NOVA SCOTIA COURT OF APPEAL

Citation: Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050,
2011 NSCA 9

Date: 20110125
Docket: CA 325296
Registry: Halifax

Between:

Cape Breton Victoria Regional School Board

Appellant

v.

Canadian Union of Public Employees, Local 5050
on behalf of the Grievor, H.D.

Respondent

Judge(s): Oland, Fichaud, Farrar, JJ.A.

Appeal Heard: November 23, 2010, in Halifax, Nova Scotia

Held: Appeal is dismissed and award is upheld, with costs of $1500 all inclusive, per reasons for judgment of Fichaud, J.A.; Oland and Farrar, JJ.A. concurring.

Counsel: A. Robert Sampson, Q.C. and Robert F. Risk, for the appellant
Susan D. Coen, for the respondent

Reasons for judgment:

[1] The grievor was a caretaker at several schools operated by the Cape Breton-Victoria Regional School Board (Board). He had sexual relations with a fifteen year old girl who was a student at one of the Board's schools. She did not attend a school where the grievor worked. Their relationship was consensual, and she was over the *Criminal Code*'s age of consent at the time. The Board terminated the grievor's employment. He grieved, then took his dismissal to arbitration under the Board's collective agreement with CUPE, Local 5050 (Union).

Arbitration Award

[2] The arbitrator, Professor Susan Ashley, conducted the arbitration in Sydney over four days in May and June, 2009. On July 9, 2009, she issued an award that allowed the grievance and concluded there was no ground for discharge.

[3] The arbitrator noted that, though the Board's termination letter referred to several grounds, the most significant was the grievor's sexual activity with a fifteen year old student of the Board. She recited the acknowledgement of the Board's counsel that "if not for the sexual conduct, the other matters would not have justified significant discipline in themselves". The arguments in this court centered on the grievor's sexual conduct and its impact on the Board's reputation.

[4] The grievor's relationship with the girl began at a horsebarn, and continued outside the grievor's work hours and off school premises. The grievor was in his mid forties, married with four children. The girl was a student of the Board, but not at one of the schools where the grievor worked as a caretaker. The arbitrator said that "counsel for the Employer and the Union agree that the proper test to determine whether off-duty conduct is worthy of discipline is the *Millhaven* test". This refers to the widely applied arbitral principles from *Re Millhaven Fibres Ltd. and Ontario O.C.A.W., Local 9-670*, [1967] O.L.A.A. No. 4, 18 L.A.C. 324 (Anderson), ¶ 20:

> 20 In other words, if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that:

> (1) ***the conduct of the grievor harms the Company's reputation*** or product
>
> (2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily
>
> (3) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him
>
> (4) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees
>
> (5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.

I have emphasized the test that was the focus of the argument on this appeal.

[5] The arbitrator referred to Brown and Beatty, *Canadian Labour Arbitration* (Canada Law Book, Aurora, 4th ed. - looseleaf), vol. 1, ¶ 7:3010, which summarized the cases that have applied *Millhaven*'s principles:

> Arbitrators have always drawn a line between employee's working and private lives. They often make the point that employers are not custodians of the characters or reputations of their employees. The basic rule is that an employer has no jurisdiction or authority over what employees do (including where they live), outside working hours, unless it can show that its legitimate business interests are affected in some way. As a result, in order for an employer to justify disciplining an employee for misconduct committed when he or she is not on duty, it must prove that the behaviour in question detrimentally affects its reputation, renders the employee unable properly to discharge his or her employment obligations, causes other employees to refuse to or be reluctant to work with that person, or inhibits the employer's ability to efficiently manage and direct the production process. Off-duty misconduct that occurs on company property is subject to discipline as well.
>
> . . .
>
> In all cases, however, arbitrators have insisted that employers show there is a real causal connection between the events that occurred when the employee was not on duty and the efficient operation of their businesses. They are required

> to undertake a meaningful investigation of how seriously the employee's personal activities will affect their interests, and not rely on unsubstantiated supposition and speculation. ***Ultimately, an arbitrator must balance the competing interests of the employer and the employee, and it has been held that any interference with the employee's private affairs must be proportional to the interest of the employer that is at stake.*** [emphasis added]

I have emphasized the passage to which I will return later (¶ 48).

[6] The arbitrator referred to s. 40(1) of the *Education Act*, S.N.S. 1995-96, c. 1:

> SUPPORT STAFF
>
> **Duties**
>
> 40 (1) ***It is the duty of a support staff member to***
>
> (a) support students in their participation in school activities;
>
> (b) ***maintain an attitude of concern for the dignity and welfare of each student***;
>
> (c) co-operate with the school board, superintendent, principal, teachers, students and other staff members to maintain an orderly, safe and supportive learning environment;
>
> (d) ***respect the rights of students***;
>
> (e) participate in staff-development opportunities identified by the person to whom the staff member reports, if requested to do so; and
>
> (f) subject to any applicable collective agreement in effect when this Act comes into force, perform such other duties as are assigned by the school board, the superintendent or the principal. [emphasis added]

I have emphasized the wording that figures in the analysis, to be discussed later, of the fiduciary duty owed to students.

[7] The arbitrator considered *Millhaven*'s first, and in this case, key test - whether the grievor's conduct "harms the [Board's] reputation". The arbitrator concluded (¶89):

> In summary, I find that there was little or no nexus between the sexual conduct and the Employer's interest.

Later (¶ 32 ff) I will discuss the arbitrator's reasoning.

[8] The arbitrator said *Millhaven*'s fourth test (serious breach of the *Criminal Code*), did not apply. The girl was over the *Code*'s age of consent (fourteen) when the relationship began. Later Parliament raised the *Code*'s age of consent to sixteen, but the girl had turned sixteen several months before the proclamation of the amendment.

[9] The arbitrator allowed the grievance against discharge. She said the grievor's sexual conduct with the girl did not justify any discipline. Because of the grievor's lack of candour during the investigation and improper use of some school property, the arbitrator substituted a three month suspension.

Judicial Review

[10] The Board applied to the Supreme Court of Nova Scotia for judicial review . Justice Bourgeois heard that application on October 27, 2009 and issued a decision (2010 NSSC 40) on February 3, 2010. She dismissed the Board's application.

[11] The judge reviewed the principles on standards of review from *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190 and this court in *Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74,¶ 39-42. She determined that the appropriate standard was reasonableness to all the Board's grounds.

[12] Applying reasonableness, the judge referred to the principles stated by this court in *Casino Nova Scotia v. Nova Scotia Labour Relations Board*, 2009 NSCA 4, ¶ 29-31 and *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Ltd.*, 2009 NSCA 60. The judge tracked the arbitrator's reasoning, found the reasoning path to be understandable, and determined that the award's conclusion occupied the set of reasonable outcomes.

Issues on Appeal

[13] The Board appeals. The Board says the judge (1) erred in choosing a reasonableness standard of review to the arbitrator's interpretation of the *Education Act*, s. 40, and (2) misapplied any standard of review by ruling that the arbitrator reasonably interpreted the legal tests that governed the grievor's sexual conduct with the girl.

[14] The Court of Appeal applies correctness to assess whether the reviewing judge properly chose and applied the standard of review: *Communications, Energy and Paperworkers' Union, Local 1520* , ¶ 18, and authorities there cited.

First Issue-
Standard of Review to Award

[15] The grievor was a support worker, not a teacher. Section 40(1) of the *Education Act* (above ¶ 6) refers to the duties of support staff.

[16] The arbitrator emphasized that the relationship occurred outside the school:

> 72. On the one hand, the nexus between the Grievor and the girl was *not* the school. She did not attend one of his schools. They did not meet on school property. Their relationship developed at a venue far removed from the school. The fact that the girl attends one of the many schools under the School Board's jurisdiction played no actual role at all in the development of the relationship. [arbitrator's emphasis]

[17] The Board submitted that s. 40(1) imposes on the grievor a duty to respect the dignity, rights and welfare of all the Board's students, not just those who attend the school where the support worker is employed. That is because the grievor works for the Board that owes such a duty to all its students. Accordingly, by emphasizing that the grievor did not work at the school attended by the girl, the arbitrator misinterpreted s. 40(1). The Board says this submission, involving statutory interpretation, should be analyzed for correctness, and that the judge erred by choosing the reasonableness standard to review the arbitrator's interpretation of s. 40(1).

[18] For the choice of the appropriate standard of review, the Board relies heavily on *University of British Columbia v. University of British Columbia Faculty Association*, 2007 BCCA 201, leave denied [2007] 3 S.C.R. xvi. An arbitrator heard a grievance by a faculty member who had been denied promotion. The

arbitrator interpreted British Columbia's *University Act*. The University sought judicial review of the award before British Columbia's Labour Relations Board, which dismissed the application. The University sought further judicial review in the Supreme Court of British Columbia, which dismissed that application. The University then appealed to the Court of Appeal. Justice Rowles for the majority held that the courts' standard of review to the Labour Relations Board's interpretation of the *University Act* was correctness.

[19] The majority of the British Columbia Court of Appeal noted that the courts' standard of review to the Labour Relations Board was prescribed by s. 58(2) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Section 58(2) said that patent unreasonableness governed review of "a matter over which [the tribunal] has exclusive jurisdiction under a privative clause" while for other matters, that do not involve procedural fairness, "the standard of review to be applied to the tribunal's decision is correctness". Justice Rowles (¶ 13, 60, 61, 67) relied on s. 58(2) and said that the interpretation of the *University Act* was not within the Board's exclusive jurisdiction. Hence the standard was correctness.

[20] Nova Scotia has no equivalent to s. 58 of British Columbia's *Administrative Tribunals Act*. So I do not find the *UBC* case to be helpful here.

[21] Judicial review in Nova Scotia is governed by *Dunsmuir*. Justices Bastarache and LeBel said:

> 54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or ***statutes closely connected to its function***, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review. [emphasis added]

[22] In *Toronto (City) Board of Education v O.S.S.T.F.*, cited in this passage, Justice Cory for the majority said:

> 39 In this case, the only unique aspect of the assessment of "just cause" and the determination of the appropriate penalty is that the arbitrators were required to interpret a provision of the *Education Act*. Section 264(1) of that *Act* sets out the standards of conduct for teachers. It is against the background of these provisions that the concept of "just cause" in the collective agreement must be considered. It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard. See *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 336-37. ***An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result.*** See *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at p. 187, per Iacobucci J. [emphasis added]

Justice Cory then said (¶ 40) that the issue - whether the exception applied to the *Education Act* - did not have to be determined given the parties' agreement to the issues in that case.

[23] In *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 (C,A,), Justice MacPherson for the Court (¶ 21-23) quoted Justice Cory's passage from *Toronto Board v. O.S.S.T.F.* and concluded:

> [23] Accordingly, the question in the present appeal is whether the arbitrator's awards come within the general rule or the exception. In my view, the decision of this court in *Ontario English Catholic Teachers' Assn. v. Lanark, Leeds and Grenville County Roman Catholic Separate School Board* (1996), 164 D.L.R. (4th) 429 ("Lanark") answers this question conclusively -- ***the exception applies*** and, accordingly, the standard of review is patently unreasonable. [emphasis added]

After discussing *Lanark*, Justice MacPherson said:

> [32] As to the nature of the problem facing the decision-maker, it is true that it involves the interpretation of a single section of a regulation made under the *Education Act*. However, the problem ***also involves the interpretation of the collective agreement, which is clearly a matter within the expertise of the arbitrator.*** Moreover, in my view, it is important ***not to lose sight of what is really at stake*** in the issue of interpretation relating to these two sources. The subject matter of the dispute is teachers' lunch breaks, specifically whether on a small number of days each month, certain teachers with student supervision duties will take their lunch break for 40 consecutive minutes between 11:30 a.m. and 12:30 p.m. or between 11:10 a.m. and 12:50 p.m. In my view, the subject matter of teachers' lunch breaks is ***essentially an employment or labour relations matter*** and is, therefore, well-suited to the regular process of grievance arbitration. [emphasis added]

[24] In my view, the Ontario Court of Appeal's reasoning in *Toronto Catholic District* applies here, as does Justice Cory's exception in *Toronto Board v. O.S.S.T.F.* The issue here whether the grievor's conduct is just cause for dismissal under the collective agreement, according to the *Millhaven* tests, particularly the first test - Does the grievor's conduct "harm the [Board']s reputation". The Board's written factum acknowledges:

> [53] The Grievor's sexual involvement with a student of the Cape Breton-Victoria Regional School Board occurred during off-duty hours. As such, the test to be applied by an arbitrator when determining whether the Board was justified in dismissing the Grievor from his employment is that established in ***Re Millhaven Fibres Ltd. And Ontario O.C.A.W. Local 9-670*, [1967] 18 L.A.C. 324**

[25] The arbitrator's mandate, into which s. 40(1) dovetails, was to apply principles of arbitral jurisprudence to determine whether there was just cause for dismissal within the meaning of the collective agreement. That is a labour arbitrator's core function, and within the court's zone of deference, attracting a reasonableness standard of review: *Communications, Energy and Paperworkers' Union, Local 1520*, ¶ 20 and cases there cited. Section 40(1) is "closely connected" to the arbitrator's function in this grievance, under the principle from *Dunsmuir*, ¶ 54.

[26] I agree with the judge that the appropriate standard of review to the award, including the arbitrator's use of s. 40(1), was reasonableness. I would dismiss the

Board's ground of appeal that challenges the judge's choice of the standard of review.

Second Issue- Reasonableness of The Arbitrator's Conclusion

[27] In *Dunsmuir*, Justices Bastarache and LeBel explained reasonableness:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

See also *Lake v. Canada*, 2008 SCC 23, at ¶ 41.

[28] In *Casino Nova Scotia*, this court, applying *Dunsmuir*'s formulation, said the following about reasonableness:

> [29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
>
> [30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, ¶ 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia* (*Director of Assessment) v. Wolfson*, 2008 NSCA 120, ¶ 36.

> [31] Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, ¶ 47-49; *Lake*, ¶ 41; *PANS Pension Plan*, ¶ 63; *Nova Scotia v. Wolfson*, ¶ 34.

See also *Communications, Energy and Paperworkers' Union, Local 1520*, ¶ 22-24.

[29] Despite the court's ambit of deference, the reasonableness standard is not a free pass for an arbitration award. *Dunsmuir* offers an example of unreasonableness. Justices Bastarache and Lebel said:

> [74] The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide or even have such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

To similar effect: *Levis (City) v. Fraternite des Policiers de Levis Inc.*, 2007 SCC 14; [2007] 1 S.C.R. 591, ¶ 75. In *Tobin v. Canada (Attorney General)*, 2009 FCA 254, ¶ 40, 53, 60-62, 68, the Federal Court of Appeal overturned as unreasonable an adjudicator's application of the *Millhaven* test to off duty conduct.

[30] In this case, Justice Bourgeois found the arbitrator's reasoning to be transparent and intelligible, and said the arbitrator's conclusion occupied the range of reasonable outcomes. I will turn to those points.

[31] To apply the reasonableness standard, the reviewing court should track the arbitrator's reasoning, and look for logical connections. If the reasoning follows a rational route, then it does not matter that a different rational path may lead to another destination. The reasonableness standard assumes that the Legislature intended it to be the tribunal's function, not the court's, to choose among reasonable outcomes. *Communications, Energy and Paperworkers' Union, Local 1520* , ¶ 24 and authorities there cited.

[32] The arbitrator defined the applicable principles as follows:

(a) The arbitrator adopted the *Millhaven* test:

> 57. The *Millhaven* test requires that
>
> > ...if a discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from work, the company must show that:
> >
> > (1) the conduct of the Grievor harms the company's reputation or product;...

(b) The arbitrator continued:

> 58. It is generally held that if the employee's conduct breaches one or more of the above factors, the Employer will have the required 'nexus' between the conduct being disciplined and the job being done by the Grievor.

(c) According to the above formulation, literally any harm – even minimal – to the employer's reputation, caused by the grievor, could justify the capital punishment of discharge. The arbitrator (above ¶ 5) quoted a passage from *Brown & Beatty* mollifying this extreme consequence with a proportionality test:

> Ultimately, an arbitrator must balance the competing interests of the employer and the employee, and it has been held that any interference with the employee's private affairs must be proportional to the interests of the employer at stake.

(d) In assessing the Board's interests under that proportionality test, the arbitrator referred to s. 40(1) of the *Education Act* (above ¶ 6), that prescribes the duties of support staff. She (¶ 66) referred to arbitral caselaw holding that a support worker "was in a position of trust, and that involving himself sexually with students violated that trust". She quoted from an earlier arbitration award dealing with caretakers:

> Caretakers cannot be closely supervised and one must rely on the discretion and judgment of employees in this category. Anything that interferes with that trust relationship is significant.

Referring to s. 40 of the *Education Act* and this case, the arbitrator said:

> 73. On the other hand, the *Education Act* sets out statutory responsibilities for support staff which implicitly accept that they are in positions of trust. While not intending to limit the scope of Section 40, it does appear that the duties described therein relate most primarily to the manner in which the employee does his job. For example, I don't think it can be argued that the Grievor's conduct in relation to this girl has had a negative impact on her “orderly, safe and supportive learning environment”.

(e) The arbitrator (¶ 69) noted that the arbitration cases cited by the Board “involved staff who had direct contact with the student in the course of their work, even though the contact itself occurred in off-duty hours”. She distinguished the circumstances of this case:

> 72. On the one hand, the nexus between the Grievor and the girl was *not* the school. She did not attend one of his schools. They did not meet on school property. Their relationship developed at a venue far removed from the school. The fact that the girl attends one of the many schools under the School Board’s jurisdiction played no actual role at all in the development of the relationship. This can be distinguished from a situation where a school support staff meets a student through his work and takes advantage of his work to foster contact, even if the contact occurs off-duty.

[33] Applying those principles, the arbitrator found (¶ 61) that “[r]egardless of whether the act was consensual or who initiated it, the age and experience

differences [between the grievor and the girl] make such conduct repugnant." Respecting the harm to the Board's reputation, the arbitrator said:

> 75. I accept that the Employer takes its responsibilities for the protection and safety of students very seriously, and that it must openly be seen to do so. As a public educational institution, its responsibilities are much broader than those of a normal private sector employer, and flow not only from common sense but from statute. A public perception that the Employer condoned an employee having a sexual relationship with a student would be negative in terms of the Board's interests.

[34] Counsel for the Board submits that these findings suffice to justify the grievor's dismissal under *Millhaven*'s first test - "harm to the Board's reputation". The arbitrator acknowledged [¶ 58 - above ¶ 32(b)] that harm to the Board's reputation will establish the "nexus". The arbitrator found that the grievor's conduct was "repugnant", that the Board has broad responsibilities for all its students (not just those in schools where the grievor works), and the public perception of the Board employee's repugnant conduct "would be negative in terms of the Board's interests". The Board submits this is a finding of reputational harm that satisfies *Millhaven*'s first test, establishing the "nexus", and the arbitrator should have just dismissed the grievance at this point.

[35] The arbitrator continued, however, to consider what she described as factors that "mitigate against such negative public perceptions":

> 75. ... However, the fact that the relationship began and grew not at the school but at the barn, that the conduct was consensual, that the Grievor and the girl are still together, and that there has been no suggestion that the Grievor has ever engaged in inappropriate conduct in his twenty years of service with the Board, would mitigate against such negative public perceptions.
>
> 76. I do not find that it is necessary for the Employer to prove actual harm in order to justify a nexus between the off-duty conduct and the discipline [*Re Ottawa-Carlton District School Board* (*supra*)]. The test is whether a reasonable and fair-minded person, knowing the relevant facts, would conclude that the continuation of the Grievor's employment was untenable. I am unable to conclude that here.

[36] The Board submitted that the arbitrator's mitigating factors, under logical scrutiny, do not eliminate the Board's reputational harm:

(a) "[T]he relationship began and grew not at the school but at the barn".

The Board contends that a parent dropping off his or her fifteen year old daughter at a school where the grievor worked would have the same concern, wherever the venue of the grievor's prior sexual tryst. So the arbitrator's key distinction – the grievor did not work at the school which his girlfriend attended – does not extinguish the impact on the Board's reputation among concerned parents.

The Board folds s. 40(1) of the *Education Act* into this submission. Section 40(1) refers to "students" generally, not just students at a particular school. The issue under *Millhaven* is the reputation of the Board – a body with fiduciary responsibility for all its students, not just those at a particular school.

(b) "[T]he conduct was consensual."

The arbitrator earlier had found that "[r]egardless of whether the act was consensual or who initiated it, the age and experience differences make any such conduct repugnant". It is this repugnance – regardless of consent – that impugns the Board's reputation.

(c) "[T]he Grievor and the girl are still together."

This appears to be inconsistent with the immediately preceding paragraph, where the arbitrator had said:

> 74 It is difficult to determine whether the Grievor's conduct harms the Employer's reputation. There has been no hue and cry over the situation, and the Board was not aware that parents had done such things as take their children from school because of the incident. This may be because the Employer has diligently tried to maintain confidentiality in this matter. However, that becomes harder to do with the passage of time. The fact that the Grievor and the young girl are now a couple living together in a fairly small community must to some extent have reached the public's radar."

If the continued relationship over time alerts the public's radar, to the Board's reputational detriment, then the conclusion that the same factor "would mitigate against such negative public perceptions" is counterintuitive.

(d) "[N]o suggestion that the Grievor has ever engaged in inappropriate conduct in his twenty years of service with the Board."

It is difficult to appreciate how the grievor's confidential service record would elevate the public's perception of the Board. The point would be more relevant to the arbitrator's separate function – as I will discuss shortly (¶ 40 ff) – of considering whether to substitute a lower penalty, than to the public's view of the Board's reputation.

(e) "Would a reasonable person "conclude that the continuation of the Grievor's employment was untenable"?"

Earlier the arbitrator had stated the test as whether "the conduct of the grievor harms the [Board]'s reputation or product" under *Millhaven*'s first test. Then she said "if the employee's conduct breaches one or more of the above factors, the Employer will have the required 'nexus' between the conduct being disciplined and the job being done by the Grievor." The tenability of the grievor's continued employment is a different standard.

(f) No pre-existing Board policy on off-duty conduct

Elsewhere in the award (¶ 33-34), the arbitrator noted that the Board had no established policy concerning off duty conduct of employees. This is another factor commonly considered in the substitution of a lower penalty, and is not strictly related to the existence of the Board's reputational harm: e.g. *Keating v. Ontario (Minister of Community Safety and Correctional Services)* (2009), 183 L.A.C. (4th) 216 (O'Neil) at ¶ 66 and authorities there cited.

[37] I agree with the Board that the arbitrator's mitigating factors extend beyond the perimeter of discrete analysis whether or not the grievor's "repugnant" behaviour with one of the Board's students "harmed the Board's reputation". Nor can it be reasonably concluded that those factors extinguish any reputational harm.

[38] May the arbitrator mitigate a disciplinary penalty because of factors such as the employee's discipline record and the tenability of his continued employment?

[39] The Union's factum says:

> 76 Mitigating factors came into play. . . The Union thought the penalty was too harsh; the employer thought it was not harsh enough. This is common at grievance arbitration: both parties must live with the result because it is within the range of reasonable outcomes.

[40] I agree that an arbitrator's discretion to substitute a lower penalty is entitled to significant judicial deference: *A.U.P.E. v. Lethbridge Community College*, 2004 SCC 28; [2004] 1 S.C.R. 727, at ¶ 22 per Justice Iacobucci for the Court. But I disagree that this award invoked the arbitrator's commonly used discretion to substitute a lower penalty.

[41] In *Heustis v. N.B. Electric Commissioners*, [1979] 2 S.C.R. 768, at pp. 772, Justice Dickson (as he then was) for the Court discussed the topic:

> The question for the adjudicator was whether the employer had just and sufficient cause to discharge the appellant. In deciding this question the adjudicator had three tasks before him. First, did the employee engage in the conduct alleged? ***Second, was the conduct deserving of disciplinary action on the part of the employer? Third, if so, was the offence serious enough to warrant discharge?*** [emphasis added]

Similarly, in *Toronto Board v. O.S.S.T.F.*, Justice Cory said:

> **49** The first step in any inquiry as to whether an employee has been dismissed for "just cause" is to ask whether the employee is actually responsible for the misconduct alleged by the employer. ***The second step is to assess whether the misconduct gives rise to just cause for discipline. The final step is to determine*** whether the ***disciplinary measures selected by the employer are appropriate*** in light of the misconduct and the other relevant circumstances. [emphasis added]

[42] *Brown & Beatty*, vol. 1, ¶ 7:4000 summarizes the law:

> In any grievance in which an employee challenges the propriety of a disciplinary sanction, arbitrators and the courts are agreed that there are two ***distinct***, though necessarily related, issues that must be addressed. First, it must be determined whether the employer had cause to discipline the employee and then a ***separate*** assessment must be made about whether the penalty it selected was appropriate. On the issue of cause, the arbitrator must be satisfied that the grievor did what the employer claims justified it in invoking its disciplinary powers and that the conduct was of a character that warranted punishment. ***In cases where both such conditions have been met***, arbitrators have consistently perceived their mandate, which is now codified in all federal and provincial labour relations legislation [citing the *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 43(1)], is then to assess the fairness of the particular penalty imposed. If an arbitrator finds that the penalty chosen by the employer was not just and reasonable in all the circumstances, he or she will substitute one that is. [emphasis added]

[43] Section 43(1)(d) of the *Trade Union Act*, R.S.N.S. 1989, c. 475, as amended says:

> 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
> . . .
>
> (d) ***where***
>
> (i) ***he or it determines that an employee has been discharged or disciplined by an employer for cause***, and
>
> (ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration,
>
> has power to substitute for the discharge or discipline any other penalty that to the arbitrator or arbitration board seems just and reasonable in the circumstances; [emphasis added]

[44] The two questions – cause for some discipline and substitution of penalty – are "distinct" and warrant "separate assessment". Section 43(1)(d) of the *Trade Union Act* and the authorities permit substitution of a penalty "where [the arbitrator] determines that an employee has been discharged or disciplined by an employer for cause".

[45] In this award the arbitrator did not distinguish and separate the issues of cause and penalty for the sexual conduct. Rather the award seamlessly flows from analysis of damage to the Board's reputation, relevant to just cause, into the mitigating factors. The condition of s. 43(1)(d) and the authorities – a finding of cause for some discipline – does not appear. To the contrary, the award uses the "mitigating" factors to support the arbitrator's conclusion that there is "no nexus" and therefore no cause for any discipline related to the grievor's sexual conduct. The three month suspension, imposed by the award, resulted from other misconduct – the grievor's lack of candour in the investigation and misuse of school property. The suspension was not a substituted sanction for the sexual conduct. The arbitrator's discretion under s. 43(1)(d) and the caselaw, with the judicial deference it attracts, does not arise in this case.

[46] So the issue distils into this question: In the arbitrator's assessment of whether there was just cause (i.e. the first of *Brown & Beatty*'s two issues and the second test from *Huestis* and *Toronto Board v. O.S.S.T.F.*), was there a reasonable basis to consider the mitigating factors cited in this award – despite that these factors do not eliminate the Board's reputational harm?

[47] In my view the answer is Yes, and I would uphold the award. "Harm to the employer's reputation" under *Millhaven*'s first test is a panoramic standard. On the face of the test, any minor harm to the employer's reputation could justify the ultimate penalty of the employee's discharge. That sweeping application would swallow *Millhaven*'s fourth test (reputational harm from serious breach of the *Criminal Code*), rendering the fourth test meaningless. The arbitral jurisprudence acknowledges this overbreadth by introducing mitigating circumstances into the analysis of just cause for such reputational harm. The arbitrator (¶ 76) cited the award in *Ottawa-Carlton District School Board and OSSTF, District 25 (Cobb)*, (2006), 154 L.A.C. (4th) 387 (Goodfellow) as authority for the test that she applied – "whether a reasonable and fair minded person, knowing the relevant facts, would conclude that the continuation of the Grievor's employment was untenable." The *Ottawa-Carleton* award explains the rationale:

> 17 This does not mean, however, that the School Board, unlike other employers, is entitled to be the "custodian of the grievor's personal character or conduct": see eg. *Port Moody (City) v. C.U.P.E., Local* 825 (1997), 63 L.A.C. (4th) 203 (B.C. Arb. Bd.) (Laing). Employees of school boards, like other employees, do not surrender their personal autonomy when they commence the

> employment relationship. In order for an employee's off-duty conduct to provide grounds for discipline or discharge, it must have a real and material connection to the workplace, in the manner described above. And, where the interest asserted by the employer, as it is here, is in its public reputation and in its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: what would a reasonable and fair-minded member of the public (in this case, the school community) think if apprised of all of the relevant facts. Would the continued employment of the grievor, in all of the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable?

[48] The arbitral caselaw recognizes that an employee has a privacy interest in his off duty conduct to be weighed against the employer's reputational interest. This approach necessarily involves factors respecting the employee's interest, that blend with the pure appraisal of harm to the employer's reputation. *Brown & Beatty*, ¶ 7:3010, in the passage quoted by the arbitrator (above ¶ 5), puts it this way:

> Ultimately, an arbitrator must balance the competing interests of the employer and the employee, and it has been held that any interference with the employee's private affairs must be proportional to the interest of the employer that is at stake.

[49] The arbitrator applied arbitral principles that, in the assessment of just cause, introduce mitigating factors for a proportionality analysis of the respective interests of the grievor and the Board. This balancing exercise is heavily factual. In addition to the points mentioned earlier, the award found the grievor's behaviour "had no real connection to his ability to perform his duties satisfactorily", that "the risk of repetition is remote", that "after having considered and giving careful thought to all of the evidence", "[t]here is no reason to have reservations about the Grievor working close to children in the future" and "[t]here is no evidence that the Grievor's conduct would lead to a refusal or inability of other employees to work with him". There is no basis for this court to question the rationality of either the established arbitral principles or the arbitrator's appraisal of the evidence (for which there is no transcript in the judicial review record) or her fact finding in the application of those principles. From the perspective of those arbitral principles, the arbitrator's analysis was understandable and transparent, and her conclusion occupied the range of reasonable outcomes. I would dismiss the Board's ground of appeal against the award's reasonableness.

Conclusion

[50] I would dismiss the appeal and uphold the award, with costs of $1500 all inclusive to the respondent.

Fichaud, J.A.

Concurred in:

Oland, J.A.

Farrar, J.A.