**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Islam v. Dalhousie University*, 2015 NSSC 285

**Date:** 20151007
**Docket:** *Halifax*, No. 436585
**Registry:** Halifax

**Between:**

Dr. Rafiq Islam

*Applicant*

v.

Dalhousie University

*Respondent*

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** July 27, 2015, in Halifax, Nova Scotia

**Counsel:** Yavar Hameed, for the Applicant
Rebecca Saturley and Michelle Black, for the Respondent

**By the Court:**

[1] Dr. Rafiq Islam was a professor in the Faculty of Engineering at Dalhousie University. On June 9, 2008 the University President, Dr. Tom Traves, suspended him for reasons of health and placed him on sick leave.

[2] The Dalhousie Faculty Association ("DFA") filed a grievance on behalf of Dr. Islam challenging the suspension. After the commencement of the arbitration hearing the DFA withdrew the grievance. Dr. Islam attempted to proceed with the arbitration on his own, however the arbitrator dismissed the grievance as a result of the DFA withdrawal.

[3] In February 2011 Dr. Islam was still on medical suspension and provided a letter to Dr. Traves from his physician indicating that he was fit to work. Dalhousie University responded that the medical evidence was insufficient and terminated his employment as of June 30, 2011.

[4] Dr. Islam filed two further grievances, without the support of the DFA, challenging Dalhousie's actions. Dalhousie disputed the right of Dr. Islam to do so for a number of reasons, including the earlier arbitration decision and the lack of participation by the DFA.

[5] By agreement of Dr. Islam and Dalhousie, the arbitrator appointed to resolve the grievances held a preliminary hearing to consider Dalhousie's objections concerning the arbitrability of the complaints. Following that hearing the arbitrator issued a decision concluding that he did not have jurisdiction to hear the grievances and, as a result, they were dismissed.

[6] Dr. Islam seeks judicial review of the arbitrator's decision.

**Collective Bargaining Agreement**

[7] As with any labour arbitration the collective bargaining agreement ("CBA") governs the relationship between the parties. It sets out their respective rights and responsibilities and the procedure to be followed in resolving disputes. The agreement is between the employer and the organization which is certified as the bargaining agent for the employees. Most agreements provide that the bargaining

agent has control over the grievance process and there is no ability for individual employees to proceed to an arbitration hearing without their support.

[8] At Dalhousie the CBA is unusual in that it creates certain categories of complaint where individual faculty members are permitted to pursue grievance arbitration without DFA support. As will become apparent, this aspect of the Dalhousie CBA features prominently in the arbitrator's decision which is under review.

[9] In order to provide a context for this decision I will set out a number of the relevant CBA provisions. The issues which may be submitted to arbitration are found in Article 29.22 which states:

> 29.22 Cases specified in the following may be submitted to arbitration:
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> (a) any grievance which has not been resolved by means of the procedures set forth in Clauses 29.08, 29.09 or 29.10, may be submitted to arbitration within and not later than fifteen days of:
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> (i) notice of the decision of a grievance committee;
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> (ii) the expiry of the deadline for resolution of the grievance agreed to in Clauses 29.10(b) or 29.10(c)(ii), or (iii) or (iv);
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> (iii) the meeting of Presidents as specified in Clause 29.10 (a) if no steps beyond those listed in Clause 29.10 were agreed;
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> (b) cases involving alleged violation by the Board of Article 3 (Academic Freedom) or Article 4 (No Discrimination) if a unanimous decision of a grievance committee as provided in Clause 29.21 is not satisfactory to the grievor. In these cases, a Member or group of Members may submit the matter to arbitration and shall have a right to whatever services C.A.U.T. is willing to provide;
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> (c) cases where a Member is subject to dismissal in accordance with Clause 28.25, regardless of the support of the Association;
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> (d) cases where decisions of the committee have not been implemented in accordance with Clause 29.21.

[10] According to Article 29.23 only those matters described in Article 29.22(b) and (c) are ones which can be initiated and pursued by individual faculty members.

[11] Disputes which are capable of individual grievance include those involving academic freedom and discrimination which are defined in Articles 3 and 4. The nature of protected academic freedom is described in Article 3.02 as follows:

> 3.02 The Parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Members of the bargaining unit are entitled to freedom, as appropriate to the Member's university appointment, in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticize, including criticism of the Board and the Association, and freedom from institutional censorship.

[12] The prohibition against discrimination is described in Article 4.01(a) in the following terms:

> 4.01 (a) The Parties agree that there shall be no discrimination or favouritism (except as may be provided for elsewhere in this Collective Agreement) exercised or practised with regard to any Member in regard to salary, rank, appointment, reappointment, promotion, tenure, continuing appointment or appointment without term, sabbatical or other leave, benefits, dismissal or any other terms and conditions of employment by reason of race, creed, colour, ancestry, national origin, place of birth, citizenship (except insofar as citizenship may be a criterion for initial appointment), political or religious affiliation or belief, sex, sexual orientation, marital status, family relationship, personal lifestyle, membership or non-membership in the Association, activity or non-activity on behalf of the Board or the Association, age (except for retirement), language (if the language is adequate to carry out required duties), criminal record prior to employment at Dalhousie University (providing such a record has not been misrepresented by the Member), or handicap or disability (providing the handicap or disability does not preclude the Member's carrying out required duties). **The correction of inequities, the implementation of affirmative action programmes, or spousal appointment provisions, as may be agreed between the Parties, shall not constitute discrimination.** (emphasis in original)

[13] Article 28 deals with disciplinary actions, suspension and dismissal. The authority to suspend is found in the following provisions of Article 28:

28.18 The President may suspend a Member by written notice for stated cause involving extraordinary circumstances. Such circumstances include an immediate physical threat by that Member to any individual in Dalhousie University or to the property of Dalhousie University, or an immediate and serious threat to the functioning of the University. The suspension may be from some or all duties in Dalhousie University and may withdraw some privileges except salary and benefits.

28.19 When the President has acted to suspend a Member, the President shall invite the Member concerned, any person the Member may wish to accompany him or her, the Dean or Vice-President concerned, and the President of the Association or his or her designate to meet and discuss the matter. If the matter is resolved to the satisfaction of the President and the Member, then with the concurrence of the President of the Association the matter shall be considered settled as agreed by the President and the Member.

28.20 If the matter is not resolved in accordance with Clause 28.19, the President shall advise in writing the Member and the President of the Association whether disciplinary proceedings are to be initiated. If they are not to be initiated by the President and the Member wishes to question the President's decision on suspension, the Member may initiate grievance proceedings. In any grievance proceedings the onus shall be on the President to establish cause for suspension.

28.21 In addition to the provisions of Clauses 28.18 to 28.20, the President may suspect a Member for reasons of health if there is good reason to believe that the Member's health is seriously interfering with his or her ability to carry out duties and responsibilities and if the Member refuses to accept reasonable arrangements for leave or variation in duties and responsibilities that may be proposed by the President. Suspension of this sort shall not lead to disciplinary proceedings. The Member may initiate grievance proceedings to question the President's decision of suspension. Suspension invoked in these circumstances will terminate when the Member presents medical evidence, including a certificate from an examining doctor named by the Member the Member and acceptable to the Association-Board Committee, indicating that the Member is fit to resume duties and responsibilities. The Chief Librarian, Dean or Vice-President concerned may vary such duties in the light of the medical report and in consultation with the Department or other similar unit.

[14] The dismissal provisions of Article 28 are as follows:

28.22 A Member holding an appointment with tenure or without term, or for a term not yet expired, may be dismissed for cause, including causes set out in Clause 28.01.

28.23 Dismissal for cause shall not be initiated unless such action is consistent with the recommendations of a University Hearing Committee, which has considered the matter and reported, in accordance with Clauses 28.14 and 28.15.

28.24 After receipt of the report of the University Hearing Committee in accordance with Clause 28.14, the President and the Member's Dean, Chairperson, Head, Director or Chief Librarian shall meet with the Member affected in the presence of a colleague in the University whom the Member may have selected as adviser and the President of the Association or his or her designate, shall explain the cause for the dismissal, shall review the matter and the President shall indicate whether a recommendation for termination of the Member's appointment will be made to the Board of Governors.

28.25 If the Member does not accept termination of his or her employment as proposed and discussed in the meeting with the President, and if the President determines that termination remains justified, the President shall within twenty-one days of the meeting serve written notice of intention to initiate procedures to dismiss the Member concerned. The notice shall include the reasons for the decision in sufficient detail to enable the Member to prepare his or her response.

28.26 Within thirty days of such notice having been given, the Member shall inform the President in writing of his or her decision either to accept termination or to oppose the proposed termination. Failure to inform the President within thirty days shall be deemed to represent acceptance of termination.

## The Initial Grievance and the Ashley Award

[15] By letter dated June 9, 2008 Dr. Tom Traves, the President of Dalhousie University, advised Dr. Islam that he was suspending him for reasons of health and placing him on sick leave pursuant to Articles 28.21 and 30.06 of the Collective Agreement. The letter said that the University had reason to believe that his health was seriously interfering with his ability to properly carry out his duties and responsibilities. The University was said to be concerned that he may pose a risk to his own health and safety as well as that of other members of the University community. The letter confirmed that the suspension was not disciplinary in nature. The letter also directed Dr. Islam to participate in a comprehensive

psychological assessment by a named psychologist before Dalhousie would consider permitting him to return to work.

[16] On August 11, 2008 the DFA filed a grievance on behalf of Dr. Islam alleging that the suspension breached Article 28.21 due to the absence of good reason to believe that his health was interfering with his ability to carry out his duties and responsibilities. It also alleged that the requirement to participate in a psychological assessment was unreasonable. The grievance went on to claim that Dalhousie's actions discriminated against Dr. Islam because of disability or perceived disability, contrary to Article 4.01 of the CBA.

[17] Arbitrator Susan M. Ashley was appointed to hear the grievance. The arbitration hearing began in April 2009 and then adjourned until December 2009. Prior to the resumption of the hearing the DFA withdrew the grievance. Dalhousie did not object to the withdrawal. Dr. Islam wished to pursue the grievance on his own and Dalhousie made a preliminary objection that the arbitrator had no jurisdiction to continue with the arbitration in light of the withdrawal of the grievance by the DFA. Arbitrator Ashley issued a written award on November 30, 2010. She accepted Dalhousie's position that she had no further jurisdiction in the matter.

[18] Arbitrator Ashley concluded that the grievance was not of a nature where Dr. Islam was entitled to proceed without the support of the DFA. She said that the grievance did not fall within the scope of Article 29.22(b) or (c) of the CBA. Even though the grievance alleged a violation of Article 4 (no discrimination), there was no indication of a decision by the grievance committee which she said is required under Article 29.22(b). Since Dr. Islam had not been dismissed Article 29.22(c) was also inapplicable.

[19] The basis for Arbitrator Ashley's decision is found in the following paragraphs of her award:

> 31. I conclude that there is nothing in the collective agreement which gives Dr. Islam the right to proceed with his grievance in the absence of the support of the Association. I further find that there is no reason not to accept the withdrawal of the grievance. Therefore, I have no further jurisdiction in the matter. Further, since the withdrawal was tendered after the hearing commenced, I exercise my authority to dismiss the grievance.
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> 32. An arbitrator cannot deal with a grievance without having the jurisdiction to do so. I have decided that the collective agreement prevents me from

> continuing. This decision is a legal one, and is not based on the strength or weakness of Dr. Islam's case on its merits.

**Subsequent Events and the 2011 Grievances**

[20] On February 4, 2011 counsel for Dr. Islam wrote to Dr. Traves enclosing a medical report from his treating physician indicating that he was fit to return to work. The letter requested a decision from Dr. Traves as to whether Dr. Islam would be permitted to do so.

[21] By letter dated February 23, 2011 counsel for Dalhousie replied to the February 4 correspondence and indicated that the medical report did not adequately address all of their concerns. In addition, the letter noted that Dr. Islam did not satisfy the condition for a comprehensive assessment from a specific psychologist which had been imposed at the time of his suspension. The letter concluded as follows:

> Dr. Islam's failure over these 32 months to cooperate with our reasonable requests constitutes non-culpable frustration of his employment relationship with Dalhousie. In the event that Dr. Islam's troubling behavior in the months prior to his suspension were related to a disability, Dalhousie has satisfied its duty to accommodate his disability to the point of undue hardship.

[22] On April 1, 2011 Dr. Islam filed a grievance alleging breaches of Articles 3, 4 and 28 of the CBA as a result of the decision set out in the February 23, 2011 correspondence. The allegations in the grievance can be summarized as follows:

1. The refusal to accept Dr. Islam's medical certificate and continue his suspension was done in bad faith and as a reaction to comments relating to the substance of his work and the nature of his interactions with Dalhousie staff which is critical in tone. The alleged objective was to sanction or curtail Dr. Islam's academic expression.

2. The University's decision to maintain his suspension and, as a result, precipitate his dismissal amounts to disguised discipline contrary to Articles 28 and 29 of the CBA.

3. By refusing to allow Dr. Islam to return to work in the face of medical evidence that he was fit to do so without providing any explanation amounts to discrimination and, in particular, a breach of Dalhousie's duty to

> accommodate a disability or perceived disability contrary to Article 4.01 of the CBA.

[23] Dr. Islam's salary and benefits were terminated by Dalhousie as of June 30, 2011. On October 5, 2011 he filed a further grievance alleging that this termination of salary and benefits breached clauses 3, 4, 28 and 29 of the CBA. The grievance attached and incorporated by reference the April 1, 2011 grievance.

**Swan Arbitration Award**

[24] Kenneth P. Swan was appointed as an arbitrator to resolve the April 1 and October 5, 2011 grievances of Dr. Islam. Dalhousie made a preliminary motion to dismiss the two grievances without an arbitration hearing. The parties prepared an agreed statement of facts providing the evidentiary basis for the preliminary motion. It set out the history of dealings between the parties beginning in May 2008. It attached various documents including correspondence, grievances and the Ashley award. According to the agreed statement of facts the preliminary motion was to deal with the following issues:

> Dr. Islam and Dalhousie have agreed that Arbitrator Swan has jurisdiction to hear Dalhousie's preliminary objections to arbitrability, namely:
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> (a) Dr. Islam did not follow the process set out in the Collective Agreement regarding the filing of the Grievance #1 or Grievance #2 and, as such, both grievances are deemed to have been conclusively resolved.
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> (b) The deadlines relating to the filing of the grievances have not been met and there is no compelling reason to extend the deadline in this case.
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> (c) The foundation of both grievances was resolved by the Ashley decision and/or the human rights complaint and cannot be re-litigated.
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> (d) Dr. Islam's grievances do not meet the requirements for making grievances without the support of the DFA.

[25] In addition to the agreed statement of facts, Dr. Islam wanted to testify about the reasons for his delay in referring the grievances to arbitration. Over the objections of Dalhousie University, Arbitrator Swan agreed to allow Dr. Islam to provide this limited *viva voce* testimony.

[26] The arbitrator rejected Dalhousie's argument that the April 2011 grievance was procedurally flawed. He expresses concern about whether the October 2011

grievance is proper since it appeared the University was simply acting on the notice of termination previously delivered.

[27] Arbitrator Swan discusses, but does not decide, the issue of timeliness of the grievances and referral to arbitration. He notes that he has a discretion to relieve against those time limits and observes that it might be reasonable to do so in the circumstances of this case. He did not see the need to decide this since he was prepared to dispose of the matter on the issue of the arbitrability of the grievances.

[28] The arbitrator's analysis of arbitrability starts with the provisions of Article 29.22 which permit individual faculty members to refer certain kinds of grievances to arbitration without support of the DFA. He decided that the absence of a decision by the grievance committee was not an impediment to an individual grievance alleging violation of Articles 3 or 4 for the following reasons:

> I note that an issue arose as to whether the academic freedom issue (as well as the discrimination issue, which I have decided on other grounds) required that the issue first be dealt with by a grievance committee. This led to judicial proceedings between the parties, ultimately dismissed, that contributed to the delay in referral to arbitration, although it was not the only factor. As I read paragraph (c) clause 29.10, resort to a grievance committee must be with the consent of both parties to the grievance. Here the university refused to participate in such a procedure, and the only fair reading of clause 29.22 is that paragraphs (a) and (b) together permit individual Grievors, as well as the Association, to treat such a refusal as permitting a referral to arbitration where the subject matter is within the scope of individual carriage. This interpretation is reinforced when the provision is read with clause 29.21, which provides for the finality of decisions of a grievance committee, except for cases involving Articles 3 and 4.

[29] After noting that the grievances allege grounds which permit individual grievances under the CBA the arbitrator said this did not resolve the issue. He stated "It is the proper characterization of the grievances, based on the evidence submitted by way of the agreed statement of facts and the documentary exhibits, that must be relied on".

[30] Adjudicator Swan observed that the 2008 grievance, which led to the Ashley award, alleged that Dalhousie discriminated based upon perceived disability by imposing the original suspension. After quoting extensively from the award he made the following comments:

> In short, arbitrator Ashley decided that the original grievance, while it might have been brought by the Grievor individually in the form of a discrimination grievance, was in fact brought by the Association, and was then withdrawn. The effect of the withdrawal was to prevent the Grievor from proceeding on his own, and the issues in dispute were resolved, in a final and binding way, against him. The formal order of the arbitrator was that the grievance was dismissed.
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> This was not, as the grievor argued, a mere jurisdictional finding. Arbitrator Ashley found that the effect of the withdrawal by the Association was to determine all the issues in dispute against the grievor. A review of the grievance and the award clearly indicates that the allegation of discrimination in placing the Grievor on a medical suspension was dismissed along with any other allegations.
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> The award of an arbitrator is final and binding, not only on the parties and all individuals affected, but on subsequent arbitrators faced with a grievance raising the same issue; see paragraphs 28 and 29 of the Ashley award. A comparison of the grievance before arbitrator Ashley and either of the two grievances before me clearly shows that the only allegations of discrimination are the same in all three, that the University discriminated against the Grievor in concluding that he suffered from a disability that required his suspension, and that the termination flowed from his failure to address that conclusion in the way prescribed by the collective agreement in clause 28.21. There is nothing to suggest any "new" discrimination that would not be finally determined by the Ashley award. I conclude that the issue of discrimination has been finally resolved against the Grievor, and while it may still be the subject of proceedings in another forum, it may not be pursued further at arbitration. I note that I am not deferring the the (sic) human rights process, as the University proposed I should. I am finding that the discrimination issue has been resolved for the purpose of the arbitration of these grievances.

[31] After disposing of the discrimination complaint on the basis of the Ashley award, Arbitrator Swan went on to discuss the allegations of unjust dismissal and breach of academic freedom. His analysis is as follows:

> The two other possible avenues to individual carriage of the grievances, unjust discharge and a breach of academic freedom, while separate claims, have some aspects in common. The Grievor alleges, in both grievances, that he has been discharged without just cause, and that the action which the University asserts was a suspension on medical grounds was in fact a disciplinary discharge in disguise. He further asserts that the University took this disciplinary action because, at least in part, he had engaged in criticism of the University that was expression protected by academic freedom. If either of these assertions has any

validity, in the sense that they raise issues that must be decided, then the Grievor would have the right to proceed to arbitration to have them decided, and to do so without the support of the Association.

The evidence before me is insufficient to permit me to know if there were grounds to impose discipline on the Grievor in relation to the criticism he alleges is protected by academic freedom. The fact is, however, that the University did not do so. It deliberately invoked a provision of the collective agreement, clause 28.21, that authorized suspension "for reasons of health". I recognize that the grievances assert that this characterization was a sham, but that assertion must be considered in light of the fact that, in adopting that characterization, the University made certain irrevocable choices.

The first was that it was immediately foreclosed from taking any disciplinary action: "suspension of this sort shall not lead to disciplinary proceedings". The second is that it presented the Grievor with a straightforward way of ending the suspension at any time, by invoking the medical certification procedure set out in the provision. That procedure permitted the Grievor to name the examining physician, subject only to the condition that that physician be acceptable to the Association-Board Committee. I have not included the provisions of the collective agreement establishing this committee, but Article 8 provides that it is a joint committee that acts by concurrent majority. The University has thus given away a significant degree of control over how such medical certification issues are to be resolved. The Grievor did not avail himself of this procedure, but it was always accessible to him.

The Grievor tendered a number of authorities on compelled medical examinations, and on discipline disguised as administrative action. In none of those cases was there such a clear mandate for an employer to impose a medical suspension, nor was there so robust a protection for the employee both in relation to the medical decision-making process and the choice of the examining medical professional. In my view, the present case depends on the unique language of the collective agreement.

There are often situations where an employer has a choice of pursuing discipline, or of choosing instead a non-disciplinary response such as that set out in clause 28.21. Where the collective agreement specifically sets out such an alternative response, and particularly where pursuing it has serious implications for the employer, there must be a significant presumption of good faith in choosing the medical suspension route.

In my view of the evidence, there is nothing to raise any inference that the employer was engaged in disguised discipline in taking the action that it took. Whether or not it might have had grounds for discipline, it clearly chose a course of action that did not permit it to act on those grounds, and that bound it to a third-party medical determination of the fitness of the Grievor to perform his duties. This was not discipline, and it was not and could not be pursued under clause 28.25, which is the provision under which the University must act to invoke the

> Grievor's right of individual carriage of the grievance at arbitration under clause 29.22. In effect, clause 28.21 is carved out of Article 28; it does not constitute discipline. It can therefore not be pursued to arbitration by an individual. It follows that any claim of a breach of academic freedom by imposing discipline for protected expression must also fail if there was no discipline imposed.

[32] Although he concluded that he did not have jurisdiction to hear the grievances because they were foreclosed by the Ashley award or outside the scope of individual grievance under the CBA, the arbitrator recognized that the merits of the dispute between Dr. Islam and Dalhousie remained unresolved. On this point he said as follows:

> It must be said that there are still important issues to be resolved on the merits between the parties which have not been foreclosed by either this award or the award of arbitrator Ashley. Not least of these is the validity of a non-disciplinary termination for frustration of the contract of employment in the circumstances that this case presents. But none of those issues fall within the narrow range of issues which an individual may take independently to arbitration. To proceed with arbitration on these issues requires the support of the Association, and that has not been forthcoming.

## Analysis

Standard of Review

[33] In conducting a judicial review of a tribunal decision the Court must first decide the standard which it will apply in that assessment. There are two potential standards of review, correctness and reasonableness. A reasonableness standard implies that a higher degree of deference will be given to the decision maker than if correctness is used.

[34] In selecting the standard of review it is necessary to consider the nature of the tribunal and its expertise as well as the particular question or decision which is being challenged.

[35] In this case we have a labour arbitrator conducting a grievance arbitration pursuant to the terms of a collective agreement. Interpretation of the agreement and the application of employment law principles is invariably reviewed based upon reasonableness. Even non-employment common law principles such as *issue*

*estoppel* will be reviewed based upon reasonableness (*M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.* 2011 S.C.C. 59).

[36] In this case Arbitrator Swan dealt with the discrimination grievance by considering the impact of Arbitrator Ashley's earlier award. I have no difficulty concluding that the interpretation of that award and its impact on the new grievances was a question which clearly fell within the expertise of a labour arbitrator and should be reviewed on the standard of reasonableness.

[37] The question of disguised discipline and breach of academic freedom involve interpreting and applying the provisions of the CBA. Nothing could be more central to the role of a labour arbitrator and these questions clearly are also subject to a reasonableness review.

[38] I am satisfied that all aspects of Arbitrator Swan's decision should be reviewed on a standard of reasonableness and not correctness.

Review of the Swan Award

[39] In my view the starting point for the review analysis is to consider the nature of the preliminary hearing which Arbitrator Swan was asked to conduct. In the agreed statement of facts and the introductory paragraph of the award the issues were described as ones of arbitrability. In his concluding comments Arbitrator Swan described it as a question of jurisdiction. He concluded that he had no jurisdiction to hear the grievances because of the impact of the Ashley decision on the discrimination complaint and his interpretation of the scope of individual grievances under the CBA.

[40] The parties provided an agreed statement of facts which they presumably felt provided a sufficient evidentiary record to resolve the preliminary arbitrability questions. Dr. Islam was given permission to provide limited *viva voce* evidence with respect to delays in filing grievances and initiating arbitration. This evidence is not relevant to the interpretation of the impact of the Ashley award or the scope of individual grievances under the CBA and Arbitrator Swan made no reference to it when he discussed those issues.

[41] The preliminary hearing was not intended to address whether Dr. Islam's complaints had merit but only whether they could proceed to arbitration without the support of the DFA. The arbitrability questions (other than the procedural and timing issues not dealt with in the award) stated by the parties were, whether the

discrimination complaint was foreclosed by the Ashley award and if the disguised discipline and academic freedom complaints fell within the limited scope for individual grievances under the CBA.

[42] Arbitrator Swan did not explicitly define the parameters of the preliminary hearing or the test for arbitrability that he would apply. It is clear that he felt he should do more than compare the language of the grievances with that of the CBA. He said he looked at the evidence provided to him in order to discern the "proper characterization" of the allegations being made by Dr. Islam and see if they fit within the individual grievance provisions of the CBA. This seems to be a very reasonable approach to the task undertaken by the arbitrator.

[43] I will consider the reasonableness of Arbitrator Swan's decision with respect to each of the three complaints raised in Dr. Islam's 2011 grievances. Before doing so it is important to identify the nature of the review undertaken when a reasonableness standard is applied. One of the best statements with respect to the nature of this undertaking is found in the Nova Scotia Court of Appeal decision in *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)* 2009 NSCA 4 where the Court states.

> 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.
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> 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. *Wolfson, Re*, 2008 NSCA 120 (N.S.C.A.), ¶36.
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> 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; *Wolfson, Re*, ¶34.

*Discrimination Grievance*

[44] Arbitrator Swan resolved Dr. Islam's complaint of discrimination by application of the Ashley award. In the grievance dealt with by Arbitrator Ashley Dr. Islam alleged discrimination based upon disability or perceived disability as a result of Dr. Traves' actions in placing him on a medical suspension. Arbitrator Ashley concluded that this allegation was not one which could be pursued as an individual grievance under the CBA. Her rationale in reaching this conclusion is found in paragraphs 21 and 22 of her award:

> 21. Article 29.23 provides that the submission to arbitration must be initiated by the Association or the University except in two situations. The first [Article 29.23 (b)] is where the grievance involves an alleged violation of Articles 3 or 4 of the collective agreement and the unanimous decision of a Grievance Committee is not satisfactory to the grievor. The grievance here alleges a violation of Article 4, but there has been no reference to or decision by the Grievance Committee.
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> 22. The second situation [Article 29.22 (c)] allows an individual grievor to proceed without the support of the Association when the grievance relates to the dismissal of the employee. That situation does not exist here. It follows that the Grievor does not fall within those two specific situations which permit an individual grievor to proceed to arbitration without the Association's support.

[45] In determining that she had no jurisdiction to deal with the grievance Arbitrator Ashley specifically noted that her decision was not based on the strength or weakness of Dr. Islam's allegations.

[46] The two grievances filed by Dr. Islam in 2011 allege that he was discriminated against in two respects. The first is the refusal of Dalhousie to accept the medical opinion that Dr. Islam was fit to return to work, and the second was the decision to terminate his employment as a result of the alleged frustration of the employment contract. With respect to both actions Dr. Islam says that Dalhousie had breached its duty to accommodate him due to disability or perceived disability.

[47] Arbitrator Swan disagrees with the interpretation of the CBA that led to Arbitrator Ashley's conclusion that the disability complaint could not form an individual grievance. He says that it is not necessary to have a decision by the grievance committee as a precondition to pursuing an individual grievance under Article 29.22(b) of the CBA.

[48] After concluding that the discrimination allegations could form the basis of an individual grievance Arbitrator Swan decides that the 2011 grievances are based on the same complaints as the grievance considered by Arbitrator Ashley. He said there was nothing new in the 2011 grievances on the issue of discrimination.

[49] Arbitrator Swan states that the Ashley award was not a jurisdictional finding but a conclusion that the withdrawal by the DFA determined all issues in dispute against Dr. Islam. It is not clear how he could have reached his conclusion in the face of clear statements by Arbitrator Ashley that her decision was based on jurisdiction and not the merits of Dr. Islam's claims.

[50] Despite concluding that the Ashley award was a finding that all issues of discrimination were resolved against Dr. Islam, Arbitrator Swan seems to suggest that they may still be alive and available to be pursued elsewhere. To this end, he says:

> …I conclude that the issue of discrimination has been finally resolved against the Grievor, and while it may still be the subject of proceedings in another forum, it may not be pursued further at arbitration…

[51] Arbitrator Swan did not discuss the application of the Ashley award in terms of *issue estoppel*, *res judicata* or abuse of process. In their submissions counsel for Dalhousie argued that despite no reference to these doctrines the Swan award is premised on the policy considerations underlying those principles. Even if I decide that the arbitrator's interpretation and application of the Ashley award is reasonable when he concludes that it forecloses a new grievance based upon the 2008 allegations, I must still assess his finding that the 2011 grievances do not contain any new issues of discrimination.

[52] It is clear from reading the 2011 grievances that new facts are alleged which did not exist in 2008. These include Dr. Islam tendering medical information with respect to his fitness to return to work and the actions taken by Dalhousie to terminate his employment. The arbitrator does not explain how he concluded that Dalhousie's refusal to accept the physician's certificate and then terminate Dr. Islam's employment involve the same issues of discrimination as those alleged at the time of the original suspension in 2008. Even if Dr. Islam is prevented from arguing that Dalhousie discriminated against him with respect to the initial suspension decision, it is not apparent why that should immunize the 2011 actions from scrutiny.

[53] It is important to remember that Arbitrator Swan was asked to conduct a preliminary jurisdictional hearing with respect to the arbitrability of the grievances. He was not asked to assess the likelihood of success but only whether an individual grievance was available under the CBA. Whether Dalhousie discriminated against Dr. Islam when it decided to reject his medical evidence, is something that can only be resolved based upon an evidentiary hearing. To the extent that Arbitrator Swan concluded that the issues were the same as those raised by the 2008 grievance he offers no explanation. It is not reasonable to simply make a finding that the discrimination issues in the 2008 and 2011 grievances are the same when the latter are based on fresh actions by Dalhousie taken three years after the initial suspension.

[54] In addition, Dalhousie's decision to terminate Dr. Islam's employment would trigger a duty to accommodate if it was based on his disability or perceived disability. That was acknowledged by Dalhousie in its letter of February 23, 2011 which said they had satisfied this obligation. The duty to accommodate in the context of terminating the employment of a sick employee who is absent from work was discussed by the Supreme Court of Canada in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hopital general de Montréal* [2007] 1 S.C.R. 161. The Court described the nature of the duty and the obligation on the employer as follows:

> 13 It is well established that the employer must justify the standard it seeks to apply by establishing:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> (*Meiorin*, at para. 54)
>
> 14 The first and second steps enable the court to assess the legitimacy of, respectively, the standard's general purpose and the employer's intent in adopting it. They thus guarantee that the standard, whether viewed objectively or subjectively, does not have a discriminatory foundation. The third step is a test of

> rationality whose purpose is to determine whether the standard is *necessary* in order to accomplish a legitimate purpose. The employer must demonstrate that it cannot accommodate the complainant without suffering undue hardship.
>
> 15. The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility (*Meiorin*, at para. 63; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at p.546; and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520-21). For example, the cost of the possible accommodation method, employee morale and mobility, the interchangeability of facilities, and the prospect of interference with other employees' rights or of disruption of the collective agreement may be taken into consideration. Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.

[55] In this case Dalhousie says that its actions in terminating the employment of Dr. Islam satisfied their duty to accommodate his disability to the point of undue hardship. Determining whether that is the case is a factual question requiring significant evidence to resolve. It will involve consideration of the circumstances which existed as of the date the decision was made to terminate Dr. Islam's employment. Arbitrator Swan, again, does not explain why he concludes that the grievance alleging a breach of the duty to accommodate raises the same issues as the initial suspension decision made in 2008. In the absence of an explanation it is difficult to assess its reasonableness.

[56] The reasonableness standard of review requires an intelligible and transparent reasoning path which I find is lacking from Arbitrator Swan's analysis of the application of the Ashley award. In addition, the conclusion that the allegations of discrimination made by Dr. Islam in 2008 and 2011 were the same is outside the range of acceptable outcomes. There are factual differences underlying the complaints and the duty to accommodate raises different legal principles than the initial suspension decision. It was unreasonable for Arbitrator Swan to dismiss the allegations of discrimination on a preliminary jurisdictional basis. Clearly issues were raised that require further analysis and consideration at an arbitration hearing.

*Disguised Discipline and Academic Freedom Grievances*

[57] Dr. Islam alleges that the termination of his employment by Dalhousie was not because of the frustration of the employment contract but was in response to

his criticism of the University and its administration. He asserts that the true nature of this decision is disciplinary and therefore is grieveable by an individual under Article 29.22(c) of the CBA.

[58] Dr. Islam also says that if the reasons for refusing to accept his medical evidence and reinstate him or to terminate his employment included his criticism of the university and administration, this is a breach of his academic freedom under Article 3 of the CBA. This would support an individual grievance under Article 20.22(b). He also says that a breach of Article 3 may arise even if the termination of employment was not for disciplinary reasons provided there is a restriction of academic freedom.

[59] Arbitrator Swan acknowledges in his award that the allegations in Dr. Islam's grievances, on their face, allege grounds which would permit individual grievances to be pursued. He describes the approach which he took to the issue at page 28 as follows:

> Perhaps not surprisingly, the grievances do indeed allege all three of the grounds which permit individual carriage. Mere allegations, however, are not sufficient to found jurisdiction. It is the proper characterization of the grievances, based on the evidence submitted by way of the agreed statement of facts and the documentary exhibits, that must be relied on.

[60] At page 32 of the award Arbitrator Swan confirms that if any of Dr. Islam's complaints have "validity, in the sense that they raise issues which must be decided", then he would have the right to pursue them individually.

[61] Arbitrator Swan's analysis starts by noting that Dr. Islam's original suspension under Article 28.21 was for medical reasons which, under the terms of the CBA, could not lead to disciplinary action. He says that the language of the CBA justifies a "significant presumption of good faith" in favour of Dalhousie in choosing a medical suspension. Because it was started as a suspension for health reasons Arbitrator Swan notes that the CBA prohibits Dalhousie from pursuing disciplinary action in relation to the suspension. He also says that the evidence in the agreed statement of facts does not "raise any inference that the employer was engaged in disguised discipline".

[62] It is common ground among the parties and arbitrator that Dalhousie could not terminate Dr. Islam's employment for disciplinary reasons without triggering a

right to pursue an individual grievance. That is precisely what Dr. Islam alleges has taken place. Arbitrator Swan was not prepared to permit Dr. Islam to take that issue to arbitration because he felt the agreed statement of facts did not raise an inference of disguised discipline. This suggests that Dr. Islam had a burden to produce evidence to establish the merits of his complaint as part of the preliminary motion on arbitrability and that he failed to do so.

[63] Arbitrator Swan's conclusion that Dalhousie was not, and could not have been, engaged in disciplinary action because the suspension was initially made for health reasons, seems to go directly to the merits of Dr. Islam's grievance. It suggests that he was required do more than simply show that there were issues to be decided at the arbitration. He needed to call evidence in support of his allegations to rebut the "presumption of good faith" and raise inferences concerning the motivation for Dalhousie's actions.

[64] The letter from Dalhousie of February 23, 2011 advising Dr. Islam that his medical evidence was not sufficient and that his employment would be terminated listed the following unresolved concerns on the part of the University:

- Pattern of repeated complaints and expressed frustration by Dr. Islam had increased substantially over the few months preceding the suspension;
- Use of inflammatory and harsh language that was interpreted as intimidating in Dr. Islam's communications with administration and colleagues;
- Changes in Dr. Islam's personal demeanor that were interpreted as threatening, including, but not limited to, uncontrolled shaking of hands giving the appearance of suppressed anger, glaring, monotone delivery, and reference to himself in the third person;
- Dr. Islam repeatedly raising issues that had already been addressed, some a few years prior;
- Dr. Islam's frequent expression of the belief that he was the victim of a conspiracy among a widening number of administrators, the nature of which was frequently described as unethical or criminal;
- Dr. Islam's expression of the belief that Dalhousie is corrupt;
- Dr. Islam's demonstrated reluctance/refusal to follow established processes; and
- Increased challenges experienced by Dr. Islam's students, particularly graduate students who were under his supervision, which may have been a reflection of Dr. Islam's own perceived frustrations, challenges.

[65] Many of these items are the sort of behaviour that might lead an employer to discipline an employee. In this case Dalhousie said that it was not relying on these allegations for disciplinary purposes and that Dr. Islam's employment was being terminated for "non-culpable frustration". Arbitrator Swan agreed with Dalhousie's characterization of its behaviour and concluded that Dr. Islam was not being disciplined.

[66] In my view the concerns raised by Dalhousie concerning Dr. Islam's conduct might be considered as disciplinary in nature or a potential infringement of academic freedom. By including these in the letter which discounted Dr. Islam's medical evidence and advised of the termination of his employment, Dalhousie has made some linkage between their concerns and the actions taken. The extent to which those issues were an operative part of the decisions undertaken in 2011 is unknown and will require witness testimony. Arbitrator Swan makes no specific reference to Dalhousie's expressed concerns but says that the evidence is insufficient to allow him to know whether Dalhousie had grounds to discipline. He goes on to make a finding of fact that the University did not do so. With respect, the question as to whether the University acted in a disciplinary fashion or interfered with academic freedom, is one for the evidentiary hearing and not the initial jurisdictional hearing on arbitrability.

[67] An infringement of academic freedom does not require a finding that Dalhousie was engaged in disciplinary action. There is no language in Article 3 of the CBA to suggest this. Arbitrator Swan lumps the allegations of disguised discipline and academic freedom together. As a result, he never considers whether a violation of Article 3 has taken place even if Dalhousie was acting in a non-disciplinary fashion.

[68] Arbitrator Swan acknowledges that there are important issues to be resolved on the merits between the parties including the alleged non-disciplinary termination. He concludes that these can only be arbitrated with the support of the DFA because he favours Dalhousie's assertions about their actions and motivation over that of Dr. Islam. I believe that his analysis on this issue is flawed because he engaged in a process of weighing the evidence and making findings of fact which went beyond the scope of the preliminary motion to determine arbitrability. The range of reasonable outcomes on the preliminary hearing was limited to whether Dr. Islam's complaints, properly characterized, fell within the individual grievance

provisions of the CBA. It did not extend to assessing the strength of Dalhousie's position that it was acting in a non-discriminatory manner.

**Conclusion**

[69] The preliminary hearing on arbitrability was designed to determine if Dr. Islam's grievances should be allowed to proceed to arbitration without the support of the DFA.

[70] Dalhousie raised a number of procedural objections which were not dealt with by Arbitrator Swan. He dismissed the grievances for other reasons.

[71] The arbitrator said the Ashley award foreclosed all of the discrimination complaints because the subject matter was the same as the current grievances. The 2011 grievances by Dr. Islam rely on facts which did not exist in 2008 and include new issues arising from the duty to accommodate. There is no reasonable basis to conclude that the complaints of discrimination are the same as those considered by Ms. Ashley.

[72] On their face, the allegations by Dr. Islam about disguised discipline and academic freedom fall within the scope of permitted individual grievances under the CBA. Arbitrator Swan attempts to determine the proper characterization for the allegations based on the evidence in the agreed statement of facts. In doing so, he goes beyond mere characterization and weighs the evidence in the agreed statement of facts in reaching the conclusion that Dalhousie's actions did not breach the CBA provisions concerning academic freedom and discipline. It was unreasonable of him to engage in such an exercise on the preliminary jurisdictional hearing. Dr. Islam's allegations raised issues which should be determined at arbitration and not dismissed summarily.

[73] I will allow the judicial review, set aside Arbitrator Swan's decision and remit the grievances to him for resolution. The parties may make written submissions on costs within thirty days.

Wood, J.