SUPREME COURT OF NOVA SCOTIA

Citation: Miners' Memorial Manor v. International Union of Operating Engineers, Local 968B, 2010 NSSC 464

Date: 20101229
Docket: 317814
Registry: Halifax

Between: Miners' Memorial Manor

Applicants

and

International Union of Operating Engineers, Local 968B, and
David J. MacDonald, Arbitrator

Respondents

Judge: The Honourable Justice Patrick J. Duncan

Heard: June 1, 2010, in Halifax, Nova Scotia

Counsel: Eric Durnford Q.C., for the applicant

Susan Coen, for the respondent International Union of Operating Engineers, Local

David J. MacDonald, respondent , not participating

By the Court:

Introduction

[1] Miners' Memorial Manor (Manor) is a residential care facility operating in Sydney Mines, Nova Scotia. Jennifer Ann LeBlanc has been employed at the Manor since 1997. From 2007 until the incidents giving rise to this litigation she was a full time Continuing Care Assistant (CCA) in the Nursing Department.

[2] An investigation initiated upon complaint determined that Ms. LeBlanc was abusive to the residents and in consequence thereof the employer terminated her employment.

[3] Ms. LeBlanc is a member of the International Union of Operating Engineers, Local 968B (Union) which filed a grievance under the terms of the Collective Agreement that governed the employment of Ms. LeBlanc with the Manor. The grievance report alleges an "unjust discharge". The matter was referred to arbitration under that Agreement.

[4] The arbitrator did not substantiate all findings of abuse alleged by the employer, but did agree that the employee was guilty of some allegations that

constituted abuse. In his conclusion, the arbitrator set aside the termination of employment and imposed a lesser penalty.

[5] The employer has applied for judicial review alleging errors by the arbitrator in the conduct of the hearing; in determining the applicable standard of proof of the alleged abuse; and in the arbitrator's conclusion that he had the authority to impose a different penalty than dismissal.

Issue 1. ***Did the arbitrator err in concluding that he had jurisdiction to vary the terms of the penalty from that imposed by the employer?***

The Arbitrator's Award

[6] Upon completion of its' investigation the employer discharged Ms. LeBlanc for abuse of a resident. The authority relied upon for this result is found in Article 20.2 of the Collective Agreement entered into by the Manor and the Union on April 23, 2006. That provision reads:

Article 20.2

> In addition to, and notwithstanding the Employer's general right to discipline and discharge employees, the Employer shall have the right to immediately discharge an employee, without notice, when the employee had (sic) abused or stolen from a Guest.

[7] Arbitrator MacDonald found that Ms. LeBlanc had committed abuse upon residents. He then turned to the question of sanction. He correctly noted the seriousness of such abuse and the employer's right to discharge the employee under Article 20.2. The arbitrator referred to what he characterized as a "containing feature" set out in the following provision of the Collective Agreement:

> Article 23.4 Arbitration Procedure
>
> Arbitration awards shall be final and binding, as provided in Section 40 of the Trade Union Act. An Arbitrator shall not alter, modify, or amend any part of the Agreement, but shall have the power to modify or set aside any penalty of discharge, suspension or discipline, unjustly imposed by the Manor or an employee.

[8] The arbitrator then analyzed the evidence as it related to the "five most important factors in determining appropriateness of penalty" as set forth in *Wm. Scott & Co. Ltd. and Canadian Food and Allied Workers' Union Local P-162 (1976)*, [1977] 1 Can. L.R.B.R. 1 (B.C.L.R.B.).

[9] He concluded that the discharge was “unjust” and that Article 23.4 left it open to him to impose an appropriate penalty. The arbitrator found that the employer exhibited bias against Ms. LeBlanc. In his opinion the employer acted unfairly in discharging her while dispensing a lesser penalty to another worker investigated at the same time, and who was also found to have committed abuse toward patients. His conclusion was that “… The Employer has discriminated against JL and that the penalty of discharge has been unjustly imposed.” (Award at page 21).

[10] After reviewing the information he considered relevant to penalty the arbitrator imposed a 6 month suspension without pay, but with no loss of seniority. As a precondition to a return to work the grievor was ordered to take a “refresher course in abuse prevention and to participate in any other course of action the parties deem appropriate to enable JL to understand the human frailty and the high level of tolerance required in dealing with the infirm and elderly.”

Position of the applicant

[11] The employer argues that the decision of the arbitrator is reviewable on a standard of correctness.

[12] The applicant submits that the arbitrator lacked jurisdiction to vary the penalty as the Collective Agreement provided for a specific penalty for abuse of a resident. They say that section 43(1)(d)(ii) of the **Trade Union Act** R.S.N.S. 1989, c. 475, as amended, (**TUA**) effectively prohibits the arbitrator from substituting that specific penalty provided for by Article 20.2, notwithstanding the provisions of Article 23.4.

Position of the respondent

[13] The respondent submits that the standard of review is one of reasonableness and that the decision of the arbitrator was reasonable, within a reasonable range of possible acceptable outcomes, and that the path of reasoning was justifiable, intelligible and transparent.

[14] As to the issue of the interpretation of the Collective Agreement in light of section 43 of the **TUA**, the respondent says that:

> The plain language of the two articles makes it clear that the parties agreed that the employer can terminate employees for resident abuse, but that the termination must be justly imposed. The parties further agreed that an unjustly imposed termination may be modified by an arbitrator.
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> (at para 62 of respondent's brief)

[15] The argument continues that the task of interpreting collective agreements is the "raison d'être of labor arbitration, and is deserving of deferential treatment."

What is the applicable standard of review?

[16] The applicable standard of review is to be determined in accordance with the analysis established by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* 2008 SCC 9. Fichaud, J.A. writing on behalf of the court in *Police Association of Nova Scotia Pension Plan v. Amherst (Town)* 2008 NSCA 74, summarized the decision, at paragraphs 38-42:

> 38 The Supreme Court issued *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 after the judge's decision here. Justices Bastarache and LeBel, for five justices, stated the following principles governing the administrative SOR.

39 Correctness and reasonableness are now the only standards of review (para. 34). The court engages in "standard of review analysis", without the "pragmatic and functional" label (para. 63).

40 The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (para. 49).

41 The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (para. 62, 54, 57).

42 If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (para. 55):

(a) Does a privative clause give statutory direction indicating deference?

(b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (para. 64).

(c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness (para. 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or *vires*", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise

> respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (para. 55-56, 58-60).

[17] It is well settled "... that a reviewing court should apply a reasonableness standard of review to an arbitrator's interpretation of a collective agreement". *(*See*, Maritime Paper Products Limited v. Communications, Energy and Paperworkers' Union, Local 1520*, 2009 NSCA 60 at para. 19).

[18] The applicant argues though that the issue in this case goes beyond the interpretation of the Collective Agreement and involves the grant of powers given to the arbitrator pursuant to the **Trade Union Act** and the Collective Agreement.

[19] The **Trade Union Act** specifies the powers and duty of an arbitrator or an arbitration board:

> 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
> > (a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceedings to present evidence and make submissions to him or it;

(b) has, in relation to any proceedings before him or it, the powers conferred on the Board, in relation to any proceedings before the Board by subsections (7) and (8) of Section 16;

(c) has power to determine any question as to whether a matter referred to him or it is arbitrable;

(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; and

(e) has power to treat as part of the collective agreement the provisions of any statute of the Province governing relations between the parties to the collective agreement.

(emphasis added)

[20] The applicant argues that the employee was discharged for cause (s. 43(1)(d)(i)), but that Article 20.2 is a specific penalty clause within the meaning of section 43(1)(d)(ii) of the **TUA.** The employer submits therefore that the arbitrator lacked jurisdiction to substitute the discharge for another penalty and that

the standard of review under the *Dunsmuir* analysis is one of correctness. In support of this position I have been referred to the following comments of the court in *Dunsmuir*:

> 57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.
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> ...
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> 59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: ... .
>
> 60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, per LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. ...

[21] In my view, section 43 of the **Trade Union Act** imposes restrictions on the jurisdiction of an arbitrator to vary penalty where there is a specific penalty clause, which the applicant says Article 20.2 is. Since the arbitrator's authority to vary the sanction, in the face of a specific penalty clause, is a "true question of jurisdiction or *vires*", the arbitrator's decision to assume jurisdiction to vary the penalty must be assessed by a standard of correctness.

Analysis

[22] Manor has referred me to three cases that it submits are supportive of its' position on this aspect of the application. They are: *International Union of Marine and Shipbuilding Workers of Canada v. Halifax Shipyard Limited (Rehberg Grievance*), [1995] N.S.L.A.A. 5 (Kydd); *Re Halifax Shipyard and Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1* (1999), 57 C.L.A.S. 442 (Darby); and *Re Halifax Shipyard and Marine Workers Federation, Local 1* (2002), 72 C.L.A.S. 63 (MacLellan) (the shipyard cases).

[23] In each of those cases, union employees were discharged by the employer for offences that were included in a schedule of “Major Offences” that formed part of their Collective Agreement. That schedule included the following wording:

> Any employee committing any of the above offences will be liable to instant dismissal.

[24] Article 6.09 of the Agreements then in question contained the following provision:

> ... The Arbitrator shall have the power to modify or set aside any penalty imposed by the company relating to disciplinary measure (s) then before him, but shall have no power to add, substitute, subtract or modify any terms of this Agreement.

[25] The respective arbitrators all came to the same conclusion: that section 43(1)(d) of the **TUA** prevents an arbitrator from substituting a lesser penalty when a specific penalty is contained in the collective agreement, and even where there is a provision permitting the arbitrator to modify the disciplinary penalty within the collective agreement.

[26] In *Rehberg Grievance*, Arbitrator Kydd concluded:

> 28 The Employer submits that this clause [Article 6.09] is not operative in the present case because the Collective Agreement provides for a specific penalty, and that to modify the punishment imposed would in effect be a modification of the Collective Agreement, and outside the Arbitrator's jurisdiction. While I accept that the phrase " be liable to instant dismissal," in light of the foregoing cases, is sufficient to categorize a specific penalty for the purpose of section 43 (1) (d) of the **Trade Union Act**, it does not mean that in every case discharge is mandatory. In fact, the point that is made in the foregoing cases is that the language does not have to take away the element of the Employer's discretion in order to be a specific penalty. If it is not mandatory, does it follow that the Arbitrator, by awarding a lesser penalty, would be "modifying the Collective Agreement", in light of the words in Article 6.09 (b) giving an Arbitrator the power to modify or set aside "any penalty"? These words, however, are immediately followed by the proscription against amending the Collective Agreement.
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> …
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> 30 The failure of an Arbitrator to give effect to such a provision of a specific penalty is, according to the earlier quoted passage in *Colonial Cookies*, an amendment to the collective agreement, and is therefore not permitted by article 6.09(b).
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> 31 For this reason I find I have no jurisdiction to modify the grievor's discharge.

[27] Arbitrators Darby and MacLellan adopted this line of reasoning and similarly concluded that once the "major offence" was proved to have been committed they had no jurisdiction to set aside the employer's decision to terminate.

[28] In this case the applicant argues that Article 20.2 of its' Agreement with the union is comparable to the language of the Schedule of Major Offences in the shipyards cases. The applicant also submits that Article 23.4 is comparable to the language of Article 6.09 considered by Arbitrators Kydd, Darby and MacLellan.

[29] I agree that Article 20.2 has a similar effect to the Schedule of Major Offences.

[30] It is not clear that Article 23.4 has the same effect as Article 6.09, since the former introduces the concept of variation of penalty, including discharge, where it was "unjustly imposed by the Manor on an employee". Article 6.09 has no such qualifying language.

[31] Nevertheless, it is very much a live issue as to whether Article 20.2 is a specific penalty clause within the meaning of section 43 of the **TUA**. Arbitrator MacDonald took the view that reading Articles 20.2 and 23.4 together was sufficient for him to vary the penalty. He did not go far enough in his analysis. He was obliged to consider whether Article 20.2 was a specific penalty clause within the meaning of section 43 of the **TUA** and determine whether he had jurisdiction to

vary, in consequence of that decision. His assumption of jurisdiction without addressing that issue was an error.

Issue 2: ***Did the arbitrator err by imposing on the employer a higher burden of proof than the law calls for?***

The Arbitrator's Award

[32] After concluding, with supporting authorities, that " ...employees in the health care field are generally held to a higher standard of conduct than employees in most other fields", the arbitrator went on to describe the standard of proof applicable on the facts before him:

> Coincidental thereto has been the development of a higher expectation by arbitrators in regard to the burden on employers to present clear, cogent and convincing evidence to support allegations of abuse.

[33] The arbitrator adopted the reasoning of Arbitrator Dorsey in *Juan de Fuca Hospital Society v. Hospital Employees Union, Local 180* (1988) 35 L.A.C. (3d) 289 where, at pp. 290-291, the applicable standard for a patient abuse case was described in the following terms:

> The standard of proof is the civil law balance of probabilities and not the criminal standard of beyond a reasonable doubt. The civil balance of probabilities is not a precise formula but one that permits accounting for the seriousness of the allegation and the gravity of the consequences flowing from a particular finding. There are levels or degrees of probability and the applicable one in any case will depend on the subject matter being adjudicated.
>
> (Emphasis added)

[34] Arbitrator MacDonald then stated that:

> In accordance with the profound expectations and consequences that attach to allegations of resident abuse, one must proceed with circumspection. Bearing these caveats in mind I have analyzed the evidence before me to determine if it does or does not support a finding of resident abuse by J. L.

Position of the Applicant

[35] The applicant submits that the arbitrator's view- that there are different levels of civil proof depending on the nature of the case - has been expressly rejected by the Supreme Court of Canada in *F.H. v. McDougall* 2008SCC 53 and therefore the arbitrator was in error. The applicant also suggests that the arbitrator's reasons for rejecting the proof offered in support of certain of the allegations of abuse may reasonably have been influenced by his adoption of this incorrect standard.

Position of the Respondent

[36] The respondent's submission is that the arbitrator, notwithstanding the language employed to describe the standard of proof, applied the correct level of scrutiny to the evidence before him.

Standard of Review

[37] The Nova Scotia Court of Appeal decision in *Nova Scotia Teachers Union v. Nova Scotia Community College* 2006 NSCA 22 held that an arbitrator's selection and application of the burden and standard of proof is subject to a correctness standard of review (at paragraph 31). In my opinion, the *Dunsmuir* analysis has not changed this standard of review.

Analysis

[38] The submission of the applicant has merit. The *F. H.* case predated the arbitrator's decision in this matter and was, and continues to be, the prevailing law with respect to the civil standard of proof. Rothstein J., writing for the Court, set

out the applicable standard, and addressed the previously applied rationale that was relied upon by Arbitrators MacDonald and Dorsey. The relevant excerpts from *F.H.* are:

> 26 Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard [page53] of Proof" in Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence (2004), 455, at p. 456:
>
>> These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the case.
>
> ...
>
> 40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. ...
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> ...
>
> 45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence

> depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.
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> ...
>
> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[39] I respectfully disagree with the position advanced by the respondent. First, the language Arbitrator MacDonald used in describing the standard, together with his unreserved adoption of the language of Arbitrator Dorsey in the *Juan de fuca* case, leaves no doubt that he intended to apply a standard that was inconsistent with the law. That is a sufficient response to this ground.

[40] Second, there is evidence that supports the conclusion that the arbitrator rejected the employer's evidence while applying a higher test than the law calls for.

The arbitrator concluded that there was a lack of "any *conclusive* evidence" that "cares" were not being performed (Award at pp. 6-7). In relation to allegations of unplugged buzzers and/or deliberately placing them out of the reach of residents, he concluded that there was no "*clear* evidence offered in support thereof" (Award at p. 7). In relation to suggestions of verbal abuse/inappropriate comments, he concluded that "… there is simply nothing that could be considered *clear and cogent* evidence to support that it amounted to verbal abuse. It was more in the nature of JL having spoken in a disdainful tone of voice" (Award at p. 8).

[41] At page 9 of the Award he says: "I am strongly influenced in my determinations by the fact that there are no specific events that can be said to have *clearly* indicated an intention to mistreat the residents."

[42] The arbitrator does not have to state in relation to each finding that he has applied the correct standard of proof. However, when, as here, the arbitrator initially adopted an incorrect test, then there should be some discussion that demonstrates that he has correctly instructed himself as he applied the test to the facts as found. That did not happen here. Instead the language used is more

consistent with his incorrect conclusion that there was a higher threshold to meet in view of the nature of the allegations.

[43] I conclude that the arbitrator selected an incorrect standard of proof and applied that incorrect standard to that evidence of the employer which was found wanting.

Issue 3: ***Did the arbitrator err in limiting cross examination of the grievor?***

[44] William Burchell, counsel for the employer at the arbitration hearing, has sworn an affidavit that is in evidence on this application. He indicates that on the third day of hearing, information came to him from another employee suggesting that there was an incident in 2007 involving Ms. LeBlanc and which resulted in a resident being taken to hospital suffering swelling and massive bleeding.

[45] Mr. Burchell says in his affidavit that during cross-examination of Ms. LeBlanc he asked whether "… she had ever done anything to a resident which could be considered a disciplinary default" and that "The grievor replied no". The arbitrator refused to allow counsel an opportunity to cross-examine Ms. LeBlanc

on the 2007 incident which Mr. Burchell says he intended to do in order to "impugn the credibility of the grievor".

[46] Ted Crockett was the union representative who presented the case before the arbitrator on behalf of the grievor and her union. He has sworn an affidavit which speaks to the arbitrator' s refusal to allow cross examination by Mr. Burchell on the 2007 incident.

[47] Mr. Crockett says that the employer closed its' case. Ms. LeBlanc was the last of six witnesses to be called by the respondent. Mr. Crockett says that during cross-examination of Ms. LeBlanc "… Mr. Burchell asked the grievor several times if, previous to the matters that led to her termination, she had done anything in the course of her employment that warranted discipline." Mr. Crockett agrees that: "The grievor denied this was the case."

[48] A discussion ensued as between the arbitrator, Mr. Burchell, and Mr. Crockett about documents that Mr. Burchell was referring to in his cross examination but that had not been disclosed to the arbitrator nor to the grievor or her representative. The arbitrator ordered Mr. Burchell to produce the documents

to Mr. Crockett, on conditions. Mr. Crockett, upon reviewing the materials, determined that the incident in question "… appeared to be at least two years old". He "… also observed that the documents did not contain any record of discipline involving the grievor".

[49] Mr. Crockett argued that Mr. Burchell should not be permitted to cross examine on the employer's own records in a matter that was unconnected with the allegations that were the subject of the hearing; which had not been raised as part of the employer's case in chief; and where there had been no previous finding of disciplinary default.

[50] The arbitrator agreed with Mr. Crockett and Mr. Burchell concluded his cross examination. No rebuttal evidence was sought to be adduced by the employer.

[51] There is no transcript of the arbitration hearing in the Record, and the arbitrator makes no reference to this evidentiary question in his decision .

[52] The applicant has referred me to *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817, where the court set out several factors that should be considered to determine the extent of procedural fairness required in an administrative proceeding. The applicant submits that a consideration of those factors will indicate that a high level of procedural fairness is required with respect labour arbitrations.

[53] The respondent has not taken issue with the suggested requirement for a high level of procedural fairness, and I would agree.

[54] The respondent's position is that the arbitrator did afford the parties procedural fairness, and was acting within his authority in refusing to allow the proposed cross examination. The respondent submits that there was no breach of natural justice.

[55] This court's role in reviewing an arbitration hearing for issues of procedural fairness was recently described by Fichaud J.A. writing for the court in *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada,* (Local 141) 2010 NSCA 19:

30 The judge [para. 8] gave no deference to the arbitrator in the judge's assessment of procedural fairness. With that, I agree. I note parenthetically that deference is not withheld because of any standard of review analysis. The judge is not reviewing the tribunal's ultimate decision, to which a "standard of review" is accorded. Rather, the judge assesses the tribunal's process, a topic outside the typical standard of review analysis. In *Nova Scotia (Provincial Dental Board) v. Creager,* 2005 NSCA 9, this court said:

> [24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E,* at para. 102:
>
>> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>>
>> This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.
>
> [25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: *eg. Bell Canada v. Canadian Telephone Employees Association, [*2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

> To the same effect: *Moreau-Bérubé v. New Brunswick (Judicial Council),* [2002] 1 S.C.R. 249, at para. 74; *Nova Scotia v. N.N.M.*, para. 39; *Allstate Insurance Company v. Nova Scotia (Insurance Review Board),* 2009 NSCA 75, para. 11.

31 From the same perspective, in *Kelly*, Justice Cromwell described the two step approach to procedural fairness analysis:

> [19] The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: *see C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness -- in other words, that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: *C.U.P.E.* at para. 102.

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty.

32 Though the reviewing judge does not conduct "standard of review" analysis for procedural fairness, the judge must still determine the content of the duty of fairness. That duty does not just replicate the courtroom model. The duty's content is context specific and depends on various factors, including the tribunal's delegated room to manouevre that is contemplated by its governing statute, the nature of the tribunal's decision and the decision's importance to the parties: *Bell Canada v. Canadian Telephone Employees Association,* [2003] 1 S.C.R. 884, at para. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, at para. 31-32; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 79; *Moreau-Bérubé,* para. 74-75; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, para. 21-28; Kelly, para. 21-33; Creager, para. 25, 100-107; *Nova Scotia v. N.N.M.*, para. 40-98 and authorities there cited.

[56] It is well established that cross examination is an essential tool in challenging the credibility of a witness and, clearly, the credibility of Ms. LeBlanc was an important issue. The arbitrator concluded that she was capable of rehabilitation and that termination was an unjust remedy. In reaching this conclusion he put weight on her evidence so as to minimize her misconduct, saying, at page 23 of the Final Award:

> ... nor do I believe that she deliberately lied or misled the board. Rather her lack of remorse and failure to acknowledge her improprieties more likely resulted from a failure to recognize that she was using her innate physicality to the point of excess when handling certain residents, and addressing them in her disdainful tone of voice.

[57] The authority of an arbitrator in deciding what evidence is admissible at a hearing is set out in the **Trade Union Act:**

> 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
>> (a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceedings to present evidence and make submissions to him or it;

> (b) has, in relation to any proceedings before him or it, the powers conferred on the Board, in relation to any proceedings before the Board by subsections (7) and (8) of Section 16;

[58] The powers referred to in section 43 (1) (b) are described in section 16 (8) which reads:

> (8) The Board may receive and accept any evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper, whether admissible as evidence in a court of law or not.

[59] The legislation therefore provides a broad discretion to the arbitrator to determine what evidence will be permitted, though he must " give full opportunity ... to present evidence".

[60] It is contrary to the goal of a fair yet expeditious proceeding if every adverse evidentiary ruling may be subject to a claim of a denial of natural justice. Both parties were permitted to make submissions and the arbitrator made a ruling. There was no procedural unfairness in the manner in which the dispute was argued and ruled upon.

[61] The question of whether the arbitrator complied with the obligation set out in section 43(1)(a) to give the parties "full opportunity" to present evidence can

only be assessed in the context of the information before the arbitrator and on which his decision was rendered.

[62] In this case, the information was in the possession of the employer before the hearing, although it only came to counsel's attention during the hearing. The allegation was not disclosed pre-hearing and was not raised in the presentation of the employer's case. Mr. Burchell says that there was no intention of using the earlier allegation as a basis for discipline, nor as similar fact evidence. Instead, it was held back to see if Ms. LeBlanc would admit the incident and if she did not then to impugn her credibility with the allegations in the previous incident.

[63] I infer from the affidavit evidence that Ms. LeBlanc did not volunteer evidence of her prior good character in relation to her earlier treatment of residents. This issue was generated by the questions posed by the employer's counsel.

[64] The evidence that the employer sought to rely upon was of a collateral fact that went solely to credibility. It had not, apparently, been tested at the time it allegedly occurred, since there was no record of discipline. If the arbitrator

permitted the questioning it would invite a contested hearing of whether the earlier incident occurred, and under what circumstances.

[65] The collateral facts rule has been articulated in **The Law of Evidence**, 5th Ed., (Paciocco, David M.; Stuesser, Lee) (Toronto, ON, CAN: Irwin Law, 2008) at page 434:

> 6.5) The Collateral Facts rule
>
> > The "collateral facts rule" prevents the calling of evidence to contradict the answers of an opponent's witness, whether given in chief or on cross-examination, on "collateral matters." What constitutes a "collateral fact" is open to debate. There are two general approaches. 1) The Wigmore Test: Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction? This test includes facts relevant to a material issue and facts that go to discredit a witness's credibility. The Phipson Test: Proof may only be given on matters relevant directly to the substantive issues in the case. Proof of contradiction going to credibility is prohibited unless it falls within certain exceptions.

[66] The rule is discussed at length by the authors who observe, at page 436:

> The collateral facts rule forbids the calling of evidence to contradict the answers given by an opponent's witness about "collateral" facts. The contradiction usually arises from an answer given in cross-examination, so the rule is often stated: "A witness's answer on a collateral matter to a question asked in cross-examination is final." However, the rule is not confined to answers given in cross-examination; it is now understood to apply to the contradiction of any answers, whether provided in chief or on cross-examination. Evidence that goes

> to prove a contradiction has some probative value in that it may make it more probable that the witness is not telling the truth or is not accurate about the facts in issue. Therefore, the rule is not based on lack of relevancy or probative value. Rather, the rule is based on policy considerations. Primarily, it is a rule of trial efficiency. Allowing proof on collateral matters may confuse the trier of fact by engaging distracting side issues, may take undue time to develop, and may unfairly surprise a witness who will not be prepared to answer the collateral evidence.

[67] Mr. Burchell posed his question and Ms. LeBlanc responded. Her answer could be treated as final, and not to be contradicted by extrinsic evidence. The arbitrator could reasonably have concluded that this line of intended questioning would offend the collateral facts rule.

[68] It was also within the discretion of the arbitrator to admit the evidence if he had chosen to do so. There are exceptions in law that are discussed in **The Law of Evidence** that could permit such questioning in some circumstances. I have been referred by the applicant to a case where such questioning was permitted. In my view it is readily distinguishable.

[69] In *Re Versa Care Ltd. and C.L.A.C.* 2005 CLB 11021 Arbitrator Knopf permitted the admission of evidence of prior misconduct by a caregiver in a Long Term Care Facility. The arbitrator found that:

> ... the Union and the grievor made her history of behaviour and conduct not only admissible, but also critically relevant, because of the claims that she had never been disciplined over the 30 years of employment, had never received complaints about her performance, and had always treated residents with dignity and respect.

[70] The grievor's prior good character was put in issue in her representative's opening address and she repeatedly, and without prompting, offered evidence of her good character to support her denials of the abuse allegations against her. That was not the case in this matter.

[71] The employer sought to introduce evidence to the contrary, including documented discipline. Arbitrator Knopf permitted introduction of the documented discipline. The Manor did not present evidence of documented discipline of Ms. LeBlanc.

[72] In those cases where there was only an employer's record, the arbitrator in *Versa Care* ruled that the grievor could be questioned about the allegation, but that no weight would be attached to that evidence unless the substance of the allegation was admitted by the grievor.

[73] It is not a matter of whether I agree with the arbitrator's ruling. I am concerned with the process. In my view, the decision of the arbitrator to refuse to allow cross examination did not amount to a breach of procedural fairness, but instead was a permissible exercise of the authority vested in him to control the proceedings.

[74] Providing a "full opportunity" to present evidence does not mean an unfettered or uncontrolled right to lead evidence. The legislature has empowered the arbitrator to make those decisions and unless there is a breach of natural justice in the way in which that authority is exercised, the decision is not assailable on the grounds of procedural unfairness.

[75] Having considered the submissions of the parties and authorities offered in support, I conclude that the arbitrator did not breach the rules of natural justice by limiting the cross examination of Ms. LeBlanc. This ground of review is dismissed.

Conclusion and Remedy

[76] The remedies available on judicial review are set out in **Civil Procedure Rule 7.11** which states:

> Order following review
>
> 7.11 The court may grant any order in the court's jurisdiction that will give effect to a decision on a judicial review, including any of the following orders:
>
> (a) an order dismissing the proceeding;
>
> (b) an order setting aside the decision under review, or part of it, and terminating any legal process flowing from the decision, or the part;
>
> (c) an injunction preventing a respondent from doing anything, or requiring a respondent to do anything;
>
> (d) a declaration that the respondent lacks the authority or has authority to do something;
>
> (e) an order providing anything formerly provided by prerogative writ.

[77] I have concluded that the arbitrator erred in assuming jurisdiction to vary the penalty without having first considered whether Article 20.2 of the **Collective Agreement** is a specific penalty clause within the meaning of section 43(1)(d) of the **Trade Union Act**. If it is a specific penalty clause then he was without jurisdiction to vary the penalty.

[78] In my view an arbitrator acting in accordance with the provisions of the **TUA** and the **Collective Agreement** is the most appropriate person to determine the question of whether Article 20.2 is a "specific penalty" clause and whether there is jurisdiction to vary the employer imposed penalty of discharge.

[79] I have also concluded that the arbitrator erred by applying the incorrect standard of proof to the evidence before him.

[80] If the only matter to be addressed by the arbitrator was the narrow issue of jurisdiction, it may have been appropriate to remit the matter to him for resolution of that question. However, if Arbitrator MacDonald were to conclude that he does have jurisdiction to vary, then the penalty to be imposed would be based on findings arising from the application of the wrong standard of proof and one that was detrimental to the employer's argument in favour of discharge. The employer is entitled to have the merits of its' position on penalty assessed on facts found according to the legally correct standard of proof.

[81] In the result, I direct that the Final Award of Arbitrator MacDonald be set aside in its' entirety and the matter remitted for rehearing in accordance with the decision of this court.

[82] If the parties are unable to agree as to costs I will receive their written submissions.

Duncan, J.