SUPREME COURT OF NOVA SCOTIA

Citation: Halifax (Regional Municipality) v. Canadian Union of Public Employees, Local 108, 2010 NSSC 234

Date: 20100617
Docket: Hfx 297912
Registry: Halifax

Between:

The Halifax Regional Municipality

Applicant

v.

Canadian Union of Public Employees,
Local 108 – Halifax Civic Workers' Union

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: June 18, 2009, in Halifax, Nova Scotia

Counsel: Randolph Kinghorne, for the Applicant
Susan Coen, for the Respondent

INTRODUCTION:

[1] This is a judicial review. The Halifax Regional Municipality (HRM) asks the court to quash, in whole or in part, an arbitration award of Bruce P. Archibald, Q.C., dated April 30, 2008, pursuant to Rule 56. Alternatively, HRM asks the court to set the award aside pursuant to s. 15(2) of the *Arbitration Act*.

[2] In particular, HRM objects to the portion of the award permitting the union and the employee to present further evidence and to make further submissions regarding a possible disability and HRM's duty, as the employer, to accommodate the disability. HRM says the award is unreasonable and is based on error of law, and, as such, constitutes misconduct on the part of the arbitrator.

GOVERNING LEGISLATION AND COLLECTIVE AGREEMENT:

[3] The dispute involves the decision of an arbitrator, working under a collective agreement, dealing with potential discrimination and human rights issues arising from the circumstances of the grievor's discipline and dismissal. The arbitrator's authority was based on the collective agreement and on the *Trade Union Act*, R.S.N.S. 1989, c. 475. Articles 3.01 and 3.02 of the collective agreement address discrimination and remedies under legislation:

> 3.01 The Employer agrees that there shall be no discrimination exercised with respect to any employee in the matter of hiring, assigning wage rate, training, upgrading, promotion, transfer, lay-off, recall, discipline, classification, discharge or any other action by reason of age, race, creed, colour, ancestry, national origin, religion, political affiliations or activity, sexual orientation, gender, marital or parental status, family relationship, place of residence, disability, nor by reason of his/her membership or activity in the Union or any other reason.
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> 3.02 Any claim by an employee or the Union pertaining to a violation of the Constitution of Canada, The *Human Rights Act*, The *Employment Standards Act*, The *Trade Union Act*, or any other labour relations legislation may be the subject of a grievance which shall be processed in accordance with the Grievance Procedure. The effect of this clause shall not be to reduce the rights of the employee or the Union as prescribed by the legislation.

[4] The collective agreement set out the duties and powers of arbitrators at Articles 16.03 and 16.04:

> 16.03 (a) In resolving disputes, an arbitrator shall have regard to the real substance of the matters in dispute and the respective merits of the positions of the parties and shall apply principles consistent with the The *Trade Union Act* and not be bound by a strict legal interpretation of the issue in dispute.
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> 16.03 (b) The arbitrator shall have the power to receive and accept evidence and information on oath, affidavit, or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law.
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> 16.03 (c) A grievance or arbitration shall not be deemed invalid by reason of a defect in form, a technical irregularity, or an error of procedure. An arbitrator may relieve against those defects, irregularities or errors of procedure on just and reasonable terms.

> 16.04 The decision of the Arbitrator shall be final, binding and enforceable on all parties and may not be changed. The Arbitrator shall not have the power to change this agreement or to alter, modify or amend any of its provisions or make any decision contrary to the provisions of this agreement. However, the Arbitrator shall have the power to modify penalties or dispose of a grievance by any arrangement which it deems just and equitable.

[5] Subsection 43(1) of the *Trade Union Act* permits an arbitrator 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."

The Arbitrator's Award:

[6] The grievor, D.D., was an outside maintenance worker for HRM. His employment was terminated in October 2005. The union grieved the dismissal, and the matter went to arbitration. The arbitrator issued an award dated April 30, 2008.

[7] The grievor was a utility worker, doing maintenance work (particularly on ballfields) in the summer months and shoulder seasons, and snow and ice removal in the winter. In 2004 and 2005, there was "an unacceptable spike in unexplained absences from work by the Grievor," including periods of unapproved leave and paid or unpaid sick leave. HRM's Manager of Property Operations issued a memorandum in February 2004 setting out procedures for obtaining authorization to be absent from the workplace. A reminder memo was issued in November 2004. The grievor's supervisor testified that he had brought these policies to the grievor's attention more than once, although the grievor "claimed that he never saw such memos since he avoided use of lunch rooms...". Nevertheless, in early 2005 the grievor missed a good deal of time, and failed to obtain authorization directly from his supervisor. This resulted in a letter from HRM to the grievor recounting his "history of excessive absences and ... refusal to follow proper procedure to be away from the workplace," amounting to frustration of the employment contract. HRM imposed a twenty-day suspension, following which the grievor would be "subject to further disciplinary action or possible termination...." [Award, paras. 3-6.]

[8] Upon the grievor's return to work in early April 2005, he requested an immediate two weeks' vacation, which was denied. The refusal led to an argument with Peter Verge, the Superintendent of Sports Fields, Playgrounds and Green Spaces,

that was sufficiently heated that the police were required to remove the grievor from the building. This "insubordinate" behaviour led to a three-day suspension. A discipline letter, dated April 19, 2005, imposed a further 40-day suspension on account of the grievor's "continuing ... direct defiance of management and managerial policies designed to achieve a consistent expectation from all staff." Stating that the grievor's actions during the argument with Mr. Verge "had a negative effect on the staff ... in the office area," the letter indicated that such behaviour "will not be tolerated in the workplace and any further inappropriate behaviour will result in further disciplinary action up to and including termination of your employment." [Award, paras. 7-10]

[9] After his return from suspension, there were no further problems with the grievor's attendance during the summer of 2005. However, an incident in September 30 led to his dismissal. On September 30, 2005, the grievor was travelling with R.F., a senior co-worker, working on ballfield maintenance. R.F., as the senior worker, was responsible for the truck, and did the driving. According to R.F., the Supervisor, Jack Graham, had given him permission to go to his bank at the Penhorn Mall during working hours. Mr. Graham denied this. In any event, the grievor went to the mall with R.F. that morning. [Award, paras. 11-12.]

[10] The same day, Douglas Zinck, a retired HRM public works supervisor, reported seeing two HRM employees in the Penhorn mall during working hours. According to Mr. Zinck's phoned-in complaint, as confirmed to Mr. Verge, the two employees entered the mall and one of them went to the bank, while the other waited outside in the mall. When the employee who entered the bank was finished, Mr. Zinck reported, the two employees went to another store. Mr. Zinck confirmed this account at the hearing, and identified the grievor as one of the employees he saw in the mall. It appears that Mr. Zinck saw the two employees get out of the truck when they arrived at 10:25 a.m., and they remained in the mall when he left at 11:35 a.m. [Award, paras. 13-14.]

[11] R.F. was subsequently investigated on various grounds, including the Penhorn Mall incident. The employer attempted to arrange a meeting in order to confront R.F. and the grievor with respect to the "overlapping investigations." It proved impossible to arrange for the grievor's attendance, due to several sick days. The employer met with R.F. and union officials on October 17, 2005. This meeting resulted in R.F.'s three-day suspension. R.F. confirmed at the meeting that he had been in the mall "at more or less the time identified by Mr. Zinck," which the employer took as

confirmation that the grievor had been there as well. R.F. said he could not remember who was in the truck with him. He did not deny that the truck was assigned to himself and the grievor. The grievor's evidence at the hearing – "belatedly concurred in by R.F.," said the arbitrator – was that he remained in the truck while R.F. went into the mall. R.F. testified that he met a friend at the mall, who must have been the second person seen by Mr. Zinck. Mr. Zinck's evidence, however, was that he saw "two people come in to the mall from the truck, and that when he went out to the truck to get its City ID number and its license plate number (circling round the truck in the process) he observed the cab to be empty." The grievor insisted that he had been in the cab reading. [Award, paras. 14-16]

[12] The employer decided to terminate the grievor's employment after the October 17 meeting. The termination letter, dated October 18, 2005, recounted the allegations of the grievor's presence at the mall on September 30. His decision to "exit the vehicle and enter the mall," was considered by HRM to be "absence from the workplace without the approval of management." The letter referenced the grievor's discipline history, and said, "[t]his incident has made it clear that you have disregarded the instructions given to you on the requirement to maintain regular workplace attendance." As a result, "[i]n consideration of past incidents as well as the recent incident on September 30," the grievor's employment was terminated as of October 21, 2005. [Award, para. 18.]

[13] The union commenced a grievance on November 4, 2005. It alleged that the grievor's termination violated Article 23 of the collective agreement, which governs discharge, suspension and discipline. The grievance stated, "[b]oth parties agree that an employee is considered innocent until the employer has proven just cause. [The grievor] was wrongfully terminated without ... the opportunity to explain in full his view on the reasons that led up to his dismissal." The union requested that the grievor be reinstated and compensated for lost wages and benefits. HRM dismissed the grievance. The January 2006 letter, signed by Peter Stickings, who was Acting Director of Real Property and Asset Management, said, in part:

> At the grievance hearing the Union presented information stating that the driver, R.F., had advised D.D. that he did have his supervisor's permission to be in the mall. Further, the Union presented that even if R.F. did not have permission to be in the mall, D.D. had no choice in the matter since he was a passenger in the vehicle.

> The Union also advised that R.F. admitted to being in the mall, but at no time did D.D. make such a statement. In fact it is D.D.'s position that he did not leave the truck when R.F. went into the mall, but stayed in the vehicle.
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> ....
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> [T]he employer has a written statement that both employees were in the mall; therefore, we do not accept D.D.'s statement that he remained in the truck while R.F. went into the mall. [Award, paras. 19-21.]

[14] The union also took the position that the grievor should have received the same penalty as R.F., to wit, a suspension of several days. The letter stated:

> [T]he discipline of the two employees was different because their circumstances were different. The penalty for the action of each employee is based on that individual's own disciplinary history.
>
> In this case, D.D. had recently been suspended twice for fairly long periods of time for being absent from the workplace without leave. He was advised at the time of the last suspension that further disciplinary action could mean termination and was therefore on notice that this could be the consequence if there were a further such incident.
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> R.F. did not have the same record of discipline for being absent from the workplace without permission, and the penalty for his actions in this situation took that into account.
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> ....
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> Therefore, in reviewing the facts presented by the Union combined with the information provided to me by the supervisory and management staff, it appears clear to me that D.D. was in the mall that day without permission, that he was previously put on notice that that a further incident of that nature could result in termination, and he proceeded to go into the mall anyway.
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> Because of that, and because D.D. was clearly advised that termination could be the result of a further incident of absence from his workplace without permission, I can find no justification for reversing the decision made to terminate this employee and the grievance is therefore denied at Step. 4. [Award, para. 21.]

[15] The arbitrator recounted that during the grievor's cross-examination certain concerns had arisen as a result of his evidence and demeanour. He wrote:

> ... In cross-examination, the Grievor was generally responsive to questions. However, the Grievor was vague about the rules governing his employment – he felt there were no real rules about when you had to work – just a common understanding. He never realised early on that there were notices on bulletin boards to be read. He admitted he was too casual in 2004 about clearing his absences with his supervisor, but claims he did not really notice he was not being paid for most of the days he took off. (He lives at his family home with his mother). He did not recall being spoken to by supervisors about his 2004 and 2005 attendance problems, and did not believe he was on a "last chance" letter. By way of explanation, he offered the comment that at that time "I had a lot of personal things". As to why he was upset with Mr. Verge and Mr. Graham concerning their refusal to grant him two weeks vacation after his 20 day suspension the Grievor simply stated: "My birthday was then – I wanted some time off". When asked by counsel for the Employer if he had ever contacted the Employee Assistance Programme or Occupational Health Services, the grievor replied somewhat awkwardly that he had "... called and talked to a lady in Ontario", but "... when they found out I was no harm to anyone at the workplace they did nothing".
>
> When matters were adjourned for the lunch break, I had a brief conference with counsel in private. From the Grievor's evidence and demeanour, it appeared that there might be emotional or psychological issues which were the root cause of his attendance problems and his apparent inability to engage in effective communication with his Employer. It was indicated to me that the Employer had no specific information in this regard. On the other hand, the Union representative presenting the case, Ms. Bramwell, revealed that she had some knowledge of certain sensitive background issues which the Grievor was reluctant to discuss publicly. I urged Ms. Bramwell to speak to the Grievor in order to see if he were willing to bring such matters into the open. I indicated my preliminary view, subject to completion of the Union's case and full argument, that the Grievor's chances of success did not look good unless there was something which could explain his erratic behaviour and which could provide the basis for an accommodation on the part of the Employer.... [Award, paras. 23-24.]

[16] As a result of this exchange, the Grievor agreed to "explain certain things" in a re-opened direct examination, agreed to by the employer, with a chance to cross-examine. The arbitrator summarized the additional evidence offered by the grievor:

> ... The Grievor's father had committed suicide on April 15, 2003 near the time of the Grievor's birthday – April 21. The Grievor stated that this troubled him greatly and he had not been able to deal with it or talk to anyone about it. This tragedy, in the Grievor's mind, was exaggerated by the fact that due to the Grievor's separation from

> his wife just before the birth of their daughter, his father had never been allowed by the Grievor's former wife to see his granddaughter. The Grievor indicated that there had been recurring disagreements between his former wife and himself over custody and access issues in relation to their daughter. Moreover, his access to his daughter had been limited by the fact that his wife had remarried and moved to Alberta with their daughter and new husband. The Grievor indicated that his year long leave of absence from the Employer (which ended in 2004) was in part for educational reasons, but also to allow him to seek work in Alberta so that he could make contact with his former wife and see his daughter. On this score, he was unsuccessful, as his wife refused all contact with him. He said he was able to get some employment in Alberta, though he kept to himself and often went for long runs in the woods (despite warnings about bears) to get exercise and avoid contact with other people. The grievor indicated that after his return to employment in 2004 he felt depressed: "It all came in on me". He agreed that his absence from work and resulting reduction in income was self-destructive. Consistent with this self-defeating approach was his failure to make any attempt to obtain employment insurance following his termination, thinking he "could straighten it out himself". The Grievor denied using alcohol or drugs, but said he often felt tired because he did not sleep well. The Grievor indicated that he had kept all these matters to himself, telling neither his Employer nor the Union. His only attempt to get professional help to address these underlying issues was his unsatisfactory contact with the EAP system mentioned above. [Award, para. 25.]

[17] The result of this evidence was that the parties agreed to adjourn in order to permit the grievor to obtain "a psychological or psychiatric assessment," which "could have an impact on the outcome of the hearing favourable to the Grievor." On resumption of the hearing on December 19, 2007, the grievor stated that he had not obtained an assessment and did not intend to do so. [Award, para. 26.]

[18] The arbitrator reviewed the arguments advanced by the parties. The employer submitted (1) that the September 30 incident provided sufficient grounds for discipline, (2) that a "corrective approach" (the prior suspensions and warnings) had been followed before September 30, (3) that even if it did not justify disciplinary action on its own, September 30 was a "culminating incident" in the context of the grievor's discipline history and (4) that there was no evidence that the grievor's "unacceptable attitude to his work responsibilities" would change. The union argued (1) that September 30 provided "no grounds for any discipline", (2) that the employer failed to comply with Art. 24.04 of the collective agreement by withholding Mr. Zinck's written complaint, (3) that September 30 was not a "culminating incident", or was "insufficiently related to the previous discipline to constitute the relevant culmination in a pattern," and (4) that the employer presented "no evidence that the

Grievor is incapable of rehabilitation and compliance with its needs ... such that the termination is disproportionate and unjust." [Award, paras. 27-37.]

[19] The arbitrator concluded that the employer "had grounds to discipline the Grievor as a result of the incident of September 30, 2005," because he left the work site, whether he went into the mall or stayed in the truck. "The Union's literalist approach to the 'in the mall' phrase in the letter of termination," the arbitrator wrote, "is not consistent with the jurisprudence it cited, nor with a purposive understanding of the discipline process under the Collective Agreement" (Award, para. 38). Whether R.F. had permission to go to the bank was also not decisive, since the grievor "manifestly did not have permission to leave his work site." The grievor was not obligated to leave the work site with R.F., and "[t]hough he may not have been the senior man in the work team, [he] was no captive. He decided to leave work without permission." [Award, para. 39.]

[20] The arbitrator concluded that the grievor's misconduct in leaving the work site was a "culminating incident" that justified termination. He wrote that "[w]hile Mr. Graham was characterised as easygoing and reasonable about permission to engage in personal errands on work time where they were necessary, neither the Union nor the Grievor could plausibly argue that the Employer was not taking the duty to be at work, and in a timely fashion, very seriously." This was clear from the memoranda on absence from the workplace, which had been brought to the grievor's attention. As a result, "[t]he Grievor knew on September 30, 2005 that his conduct was under scrutiny for proper attendance and he had been warned that 'any further inappropriate behaviour will result in further disciplinary action up to and including termination of your employment.'" Furthermore, the termination letter made "specific reference to 'consideration of past incidents including the recent incident on September 30, 2005." The arbitrator regarded this as "an entirely justifiable invocation of the culminating incident doctrine." [Award, para. 40.]

[21] The arbitrator rejected the union's argument that the employer breached the duty of procedural fairness by withholding Mr. Zinck's written complaint. He concluded that HRM had complied with the relevant articles of the collective agreement in investigating the complaint and in terminating the grievor's employment, and in fact exceeded its obligations by convening the meeting of October 17, 2005, at which the grievor did not appear. The arbitrator did not accept the grievor's claim that he was "sick" that day, and inferred that he "was aware that something was up, but that he was unwilling to come to work to face the music." The grievor's claim to have been

"totally unaware of the fact that there was an issue concerning his conduct in relation to R.F." was "not credible." [Award, paras. 41-42.] The arbitrator reached the following conclusion:

> I have concluded that, setting aside any possible basis for a claim from the Grievor regarding a disability, the Employer has clearly and cogently demonstrated on a balance of probability that the grievor engaged in conduct on September 30 which warranted discipline. Moreover, given the prior discipline which the Grievor had received on similar issues, the September 30 event appropriately constitutes a culminating incident. On its face, the termination thus appears reasonable and proportionate, and not discriminatory. Indeed, the Employer has been extremely tolerant and understanding with the grievor's absences and only reluctantly invoked progressive discipline when forced to the wall by the Grievor's erratic and unreasonable behaviour.... [Award, para. 43.]

[22] This was not the end of the matter, however. The arbitrator qualified this conclusion with the suggestion that neither the employer nor the union appeared to "fully appreciate the potential implications of the possible application of new doctrines surrounding the duty to accommodate disability in such circumstances." [Award, para. 43.] He went on:

> The Grievor's evidence, in my view, gives rise to a clear possibility that he has been suffering from depression, or perhaps other psychological conditions which could be connected to his absence problems and to his apparent incapacity or unwillingness to enter into open communication with his employer about work related issues. It is true that he was "thrown a life-line" which he may have refused to grasp. However, this could be part of the psychological problem, if there is one. More importantly, the Union's case, or at least its first line of defence, was that the Grievor could not be disciplined at all for technical reasons related to the "in the mall" argument or for procedural reasons related to Article 24.04. This may have given the Grievor an unrealistic expectation that he could win his case without having to confront underlying personal issues which may be the root of the real problems in preventing him from reaching his potential as an otherwise valuable employee. [Award, para. 44.]

[23] The arbitrator went on to discuss the law governing the duty upon employers and unions to accommodate employees with disabilities:

> ... Disability is a right of an employee and imposes duties on both the employer and the union. Most importantly it can be asserted after a termination: see *Quebec (Commision des croits de la personne et des droits de la jeunesse) v. Montreal (City)*,

> [2000] 1 S.C.R. 655. It may go further. At least one arbitration board has suggested it may apply to circumstances where an employee's underlying grounds for disability accommodation may not have been revealed or diagnosed until after dismissal: see *Ottawa Civic Hospital and O.N.A. (Re Hodgins)* (1995), 48 L.A.C. (4th) 388 (R.M. Brown). The jurisprudence appears to establish that the employee seeking accommodation must establish "(1) that he has a disability or is perceived to have one; (2) the causal link between his disability and the necessity for a workplace accommodation (which may include a physiological or medical explanation for alleged workplace misbehaviour); and (3) the adverse disadvantage that [he] suffered as a consequence" (see [**Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada**," Law Society of Upper Canada Special Lectures 2007: **Employment Law** (Irwin Law, Toronto, 2007) 189, at p. 227]). If these steps are satisfied then the onus shifts to the employer to meet the accommodation test in the Meiorin case: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union*, [1999] 3 S.C.R. 3 (Meiorin). Clearly, the Grievor's evidence raises a concern about these issues, but he has not met the three-fold initial onus. However, there may be reasons related to the Union's arguments in the case and the grievor's personal situation, as outlined above, which explain why the Grievor did not "grasp the life-line" which we see ultimately involves proof of three initial steps. [Award, para. 46.]

[24] The arbitrator's "bottom line" was the following:

> ... Article 16.04 authorises me to dispose of a grievance by any arrangement which I deem just and equitable. I therefore dismiss the grievance and confirm the termination of the Grievor, subject to a condition subsequent which may render the dismissal defeasible. I hereby hold that the Employer's evidence demonstrates just cause for dismissal, unless the Grievor and/or the Union can provide evidence which may be sufficient to meet the initial onus on an employee seeking disability accommodation as outlined above. This requirement will presumably include expert medical evidence. However, the accommodation jurisprudence does not impose a totally open-ended duty upon employer and/or union. The parties, including both Union and Employer, are entitled to closure at some point. Therefore, the Grievor shall have 30 days from the date of this award to inform the Union as to whether he wishes to have disability evidence presented on his behalf, indicating the nature of what this evidence shall be. This information, of course, must be shared with the Employer if the matter is to go forward. I hereby retain jurisdiction to deal with any procedural and/or substantive consequences which may flow from this award. In the absence of the Union coming forward on the grievor's behalf with evidence relevant to the disability issue, the grievor's termination is hereby confirmed as of 30 days from the issuance of this award. [Award, para. 47.]

GROUNDS OF REVIEW:

[25] HRM asks the court to "quash or in the alternative set aside" the arbitrator's award. The applicant takes issue with the arbitrator's decision to permit the grievor to present additional evidence and submissions on the issue of a possible disability and the employer's duty to accommodate. HRM says the award "is both unreasonable and is based on errors of law, and as such constitutes misconduct" by the arbitrator. HRM advanced various grounds for judicial review in its Originating Notice. The issues are defined by the parties in their submissions roughly as follows:

> (1) The standard of review;
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> (2) The requirement under the *Trade Union Act* for the arbitrator to provide a final and binding decision;
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> (3) The responsibility under the *Human Rights Act* to accommodate a potentially disabled employee who is not assisting in the assessment of the existence of a possible disability;
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> (4) The responsibility of an arbitrator to accommodate a potentially disabled employee who is not assisting in the assessment of the existence of a possible disability;
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> (5) The burden of proof in respect of an alleged disability which might raise a duty to accommodate under the *Human Rights Act*;
>
> (6) The application of the doctrines of issue estoppel and abuse of process.

[26] In essence, the issue is whether the arbitrator's decision to make the result of his award dependent upon a "condition subsequent" was one that was available to him, or is reviewable in the circumstances.

STANDARD OF REVIEW:

[27] The Supreme Court of Canada set out the analysis for determining standards of review on applications for judicial review in **Dunsmuir v. New Brunswick**, [2008] 1 S.C.R. 190, 2008 SCC 9. Bastarache and Lebel JJ., for the majority, wrote that issues of "fact discretion or policy as well as questions where the legal issues cannot be easily separated from the factual issues" will generally be reviewed on a standard

of correctness, although some legal issues would "attract the more deferential standard of reasonableness" (para. 51). The majority went on to discuss the considerations that would indicate a standard of reasonableness, commenting first on the significance of privative or preclusive clauses:

> [52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative....

[28] The majority then considered the nature of questions on which deference would be called for:

> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically.... We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
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> [54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.... Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.... Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, 1974 CanLII 12 (S.C.C.), [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.
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> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
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> — A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> — A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

> — The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard.... On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
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> [56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[29] The majority noted that an "exhaustive review is not required in every case to determine the proper standard of review" because, "existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard.... This simply means that the analysis required is already deemed to have been performed and need not be repeated" (para. 57). As to the considerations that would support a standard of review of correctness, the majority said:

> [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.... These questions will be narrow. We reiterate the caution of Dickson J. in CUPE that reviewing judges must not brand as jurisdictional issues that are doubtfully so.
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> [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".... Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers....

[30] The majority concluded:

> [62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
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> ....
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> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[31] The Supreme Court of Canada has "often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference" (Dunsmuir, para. 68).

DISCUSSION OF THE STANDARD OF REVIEW:

[32] ***Application of human rights legislation by the arbitrator***. The *Trade Union Act* permits an arbitrator 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" (s. 43(1)). The majority of the Supreme Court of Canada said in **Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324**, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 52:

> Granting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes has the additional advantage of bolstering human rights protection. Major J. correctly observes that if the dispute is non-arbitrable, aggrieved employees have available the same mechanism for enforcing fundamental human rights as any other member of society: they may file a complaint before the Human Rights Commission. But the fact that there already exists a forum for the resolution of human rights disputes does not mean that granting arbitrators the authority to enforce the substantive rights and obligations of the Human Rights Code does not further bolster human rights protection. As discussed above, grievance arbitration has the advantage of both accessibility and

> expertise. It is a reasonable assumption that the availability of an accessible and inexpensive forum for the resolution of human rights disputes will increase the ability of aggrieved employees to assert their right to equal treatment without discrimination, and that this, in turn, will encourage compliance with the Human Rights Code.

[33] The court went on to hold that the substantive rights and obligations of the human rights legislation were incorporated into the collective agreement, and, as a result, "an alleged violation of the Human Rights Code constitutes an alleged violation of the collective agreement" and fell "squarely within the Board's jurisdiction" (para. 55).

[34] The employer says the standard of review is correctness. HRM's position is that s. 43(1) of the *Trade Union Act*, as interpreted through Parry Sound, indicates that "employees receive their rights under human rights legislation – not just someone's reasonable interpretation of the rights the legislation might provide." The violation of the collective agreement is collateral to the violation of human rights legislation. The employer says, "the access to the rights provided are those of the individual.... [A]n employee is entitled to the full rights provided at law, not some partial right because a tribunal's decision was reasonable." The employer further submits that in applying human rights law, an arbitrator "serves a public function to which a standard of correctness must apply." A collective agreement "is a private contract, but a contract that serves a public function: the peaceful resolution of labour disputes": Parry Sound at para. 30. [HRM brief, paras. 18-19]

[35] The Supreme Court of Canada discussed the application of a correctness standard to arbitrators applying outside legislation in **Toronto (City) Board of Education v. O.S.S.T.F., District 15**, [1997] 1 S.C.R. 487, where the majority said, at para. 39:

> ... [T]he expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard.... An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result....

[36] There is authority that a correctness standard applies to a Human Rights Board of Inquiry's decision on a question of law under the *Human Rights Act*: **Kaiser v.**

Dural (2003), 219 N.S.R. (2d) 91, at para. 21. The employer argues that the same standard applies to an arbitrator's interpretation of the *Human Rights Act*. The alternative, it is submitted, is "different standards of justice for complainants depending on whether they choose to take their complaint of a violation of their rights under the *Act* to the Human Rights Commission or to an arbitrator." [HRM brief, paras. 21-22]

[37] The union says there are distinctions between the two statutes that nullify this argument. *The Human Rights Act* lacks a privative clause. Additionally, the union says, labour arbitrators, unlike members of Human Rights boards of inquiry, "have expertise and experience." Finally, arbitrators possess "fulsome procedural, substantive and remedial powers" under the *Trade Union Act* and collective agreements, which boards of inquiry do not have. Many of these points were made in **Kaiser**, where Hamilton J.A., writing for the court, said at para. 21:

> In this case the Act does not contain a privative clause and s. 36 of the Act provides for a right of appeal on questions of law from a board's decision. This suggests a searching review rather than deference is applicable in this appeal. Persons appointed under the Act to sit on boards of inquiry are not required to have any particular expertise or experience, again suggesting no deference is to be given to the board's decision. The Act has a mixed purpose; a public interest to deter and eliminate discrimination on the bases enumerated in s. 5 of the Act and a private interest to remedy specific violations of the Act. Here the complaint was made by Mr. Kaiser to remedy an alleged specific violation of the Act, a private interest especially given the limited remedies being sought. Hence, any deference that may be warranted if there were a public interest at stake is not warranted in this appeal. The issues before the court on this appeal are questions of law, again suggesting no deference. Hence, the standard of review is one of correctness, without any deference to be shown to the board's decision.

[38] The union submits that deference is due to "arbitrators' application of disability and accommodation principles...." There are privative clauses at s. 42 of the *Trade Union Act* and Article 16.04 of the collective agreement, and the purpose of the legislation and the institutional expertise of the arbitrator support deference. The union characterizes the question as "how an arbitrator tailors his hearing and decision-making process in order to ensure the opportunity to provide medical evidence of mental disability, if one exists." The union says the "issues ... were within the arbitrator's expertise. He was operating within a comprehensive statutory scheme. The arbitrator determined key issues of fact, exercised his discretion, and took a

sensitive approach." The union says it is open to an arbitrator to render an interim decision. [CUPE brief, pp. 10-13.]

[39] The union cites **Canada Post Corp. v. C.U.P.W.**, 2008 BCSC 338, 171 L.A.C. (4th) 353, 2008 CarswellBC 566 (B.C.S.C.). In that case, "the parties had agreed that the Grievor should be reinstated with conditions" and the arbitrator "was required to determine what terms and conditions the employer could impose and for what duration" (para. 30). This involved applying "the collective agreement, the enabling legislation and the Canadian *Human Rights Act* to the particular facts before him," but the arbitrator was "not required to decide a true question of jurisdiction, a constitutional question, or a question of general law of central importance to the legal system" (para. 31). L. Smith J. held that the Canadian *Human Rights Act* was "closely connected to the arbitrator's function under the Code" (para. 32) and that reasonableness was the standard of review (paras. 32-33). The union submits that in the present case, "although the arbitrator was faced with human rights questions of a different nature, he was not required to decide a true question of jurisdiction, a constitutional question, or a question of 'general law' of central importance to the legal system. The questions before him were amenable to a number of possible reasonable conclusions." [Union brief, pp. 13-14.]

[40] The union advances an argument under the heading "fact-finding" that appears to rest on the uncontroversial proposition that "arbitrators see and hear the evidence first hand. Courts do not." While there is no dispute that factual findings by arbitrators require deference, it is not clear what relevance this has to the issues here. There is a claim by the union that "the Applicant does not characterize its application as a factual challenge, but it is." [CUPE brief, pp. 12, 16.] There is no apparent basis for the suggestion that the issue is challenge to the arbitrator's findings of fact.

[41] ***Procedural fairness and natural justice***. There seems to be no dispute that issues of procedural fairness call for a standard of correctness: see, for instance, **Nova Scotia Teachers Union v. Nova Scotia Community College**, 2006 NSCA 22, [2006] N.S.J. No. 64 (C.A.), at paras. 19 and 41. The union agrees that if there were an allegation that the arbitrator violated the requirements of natural justice or procedural fairness, the standard of review would be correctness. However, the union submits that the proper interpretation of what transpired is that the arbitrator "left the window open for the union to lead medical evidence only (not completely reopen all evidence) and likewise left it open for the employer to cross-examine, make submissions and fully present its case." In the alternative, if this was a question of procedural fairness or

natural justice, the union says the arbitrator's decision was correct. [HRM brief, para. 23, CUPE brief, pp. 10, 16, 18.]

[42] ***Issue estoppel and abuse of process***. The employer says the standard of review on the issues of issue estoppel and abuse of process is correctness, as they are doctrines of "general law impacting on the administration of justice as a whole and thus requiring uniform and consistent answers," as described in **Dunsmuir** at para. 60. The union agrees that the standard applicable to res judicata and abuse of process is correctness, but submits that these issues did not arise in the arbitration. Rather, it would be open to HRM to raise the issue at the resumption of the arbitration. [HRM brief, para. 24; CUPE brief, p. 18]

[43] ***Conclusion on this Issue:***. The fundamental issue relates instead to the arbitrator's interpretation of his jurisdiction under the collective agreement when he decided to "dismiss the grievance and confirm that termination of the Grievor, subject to a condition subsequent which may render the dismissal defeasible." On questions of law, the standard of review of the arbitrator's interpretation of the collective agreement would normally be reasonableness. However, I am satisfied that in determining the scope of his own jurisdiction, the arbitrator was required to be correct. I note, in this regard, the decision of Farrar J. (as he then was) in **Nova Scotia (Department of Transportation & Infrastructure Renewal) v. N.S.G.E.U.**, 2010 NSSC 15. In that case, the arbitrator held that the Province breached a collective agreement by failing to negotiate a rate of pay for a newly-created position. He declared that "the rate of pay shall be subject to negotiations between the Employer and the Union and that failing agreement, the Union may refer the matter to adjudication..." (para. 8). When negotiations failed, the union sought adjudication by the same arbitrator. The Province objected to the arbitrator's appointment, and objected to him ruling on his own jurisdiction. On judicial review, Farrar J. held that this was a true question of jurisdiction, subject to a standard of correctness. Similarly, I am satisfied that the arbitrator's decision that the collective agreement provided him with the authority to subject his final decision to a "condition subsequent" was a matter of jurisdiction on which he was required to be correct.

ISSUES:

[44] ***"Final and binding" arbitration***. The employer says the arbitrator failed to provide a final settlement, as required by the collective agreement and the *Trade Union Act*. Subsections 42(1) and (3) of the *Act* provide:

> 42 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
>
> ....
>
> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

[45] The collective agreement provides, at Art. 16.04, that "[t]he decision of the Arbitrator shall be final, binding and enforceable on all parties."

[46] The Supreme Court of Canada commented on final and binding decisions in **Toronto (City) Board of Education v. O.S.S.T.F., District 15**, [1997] 1 S.C.R. 487, where Cory J., in the course of a discussion of deference where the decision is protected by a privative clause, said for the majority, at paras. 35-36:

> ... There are a great many reasons why curial deference must be observed in such decisions. The field of labour relations is sensitive and volatile. It is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding.
>
> In particular, it has been held that the whole purpose of a system of grievance arbitration is to secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken by an employer. This is a basic requirement for peace in industrial relations which is important to the parties and to society as a whole....

[47] The employer submits that the arbitrator's award cannot be considered "final and binding," on account of the provision permitting the grievor to advance additional evidence on the issue of disability and accommodation. The grievor did give evidence on this issue, but declined to present medical evidence. The arbitrator, HRM says, made a clear finding that the evidence did not establish a disability, and sought no

submissions on whether there should be a further provision for additional evidence to be adduced. The employer submits that the failure to provide a final decision "is both an error of law and unreasonable." [HRM brief, paras. 30-31.]

[48] The union agrees that the arbitrator "did not render a final and binding decision – yet." Arbitrators have "broad procedural and remedial powers" under s. 43 of the *Act*, including the requirement to determine their own procedure (s. 43(1)(a)) and the power to exercise the powers conferred on a commissioner under the *Public Inquiries Act* (ss. 43(1)(b) and 16(7)). That *Act* allows a commissioner to require production of "such ... things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire" (*Public Inquiries Act*, s. 4). According to the union, the arbitrator "drew upon the collective agreement and the [*Trade Union Act*] to ensure that the Grievor has an opportunity to ascertain and disclose if he has (or had) a mental disability. At the end, he will render a final decision." [CUPE brief, pp. 19-20.]

[49] ***Burden of proof.*** HRM submits that, in general, where a breach of a collective agreement by the employer is alleged, the burden of proof is on the union to establish that the employer's action was wrongful. In other words, the burden of proving a breach of a collective agreement is upon the party who alleges that a breach has occurred: **Cape Breton Development Corp. v. United Mine Workers of America, District No. 26, Local 4522 (Sectionmen)** (1985), 70 N.S.R. (2d) 113, [1985] N.S.J. No. 396 (S.C.A.D.), at para. 16. [HRM brief, para. 32.]

[50] Article 23.03 of the collective agreement provides:

> In cases of discharge and/or discipline, the burden of proof of just cause shall rest with the Employer. In the subsequent grievance proceedings or arbitration hearing, evidence shall be limited to the grounds stated in the discharge or discipline notice to the employee.

[51] The arbitrator concluded that HRM had discharged its burden under Art. 23.03, subject to additional evidence relating to disability. As HRM points out, the grievor had already been given the opportunity to introduce evidence of a possible disability. Indeed, the arbitration was adjourned to permit him to bring such evidence, which he did not do. The arbitrator concluded that the evidence did not establish a disability. This, the employer submits, "should have been the end of the disability/ accommodation issue." Effectively, HRM says, the arbitrator made "conjecture" the

standard of proof for consideration of a disability claim. Furthermore, the employer argues, the arbitrator "effectively placed the burden of proof on HRM as employer to establish an absence of a disability on the part of the grievor" and thereby "both erred in law and acted unreasonably." [HRM brief, paras. 35-36.]

[52] The union's position appears to be that the arbitrator's decision should receive deference due to the privative clauses in the legislation and the collective agreement. According to the union, "[t]he arbitrator described some but not all of the evidence leading to his ‘speculation' about mental disability. On the uncontested facts, the ‘speculation' was well-founded. The arbitrator's measured response was prudent, reasonable and correct." [CUPE brief, pp. 28- 30.] The union's emphasis on privative clauses in this regard sits uncomfortably alongside its agreement that the arbitrator did not give a final and binding decision.

[53] ***Issue estoppel and abuse of process***. Given that the grievor received an adjournment in order to adduce evidence on disability but declined to do so, and that the arbitrator held that HRM had met its burden to demonstrate cause for dismissal, HRM submits that any issue of disability was decided. To revive the issue by offering the grievor the chance to bring further evidence after the Award, HRM says, raises issue estoppel and abuse of process. [HRM brief, paras. 37-38.]

[54] Having determined that no disability was established, HRM submits, that issue is subject to issue estoppel, as described in **Danyluk v. Ainsworth Technologies Inc.**, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[55] The arbitrator made a finding of fact and law that no disability was established. That decision was "required to be final" pursuant to the *Trade Union Act*. [HRM brief, paras. 39-40.] The employer, of course, maintains elsewhere that the arbitrator made no final decision. Where the technical requirements of issue estoppel are not met, the doctrine of abuse of process may intervene to prevent relitigation of a claim that has already been determined: **Toronto (City) v. C.U.P.E., Local 79**, [2003] 3 S.C.R. 77,

2003 SCC 63, at paras. 37-38. These doctrines may be applied by tribunals applying human rights law: **Kaiser v. Dural** at paras. 32-43.

[56] The union's position is that neither abuse of process nor res judicata are properly at issue, because the arbitrator has "not yet" rendered a final and binding award, but only an interim award. Further, it is submitted, he did not render a final decision as to the existence of a disability requiring accommodation. Additionally, the union suggests that "the arbitrator's sensible approach likely avoids further litigation in ... a human rights proceeding," in the event he had "closed the arbitral door" on the existence of a disability, since there would have been a possibility of a subsequent human rights complaint. [Union brief, pp. 31-34.]

[57] ***Duty to accommodate.*** HRM argues that the arbitrator erred his interpretation of the *Human Rights Act*. The *Act* prohibits discrimination in respect of employment on the basis of disability, physical or mental: s. 5(1)(d) and (o). HRM, as employer, agrees that it would have a duty to accommodate if a disability had been established. However, it emphasizes the corresponding duty on the employer and the union "to assist in securing an appropriate accommodation.... [I]n determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered": **Central Okanagan School District No. 23 v. Renaud**, [1992] 2 S.C.R. 970, at para. 43. The employee does not, however, have "a duty to originate a solution" in addition to bringing the relevant facts to the employer's attention: **Renaud** at para. 44. The grievor never raised any facts relating to possible disability or discrimination with HRM. The matter was raised by the arbitrator. HRM says the grievor's "failure to advise and to co-operate in the accommodation process has negated any further duty of accommodation on the part or HRM as employer" and maintains that the arbitrator "erred in law and reached an unreasonable conclusion in deciding that HRM has a continuing obligation to accommodate a possible disability of the [grievor] under these circumstances." [HRM brief, paras. 44-49.]

[58] The union points to the broad definitions of "disability" and "discrimination" under ss. 3 and 4 of the *Human Rights Act*, as well as the preamble to the *Act*, as read in light of the *Interpretation Act*. In **Oliver Paipoonge (Municipality) v. L.I.U.N.A., Local 607** (1999), 79 L.A.C. (4th) 241, 1999 CarswellOnt 3359 (Ont. Arb. Bd., Whitaker), the grievor had been diagnosed with a mental disability and was later dismissed by the employer on the basis that he was unable to do his job and would remain so, which the employer proposed to prove through medical evidence. The employer sought production of medical evidence from the grievor, but the union took

the position that this was premature, since its primary argument was that the grievor had been able to do his job when he was terminated. As such, the union argued, the grievor's mental health would not necessarily be in issue, unless it resorted to an alternative argument. The arbitrator said:

> ... The obligations to produce mental health records and to submit to a psychiatric examination are prima facie highly intrusive. By their nature, these types of inquiries may reveal the most intimate details of a person's innermost private life. For better or for worse, our society deals with issues of mental health differently from issues of physical health. Persons may be subject to discrimination, stigmatization or ridicule when it is known that they suffer from mental illness or where the details of such an illness are disclosed. In recognition of this reality, it appears arbitrators have fairly consistently said that such inquiries will only be undertaken at the point in time when they are in fact necessary or essential for purposes of the adjudication of the grievance....

[59] The employer's motions were dismissed on the basis that "the employer does not require the production of medical records or the submission of the grievor to an examination by the employer's expert, in order to prove its case, and the union has not put the grievor's mental health in issue..." (para. 14). In the present case, the union relies upon this decision (it appears) in support of the argument that the arbitrator "concluded that if hurdles to getting medical evidence exist at least in part due to a disability, then he can keep the window open longer.... His power to accept a range of evidence, whether or not admissible in a court of law, grounded the process he took and designed." [Union brief, pp. 21-24.]

[60] ***Accommodation in the hearing process.*** HRM submits that the arbitrator, having concluded that the grievor was not acting in his own best interests, attempted "to adapt the hearing procedure to accommodate his concerns as to the manner of the [grievor's] participation in the process." In doing so, HRM argues, the arbitrator "erred and acted unreasonably" in interpreting and applying the law relating to "the participation in legal proceedings of persons who may potentially suffer from mental health issues." HRM says the arbitrator "foisted" the question of possible mental disability on the union and the grievor "as a potential justifying explanation for the grievor's behaviour." This, it is suggested, is inconsistent with the adversarial nature of arbitration, because the union's decision as to how to present the case on behalf of the grievor is "beyond the jurisdiction of an arbitrator." The "practical effect" of the arbitrator's conduct of the proceeding in this way is to impose "an accommodation in the legal hearing process to accommodate a possible mental disability based on his

concerns arising from the fact that the [grievor] does not appear to [be] acting in his own best interest." HRM offers analogies with the right of an accused person to control the conduct of their own defence and the determination of whether an accused is fit to stand trial; the cases cited by HRM on these points include **R. v. Swain**, [1991] 1 S.C.R. 933, **R. v. Taylor**, [1992] O.J. No. 2394 (Ont. C.A.) and **R. v. Morrissey** (2008), 87 O.R. (3d) 481 (Ont. C.A.), leave to appeal dismissed, 255 O.A.C. 395 (S.C.C.)). [HRM brief, paras. 50-58.]

[61] The union says the arbitrator "gathered enough evidence, as recounted in his reasons, to warrant keeping the window open for a defined period." The union says the criminal law analogy advanced by HRM does not stand up, in view of the arbitrator's duty to reach a "just and equitable" result and the prohibition of discrimination by the parties, with the attendant potential for the duty to accommodate to arise. The union says "[t]he reason the medical evidence is not available may well be due to a disability. The Union cannot get medical evidence without a release. The arbitrator ... under the collective agreement is empowered to arbitrate the real substance of the matter in dispute." Furthermore, "the employer was neither caught unaware nor was denied natural justice" and the arbitrator merely exercised the "degree of creativity" permitted under the *Trade Union Act* and the collective agreement. The union submits that the arbitrator's award amounts to a "last chance agreement ... where conditions are imposed upon continuing employment." Finally, the union says the arbitrator "essentially bifurcated" the hearing by rejecting the union's submission that he should not be disciplined, while forming the conclusion that there might be a psychological problem "which the Grievor had not confronted due to his personal situation and the union's first line of defence." He did not, it is submitted, allow an "open-ended process," but limited any further hearing to evidence relevant to disability. [Union brief, pp. 25-27.]

[62] After reviewing the law respecting the participation of individuals with mental disability in criminal proceedings, HRM submits that

> in the criminal process the accused stands to lose his liberty and accordingly strong protections have been imposed to accommodate the mentally disabled litigant. How can a higher standard of accommodation be expected to be applied in civil matters? Again it is noted that the civil litigation system has drawn from the criminal system accommodations and adapted same to address the civil proceeding context. [HRM brief, para. 58.]

[63] HRM cites several authorities dealing with "mentally disabled" litigants: **Wirtanen v. British Columbia**, [1994] B.C.J. No. 2439 (B.C.S.C.) at paras. 20-21, **Canada (Minister of Citizenship and Immigration) v. Seifert**, [2003] F.C.J. No. 1129 (F.C.) and **L.M. v. D.F.** (1999), 68 B.C.L.R. (3d) 132, [1999] B.C.J. No. 1049 (B.C.S.C.). HRM says the "fact that the [grievor] may not be acting in his own best interest is not a relevant consideration to depart from the normal hearing process." There being no evidence that he was "unfit to stand trial," (civilly or criminally) the grievor must be "presumed able to manage his litigation as he wishes." And if he was "unfit to stand trial," HRM submits, the proper remedy would be appointment of a litigation guardian. [HRM brief, paras. 59-63.]

[64] ***The issue for arbitration was resolved.*** HRM argues that the issue put to the arbitrator was "whether the employer had just cause for the termination of the grievor." This issue, it argues, "was fully heard and decided." The test for just cause to discharge" was stated in **Heustis v. N.B. Electric Power Commission**, [1979] 2 S.C.R. 768, where Dickson J. (as he then was) said, at p. 772:

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

[65] HRM submits that the arbitrator addressed this analysis and upheld the termination, and that "as all outstanding issues posed by the parties have been dealt with ... there is no basis for further proceedings of the arbitrator in this matter." [HRM brief, paras. 64-66.]

<u>ULTIMATE DISPOSITION:</u>

[66] The union submits that "[t]he arbitrator's interim award falls within a range of possible acceptable outcomes which are defensible in respect of the facts [and] law. Both the process and outcome are within the range of acceptable and rational solutions." The award itself gives no indication of being "interim." In his introduction, the arbitrator expressed the intention to "summarise the final arguments of the parties, prior to presenting the ultimate findings of fact and legal conclusions upon which the decisions in the award are based." [Award, para. 2.] He concluded the Award by expressly dismissing the grievance and confirming the termination, subject to a "condition subsequent which may render the dismissal defeasible," permitting the grievor or the union to "provide evidence" – presumably including "expert medical evidence" – that "may be sufficient to meet the initial onus on an employee seeking disability accommodation...". [Award, para. 47.]

[67] The arbitrator's authority for proceeding as he did arose from his interpretation of Art. 16.04 of the collective agreement, which provides:

> 16.04 The decision of the Arbitrator shall be final, binding and enforceable on all parties and may not be changed. The Arbitrator shall not have the power to change this agreement or to alter, modify or amend any of its provisions or make any decision contrary to the provisions of this agreement. However, the Arbitrator shall have the power to modify penalties or dispose of a grievance by any arrangement which it deems just and equitable.

[68] The arbitrator interpreted this provision as authority him to "dispose of a grievance by any arrangement which I deem just and equitable." [Award, para. 47.]

[69] The arbitrator's decision to give the union a second opportunity to present medical evidence of a disability – a decision that was included within what purported to be a final decision – was based on speculation and, even more significantly, was beyond the arbitrator's jurisdiction. The arbitrator's duty was to provide a final and binding decision. The decision he gave did not purport to be an interim one, and included clear and decisive findings of fact based on the evidence that was adduced before him. The broad powers an arbitrator possesses determine the process of the proceeding were well illustrated by the arbitrator's decision to adjourn the hearing so as to permit the grievor and the union to bring evidence of mental disability. This they

did not do. The arbitrator did not have jurisdiction to leave the door open for a further "kick at the can" by imposing a "condition subsequent" on his own final decision.

____

Justice Glen G. McDougall