (para. 23).

26 He argued that even with a failed test termination is not the result dictated by the policy, and a refusal to take the test is treated as a failure in Clause 5.1 of the Policy, which reads as follows: "For the purposes of this Policy, a worker who refuses to comply with a testing demand will be considered to be in violation of this Policy and dealt with in a manner consistent with a positive test result". Mr. Deering should have been referred to an M.R.O. and the sequence of events required by Clause 4.3.7. should have been followed.

27 Mr. French's main argument was that the course of action required by the policy was clear, and the employer did not follow it. In the alternative, if there is any ambiguity about the required course of action, such ambiguity should be resolved in favour of the employee, and not of the employer who created the Policy, citing the principle of *contra proferentem*.

28 Ms. Gift addressed the issue of damages. She calculated Mr. Deering's lost wages from employment with Cougar from the date of termination to the date of this hearing to be $83,238.69, which amount includes the value of benefits. This award would be under section 242(4) (a). She also argued that severance pay, dealt with under section 235, should be awarded, citing a Federal Court decision, *Geauvreau-Turner Estate v. Ojibways of Onigamine First Nation*, [2006] F.T.R. TBEd. MY.O11, in which Justice von Finckenstein found that an award could be made under both section 242(4)(a) and section 235. He found that an arbitrator can use his powers under section 242(4)(c) to increase the amount of termination pay awarded under section 235 "to remedy or counteract any consequence of the dismissal", (para. 20) Ms. Gift asked for an award of 15 days severance which amounts to $6600.99.

29 Ms. Gift then asked for an additional six months of salary, or $55,000.00, for the reckless manner in which Mr. Deering was fired and the adverse effect which it had

on him. She cited an arbitration decision of T. Jollife, *Zikman and Canadian Pacific Railway* (2006) CarswellNat 6776, where such an award was made under the authority of section 242(4)(c). In that decision the arbitrator described the employer's actions as "high handed", "callous" and "reprehensible".

30 Ms. Gift also asked for aggravated damages, again under section 242(40(c), for the emotional toll the termination took on Mr. Deering and his family. She asked for $45,000.00 under this heading.

31 She then asked for punitive damages of $35,000.00, to punish the employer for not following its own rules and terming the dismissal as reprehensible and in bad faith.

32 Finally, she asked for costs in the amount of $35,000.00, which I take to be close to if not the equivalent of solicitor-client costs. This is based on the conclusion that there was conduct by the employer in the course of the litigation that called for a monetary censure of this nature. The total reached by Ms. Gift was $249,839.68.

33 In her rebuttal, Ms. Sheppard argued that the termination referred to the admitted smoking of marijuana as well as the refusal as the grounds for dismissal. She submitted that the eight hour rule does not apply to an illicit substance. "Smoking cannabis is not on". With regard to the argument that the wrong test was put to Mr. Deering, she stated that the employer relies on A.O.M.S. to do the actual testing. With regard to damages, she argued that overtime should be excluded from the figure used given its apparent rarity in this work place. She stated that severance is a discretionary award and is not the norm. She submitted that Mr. Deering had been treated fairly and the employer was not reckless in how they dealt with him.

34 Let me begin my reasoning in this decision by referring to the testimony of Dr. Snider-Adler. I accept without reservation all of the facts that she presented to us about the cognitive impairment that can result from the smoking of cannabis. THC does not behave like alcohol in the body. Its effects can linger for considerable periods of time, especially if the user smokes it regularly. It can have an effect on cognition long after the user has ceased to detect any "high" from its use. It is far from being an innocuous recreational substance and the literature spawned by its legalization is attempting to create new and more sophisticated standards for dealing with its use by those who occupy safety sensitive positions. If indeed effects on cognition can last for up to 30 days, it is difficult to see how anyone in a safety sensitive position could ever safely use it at all.

35 That being said, it is clear that the Cougar Drug and Alcohol Policy in force at the time Mr. Deering was hired, and when he was terminated, was not the product of such a sophisticated and cutting edge analysis of the effects of THC on cognition. Rather we

find in Clause 6.1.2 the requirement that an employee "abstain from the use of Alcohol or Mood Altering Substances for a period of eight (8) hours ... prior to reporting for scheduled duty." The authors of the policy were thus equating drugs with alcohol and assuming that the time which sufficed to clear alcohol from the system would also apply to drugs.

36 I find that whether Mr. Deering's termination was justified or not has to be determined using the policy in force at the time. I note that in his testimony Mr. Jacobs said that the policy "was in transition" and he concluded that a urine drug sample could be requested even though it was not an option under the existing policy. He remarked as well that there was a zero tolerance for THC on the job and Mr. Deering knew this, even though it is not in the existing policy. As noted above, Mr. White said in his testimony that "we thought it was zero tolerance" and that the policy has changed since.

37 Under the policy in force at the time of this termination, what rules for drug use were known to Mr. Deering and his fellow employees? Clause 6.1.2 requires the employee to refrain from the use of alcohol or mood altering substances for a period of eight hours before a shift. I recognize that marijuana fits under the category of illicit drugs as defined in Clause 1.4. However, the definition of mood altering substances in Clause 1.4 includes synthetic marijuana, natural marijuana and medical marijuana. I am not sure if "natural marijuana" is a term of art that describes something different in some way from run of the mill marijuana, but I have no doubt that it and medical marijuana contain T.H.C. It is therefore entirely reasonable to conclude, as Mr. Deering did, that the use of a substance containing T.H.C. is permissible if it occurs more than eight hours before a shift. He said that this was the common belief among the employees and no one contradicted him on this point. The policy clearly did not contain an outright prohibition on the use of cannabis.

38 The witnesses for the employer raised the point that quite apart from the detailed rules dealing with drug use and testing, the overarching safety principle was that the employee had to report "fit for duty", free from the aftereffects of alcohol or drug use. The implication was that Mr. Deering was not fit for duty because of the joint smoked early on the day in question. As I have noted above, this conclusion is perhaps a logical one to reach with the benefit of Dr. Snider-Adler's evidence, but that reasoning cannot be applied to decisions made in relation to an incident that occurred on March 4, 2018. Mr. Deering certainly did not think that he was suffering from any after effects of the joint and there is no evidence from any of the employer's witnesses that such after effects were noticed. The incident report does not point the finger at cognition problems by the brake operator as contributing to the accident.

39 Did Mr. Deering refuse in advance of the requested test to take any test at all? There is some conflicting evidence that suggests this. I find, however, that the refusal by Mr. Deering took place when he actually met with the A.O.M.S. nurse. At that point he declined the urine test, with his reasons spelled out in the form reproduced at tab 3 of the consent book of documents. If he was not willing to take any test, there would have been no point in meeting with the nurse at all.

40 What of the fact that Mr. Deering wanted to take a "current impairment test" rather than a urine test, which, in his view, only captured past usage? As indicated by Dr. Snider-Adler, there is no such thing as a "current impairment" test. All tests measure past usage only. My conclusion is that Mr. Deering was referring to the oral swab test, which in his view captured more recent usage than did the urine test. Thus it was, in a sense, more "current". I do conclude that Mr. Deering had read and understood the drug policy and he knew that the oral swab test was an option as well as the urine test. He said that he had done oral swabs before. He did not refuse the oral swab test because it was never offered to him. He did clearly refuse the urine test, but that was not the appropriate post incident test.

41 I find as well that the employer did not follow the stipulated sequence of events set forth in Clause 4.3.6. of the Policy. A refusal is treated as a positive test, and it should have led to an M.R.O. review and then to a S.A.P. for possible treatment. Termination is not included as a possible consequence of these steps. I am somewhat surprised to hear that referral was ruled out because Mr. Deering said that he did not have a substance abuse problem. There is nothing in Clause 4.3.6. that allows the referral process to be truncated or avoided altogether based on the employee's self-diagnosis that he does not have a substance abuse problem. Someone with such a problem may well be the last to know that he in fact needs help. A lack of insight into the existence of drug abuse is one of its characteristics. The M.R.O. was not complying with the policy when he concluded that there was nothing to discuss in the absence of a test result. He should have met with Mr. Deering and dealt with him on the basis of a positive test. It strikes me that A.O.M.S. was not entirely conversant with the role it had to play under the policy. If it was, the nurse would have offered Mr. Deering the swab test and nothing else. I can understand why Mr. Jacobs said that he left the testing up to A.O.M.S., but that delegation does not absolve the employer from the duty of ensuring that the terms of the policy are correctly applied. As the Irving Pulp decision of the Supreme Court of Canada makes clear, the rules relating to drug testing in the work place have to be known by the employees and they have to be followed by the employer.

42 In short, I find that Mr. Deering was unjustly dismissed by Cougar as he alleges. He followed the testing rules as they existed at the time, while Cougar did not. It may

be that today new rules apply that incorporate Dr. Snider-Adler's opinions on impaired cognition, but they were not in place at the time I am dealing with.

43 I accept the arithmetic of Ms. Clift and fix the amount of remuneration to be paid by Cougar under section 242(4)(a) at $83,238.69, a figure which I know takes into account overtime earned in the last year of employment. What of the other heads of damage that Ms. Gift outlined, which all fall under section 242(4)(c)? I find to a large extent that they are overlapping, designed to in part compensate, or "make whole" the employee and in part to express disapproval of the actions of the employer. I am not inclined to award severance under section 235 - the amount involved is not large and would be even less after the obligatory statutory deductions. I will award aggravated damages of $20,000.00 to compensate Mr. Deering for the emotional stress caused by the termination. As an aircraft maintenance engineer he is a highly trained professional living in a province with a small pool of potential employers. To gain work he had to leave the province. He eventually obtained employment with P.A.L. airlines, which I assume is the only other major employer of aircraft maintenance engineers in Newfoundland and Labrador. The disruption suffered as a result of the termination was substantial.

44 Should I make an award of any sort, call it what you will, to express disapproval of the actions of the company? The cases cited deal with situations in which personal animosity could be shown to have existed against the employee, leading to behaviour by the employer which could be characterized as "reckless", "high handed", "callous" and "reprehensible". By finding the dismissal to be unjustified, I have already ruled that the employer was wrong. I do not find that this wrongful dismissal was motivated in any way by animus towards Mr. Deering and see no need to pile on further financial penalties. I accept fully the explanation of Mr. Jacobs and the other witnesses for the employer that they were motivated by considerations of safety above all else. They unfortunately did not correctly interpret and follow their own safety policy and for this the company will have to pay the compensation stipulated in section 242(4)(a), and the aggravated damages awarded under section 242(4)(c), but nothing further.

45 As to costs, solicitor-client costs are rarely awarded and usually only when the conduct of the litigation by the losing side was in some way subject to criticism. That is certainly not the case here. On the other hand, taking this matter to a three day hearing, with all of the preparation that entails, is an expensive project and to decline to award any costs would seriously impact the ultimate financial outcome for the employee. I will award a lump sum of $20,000.00 as costs.

46 Accordingly, the bottom line of my decision is that Cougar will pay to Mr. Deering a total of $123,238.69, subject of course to the statutory deductions applicable to the portion of the award which is comprised of remuneration for lost wages and benefits.

Jurisdiction is reserved to deal with any issues which the parties have in regard to the implementation of this award.