Court of King's Bench of Alberta

Citation: Quong v Lafarge Canada Inc, 2024 ABKB 340

Date: 20240611
Docket: 2201 09604
Registry: Calgary

2024 ABKB 340 (CanLII)

Between:

Garry Frederick Quong

Plaintiff

- and -

Lafarge Canada Inc.

Defendant

Reasons for Judgment
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Mr. Quong was a long-term employee of Lafarge Canada Inc ("Lafarge"). He worked in various capacities over the years in Lafarge's construction business. He began as a labourer and progressed to become a Site Superintendent.

[2] On June 3, 2022, Mr. Quong was involved in a minor automobile accident at a worksite. Post-incident drug testing revealed that he had THC, the psychoactive chemical in cannabis, in his body above the threshold permitted by Lafarge's Drug and Alcohol Policy. Lafarge, pursuant to that policy, required Mr. Quong to undergo a substance abuse assessment and participate in a substance abuse program as a condition of returning to work. He refused. Lafarge terminated Mr. Quong because of his refusal to participate in the substance abuse assessment and substance abuse program.

[3] Mr. Quong claims that he was wrongfully dismissed and seeks damages in lieu of reasonable notice equivalent to 24 months pay plus interest and costs. Mr. Quong asserts that Lafarge's Drug and Alcohol Policy is unreasonable and that Lafarge failed to honour the terms of his employment contract which included progressive discipline for infractions rather than immediate escalation to termination. He further asserts that Lafarge's actions were inconsistent with the Drug and Alcohol Policy.

[4] Lafarge submits that its actions in terminating Mr. Quong were reasonable and consistent with its Drug and Alcohol Policy. Lafarge further submits that its policy is consistent with best practices and the law on drug testing of employees who work in safety-sensitive positions. Lafarge's position is that, faced with Mr. Quong's wilful refusal to undergo a substance abuse assessment and participate in the substance abuse program as required by the Drug and Alcohol Policy, it had no option other than to terminate Mr. Quong's employment.

[5] This matter was set down to be heard as a summary trial prior to the summary trial rules being replaced with the new streamlined trial rules. The parties agreed that summary trial was the appropriate procedure and I am satisfied that the matter may be decided by way of summary trial. For a discussion of when a matter is suitable for summary trial, see: ***Benke v Loblaw Companies Limited***, 2022 ABQB 461 at paras 5-23.

II. Background

A. Mr. Quong's Employment at Lafarge

[6] Lafarge is a large corporation engaged in the business of manufacturing and producing cement and cement products for the construction industry. Lafarge also provides construction services for civil infrastructure, including roads.

[7] Mr. Quong was hired by Lafarge on August 5, 1981, as a labourer. From the time that he commenced employment until his termination on June 20, 2022, Mr. Quong either worked for Lafarge or Pro Con Road Works Ltd, a Lafarge affiliate.

[8] Mr. Quong was promoted many times during his employment. From 2020 until his termination, Mr. Quong worked as a Site Superintendent at the Banff Trail Area Improvement project (the "BTAI Project"). The BTAI Project was a construction project in northwest Calgary that involved major road construction around 16th Avenue and Crowchild Trail.

[9] Mr. Quong testified that his responsibilities as a Site Superintendent included: "(i) overseeing workers; (ii) planning and supervising various infrastructure projects; (iii) ordering concrete and other materials; (iv) participating in bid reviews; (v) resurfacing roads, curbs, tree trenches; and (vi) compaction testing for final products." Ms. Thibault, a Lafarge human resources employee, added that Mr. Quong's responsibilities included, "site safety, including overall jobsite safety for workers and visitors and compliance with company safety policies."

[10] Mr. Quong agreed that his Site Superintendent position was safety-sensitive. He worked on construction projects like the BTAI Project where there was large machinery and other workplace hazards.

B. Termination of Mr. Quong's Employment

[11] On the evening of June 2, 2022, Mr. Quong smoked a marijuana joint at home. He testified that he believes that cannabis helps him with pain and stress relief.

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[12] At 10:45 am the next morning, June 3, 2022, Mr. Quong was driving a company-owned GMC Sierra pick-up truck on site. He inadvertently hit a mobile compactor unit and damaged the taillight on the truck (the "Incident"). The parties' estimates of the cost to repair the damage range between $700 and $1,000. No one was injured in the Incident and the mobile compactor unit was not damaged.

[13] Following the Incident, Mr. Quong's supervisor requested that he take a drug and alcohol test. Mr. Quong submitted to oral fluid and urine testing within one hour of the Incident. The testing was performed by Lifemark, a third-party testing provider engaged by Lafarge.

[14] Mr. Quong's oral fluid result was "Presumed Positive". The "Presumed Positive" result meant that Mr. Quong's sample had to be sent to Toronto for lab confirmation testing. Lafarge placed Mr. Quong on paid leave pending the results of the lab confirmation testing.

[15] On June 9, 2022, Mr. Quong's urine test was lab confirmed to be positive for THC (*i.e.* over the thresholds permitted by the policy). The following day, June 10, 2022, Mr. Quong's oral fluid test was lab confirmed to be positive for THC (*i.e.* over the thresholds permitted by the policy).

[16] On June 14, 2022, Mr. Sale, a Senior Project Manager, and Ms. Thibault, met with Mr. Quong to discuss the consequences of the positive test results. Mr. Sale and Ms. Thibault advised Mr. Quong that he was not being terminated but that he would have to undergo a substance abuse assessment and participate in Lafarge's substance abuse program ("SAP") with HumanaCare, a third-party service provider.

[17] Mr. Sale and Ms. Thibault provided Mr. Quong with a letter (the "Next Steps Letter") dated June 14, 2022. The Next Steps Letter explained that Mr. Quong was required to participate in the SAP and that he was required to complete a consent form to enroll in the SAP. The Next Steps Letter advised Mr. Quong that if the assessment phase of the SAP determined that he had a substance abuse disorder, "an accommodation for substance abuse may be required." If the assessment phase of the SAP determined that he did not have a substance abuse disorder, then Lafarge would "determine the level of discipline [he] will receive, which will be up to and including termination of employment for violating the Lafarge policies and expectations." The Next Steps Letter further provided that if Lafarge decided to permit Mr. Quong to return to work, he would be required to sign a "Return to Work Last Chance Agreement which requires you to submit to unannounced testing for a period of twenty-four (24) months. Failure to provide a negative test result during this period of twenty-four (24) months will lead to the immediate termination of your employment."

[18] Mr. Quong refused to participate in the SAP and rejected the terms set out in the Next Steps Letter including the random drug testing during the return to work period. As he put it, "I found the requirement [to participate in the SAP] to be offensive, unreasonable, a disproportionate invasion of my privacy and accordingly declined to participate in it."

III. Employee Drug Testing and the Lafarge Drug and Alcohol Policy

A. Employee Drug Testing in Safety Sensitive Workplaces

[19] Employers have an obligation to maintain a safe workplace: *Occupational Health and Safety Act*, RSA 2000, O-2, ("*OHSA*") s 2(1). Employers are required to "ensure, as far as it is reasonably practicable for the employer to do so, (a) the health and safety of (i) workers engaged

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in the work of that employer, and (ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out." The duty of employers to maintain a safe workplace is reinforced by criminal law. Section 217.1 of the *Criminal Code* provides that "[e]very one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."

[20] The Alberta Court of Appeal has accepted that employers have a legitimate interest in preventing employees from using cannabis in their private time if cannabis remains in the employees' body when at work. The Court of Appeal considered the circumstances of a recreational marijuana user in ***Chaisson v Kellogg Brown & Root (Canada Co)***, 2007 ABCA 426. At para 35 the Court of Appeal observed that "effects of cannabis use lingers for days" and drew an analogy between cannabis and alcohol at para 36. The Court observed that it was a "legitimate presumption" that "any level of alcohol in a driver's blood reduces his or her ability to operate the employer's vehicles safely." This point was reiterated in ***Stewart v Elk Valley Coal Corp***, 2015 ABCA 225 at para 69.

[21] ***Stewart v Elk Valley Coal Corp***, 2017 SCC 30 is instructive. There, an employee tested positive for cocaine after a workplace incident. The employee was terminated instead of being offered a substance abuse assessment, an opportunity for treatment, and given another chance like Mr. Quong. Chief Justice McLachlin, writing for the majority, upheld the decision of the Alberta Human Rights Tribunal. The employer's "no free accident" rule was intended to have a deterrent effect on drug use. McLachlin CJC observed at para 10 that the Tribunal "found that offering [a substance abuse] assessment without termination ... would dilute the purpose of the Policy."

[22] Dr. Charl Els, a psychiatrist and addiction specialist called to testify on behalf of Lafarge, opined that there was some evidence that "impairment following the consumption of cannabis ... may well reach 24 hours, or even longer." However, he described "current empirical scientific evidence" concerning "the nature and duration of cognitive and performance impairment following consumption of cannabis" to be of "varying quality" and he said some studies exhibit "suboptimal rigour" and have "mixed results." He further explained that because of the lack of good scientific data and scientific consensus concerning the lingering effects of cannabis and the risk of serious injury or death in safety-sensitive workplaces, the Occupational and Environmental Medical Association of Canada (OMEAC), an association of physicians with an interest in occupational and environmental medicine, issued a consensus statement saying that it was appropriate to follow the "precautionary principle." OMEAC recommends "[u]ntil definitive evidence is available, it is not advisable to operate motor vehicles or equipment, or engage in other safety sensitive tasks for 24 hours following cannabis consumption, or for longer if impairment persists."

[23] The precautionary principle, according to Dr. Els, means proceeding on the basis that the presence of cannabis in the body is unsafe for employees working in safety-sensitive workplaces until proven otherwise. This is a different way of expressing the "legitimate presumption" of the Court of Appeal in ***Chaisson***. No expert evidence was adduced on behalf of Mr. Quong with respect to the lingering effects of cannabis. I accept the evidence of Dr. Els concerning the state of scientific research on the lingering effects of cannabis and the consensus view in the medical profession that given the lack of clear scientific evidence of the lingering effects of cannabis use a precautionary approach is appropriate to mitigate risk in safety-sensitive workplaces.

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[24] Many employers whose business involves physical risk to employees and risk of property damage follow the precautionary principle by having drug and alcohol policies to protect employees, others who may be on the work site, and property: see Clarissa Pearce, "Balancing Employer Policies and Employee Rights: The Role of Legislation in Addressing Workplace Alcohol and Drug Testing Programs" (2008) 46 Alberta Law Review 141 at 144-46 and Jon Soltys and Daniel W. Dylan, "Accommodating the Unknown: Balancing Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9 Canadian Journal of Human Rights 57 at 66.

[25] Drug and alcohol policies that require testing following a workplace accident have been found to be reasonable. Justice Abella, writing for the majority in ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd***, 2013 SCC 34 held at para 30:

> In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measures have been exhausted if there is "reasonable cause" to believe that the employee is impaired while on duty, where the employee has been directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse.

[26] There are examples in the case law of random drug testing being imposed for a reasonable period as a condition of returning to work following a positive drug test that suggest that it is a widespread practice for safety sensitive positions: see, for example, ***Irving*** at para 12 and ***Power Workers' Union v Canada (Attorney General)***, 2023 FCA 215 at para 9. No court cases were provided to me where the practice was challenged. Indeed, the discussion in most cases seems to implicitly accept that random testing for a reasonable period after an employee returns to work in a safety sensitive environment after a positive drug test is permissible.

B. The Lafarge Drug and Alcohol Policy

[27] The Lafarge Drug and Alcohol Policy was adopted in 2009. The policy explained that "Lafarge operates in a safety sensitive industry and all employees may in the course of their employment be exposed to safety sensitive environments and/or be considered to be in a safety sensitive job. As a result, all employees are expected to comply with this policy and ensure that they are fit for duty at all times while at work." The policy stated, "[n]o employee shall: ... Report to work or continue working unfit for duty due to the consumption or use of drugs, alcohol or medications."

[28] The policy addressed what it called "medically authorized cannabis." Employees who are authorized to use cannabis by a health professional must disclose that to Lafarge whereupon "Lafarge will explore and offer accommodation options to medical cannabis users..." if certain requirements are met.

[29] The policy provided that drug or alcohol testing would take place after a workplace incident if four conditions were satisfied:

1. The test is intended to eliminate drug or alcohol use as a possible cause of or a contributing factor to an incident;

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2. The employee's explanation of the incident must be considered. If the employee provides a reasonable explanation (e.g. structural or mechanical failure), this is to be weighed against the need for conducting a test;
3. There must be some evidence to indicate that the actions or omissions of the employee contributed to or caused the incident; and
4. The incident must be an event involving one (1) or more of the following:
    i. Fatality;
    ii. Critical incident;
    iii. Bodily injury to self or others;
    iv. Property damage;
    v. Environmental damage;
    vi. A near miss or relatively minor incident that, in management's opinion, could have resulted in any of the above. The proximity of harm must be realistic, and the potential harm significant.

[30] The amount of cannabis metabolite in an employee saliva or urine sample that qualifies as a positive test pursuant to the policy was adopted from the Canadian Model for Providing a Safe Workplace published by the Construction Owners Association and Energy Safety Canada. The appropriateness of the testing threshold levels was not challenged by Mr. Quong.

[31] The policy explained the consequences of a positive test and the conditions that would apply to a return to work after a positive test or treatment. The employee is required to participate in a company-sponsored SAP to assess whether the employee has a substance use disorder that requires treatment or accommodation. An employee is placed on unpaid leave while participating in the SAP but may be able to access sick leave or disability benefits.

[32] Pursuant to the policy, upon completion of the assessment phase of the SAP, an employee may be required to participate in rehabilitation prior to return to work or may be permitted to return to work without further treatment. Prior to an employee returning to work, the employee must sign a Last Chance/Return to Work Agreement that outlines the conditions for the employee's return to work. The policy provides that "[i]n a return to work situation (post-violation and/or post-treatment) the employee may be subject to unannounced testing as per the terms and conditions of the Last Chance/Return to Work Agreement...."

IV. Was Mr. Quong Wrongfully Terminated?

A. Was the Policy a Term of Mr. Quong's Employment Agreement?

[33] The law concerning whether a workplace policy constitutes an express or implied term of an employment agreement and is thus enforceable was canvassed by Marion J in ***Stonham v Recycling Worx Inc***, 2023 ABKB 629 at paras 60-65. He explained at para 61 that a workplace policy "must be reasonable, unambiguous, well published, consistently enforced, and the employee must know or ought to have known of the policy including consequences of breach."

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[34] Marion J further explained at para 62 that "where a workplace policy purports to change a fundamental aspect of the employment terms or relationship, to be binding on the employee the employee must have outwardly assented to the terms of the policy and there must be fresh consideration." However, a fundamental change to the terms of employment need not be accompanied by fresh consideration "[i]f an express or implied term gives the employer the authority to make the change, or if the employee consents to or acquiesces in it...": ***Potter v New Brunswick Legal Aid Services Commission***, 2015 SCC 10 at para 37 per Wagner J, as he then was, for the majority. See also, ***Kosteckyj v Paramount Resources Ltd***, 2022 ABCA 230 where an employee was found to have acquiesced to a unilateral and material decrease in pay by continuing employment for 25 days after the decreased in pay was announced.

[35] Doherty JA explained in ***Haldane v Shelbar Enterprises Limited***, 1999 CanLII 9248 (ON CA) at para 10 that a term may be implied in an employment agreement in the same way that a term may be implied in any other sort of contract. He wrote, "[t]erms may be implied into a contract based on custom and usage or based upon the presumed intention of the parties: ***M.J.B. Enterprises Ltd v Defence Construction (1951) Ltd***, [1999] 1 SCR 619 at 634-36."

[36] Mr. Quong commenced employment in 1981. There is no written employment agreement between Mr. Quong and Lafarge in evidence. There is also no evidence whether Lafarge had a drug and alcohol policy in 1981. I am satisfied that a person accepting employment with Lafarge would have had a reasonable expectation that she was to abide by the policies of Lafarge. Accordingly, I find that it was an implied term of Mr. Quong's employment agreement that he abide by Lafarge company policies so long as they met the criteria set out in ***Stonham***.

[37] Lafarge had five "Health & Safety Rules". Rule 4 was "I do not work under the influence of alcohol or drugs." The Health & Safety Rules provided that "**Living by these rules is a condition of employment**" [emphasis in original]. Mr. Quong testified that understood these rules and that they were a condition of employment.

[38] Mr. Quong deposed that he did not understand the Drug and Alcohol Policy or the consequences of breaching the policy because it "is a very detailed and complex document that was never explained to me in detail." The evidence shows, however, that he received annual training on the Drug and Alcohol Policy from 2012 onwards except for 2020 due to the COVID-19 pandemic. Mr. Quong testified that he was aware of and had read the Drug and Alcohol Policy. Indeed, he acknowledged that he was responsible for regularly training other workers on the Drug and Alcohol Policy. Advising workers of the Drug and Alcohol Policy was part of the site orientation process. Mr. Quong conducted approximately 100 site orientations while working on the BTAI Project. I do not accept Mr. Quong's evidence that he did not understand the Drug and Alcohol Policy – he clearly understood the Drug and Alcohol Policy and the consequences for breaching the policy.

[39] Mr. Quong submits that the "SAP is an unreasonably invasive process to determine if an employee has a drug addiction or not, particularly where it concerns an employee with no record of disciplinary actions for or allegations of drug abuse." He submits that the SAP requirement is unreasonable because it: (a) "has nothing to do with the actual question of fitness for work"; (b) Mr. Quong would be on unpaid leave for the duration of the SAP; (c) "[e]ven if [Mr. Quong] was not found to have a drug abuse problem, [he would] still be subject to additional disciplinary

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measures"; and (d) he "would have to sign a return-to-work agreement that allows Lafarge to conduct unannounced drug testing for a period of up to 2 years."

[40] The starting point for analysis of the Drug and Alcohol Policy's SAP requirement is that the alternative is termination of employment for a positive drug test following a workplace incident causing property damage. The SAP is directly related to the question of fitness for work. A purpose of the SAP is to determine whether an employee has a drug dependency. Given that Mr. Quong testified that he used cannabis regularly and perhaps daily, it was reasonable to ask if he had a drug dependency. And whether an employee has a drug dependency goes straight to the issue of fitness for work. If the employee has a drug dependency, then the question is one of treatment and accommodation because drug dependency is a human rights matter. If the employee does not have a drug dependency, then it is a matter of discipline. The fact that an employee is on unpaid leave for the duration of the SAP is reasonable because the employee is not working because of non-compliance with the Drug and Alcohol Policy, potentially because of a disability, and, in any event, the employee may qualify for sick leave or disability benefits while participating in the SAP. Lastly, the requirement that the employee sign the Last Chance/Return to Work Agreement that provides for random drug testing for a period of two years is consistent with industry practices noted in the caselaw. The Last Chance/Return to Work Agreement may represent a fundamental change in the terms of employment, but the consideration provided by Lafarge is foregoing the right to immediately terminate the employee.

[41] The submission that the SAP and random drug testing during the two year return to work period constitutes an unjustified invasion of privacy is without merit. Once an employee tests positive for drugs after a workplace incident, privacy interests that might otherwise preclude random drug testing are outweighed by safety concerns. Employees have legal and moral duties, not just to their employer, but to their fellow employees to maintain a safe workplace. This does not mean that Lafarge may disregard its obligations with respect to employee privacy after a positive drug test. Indeed, Lafarge must adhere to its obligations to keep the personal information of employees confidential and only use information from the SAP and random drug testing during the return to work period for legitimate purposes. Indeed, the Drug and Alcohol Policy requires Lafarge to "[e]stablish and enforce procedures to safeguard and maintain confidential information." There is no evidence to suggest that Lafarge was careless or indiscreet with employee personal information or used it for anything other than legitimate purposes.

[42] I find that the Drug and Alcohol Policy was reasonable, unambiguous, well published, and consistently enforced. Lafarge is involved in the construction industry where employees are regularly working with or around heavy machinery. Safety is of the utmost importance and, following the precautionary principle, drug testing following workplace incidents is reasonable and random drug testing as part of a return to work protocol following a positive drug test is reasonable. There is nothing about the Drug and Alcohol Policy that is ambiguous or otherwise unclear. The Drug and Alcohol Policy was available to all employees and regular training on the policy was conducted by Lafarge. Lastly, the Drug and Alcohol Policy was consistently enforced as reflected by Mr. Quong's evidence that, as a Site Supervisor, he was responsible for removing impaired workers from the workplace and had done so, he was responsible for driving employees to the testing facility when testing was required by the Drug and Alcohol Policy, and

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he was aware of a circumstance where a worker had been terminated for violating the Drug and Alcohol Policy.

[43] The Drug and Alcohol Policy constituted an implied term of Mr. Quong's employment agreement. His continued employment without protest for a period of at least a decade under the Drug and Alcohol Policy constitutes acquiescence to the policy even in the absence of fresh consideration. He was not only regularly trained on the Drug and Alcohol Policy, he participated in the training of others and in the enforcement of the policy. His position that the policy is not binding on him has no merit.

B. Did Lafarge Act Reasonably and Abide by the Policy?

[44] Mr. Quong submitted that Lafarge did not act reasonably because Mr. Quong did not use cannabis at work, the cannabis in Mr. Quong's system did not cause the accident, and Lafarge failed to consider whether Mr. Quong's cannabis use had a medical justification. Mr. Quong further submitted that Lafarge's Last Chance/Return to Work Letter was inconsistent with the terms of the Drug and Alcohol Policy.

[45] The Drug and Alcohol Policy prohibits cannabis usage while at work. However, the whole thrust of the policy is to promote workplace safety by ensuring that employees are fit for duty. This includes preventing any reduced fitness to work whether such reduction in ability to perform stems from drug and alcohol usage before or at work. The purpose of the Drug and Alcohol Policy is stated to be to "provid[e] a safe and healthy workplace" which "includes taking all reasonable precautions to ensure that employees report to work fit for duty, and remain fit during their shift." The Drug and Alcohol Policy cannot be read as permitting a worker to consume cannabis prior to work – whether the morning before work or the previous evening – given that there may be lingering effects that continue to affect the performance of the worker. The workplace testing provisions of the Drug and Alcohol Policy are about identifying the presence of cannabis in a worker's system irrespective of when or where the cannabis was consumed.

[46] Whether the cannabis in Mr. Quong's system caused the Incident is irrelevant. The Drug and Alcohol Policy requires an employee to be tested for drugs and alcohol to assess whether drugs or alcohol are contributing causes of a workplace incident. This was understood by Mr. Quong. He testified as follows:

> Q As soon as that – you hit the compactor, you knew you were going to have to go to drug testing –
>
> A Yes.
>
> ...
>
> Q And you knew that because you know how the drug and alcohol policy works and you know post-incident testing; correct?
>
> A That's correct, yes.
>
> Q And you knew that post-incident testing was required in order to eliminate drugs or alcohol as a possible cause or contributing factor to the accident; correct?
>
> A Yes.

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[47] Mr. Quong says that he used cannabis regularly to help him cope with the pain from injuries suffered on the job. He did not have medical authorization for cannabis nor did he purchase cannabis from a pharmacy or other approved dispensary of medical cannabis. Instead, he grew his own cannabis plants and rolled his own joints.

[48] The Drug and Alcohol Policy treats medical cannabis the same way that it treats other prescription and non-prescription medication that may affect fitness to work. An employee who is authorized to use cannabis by a health practitioner is required to disclose that to Lafarge and provide information to Lafarge to allow it to be determined that their use of medical cannabis "does not impact their health and safety, or those around them, in performing their job duties." The policy further provides that "Lafarge will explore and offer accommodation options to medical cannabis users...."

[49] Mr. Quong did not disclose his cannabis use to Lafarge prior to the accident nor was his cannabis use authorized by a health practitioner. Only after he was terminated did Mr. Quong obtain a note from a physician indicating that his cannabis use had a medical purpose. While Mr. Quong's efforts to manage the pain from his workplace injuries are understandable, they did not fit within the exception for medical cannabis in the Drug and Alcohol Policy. And even if Mr. Quong had been authorized to use medical cannabis, he failed to follow the disclosure requirements of the policy. Mr. Quong's belated effort to characterize his cannabis use as sanctioned by a health practitioner does not render Lafarge's actions unreasonable.

[50] Mr. Osuji argued that the Last Chance/Return to Work Letter was inconsistent with the Drug and Alcohol Policy. Specifically, he submitted that the Last Chance/Return to Work Letter specified that a positive test would result in dismissal. Whereas the Drug and Alcohol Policy specified that Lafarge could impose "discipline, up to an including dismissal, for violations of this Policy where appropriate." He submitted that Mr. Quong was being asked to sign an agreement that provided for more strict consequences than the policy.

[51] The words relied on by Mr. Osuji qualify Lafarge's acknowledgement that "an employee addicted to alcohol and/or drugs is disabled for the purposes of human rights legislation and is entitled to reasonable accommodation in managing his or her disability." The point of the words relied on by Mr. Osuji is to clarify that despite drug dependency being a disability, non-compliance with the policy may still result in discipline up to and including dismissal. The Last Chance/Return to Work Letter is consistent with the policy because, even though it provides for dismissal, Lafarge always retains the discretion to impose lesser discipline.

C. Did Lafarge Have Just Cause to Terminate Mr. Quong?

[52] Lafarge's approach to Mr. Quong's positive drug test makes it clear that he would not have been terminated but for his refusal to undergo a substance abuse assessment and participate in the SAP. The termination letter issued by Lafarge to Mr. Quong on June 20, 2022 explained the reason for his termination as follows:

> Since you are in violation of the drug and alcohol policy and refused to participate in the substance abuse program we were forced to make this decision in absence of a professional substance abuse assessment.

[53] Mr. Quong submits that there was no just cause to terminate him because Lafarge failed to conduct a contextual analysis that accounted for: (a) the length of his employment and history of performance; (b) his age; (c) job performance; (d) seriousness of the incident; and (e)

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seriousness of harm suffered by Lafarge. Mr. Quong also submitted that Lafarge failed to consider progressive discipline short of termination. Lastly, Mr. Quong submitted that his honesty throughout the process and cooperation with the initial drug testing should weigh against termination.

[54] In many circumstances, Mr. Quong's submissions would have merit. The difficulty in the present circumstances was his wilful refusal to participate in the SAP and submit to random drug testing during the return to work period. Faced with an employee who had a positive drug test, Lafarge had no alternative but to insist on compliance with its Drug and Alcohol Policy which I have found to be reasonable. Lafarge is required by law to maintain a safe workplace and could not, in the face of a positive drug test, accede to Mr. Quong's position that he not be required to participate in the SAP or be subject to random drug testing in the return to work period. Returning Mr. Quong to work on a safety sensitive job site in any capacity was not a viable option. Further, pursuant to human rights law, Lafarge has a duty to accommodate employees with disabilities, including substance use disorder. Mr. Quong's refusal to undergo a substance abuse assessment as part of the SAP prevented Lafarge from meeting its human rights law obligations.

[55] A contextual analysis, progressive discipline, and honesty and cooperation in the investigative process would all be legitimate issues if all that was in issue was the Incident. No doubt, if there had been no positive drug test and no subsequent refusal to participate in the SAP and random drug testing on return to work, Mr. Quong's long service and exemplary record would have resulted in little or no discipline. What changed everything was his refusal to abide by the Drug and Alcohol Policy by rejecting the SAP and random drug testing upon return to work. The wilful refusal to abide by a policy critical to ensuring a safe workplace is incompatible with continued employment. Mr. Quong's refusal constituted a repudiation of his employment contract: ***Potter*** at paras 107-11.

A. Conclusion

[56] Mr. Quong's claim for wrongful dismissal against Lafarge is dismissed. If the parties are unable to agree on costs, they may make submissions in writing of 5 pages or less supported by a Bill of Costs by June 28, 2024 or such other date as they may agree upon and advise the Court.

Heard on the 04th day of June, 2024.
Dated at the City of Calgary, Alberta this 11th day of June, 2024.

Colin C.J. Feasby
J.C.K.B.A.

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Appearances:

Charles Osuji and Imtiaz Hafiz, Osuji & Smith
for the Plaintiff

Timothy Mitchell KC and Allie Laurent, McLennan Ross LLP
for the Defendant

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