

# Grievance from SFUEU

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To: Simon Fraser University, Human Resources Department

From: Matthew Williams, Gurinder Dahia, and Emily Ortis, Simon Fraser University  
Employee Union (SFUEU)

Date: 12 February 2012

**Subject: Grievance on behalf of Emile**

We grieve on behalf of Emile as he was terminated without cause from his position as Housing Supervisor at Simon Fraser University (SFU). Emile has been a valued employee at SFU for the past 22 years whose performance has only declined in the past 2 years as a result of his drug addiction disability, for which he has been seeking treatment, and his psychiatric issues.

As stated in article 15 of the BC Human Rights Code, a drug addiction is considered a disability and the employer has the duty to accommodate to the point of undue hardship. In the case of Emile, some accommodations were made, however, not the point of undue hardship. As a result, there was no cause for dismissal; therefore, the penalty of termination was not appropriate.

Given Emile's long history of good service to SFU, and SFU's duty to accommodate SFU Employee's Union (SFUEU) requires that Emile be reinstated, with back pay to the effective date of his termination, into his position as a Housing Supervisor with SFU, and be provided with ongoing Psychiatric treatment and the opportunity to complete his addiction treatment program.

If you have any questions or concerns regarding the grievance please do not hesitate to contact us by e-mail at [REDACTED]

[REDACTED].

# Emile Case Union Theory

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This is a discipline and discrimination case regarding the wrongful termination of Emile from Simon Fraser University (SFU). Emile was terminated from his position as a Housing Supervisor due to his addiction to cocaine.

Emile has been a valued employee at SFU, with a 22 year history of excellent job performance, receiving numerous promotions that have allowed him to work his way up from a position as a Residence Advisor to the Housing Supervisor. Emile's performance has only declined in the past 2 years, as a result of Psychiatric issues, and his drug addiction disability.

Emile was diagnosed with a drug addiction and psychiatric issues by a Psychiatrist through the Employee Assistance Program (EAP). Subsequently he attended and successfully completed a daytime detox for 30 days, using his vacation time. Emile's initial Detox program was successful, and led to improved performance and attendance; however, Emile did begin experiencing a decline in performance and attendance in November of 2010 which resulted in a poor performance appraisal, a verbal warning, a written warning and finally a one day suspension.

On March 3rd 2011, a flood occurred in the building for which Emile is responsible. Emile was unable to be located. This resulted in a disciplinary investigation in which Emile admitted he had relapsed, as is common in drug addiction disabilities, and was using cocaine again. As a result of this relapse SFU and SFUEU agreed to the residential treatment program and other conditions to aid in Emile's recovery. Emile was in the process of recovering from his addiction in the residential treatment rehabilitation program agreed upon by SFU, when he had another relapse, and was subsequently unjustly terminated.

SFU has a duty to accommodate Emile's drug addiction disability, and was not acting in good faith in their duty to accommodate to the point of Undue Hardship when they terminated him prior to his completion of the addiction treatment program, and he was not provided with the opportunity to complete all conditions of the program. SFU is a large institution with significant resources, and Emile's accommodation can hardly be considered Undue Hardship. Additionally, there was no union negotiated Last Chance Agreement in place, as the Final Warning was negotiated outside the union's sole bargaining authority.

The William Scott & Co., Fraser Lakes Sawmills, and the Meiorin case laws apply, as Emile was terminated without cause on the basis of discrimination, as his addiction to cocaine is considered a disability, under Article 13 of the BC Human Rights Code, therefore SFU has breached its duty to accommodate Emile to the point of Undue Hardship in Emile's efforts to seek treatment for his addiction. Under the Fraser Lakes Sawmills case Emile's actions in relation to his drug addiction disability can be considered non-culpable issues as Emile has acknowledged his disability and has sought treatment on multiple occasions.

Given Emile's 22 year history of good service to SFU, and SFU's duty to accommodate, and SFU's failure to issue an appropriate Last Chance Agreement, we request that Emile be reinstated into his position of Housing Supervisor with SFU and is compensated retroactively for all lost wages since Emile's termination in addition to be provided with ongoing psychiatric treatment and the opportunity to complete his addiction treatment program.

# Agreed Statement of Facts

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In the matter of Emile the parties are agreed on the following facts which are NOT in dispute:

1. Emile has worked at SFU for 22 years.
2. Well liked and respected by his peers, supervisors and students.
3. 20 years of good service, without any issues; which resulted in multiple promotions
4. Issues started 2 years ago with increased sick time with 1 or 2 day absences adjacent to weekends.
5. Bill Threadwill, Emile's manager confronted Emile in August 2011.
6. Emile saw a psychologist through the EAFP who diagnosed and referred Emile to an addiction specialist.
7. Emile saw an Addiction Specialist through the EFAP.
8. Emile saw an Psychiatrist through the EFAP
9. The Psychiatrist diagnosed Emile with a "Dual Diagnosis" of cocaine addiction and other psychiatric issues.
10. The Psychiatrist referred Emile to a detoxification program.
11. Emile informed Bill Threadwill of the diagnosis.
12. Emile took 1 month of vacation to undergo the detoxification program.
13. Returned with a certificate from the detoxification program stating Emile was dry for 30 days and provided a copy to Bill Threadwill.
14. In November and December he began to miss work for sick days primarily on Mondays and Fridays.
15. Emile received a performance appraisal in December that noted inconsistent work and attendance.
16. Emile received a verbal warning on January 12th for poor work performance.
17. Emile received a written warning on February 3rd for poor work performance.

18. Emile received a one-day suspension on February 17th for poor work performance.
19. Assistance was offered if any of the poor work performance was caused due to the disability and he turned down any aid from SFU.
20. On March 3rd there was a flood in Emile's residence, and Emile was unavailable resulting in a cleanup delay.
21. On March 5, during a disciplinary investigation Emile admitted that he had relapsed into cocaine use.
22. Management agreed addiction is a disability and should be accommodated.
23. Emile agreed to attend a 6 week Residential Treatment Program in the Fraser Valley.
24. SFU agreed to pay half for half of the 6 week Residential Treatment Program; which is \$5000.
25. Emile agreed to pay the remaining \$5000 for the Residential Treatment Program, however he was loaned this money from SFU, which would be paid back in full.
26. The loan from SFU was to be repaid from Emile's wages over 10 months.
27. Emile would be placed on 6 weeks of paid sick time during his treatment at the Residential Treatment Program.
28. Upon return from the program Emile was required to participate in ongoing addiction counselling and be subject to random drug tests through an agency to be retained by SFU.
29. Emile was also required to attend at least 5 "Narcanon" meetings per week for the first 2 years.
30. During the 4th week of the Residential Treatment Program Emile was granted a weekend pass, upon his return Emile tested positive for cocaine, and was dismissed from the program.
31. SFU terminated Emile for failure to adhere to a program of abstinence from drugs.
32. No last chance agreement was agreed upon between management and union.

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Union Signature(s)

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Management Signature(s)

# Timeline of Events

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1. September 1987 – Emile began attending SFU as a first year student
2. 1989 – Hired as an Resident Advisor at SFU while attending SFU as a student
3. 1991 – Emile was hired by SFU as a Custodial Lead Hand
4. Unknown - Emile was promoted from Custodial Lead Hand to Custodial Supervisor
5. Unknown - Emile was promoted from Custodial Supervisor to Housing Supervisor
6. 2008 (Approx) – An increase in usage of sick time by Emile is noted
7. August 2010– Bill Threadwell confronted Emile about the absences; this led to Emile seeking help through the EFAP, resulting in the counsel of a psychologist, addiction specialist and psychiatrist.
8. Late August 2010 – Emile was diagnosed with a “dual Diagnosis” for cocaine addiction and other psychiatric issues.
9. Late August 2010 – Emile informed Bill Threadwell of his diagnosis and his desire to take a month off for a Detoxification Program.
10. September 2010 – Emile used his vacation time in order to attend a daytime detox program.
11. 30 September 2010 – Emile returned to work at SFU with a certificate noting he had been dry for 30 days. The certificate was provided to Bill Threadwell.
12. November 2010 – Emile is observed to use sick days on Mondays and Fridays.
13. December 2010 – Emile continued to take frequent sick leave
14. Mid December 2010 – Bill Threadwell provided Emile with a performance appraisal, which identified Emile’s inconsistent work and attendance. It identified Emile’s history with drug addiction - Emile did not dispute the appraisal.
15. 12 January 2011 – Emile received a verbal warning for poor work performance.
16. 03 February 2011 – Emile received a written warning for poor work performance.
17. 17 February 2011 – Emile received a one-day suspension for poor work performance.
18. 03 March 2011 – A flood occurred in the residence that Emile is responsible for, and Emile was unable to be found resulting in a cleanup delay.

19. 05 March 2011 – Bill Threadwell held a disciplinary investigation for Emile regarding the events of 03 March 11; at this time Emile admitted that he had relapsed.

20. Mid March 2011 – Emile began attending a six-week residential treatment program in the Fraser Valley.

Mid April 2011 – Emile was granted a weekend pass to leave the Residential Treatment Facility; upon his return, he is tested positively for cocaine and is dismissed from the treatment program. This resulted in Emile's termination from SFU.

# Witness List

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## Witness #1

Bill Threadwell

Work Phone: 604-597-6974

Cell Phone: 778-987-4512

Email: [bill.threadwell@sfu.ca](mailto:bill.threadwell@sfu.ca)

Questions for Bill Threadwell

1. Would you describe the events leading to Emile's termination?
2. What was the reason for Emile's termination?
3. Can you please describe Emile's overall performance since he has started with SFU?
4. Can you tell me about Emile's working relationship with you, the students and the university?
5. Explain the provision of Emile's Final warning, and why the Union was not involved in the decision?

## Witness #2:

Dr. Brian C Murphy, MA, Phd

Psychiatrist

Cell Phone: 778-785-1367

Email: [dr.b.murphyt@innercare.org](mailto:dr.b.murphyt@innercare.org)

Questions for Dr. Brian Murphy

1. What was your diagnosis for Emile?
2. What is the Nature of a Dual Diagnosis?
3. What is your opinion of relapses in the drug addiction rehabilitation process?

## Witness #3:

Joe Smith

Addiction Specialist

Cell Phone: 778-785-1367

Email: [J.Smith@addictionservices.com](mailto:J.Smith@addictionservices.com)

Phone: 604-987-1923

Questions for Joe Smith

1. Can you please describe the complexity of a dual diagnosis drug addiction?
2. Can you please tell me about recovery/rehabilitation process/success for cases such as Emile?



# Collective Agreement

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It is a generally accepted principle that Unions, through a Collective Agreement, are the sole bargaining authority for all employees covered by the Collective Agreement for which the Union is certified under the Labour Code of British Columbia.

The BC Labour Relations Code section 2 sub-paragraph 2, and section 27, sub-paragraph 1 (a) state.

2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

(d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,

27. (1) If a trade union is certified as the bargaining agent for an appropriate bargaining unit,  
(a) it has exclusive authority to bargain collectively for the unit and to bind it by a collective agreement until the certification is cancelled,

# Statutes

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## BC Human Rights Code Section 1, para 1

### Discrimination in employment

**13** (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

# Precedent Case Citations and Summaries

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1. Case citation: [Village of Cache Creek v. International Union of Operating Engineers, Local 115C \(Cassidy Grievance\), \[2002\] B.C.C.A.A.A. No. 79](#) ~ 26pp

2. Mr. Chair, the Village of Cache Creek v. International Union of Operating Engineers case is about discipline, termination without cause, and the assumption of a last chance agreement being in place on behalf of the employer. In that case the grievor, Bruce Cassidy a utility man for the Village of Cache Creek, had a record of good and conscientious work. However, Mr. Cassidy also had a history of drug and alcohol addiction, which resulted in three alcohol related incidents affecting his ability to do work over a three month period.

The first incident resulted in a verbal warning when Mr. Cassidy was unable to perform his stand-by duty when an alarm went off at the sewage treatment plant, and he was too intoxicated to fulfill his duties. Mr. Cassidy admitted his alcohol addiction and sought counselling. Mr. Cassidy's performance improved over a three month period until the second incident occurred in which he did not show up for work do to intoxication, and received a written warning. At this time drug and alcohol abuse treatment programs were discussed, and Mr. Cassidy and the employer agreed to a 7-day detox program, for which Mr. Cassidy was given a leave of absence.

Mr. Cassidy's performance improved, and there were no incidences for a further few months, until Mr. Cassidy did not show up for work on June 22<sup>nd</sup> as a result of intoxication. This third incident resulted in Mr. Cassidy's termination from the Village of Cache Creek. The employer assumed that Mr. Cassidy's actions were culpable, and the written warning was a last chance agreement, and therefore, the third incident was grounds for dismissal.

In this case the arbitrator decided that Mr. Cassidy's actions were non-culpable due to his substance abuse disability. Additionally, the arbitrator noted that a written warning

does not convey the seriousness of a last chance agreement, and, should also be agreed upon and signed by the union. Neither of which were the case with regard to Mr. Cassidy, and; therefore, the grievance was partially upheld and Mr. Cassidy was reinstated.

3. Page 22, Para 42:

This matter must be addressed as a case of non-culpable absenteeism due to alcoholism. As well, alcoholism is a disability and, as such, it is covered by the Human Rights Act of British Columbia: *British Columbia Government and Service Employees' Union v Public Service Employee Relations Commission*, 176 D.L.R. (4th) 1 (S.C.C.); *Grismer Estate v B.C. Council of Human Rights et al.*, 181 D.L.R. (4th) 385 (S.C.C.). Attendance is a bona fide occupational qualification on the part of the Employer but there exists a duty to accommodate short of undue hardship.

Page 23, Para 45:

Moreover, this "Formal Written Warning" lacks some typical indicia of a last chance agreement. To begin, it is referred to as a "Found Written Warning" which hardly connotes the seriousness of a last chance warning. Further, it states that dismissal would "be seriously considered" which hardly puts the issue in as stark as terms as would be appropriate. The wording in this document is not such that one would infer there will be no further chances and this is the last resort: *Heather Steele*, B.C.L.R.B. No. B546/98 and *B.C.L.R.B. No. B313/98*. Additionally, a formal last chance agreement should generally be signed by the Union in its capacity as the bargaining agent for the employee. In this case, I accept Mr. Lefebvre was at the April meeting in his capacity as a Union Representative and, indeed, represented the Grievor's interests at the meeting. However, the document is very clear that Mr. Lefebvre signed as a "witness" which is quite distinct from a signature purporting to bind the Union to inevitable consequences should certain actions recur on the part of the Grievor.

4. Mr. Chair, the reason this case is important is it identifies another case where substance abuse was identified as a concern in which the employer was aware of the disability and the duty to accommodate, and the employee recognized the negative consequences of his substance abuse disability and his requirement to take responsibility and seek treatment, as is the case with Emile. Additionally, this case deals with a relapse and subsequent dismissal during the substance abuse treatment. Finally, and most importantly, this case also deals with the requirement and provision of a last chance agreement. In Emile's case no Last Chance Agreement was agreed upon by the union or SFU, and the provision of the Final Warning was outside of collective Agreement, and it stands for the principle that Mr. Cassidy's actions were non-culpable, and that no formal last chance agreement was provided, or agreed upon.

5. Because of this Mr. Chair we submit that you should uphold SFUEU's grievance on behalf of Emile, and reinstate him to his position of Housing Supervisor with SFU.

1. Case citation: [Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115 \(Gardiner Grievance\), \[2005\] B.C.C.A.A.A. No. 90](#) ~ 28pp

2. Mr Chair, the Kemess Mines Ltd. v. International Union of Operating Engineers case is about discipline, and termination without cause. In that case, the grievor, Mark Gardiner Tailings Operator at the Kemess mine in northern British Columbia, was dismissed for smoking marijuana in his room on the mine site which the employer, Kemess Mines Ltd., claims culpable misconduct as Mr. Gardiner had signed a form indicating that there was to be no drugs or alcohol on the premises. The union stated that as drug dependency is disability, and the dismissal of Mr. Gardiner was a violation of section 13 of the Human Rights Code. Upon being caught Mr. Gardiner admitted to smoking marijuana, and when asked if he required help with his addiction he said that he did. Mr. Gardiner received no assistance, and was subsequently dismissed without cause as he knowingly disobeyed the employer's zero tolerance policy. Mr. Gardiner stated that though he was aware of the zero tolerance policy and an Employee and Family Assistance Program that could help with his drug dependency he did not feel he could live without marijuana. Given the facts of this case the arbitrator decided dismissal of the grievor was a violation of section 13 of the Human Rights Code, and upheld the grievance.

3. Page 7, Para 22

The grievor said in chief that he was aware of the "zero tolerance policy". He was then asked why, in the light of his knowledge of the policy, he kept taking marijuana with him to the mine site. The grievor's answer was that, "It just became part of my life; I didn't feel I could function normally without it". The grievor was asked if he "... ever [thought] he would get caught". The grievor's reply was, "No ... because I'd been doing it for six years, and never got caught".

Page 7, Para 23

The grievor acknowledged in chief that he was aware of the existence of the company-sponsored EFAP, and that he had "... a pretty good idea that it was confidential". The grievor was asked in chief why he hadn't taken advantage of the EFAP. The grievor's response was that, "In hindsight, I should have taken advantage of it; marijuana was something I truly believed I couldn't live without; I think I'm more fully aware today of the [EFAP], but I guess I didn't have all the information about the program back then".

Page 33, Para 90

Here, I have found that a duty to accommodate existed to the point of undue hardship in respect of the grievor's disability, and to the extent such disability contributed to the grievor's misconduct. Largely for the reasons advanced by the union, I am of the view that the employer's legitimate interests, like the grievor's, can be accommodated short of upholding the grievor's termination.

4. Mr. Chair, the reason this case is important is that it identifies the requirement for employers to accommodate a substance abuse disability under section 13 of the Human Rights Code to the point of Undue hardship, and the difficulty in overcoming a substance abuse disability despite the knowledge of one's addiction and the programs available to help them overcome their addiction. Like Emile's Case it stands for the principle that the actions of an individual with a substance abuse disability can be considered non-culpable, and that that an employer must accommodate the disability to the point of Undue Hardship which in both cases can be accommodated without termination.

5. Because of this Mr. Chair we submit that you should uphold SFUEU's grievance on behalf of Emile, and reinstate him to his position of Housing Supervisor with SFU.

# Remedy Sought

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Without prejudice or precedent, the Union seeks Emile's reinstatement into his position as Housing Supervisor with SFU, and that Emile is compensated retroactively for all lost wages since his termination. Additionally, Emile should be provided with an opportunity to complete his addiction treatment program.

# Best Alternative Mediated Outcome (BAMO)

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1. Emile be provided an 8 week unpaid leave of absence in order to complete the addiction treatment program.
2. Emile is placed on a 6 month suspension