SUPREME COURT OF NOVA SCOTIA

Citation: Highland Community Residential Services v. Canadian Union of Public Employees, Local 2330, 2013 NSSC 132

2012

Date: 20130425
Docket: PicNo 395459
Registry: Pictou

Between:

HIGHLAND COMMUNITY RESIDENTIAL SERVICES
(HCRS)

Applicant

v.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2330 (CUPE)
and LORNE MACNEIL and AUGUSTUS (GUS) RICHARDSON,
Q.C., as arbitrator in respect of a grievance in matters governed
by the *Trade Union Act*, R.S.N.S. 1989, c. 475, as amended

Respondents

Judge: The Honourable Justice Margaret J. Stewart

Heard: September 24, October 5, November 7 and 8, 2012
in Pictou, Nova Scotia

Counsel: Bruce T. MacIntosh, Q.C. and Joel Sellers, for the Applicant
Susan D. Coen, for the Respondents
Augustus (Gus) Richardson, Q.C., Arbitrator (not participating)

By the Court:

INTRODUCTION

[1] This is a judicial review of a decision of an arbitrator pursuant to a collective agreement between the employer, Highland Community Residential Services (HCRS), and the union, the Canadian Union of Public Employees, Local 2330 (CUPE). The dispute involved the employer's dismissal of an employee, Lorne MacNeil (MacNeil), and the resulting grievance and arbitration award. The arbitrator's decision is reported at 219 L.A.C. (4th) 52.

BACKGROUND

MacNeil's background and employment with HCRS

[2] The employer, HCRS, is a non-profit organization which assists clients who have intellectual disabilities and mental health issues to live in the community in a non-institutional setting. HCRS runs group homes, supervised apartments, and small options programs in the area of Pictou County. Most direct work with clients, including counselling, is done by residential counsellors and house managers, who report to program supervisors, who, in turn, report to the Executive Director. This work involves a broad range of duties. In the arbitrator's words, the residential counsellors:

> organize and cook meals. They monitor the daily routines and chores of a house and its residents (such as cleaning and laundry). They keep a record of food and other items used or consumed in the day. They take their clients to community events or activities, such as bowling, church or exercise. They will accompany those clients who need help in dealing with social interchange in the outside community. They ensure that clients take their prescribed medication at the time and in the dosage set out in their treatment plans. They record the events of their shift in a daily log or communication book. Any events of particular note are recorded in "Incident Reports" that are eventually reviewed by the house manager and the program supervisor. Where necessary, the house manager and program supervisor take whatever action is deemed appropriate. [para. 18]

[3] MacNeil had worked as a residential counsellor at HCRS for 16 years. He was assigned to the Beech Street home. MacNeil had a difficult upbringing and in his younger days was involved in substance abuse and trouble with the law, but

had overcome these setbacks, obtained employment and advanced his education. He had obtained training and employment with HCRS beginning in 1995, becoming a full-time assistant counsellor in 1997. His supervisors' evaluations at this time were "almost uniformly positive," the arbitrator said (paras. 22-24). At the time of MacNeil's termination, the house manager was Tracy Pushie and the program supervisor responsible for the home was Rocklyn Dorrington.

[4] Around 2001, while maintaining generally positive evaluations, MacNeil's supervisors noted concerns about his relations with co-workers, particularly communication problems. There were also concerns – which he acknowledged – with his dispensing and recording of medication. These concerns were present in later evaluations as well. The arbitrator noted that the employment record suggested "periodic friction between the grievor and his supervisors over issues of shift schedules and alleged breaches of confidentiality in this period... Most if not all of the grievor's personnel file was put into evidence, and scattered throughout it are signs that suggest the grievor was a somewhat cantankerous employee who wore his grievances on his sleeve" (para. 31). By 2006, however, MacNeil was apparently making improvements in areas of concern, receiving a "relatively positive" evaluation. His 2008 evaluation was similar, with the only area needing improvement being communication with co-workers (paras. 32-33).

The events of 2010

[5] The events that formed the background for MacNeil's dismissal occurred in 2010. In February 2010 there was an incident where MacNeil was accused by a program supervisor of smoking in the workplace, and having visitors during working hours, contrary to HCRS policies. In March 2010, he was accused of failing to follow a policy of removing toilet paper from a washroom in the house because one of the residents would sometimes overuse it due to obsessive-compulsive disorder. In June 2010, MacNeil failed to follow correct protocols in initialing a pill package after administering medication; he then inappropriately (in management's view) called the counsellor who prepared the resulting incident report at home to inquire about the error. He subsequently initialled the package, although not in the location where the initial would normally go (paras. 36-72).

[6] Later in June 2010, MacNeil failed to appear for a shift, leading to an allegation of "abandonment of shift." The arbitrator set out his own view of this incident at para. 74:

> The parties at the hearing spent some time testifying as to this "abandonment of shift." In essence, I am satisfied, based on the testimony of the grievor and Ms. Pushie, that what happened was this. The grievor was scheduled to be on vacation on June 18-24. He put in an application for leave request to be off on the weekend of June 26-27, but filled out the form incorrectly. He re-submitted the form but again did it incorrectly. In the meantime, at some point during this process he called Ms. Pushie and asked if he could have that weekend off. Such requests are common after a schedule is in place, and house managers will generally grant them if they can find someone to take the employee's place. Ms. Pushie said something along the lines of "Yes, if I can find someone." The grievor mistakenly concluded that this meant that his request had in fact been granted and acted accordingly. Hence his failure to show up on June 26 was an error, but it was an error borne of mistake. It was not intentional. It was not a knowing repudiation of his obligation to be at work on a scheduled shift.

[7] The arbitrator went on to say that the issue was who was responsible for the mistake. This was not addressed in a discipline context until October 2010, as MacNeil was off work with illness or vacation during most of the late summer (paras. 75-76).

[8] Another issue arose in October 2010, when, during a shift change, the incoming counsellor noted a shortage of petty cash. MacNeil's reaction was taken to imply that that other counsellor had taken the money (which was later found). The same month, there was an additional claim that MacNeil had failed to follow protocols respecting a special showering procedure that was implemented for the resident with obsessive-compulsive disorder (paras. 77-87).

[9] On October 21, 2010, MacNeil, along with a union representative and the president of the local, met with Ms. Pushie and Ms. Dorrington to discuss the medication error, the alleged abandonment of shift, and the missing cash. MacNeil agreed that he had erred in failing to initial the blister pack. He did not agree that he had acted unprofessionally in calling a co-worker at home, but he withdrew his grievance. He took the view that the mistake which led to the alleged shift abandonment resulted from Ms. Pushie's mistake. Ms. Pushie imposed a one-day suspension, which MacNeil accepted. He refused, however, to sign the Record of

Disciplinary Action, feeling that he had been treated unfairly by Ms. Pushie. The meeting ended without addressing the third issue. Ms. Pushie recorded that MacNeil had become frustrated, and that he alleged that she and Ms. Dorrington were "out to get him," which Ms. Pushie "assured him we were not." MacNeil subsequently appeared for work on October 24, only to learn that this was the day of his suspension. The arbitrator found that MacNeil was upset by this, feeling that "he had been publically humiliated in front of the co-worker who had taken his shift." The resulting stress, the arbitrator found, "led, within a day or two, to the incident that eventually culminated in his termination" (paras. 88-94).

MacNeil seeks medical attention

[10] It is at this point that the sequence of events leading directly to MacNeil's dismissal commenced. The arbitrator made the following comments on MacNeil's actions and state of mind in late October 2010:

> 95 The grievor testified that the stress was so strong that worried he might act out. He was concerned about the thoughts and fantasies he was having. He went to his family physician, and he recommended that he go to the Aberdeen Hospital Emergency department. So he did.
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> 96 On October 25th the grievor went to the emergency room of the Aberdeen Hospital. He was seen at 4:05 p.m. by Ms. Dalton, a crisis response clinician. He discussed with her the stress he was under at work. He described the fantasies he was having and the real concerns he had about them. He told her that he didn't want "to go to work and wants papers signed to be off work. He doesn't think he needs to be hospitalized:"... She nevertheless recommended that he be admitted and have a psychiatric assessment. He accepted the recommendation and was accordingly admitted (on a voluntary basis) to the mental health wing of the hospital.

[11] Two days later, on October 27, while preparing to leave hospital, MacNeil met with Dr. Kara MacNeil (no relation), a psychiatrist. In the course of this discussion, MacNeil described thoughts and fantasies involving violence against certain management personnel at HCRS. The arbitrator made the following comments on the consultation with Dr. MacNeil:

> 97 … The grievor explained what had brought him to be admitted, and the thoughts that he had been having. Dr. MacNeil was concerned about what she had heard from the grievor and what she had read in the hospital file. She decided to

> commit him involuntarily to the secure wing at St Martha's Hospital in Antigonish. She also decided she was obligated to breach confidentiality and report the threat of harm to both the police and the Executive Director of HCRS.
>
> 98 Dr. MacNeil recorded that the grievor was surprised and upset, but not physically aggressive, when she told him what she had felt obligated to do. He was swearing. He told her she had cost him his job. He "remained relatively settled" though he stood by the door and told her that he would "bolt" the moment it was opened: Ex. 16, p.70. The police eventually arrived, and the grievor was taken by ambulance to St Martha's Hospital. He was released on November 1st.

[12] The arbitrator noted that Dr. MacNeil was on the HCRS board, but that she testified that this did not impact her decision to breach confidentiality (para. 99).

[13] The arbitrator went on to detail the safety protocols implemented by Hilary Amit, the Executive Director of HCRS, including notifying head office that there had been a threat involving MacNeil, barring MacNeil from the premises and arranging for a security guard. Mr. Amit was not able to be specific about the threat in his discussions with head office. As the arbitrator described, he had only been given limited information by Dr. MacNeil:

> 101 In his discussions with the head office staff Mr. Amit was not specific, partly because he didn't himself know who had been threatened or what the threat was. He testified that the phone call he received from Dr. MacNeil was brief. She did not report particulars of the threat — only that it was serious and was directed at senior levels of management. Mr Amit testified that when he received the call from Dr. MacNeil he did not know at the time who exactly was the target of the threat that concerned her (other than that it was someone within management). He no doubt had a suspicion that it was directed at him, but as he testified with respect to the police report he filled out on November 15th, "when Dr. MacNeil called there was a grey area ... I didn't have the level of detail that I have heard here today [that is, the day of the hearing.]" This testimony is consistent with his own statement, in his handwriting, to the police on November 15th, when he wrote that he had received a call from Dr. MacNeil on October 27th "informing that staff person Lorne MacNeil had made a threat of assault/aggression towards Administrators/Supervisors of HCRS [and] that she evaluated the threat as credible and serious:"...

[14] Ms. Dorrington and Ms. Pushie also gave evidence on their limited knowledge of the specifics of the threats:

> 102 This lack of specificity is also consistent with Ms. Dorrington's testimony. She stated in direct that she first heard about the threat from Mr. Amit, who provided few details beyond the fact that one had been made, and that it had been made in discussions with the grievor's doctor. She understood that it was a threat against Mr. Amit. She repeated this in cross, but said that "I'm his supervisor ... I know his anger was directed at me ... I'm sure that I still believe that it was directed at me." Ms. Dorrington had no information that the threat which Mr. Amit reported as having been made against him was also made against her. She simply assumed it was the case, and then went on, as she said in direct, to develop a fear for her own life. Her concern appeared to be that the grievor had become so angry and confrontational in recent years, in contrast to the very favourable impression she had had of him in the early years.
>
> 103 Ms. Pushie as well became aware that a threat had been made by the grievor. She testified in direct that she knew that the threat had "not been made to me." However, she was concerned because she was the one that usually presented the discipline reports "so I felt that there might be some anger against me." The only foundation for thinking that way that she could offer was the "disrespectful" way the grievor had spoke to she and Ms. Dorrington at the October 21st meeting; or when, at another meeting when she offered the grievor help he had replied "you're not a psychiatrist."

[15] After his discharge from St Martha's, MacNeil began to see a psychiatrist, Dr. Vienneau, who, after several sessions, concluded that he was ready to return to work. On February 10, 2011, she prepared a note for HCRS, indicating that MacNeil could return to work on March 1, but that he should "ease back" to work, working part-time for two weeks, then returning to full-time work. She added that there should be no meetings or stressful issues raised in the first months. MacNeil attempted to deliver this note to the HCRS head office on February 11, but the door was barred to him, in accordance with the order forbidding him to go near the office, houses, staff, or clients. The note was delivered by the union (paras. 104-105). The arbitrator described the HCRS reply to MacNeil's proposed return to work in the following terms:

> 106 On February 28, 2011 Mr. Amit wrote to the grievor. He stated that Dr. Vienneau's note was "not sufficient to support your return to work." He explained that the position of resident counsellor is "very safety sensitive" and potentially stressful. That being the case the grievor had to be "functioning at a sufficiently high level at all times while on duty" before he could return to work: Ex. U/E 9, Tab 7, p.56. He wrote that based on the grievor's "employment history and the serious safety issues you presented in the work place in October 2010 (which

> remain under investigation), HCRS cannot support your return to work at this time:" *ibid*.
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> 107 Mr. Amit went on to write that HCRS could not "assess the suitability of your return to work until the following steps are completed:
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> > 1. A disciplinary investigation and review of the incidents surrounding your serious threats of harm. This has been held in abeyance as a result of your presenting medical/mental health condition;
> >
> > 2. Sufficient medical/psychiatric information is received respecting your suitability and ability to return to work and to assess your readiness to engage in the required discipline investigation;
> >
> > 3. An assessment of the future risk you pose to HCRS clients, staff and administration. HCRS will complete this assessment following completion of steps 1 and 2 above:"…

[16] Mr. Amit also set out the restrictions which remained in place, requiring MacNeil to stay away from HCRS premises, personnel and clients, and to communicate through CUPE. The arbitrator noted that there was no evidence that MacNeil ever violated any of these restrictions, other than when he attempted to deliver the note on February 11, 2011. HCRS later withdrew its peace bond application on the basis of MacNeil's agreement to the no-contact requirements (paras. 109-112).

Dr. Theriault's IME and the proposed return to work

[17] In order to meet the requirement for "medical psychiatric information," it was agreed that Dr. Scott Theriault, a forensic psychiatrist in Halifax, would conduct an independent medical examination (IME). The arbitrator described HCRS's directions to Dr. Theriault, as set out in a letter from Mr. Amit on April 7, 2011. The primary purpose was to "determine Mr. MacNeil's suitability and capability to perform the duties of his job." Mr. Amit summarized MacNeil's work history. The arbitrator noted that "[b]y this time Mr. Amit appears to have understood that the grievor had 'disclosed homicidal ideation directed towards HCRS staff'." Mr. Amit wanted to satisfy himself that MacNeil's "return to work is appropriate, both with respect to his own medical needs and also with respect to the needs of our residents" and, in particular, that MacNeil was "fit and entirely

capable of handling the stressors which are likely to arise in the workplace, and that his return to work does not pose a risk of any sort to our residents."

[18] The arbitrator summarized (at para. 113) the questions Mr. Amit put to Dr. Theriault as follows (I paraphrase): (1) Was MacNeil capable of returning to work? (2) Was MacNeil a threat in the workplace to co-workers, supervisors, the Executive Director or residents? (3) Was MacNeil capable of accepting responsibility for his actions, including his threat? (4) Was MacNeil able to engage in the suspended disciplinary process? (5) Was MacNeil able to resume interactions with Mr. Amit and other supervisory staff?

[19] The IME was conducted on April 26, 2011, and Dr. Theriault provided a report on May 3. He reviewed MacNeil's history and the consultation reports of the doctors who had already seen him. Dr. Theriault described MacNeil's family background, youth, education and work history, and his work situation, including his feelings of being mistreated by Mr. Amit. He took note of earlier psychiatric assessments indicating that MacNeil had a long history of violent thoughts. He also reviewed recent developments, post-dating the October 2010 situation, indicating that medication prescribed by Dr. Theresa Vienneau, namely Valproate, had helped MacNeil control his anger, and MacNeil's own view that he had been feeling much better over recent months, that his mood was good, and that his anger was not then an issue. He also noted that MacNeil denied any thoughts of harming others.

[20] Dr. Theriault noted that MacNeil "appeared to engage in impression management; that is, he appeared to be at pains to present himself in a positive light." He tended to minimize the seriousness of his anger problems. While he did not show significant shifts in mood during the interview, he did become animated when discussing work issues, and admitted that his anger had been triggered in the past by events at work, particularly in interactions with supervisors, rather than with residents or co-workers.

[21] Dr. Theriault concluded that MacNeil was "currently stable psychiatrically speaking and would be capable of returning to work and completing the duties of his job." Dr. Theriault did not believe that MacNeil had the symptoms of bipolar disorder, but took the view that intermittent explosive disorder better fit his condition: "[e]ssentially," he wrote, "it is characterized by a lifelong pattern of

chronic tension or anger with intermittent eruptions of that anger in verbal or physical form." Dr. Theriault attributed the origin to MacNeil's relationship to his father, "who he described as persistently verbally abusive." This led to problems with anger in situations dealing with people in authority. Dr. Theriault noted that one treatment for intermittent explosive disorder was mood stabilizing medication such as Valproate, which might therefore be "the cornerstone for his long term stability." He concluded that "[o]verall ... I do think he has the capacity to address and maintain sustained long term improvement in his social conduct in the workplace."

[22] As to whether MacNeil presented a threat in the workplace, Dr. Theriault concluded that he did not believe that "at this time Mr. MacNeil represents an immediate or imminent threat in the workpalce" to colleagues, supervisors, the executive director, or HCRS residents. He went on to say that despite lifetime anger issues, MacNeil had "maintained full time employment over many years" without (by his own report, at least) engaging "in any activity that has led to criminal charges in many years." While MacNeil seemed, "by report, to have fantasies of harming others at time [sic], particularly in times of stress but has never acted upon them. In the instance of his hospitalization..., he self presented for help, suggesting that he was aware that the ideas he was entertaining were inappropriate."

[23] Dr. Theriault went on to discuss the "static (i.e. non-changing) and dynamic (malleable)" factors that determine an individual's risk for future violence. Dr. Theriault suggested that the element of "unresolved workplace conflicts" was a dynamic factor that would tend to increase the risk, while MacNeil's "chronic anger" was a dynamic factor that appeared to be under better control, with the assistance of medication. While little could be done about static factors (such as a history of violence), he expressed the view that MacNeil would benefit from therapy "to help him deal appropriately with his anger, and diminish his use of violent fantasy." He added that although MacNeil did not "currently pose a significant risk, his risk should be monitored," and that any "increase in anger, or display of angry affect, especially in the workplace, or recurrence of violent fantasy would suggest that his overall risk to act violently has increased."

[24] On the question of MacNeil's ability to deal with the unpredictable nature of the workplace, Dr. Theriault stated that MacNeil "appeared to be stable in his

mental state." Moreover, in his opinion, MacNeil's intermittent explosive disorder "really is a life long thing for him and in many ways should be seen as more characterological ... in nature; in this regard Mr. MacNeil has been able to perform the functions of his work and deal with the demands and unpredictable nature of it over many years despite his chronic issues with anger. There is no reason to think he would not be capable of doing so now."

[25] As to MacNeil's ability to respond appropriately to management and constructive criticism in the workplace, Dr. Theriault's view was that MacNeil "needs to learn to deal appropriately with his tendency towards anger. In light of this, I do not think that it would be appropriate to deal with him any differently than any other employee with respect to necessary management issues and constructive criticism of his job performance." MacNeil, he said, "should be expected to manage his anger the same way as any other individual would, and should be "dealt with the same way as any other citizen" should he voice verbal threats in the future. He believed that MacNeil was "certainly capable of accepting responsibility for his behaviour and in fact should be expected to do so." In short, Dr. Theriault's view was that MacNeil was "capable of returning to his position as a full time Residential Counsellor for the HCRS."

[26] The arbitrator summarized Dr. Theriault's conclusions as follows:

> 114 Dr. Theriault saw the grievor on April 26, 2011 for two hours. Dr. Theriault had the Aberdeen Hospital medical records, and in particular the consultation reports of Drs. Vienneau, MacNeil and Aquino. He had Mr. Amit's letter of April 7th. On May 3, 2011 Dr. Theriault provided a detailed, 15 page report which set out the grievor's past history, discussed the various consultation reports and the events leading to the October 27th threat, and responded to the 11 questions put to him by Mr. Amit. In summary, Dr. Theriault was of the view that the grievor:
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> a. was currently stable psychiatrically speaking and was capable of returning to work and performing the duties of his job;
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> b. the grievor's presentation best fit a diagnosis of intermittent explosive disorder, which, he noted parenthetically, "has some degree of controversy in psychiatry;"
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> c. had "the capacity to address and maintain sustained long term improvement in his social conduct in the workplace;"

> d. was not at that time an immediate or imminent threat in the workplace to co-workers, supervisors, the executive director or the residents;

e. was capable of accepting responsibility for his behaviour and actions and, in fact, should be expected to do so;

> f. was capable of returning to work as a full-time residential counsellor at HCRS; and
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> g. insofar as discipline was concerned, should be and could be treated no differently "that any other employee as a result of [his intermittent explosive disorder]:"…

[27] Moving to more specific issues and qualifications arising from Dr. Theriault's report, the arbitrator said:

> 115 Dr. Theriault did opine that the grievor "needs to learn to deal appropriately with his tendency towards anger." He did not think that "the sort of anger displayed by Mr. MacNeil in the autumn of 2010 was evidence of deterioration of his 'emotional well being' and I believe Mr. MacNeil should be expected to manage his anger the same way as any other individual would:"... Dr. Theriault's evaluation of the grievor's "anger issues" is perhaps best summarized in the following excerpt from his report:
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> > "Mr. MacNeil has a reported history of lifetime anger issues; however, he has maintained full time employment over many years and has not (by self report but not formal review) engaged in any activity that has led to criminal charges in many years. He seems, by report, to have fantasies of harming others at time, particularly in times of stress but has never acted on them. In the instance of his hospitalization in October, he self presented for help, suggesting that he was aware that the ideas he was entertaining were inappropriate:"...
>
> 116 Dr. Theriault observed that a person's risk for future violence was determined by both static and dynamic factors. Static factors for the grievor that increased the risk for future violence included a previous history of and conviction for assault (many years ago when he was young) and "his long standing history of anger and violent fantasy." Conversely, static factors that decreased the risk included the grievor's history of general law abiding behaviour, stability of employment and lack of drug use (other than cannabis). Dynamic factors that increased his risk centred on his unresolved workplace conflicts, while those that decreased the risk included his use of Valproate. He recommended that since nothing could be done

> about the static factors that he deal with the dynamic issues: "it would be helpful for Mr. MacNeil to engage in therapy to help him deal appropriately with his anger, and diminish his use of violent fantasy." Medication could also play a role... (The grievor was then on Valproate and had reported it as being helpful.)

[28] HCRS responded to Dr. Theriault's findings on June 2, 2011. Mr. Amit indicated by letter that any consideration of a potential return to work first required a discussion of the outstanding disciplinary matters, specifically, MacNeil's accusation of theft by a co-worker, the alleged shift abandonment; the medication error, the toilet paper and shower protocol issues (in which, Mr. Amit wrote, MacNeil's actions "put a client at risk"), the allegation of smoking on shift, the death threats made the previous October and "subsequent threatening statements made in February 2011." Mr. Amit added that it would be necessary to discuss "the information contained in Dr. Theriault's report, as it relates to your ability to return to work." Such a meeting, he wrote, was necessary to determining "what disciplinary action may be appropriate, and whether your return to work can be facilitated" (paras. 117-118).

[29] A "disciplinary investigation interview" was conducted on June 20, 2011. This meeting was attended by MacNeil, Mr. Amit, Betty Jean Sutherland (the CUPE national representative), Nan McFadgen, the president of the CUPE Local, Mike Kelly, Ms. Dorrington, Ms. Pushie and Frank Gillan. The arbitrator made the following comments about the meeting:

> 120 The first part of the meeting dealt with the "disciplinary matters" that had been outlined in Mr. Amit's earlier letter: the theft of money issue; the abandonment of shift; the blister pack issue; the smoking on shift issue; and the failure to follow protocols. Mr. Amit recorded the grievor's responses as being generally argumentative, either not seeing a problem or complaining that the Employer's processes were confusing... Ms. Pushie and Ms. Dorrington then left and the discussion turned to the question of the threat, his relations with Mr. Amit and Dr. Theriault's report. Mr. Amit recorded the grievor as denying that he had ever threatened either Mr. Amit or the grievor's supervisors, and generally refusing to discuss what he had said to Dr. MacNeil. (The grievor in his testimony explained that what he meant by that was that he had not directly threatened them, as opposed to talking about potential violence to Dr. MacNeil.) The grievor accepted Dr. Theriault's report, save with respect to the diagnosis of intermittent explosive disorder. He also refused to consider therapy, unless he could be assured that confidentiality could be maintained. He claimed that "all he needs is

> an in depth orientation to his worksite, couple of hours, and he is ready to return to work:"...
>
> 121 Mr. Amit was not impressed. He stated that there were three principle factors that in the end weighed against Mr. MacNeil. First, there was the fact that some staff were uncomfortable and afraid. Second, and "the biggest piece of it," was that "even in the face of identified solutions to a life long condition, there was a denial and refusal to do anything about it." Third, there was the problem that they "could not trust the safety of our clients with a person like Mr. MacNeil." With respect to this last point, the concern was Mr. Amit's perception that the job entailed stress, and if stress caused Mr. MacNeil to get angry there was a risk that he might strike out at them.

[30] Mr. Amit decided to terminate MacNeil's employment. In a termination letter dated 4 July 2011, Mr. Amit identified the "material considerations and workplace misconduct" that formed the reasons for the termination decision. These included violation of workplace smoking and visitors policies; violation of protocols by failing to log medication (after which he was alleged to have "falsified the records after [his] error, and tried to cover up [his] mistake) and by violating a "client care safety protocol which exposed the client to considerable risk"; inappropriately taking a coworker to task for reporting the medication error; and threatening the executive director. This history, Mr. Amit wrote, demonstrated "poor judgment in the workplace, including decisions surrounding client care, compliance with protocols and policies. You have dismissed and minimized the legitimate safety and protocol concerns of HCRS, failing to have insight into the concerns and the impact of your actions on our work environment, clients, staff and yourself."

[31] Mr. Amit noted past incidents of discipline, some of them leading to "medically advised absences ranging from one shift to many weeks off work." He concluded that MacNeil's "behaviours in the workplace have been longstanding and have escalated over time. They have reached the point where the employment relationship has broken down and is not subject to further remediation." In his decision, the arbitrator stated that the reasons for dismissal were smoking on the job, failing to follow work protocols, and threatening the director of HCRS. He stated, however, that the employer's "fundamental reason" for the dismissal was "its conclusion that the employment relationship had broken down."

[32] The union grieved MacNeil's dismissal on the basis of wrongful discharge, pursuant to Article 11.02 of the collective agreement. Article 11.03 permitted the arbitrator to reinstate the employee without loss of seniority. This was the remedy sought in the grievance, along with restoration of wages and monetary benefits, along with damages. Where reinstatement was not appropriate, Article 11.03 permitted the arbitrator to impose a "fair and equitable" remedy.

The proceeding before the arbitrator

[33] The arbitrator made a witness exclusion order at the beginning of the hearing. Exceptions were made for MacNeil, Mr. Amit, and the union representatives, Ms. Sutherland and Ms. MacFadgen. He then heard from seven witnesses on the employer's behalf, plus two medical witnesses: Dr. MacNeil and Dr. Theriault. The arbitrator also heard three witnesses on behalf of the grievor. He found "little dispute between the parties on the material facts;" rather, the disputes, which he described as serious, "lay more with the explanations, inferences or conclusions to be drawn from those facts." As such, he said:

> 10 … Credibility as a result was not in my view an overarching concern. That being the case I see no need to provide an exhaustive precise of the evidence of each of the witnesses. Instead, I will set out the facts as I find them to be based on the testimony of the witnesses and the documentary record, save where it is necessary to discuss the evidence in greater detail in order to resolve a point that was in contest.

[34] The arbitrator went on to explain his treatment of the evidence. Dr. MacNeil had reported the threat to Mr. Amit in general terms: she had only indicated that MacNeil had made a threat that she evaluated as being credible and serious. It was only during the hearing that extensive details were disclosed to the employer's counsel, which counsel was able to discuss with Mr. Amit, who thus became aware of further details (as he did on hearing the witnesses.) This resulted in the employer obtaining knowledge of details of conversations between MacNeil and his doctors that were not known at the time of the termination. The arbitrator said:

> 13 The fact that this information was revealed only in the context of the arbitration hearing itself makes my task somewhat difficult. Social policy as well as the therapeutic model dictates that I protect as much as possible the confidentiality of the doctor-patient relationship. As well, fairness to the process and the parties — and in particular the grievor — demands that I limit myself as

> much as possible in my award to only the information that was actually known to the Employer at the material time. After all, it is that information — not the confidential information that came out during the hearing — that formed the basis of the Employer's decision.

[35] HCRS asserted to the arbitrator that MacNeil's termination arose from a "loss of faith and trust" and that his "history with the Employer had been marred by denial and deflection, and by a repeated and ongoing refusal to accept responsibility for anything he had done or not done" in a pattern persisting "up to and through the meeting on June 20, 2011." The employer submitted that the decision to seek medical help, leading to the threat, indicated that MacNeil was losing self-control, but that he nevertheless refused to follow the steps recommended by doctors to deal with his anger. As such, the fact that he had not assaulted anyone was no assurance that he would not do so in the future. He had not sought help, nor had he accepted recommendations that were offered, or pursued suggested therapy. HCRS argued that even if the arbitrator found in MacNeil's favour, damages should be awarded in lieu of reinstatement. (Paras. 123-131).

[36] CUPE submitted to the arbitrator that no discipline was called for and that MacNeil should be reinstated with full back pay, plus damages. The union argued that a statement to a treating physician could not constitute misconduct worthy of discipline. Moreover, counsel submitted, HCRS was using the statement to Dr. MacNeil to go behind Dr. Theriault's report. The earlier incidents had either been dealt with or were equivocal. Further, MacNeil, it was submitted, suffered from a disability, creating an obligation for the employer to accommodate. The employer took the position that MacNeil had never sought accommodation and had refused to follow recommended therapy (paras. 132-140).

The arbitrator's reasoning

[37] The arbitrator described the case as a difficult one, "made more difficult by the fact that much of the testimony and evidence dealt with the subjective feelings, emotional responses and unresolved complaints of the various participants stretching back over years, rather than the actual events in 2010 that gave rise to the termination" (para. 141). He set out the principles of termination law that he proposed to apply:

> 142 First, I must determine whether the acts complained of warranted any discipline at all. If I determine that the act or actions complained of did not warrant discipline then my inquiry ends and the grievor is returned to the workplace.
>
> 143 Second, if I decide that some discipline was warranted for the acts or actions in issue, I must then decide whether the discipline imposed — in this case, termination — was reasonable in the circumstances. If I decide that it was then the termination is upheld and the grievance is dismissed.
>
> 144 Third, if I determine that while some discipline was warranted the discipline imposed was unreasonable or excessive in the circumstances, I must then decide whether it is appropriate that a lesser discipline be imposed. If I do come to that decision, then the grievance is allowed in part, inasmuch as the grievor is returned to the workplace with a lesser discipline.
>
> 145 Finally, if I decide that termination was not warranted I may in "exceptional circumstances" consider awarding damages in lieu of reinstatement: *A.U.P.E. v. Lethbridge Community College*, [2004] S.C.J. No. 24 (S.C.C.) at para.56.

[38] On the first issue – whether any discipline was warranted – the arbitrator considered the various items of alleged misconduct. While finding that MacNeil had violated protocols against smoking and having visitors in the workplace, he rejected the argument that these incidents warranted discipline. He did find that the violation of the protocol respecting the dispensing of toilet paper warranted some form of discipline, while also holding that the breach had not compromised the resident's safety or well-being. He reached a similar conclusion respecting the shower incident, adding that this would have called for more serious discipline, being the "second failure on his part with respect to the same area of responsibility within less than a year." As to the blister pack incident, MacNeil had been disciplined, but the arbitrator noted that this event was too far removed from the threats to be part of a progressive chain of discipline culminating in dismissal. As with the smoking incident, however, the employer was more concerned about MacNeil's reaction than about the breach of protocol itself (paras. 149-161).

[39] The arbitrator moved on to consider whether the threat of violence – which he characterized as "the basic underlying reason" for MacNeil's termination – warranted discipline. He found as a fact (at para. 163) that MacNeil "said the things he is reported to have said to Ms. Dalton and to Dr. MacNeil" and that the statements he had made,

> in the circumstances, would have been reasonably interpreted by anyone as a threat that if something was not done to help the grievor he might do something to seriously harm some members of senior management at HCRS. The fact that Dr. MacNeil thought it necessary to breach doctor-patient confidentiality is testament to the seriousness with which she viewed the grievor's statements.

[40] The arbitrator found that "the threat that was made did merit discipline. It was serious. It was focussed. It flowed directly from and was a response to the grievor's employment relationship" (para. 164). He rejected the suggestion that MacNeil might have acted differently had he known that Dr. MacNeil was on the HCRS Board (paras. 165-166). He made the following remarks about the magnitude and significance of the threats:

> 167 … What the Employer in any such case has to deal with is the fact that a threat has been communicated to its management or its employees. Threats can wreck [*sic*] havoc in the workplace. They can affect the mutual trust and respect that is crucial to an effective operation and to the employment relationship. It does not matter in my view whether the intended victim learns of the threat directly from the employee, or indirectly via some third party who feels it necessary to inform the Employer that such a threat has been made: see, for e.g., *Livingston Distribution v. IWA-Canada, Local 700* (Manilall Grievance), [2001] O.L.A.A. No. 32 (Ont. Arb. Bd.) (Stewart).

[41] The arbitrator rejected the union's argument that no discipline should arise due to the medical and clinical context in which the threats were made:

> 168 There is then the question of what difference, if any, it makes that the grievor said what he said in the context of a therapeutic relationship with someone he thought was bound by strict rules of confidentiality.
>
> 169 In the circumstances of this case it does not, in my view, make any difference. This is not a criminal case where evidence that was obtained in violation of an accused's Charter rights is excluded by reason of that violation. Nor, as a general rule, am I entitled as an arbitrator to ignore relevant evidence solely because of concerns about how it may have been obtained. And as I observed to counsel for the grievor, the chain of events initiated by the grievor's comments placed "an elephant in the room" that cannot be ignored. The grievor said what he said. What he said was reasonably interpreted by a professional as an imminent threat to commit serious physical harm. That threat was conveyed to the employer and its senior management. It had and continues to have an impact on the feelings and emotions of some of the grievor's immediate supervisors. In the circumstances of

> this case then the statements cannot be excused or ignored simply because they were made to a person ordinarily charged with keeping such statements secret. The crucial point is that the threat was made and that it was conveyed to the Employer.

[42] Having said that, the arbitrator went on to consider the circumstances in which the threats were made:

> 170 However, what does make a difference in my opinion is that what Dr. MacNeil perceived as a threat was made precisely because the grievor recognized that (a) the fantasies were inappropriate and (b) his self-management techniques were reaching the limits of their effectiveness and (c) he needed medical help in dealing with them. He had no immediate intention to act on these fantasies. He was seeking help in order to avoid acting on them. It was an "elicited" threat. That is, it was expressed not as an intention to commit an act, but rather as an explanation of his desire and need for help. It was not, as in most if not all of the cases cited to me by counsel for both parties, a stated intention to commit an immediate or future act of violence.

[43] The distinction was a fine one, the arbitrator acknowledged, but was nevertheless a relevant factor in considering appropriate discipline (para. 171).

[44] Having concluded that the failure to follow protocols was cause for discipline, as was the threat of violence, the arbitrator considered whether termination was justified in the circumstances. He concluded that the failure to follow resident protocols did not justify termination, and that HCRS had, in fact, overstated their seriousness. Further, the protocol failures had no effect on the question of whether the threat warranted termination, being “entirely different from the threat in gravity and impact on the employer and its operations.” The threat was a “standalone issue” (paras. 173-174).

[45] The arbitrator, it should be noted, found that this was not a case of a disability requiring accommodation under the *Human Rights Act*, RSNS 1989, c 214. Nor was he convinced that HCRS had a duty to “institute conflict management programs for its entire workplace simply because there may have been some conflict surrounding one of its employees; or that it failed a responsibility to offer some form of ‘help’ to him.” MacNeil had been advised that his medical plan covered psychological therapy. It was for him and the union to seek assistance. Indeed, MacNeil’s doctors had made such recommendations, “which he consistently refused to accept” (paras. 177-179).

[46] Moving to the question of whether the threat warranted termination, the arbitrator acknowledged that threats and acts of violence were "serious issues" and that termination "is often found to be warranted, even in the case of long-term employees, particularly where the employee lacks remorse, refuses to apologize or feels justified in what he or she did…" (para. 175). Termination, however, was not "inevitable nor invariable," and reinstatement, "often with strict conditions," might be ordered in the event of provocation or "an understandable if not excusable momentary outburst," particularly where the employee takes steps to modify their behaviour (para. 176).

[47] The arbitrator went on to comment on MacNeil's evidence and to attempt to place the threat in context:

> 180 The general tenor of the grievor's evidence, both in his evidence before me and in the documentary record, was that he had been unfairly picked upon or singled out by management for unequal treatment. On the evidence I was not satisfied that there was any intention on the part of his managers to treat the grievor unfairly. However, and at the same time, some of their actions in dealing with him could reasonably be perceived in that manner by the grievor. In other words, while the grievor's perception was incorrect it was not entirely unreasonable for him to have thought the way that he did.

[48] The arbitrator used the example of the blister pack incident and the subsequent phone call, noting that MacNeil had been encouraged to communicate with co-workers rather than going directly to a supervisor. In the circumstances, the arbitrator did not regard it as unprofessional for him to phone a colleague about a recording error. (This was not to say, he added, that MacNeil had handled the actual conversation appropriately.) Similarly, he did not regard MacNeil's conduct during the suspected theft incident – when he pointed out that "we have a problem" – as unreasonable. The money had in fact been missing, if only temporarily, and there were "oddities in the co-worker's explanation" which Ms. Dorrington acknowledged "she had wondered about – but in the end did not pursue…" Nor did he accept Ms. Pushie's concerns about MacNeil's subsequent rearrangement of the office furniture, intended to ensure that the money was counted in front of a witness. In these circumstances, he found it "not surprising" that MacNeil "should have felt that he was being unfairly chastised for actions that were reasonable in the circumstances – or that such feelings of unjust treatment could create stress for him" (paras. 181-183).

[49] The arbitrator further found a tendency on the part of management or co-workers at HCRS to "overstate" MacNeil's conduct, such as by describing his initialling of the blister pack beside, rather than inside, the circle as "falsification" or an attempt to "cover up," particularly where he had accurately recorded the dispensation on the relevant document. To a similar effect, the arbitrator regarded the accusation of "abandonment of shift" to be an overstated description of a mistake. Another example was a co-worker's explanation for her suggestion that she felt "intimidated" by MacNeil. In the arbitrator's view, her explanation amounted to a feeling arising from MacNeil's lack of pleasantries during shift changes (paras. 184-186).

[50] The arbitrator did not find that MacNeil was in fact "being treated unfairly by HCRS management or by, in particular, his house manager or his program supervisor." However, MacNeil's perception that he was sometimes singled out was, in the arbitrator's view, not unreasonable:

> 187 … It is to say, however, that some of their approaches to events involving the grievor could reasonably seem to him to be unfair, thereby generating feelings of frustration, stress and defensiveness. That this might be so is not surprising, given that in some sense they were almost bound to misinterpret or misunderstand each other's actions and comments. Ms. Pushie and Ms. Dorrington had university degrees and were used to speaking in the sometimes indirect language of mental health care professionals. The grievor had a GED and was used to speaking, when at all, in the taciturn, blunt words of the working class. By way of example, Ms. Pushie called the grievor "anal" in a staff meeting on November 22, 2006. She meant it as a compliment, because as she explained in a memo to file at the time, she "had been referring to his work ethic and as I explained to him that day ... I meant it in a positive way because I can rely on him to do his work thoroughly and by the book and in no way does he slack off or do it half way." The grievor, on the other hand, as she reported, "didn't appreciate being called anal because he took it to mean that I called him an asshole:"...
>
> 188 All of this in my view weighs in the grievor's favour. It demonstrates that the Employer had a role — albeit an innocent one — in creating in the grievor a sense of being "poked" or "picked upon." That sense in part led to the stress and hence the thoughts that he expressed to the medical staff at the Aberdeen Hospital in October 2010.

[51] Although the arbitrator had earlier rejected the suggestion that the therapeutic context in which the threats were made exempted MacNeil from

discipline, he did consider this a favourable factor on the question of whether termination was justified:

> 189 It also weighs in the grievor's favour that the threat that was found in his words was not made directly. It was made in the context of a therapeutic relationship — that it was what might be called "a cry for help" (as discussed above at para. 170 above). This fact mitigates — or perhaps better blunts — the extent of the threat outside that relationship. In my view this blunting of effect can be seen in the evidence (discussed above at paras. 101ff above) of those most affected by the grievor's statements — Mr. Amit, Ms. Dorrington and Ms. Pushie.
>
> 190 The evidence of Ms. Pushie and Mr. Amit lacked the sense of immediate threat or terror that one often sees in the fact scenarios in the arbitral jurisprudence dealing with workplace violence. In my opinion this was an example of the mitigating effect of the way in which the threat was communicated to them. It was also in my opinion a function of HCRS's recognition that people can sometimes react to stress or upset with outbursts of threats or violence. Indeed, it is part of the very purpose and goal of the organization to assist such people to control or minimize such outbursts. So, for example, Ms. Dorrington by her own admission has clients who have on occasion acted out physically, striking staff including herself. There were also reports in evidence that at least one client, if not two, had in the past told Ms. Pushie or Ms. Dorrington that they might assault the grievor... All this is to say that while threats of assault are obviously matters of concern, they do not by the Employer's own evidence automatically rule out continued working with or for the persons having made such threats.

[52] The arbitrator went on to comment on Dr. Theriault's report. He said:

> 191 Finally, there is the report of Dr. Theriault (which I note while on this point that Ms. Dorrington was aware of). His opinion was clear and unequivocal. The grievor is not a current threat. He is able to return to work. There would be no risk to co-workers, managers or clients if he did. These are emphatic answers to the very questions that Mr. Amit posed to Dr. Theriault. Such answers strongly support a conclusion that the grievor's statements were at best a one-off expression resulting from stress and not in ordinary course a portent of things to come — or to be repeated.

[53] The arbitrator discussed the factors favouring termination, primarily MacNeil's "unwillingness to confront the fact that the techniques he has used to date to manage his anger no longer seem entirely adequate." In Dr. Theriault's opinion, MacNeil required therapy in order to learn to deal with anger. The medical records indicated that MacNeil had been recommended cognitive

behaviour therapy, and had commenced a course of such treatment with a clinical social worker, Kendra Popwell, in January 2012. He had broken off the therapy in March, however, indicating (according to the records) that “speaking about anger, anxiety, power/control, coping or interpersonal relationships triggers him emotionally which can turn a good day into a bad one.” MacNeil’s own evidence was that Ms. Popwell “was not giving me the help that I wanted,” which, he said, was “how to deal with people coming towards me with issues, like how to deal with someone who repeatedly says untrue things to me ... how do I deal with that at work” (paras. 192-194).

[54] The arbitrator described MacNeil’s failure to acknowledge the therapy he needed, his failure to grasp the effect of his words on his co-workers, and his failure to understand the need to change his behaviour:

> 195 He also testified that the year off work meant that he could rest and relax. He stated that as a result "there is no risk now ... I realise that I was depressed before and that I must accept the fact of being in a depression ... with medication and therapy I feel totally one hundred percent better ... I'm more calm and relaxed than I have been in years, and I feel I can do the job the way I used to do it and enhance on that." He regretted that Ms. Dorrington and Mr. Amit had to experience the fear that they had, but said they had no cause for fear now. He hoped that "there is some way I can make this up for what has taken place." He added that he was prepared to participate in any program offered by HRCS, though he did not explain what particular program he had in mind — and added in any event that he believed the HCRS "lacked in any programs."
>
> 196 None of this evidences much insight on the part of the grievor. While it is true that the grievor has never directly threatened any co-worker, supervisor or client of HCRS, it is also true that his frustration, anger and stress led him to take significant amounts of time off work in the summer of 2010 — and led him to seek medical attention for fear that he might in fact lash out at those responsible for his supervision. And while I accept that he feels calm and relaxed now, after a year away from work, there is no reason to suppose that if he returns to work he will not begin to experience the same stress leading to the same problems with management. His comment that he does not need anger management therapy flies in the face of the recommendations and advice of most if not all of the medical reports filed in evidence. And his suggestion that he does not need to do anything to assuage the concerns of his supervisors should he return to work simply ignores the very real fright they were given in October 2010. It ignores the fact that that fright originated in his own realization that he might no longer be able to maintain

> control of his anger. In short, he has not really accepted the demonstrated need for him to change his behaviour.

[55] The arbitrator concluded that the case was a close one, with discipline in some form being warranted for both the protocol failures and the threats. He went on to weigh the factors for and against reinstatement:

> 197 … Also weighing against the grievor is the fact that he made a threat that was communicated to his Employer, causing some fear and upset with at least one of his supervisors. Weighing against him too is the fact that he continues to demonstrate little willingness to accept responsibility for his actions or to do anything that would demonstrate to those he threatened (albeit indirectly) that he was interested in changing his behaviour.
>
> 198 On the other hand, and weighing in his favour, is the fact that the grievor had worked hard to improve in his years as a residential counsellor. He has had good performance reviews in the past. He has never actually assaulted or threatened anyone at HCRS — whether supervisor, co-worker or resident — in the years he has worked there. Moreover, the Employer did have a role in creating or exacerbating the stress under which he was labouring. Weighing too in his favour is the fact that his threat represented — and was made in the context of — a cry for help; and the fact that the IME report commissioned by the Employer for the precise purpose of determining his ability to return to work without posing a risk to anyone, including his supervisors, stated without reservation that it was safe to let him return to work and that he posed no risk to anyone — management, staff or co-workers — at HCRS.
>
> 199 I have concluded that the balance tips — just barely — in favour of a conclusion that the particular discipline imposed was excessive in all the circumstances. I am accordingly satisfied that reinstatement — albeit on strict conditions — ought to be ordered. I should say at this point that I do not consider this to be one of those "exceptional cases" where damages in lieu of reinstatement could be ordered. I did not have the sense that the workplace was so poisoned that it would be impossible for the grievor to return to work there. Residential counsellors spend a great deal of their time alone with residents, and there was no evidence that the grievor had ever threatened them or that they had any knowledge as to what had happened. The fact that the grievor and one or two of his co-workers might have issues dealing with each other is not a reason to conclude that they cannot continue to work together or, at least, in the same organization.

[56] Accordingly, the arbitrator ordered MacNeil reinstated, with no loss of seniority, but no back pay. The conditions included, *inter alia*, that MacNeil

would “continue with his current medication regime under the direction of his family physician,” whom MacNeil was directed to authorize to inform the HCRS Executive Director of what medication he was on, and any changes in it, as well as to advise if he went off a prescribed medication contrary to medical advice. MacNeil was also required to “commence therapy with Ms. Popwell, or such other therapist as the parties may agree, and is to cooperate and participate in such therapy in good faith for 20 sessions, or such lesser number of sessions as Ms. Popwell (or the alternate therapist) considers sufficient.” The therapist was to be authorized to “report to the Executive Director after every 5 sessions, confirming (without revealing the content of any discussions) that the grievor has been attending and whether in the therapist's opinion he is making good faith efforts to participate in the therapy” as well as to advise if he stopped attending. MacNeil would be “subject to immediate discharge if he commits or threatens any act of physical assault or violent conduct in the workplace against anyone,” and were he to fail to comply with any of the conditions, “such failure shall be considered and may be acted upon by the Employer as just cause for termination” (para. 200).

STANDARD OF REVIEW

[57] The leading case on the determination of the standard of review is *Dunsmuir v New Brunswick*, 2008 SCC 9, where the majority of the Supreme Court of Canada defined the two standards of correctness and reasonableness, and set out the framework for determining which standard applies in a given case. In this case there is no dispute that the applicable standard of review is reasonableness. Counsel’s agreement is not determinative, however: *Casino Nova Scotia v Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, at para. 4. That being said, if the “jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question,” an extensive analysis is not required, as the necessary analysis is deemed to have been performed (*Dunsmuir* at paras. 57-62).

[58] The Court of Appeal has held that the application of “principles of arbitral jurisprudence to determine whether there was just cause for dismissal” under a collective agreement is “a labour arbitrator's core function, and within the court's zone of deference, attracting a reasonableness standard of review”: *Cape Breton-Victoria Regional School Board v CUPE, Local 5050*, 2011 NSCA 9, at para. 25. While the current matter did not require the arbitrator to interpret a collective agreement, in all other respects, the question of whether the discipline imposed by

the employer was appropriate is squarely within the arbitrator's mandate and is subject matter on which a labour arbitrator is at no disadvantage in terms of expertise by comparison with the court. Reasonableness is certainly the proper standard of review.

[59] Bastarache and Lebel JJ, speaking for the majority of the Supreme Court of Canada, described the application of the reasonableness standard in *Dunsmuir v New Brunswick*, 2008 SCC 9:

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

[60] The principle of curial deference to decisions of labour arbitrators is well-recognized. In *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487, the majority of the Supreme Court of Canada noted, at 505, 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."

[61] The application of the reasonableness standard requires the reviewing court to "track the arbitrator's reasoning, and look for logical connections. If the reasoning follows a rational route, then it does not matter that a different rational path may lead to another destination. The reasonableness standard assumes that the Legislature intended it to be the tribunal's function, not the court's, to choose among reasonable outcomes": *Cape Breton-Victoria Regional School Board v Canadian Union of Public Employees, Local 5050*, 2011 NSCA 9, at para. 31.

THE ARBITRATOR'S REASONING PATH

[62] The arbitrator's path of reasoning has been described in detail above. I will summarize it, for the purpose of the analysis.

[63] The arbitrator identified the legal test to be applied as a four-stage process: (1) Was any discipline warranted? If so, (2) was termination reasonable in the circumstances? If not, (3) should lesser discipline be imposed? (4) If termination was not warranted, should damages be awarded in lieu of reinstatement? (paras. 141-145). This approach appears to be substantively compliant with the analysis set out by the majority in *Toronto (City) Board of Education*, *supra*, where Cory J said, at 509:

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

[64] The arbitrator assessed the historic disciplinary issues, finding that some called for discipline – albeit short of termination – while others did not. He then considered the threats. He found these to be serious and worthy of discipline. He regarded it as reasonable that those hearing such statements would regard them a threat to cause serious harm to HCRS managers. He did not consider it significant that the threat was conveyed indirectly rather than being made directly, or that it was made in a therapeutic context, at least in the context of the threshold question of whether discipline was warranted. He found that, while the statements were reasonably perceived as threats, MacNeil's conduct was in fact directed to obtaining medical assistance in order to avoid acting upon them. This led him to characterize the threats as "elicited," by which he meant that they were "expressed not as an intention to commit an act, but rather as an explanation of his desire and need for help." In short, there was no "stated intention to commit an immediate or future act of violence." This was, he stated, a distinction from "most if not all" of the cases cited by the parties (paras. 149-170).

[65] On the next question – whether termination was the appropriate penalty – the arbitrator found, first, that the violations of protocols did not justify

termination, although they might justify lesser discipline. Moving on to whether the threats – a "standalone issue" – warranted termination, the arbitrator first cited, in a general way, the legal principle that termination will often be warranted for threats or acts of workplace violence, though it will not be "inevitable or invariable" and reinstatement, often on strict conditions, is possible in the event of (for instance) momentary outbursts where the employee takes responsibility for their conduct and takes steps to remedy its causes (paras. 173-176).

[66] In this case, the arbitrator concluded, MacNeil had incorrectly, but not unreasonably, perceived that his managers intended to treat him unfairly, resulting in feelings of "frustration, stress and defensiveness" on his part, which contributed to the thoughts he ultimately expressed at the hospital in October 2010. He also regarded it as a mitigating factor that the threats were made indirectly, in a therapeutic context, as "what might be called 'a cry for help'." He supported this finding with comments about the lack of a "sense of immediate threat or terror" in the evidence of Ms. Pushie and Mr. Amit, noting that HCRS staff had experience of violence and threats from their clients. Finally, the arbitrator cited Dr. Theriault's report, which he described as a "clear and unequivocal" opinion that MacNeil was fit to return to work and that the statements were "at best a one-off expression resulting from stress…" (paras. 180-191).

[67] Set against these mitigating facts, the arbitrator pointed out that MacNeil had not demonstrated a willingness to deal with his anger management problem. For example, MacNeil had commenced cognitive behaviour therapy, but had not persisted with it. Overall, the arbitrator found little insight on MacNeil's part into his problems or into the "very real fright" he had caused. He had not "accepted the demonstrated need … to change his behaviour" (paras. 192-196).

[68] Weighing the competing considerations, the arbitrator concluded that the balance tipped "just barely" towards a finding that termination had been excessive discipline and that reinstatement on "strict conditions" was justified. He did not believe that the workplace was so poisoned as to make a return impossible, and thereby rejected the suggestion of damages in lieu of reinstatement (paras. 197-199).

ANALYSIS

[69] The applicant's position is somewhat diffuse, consisting mainly of a broad attack on the arbitrator's findings of fact, apparently on the assumption that it is appropriate on judicial review on a reasonableness standard for the court to re-weigh the evidence. I will attempt to isolate some of the specific arguments advanced by the applicant.

"Exclusion of material evidence from consideration."

[70] During arbitration the Union disclosed medical records to HCRS counsel, who was permitted to discuss their contents with the HCRS instructing witness, Mr. Amit. This material was admitted into evidence by the arbitrator. Mr. Amit heard all of the evidence, and therefore learned details of the statements by MacNeil to his doctors that were not known to HCRS when MacNeil was terminated. This was the context in which the arbitrator made reference to his preference for protecting – "as much as possible" – the confidentiality of the doctor-patient relationship, as a matter of policy. He also stated that fairness demanded – again, "as much as possible" – a focus on information that was actually known to the employer at the time of termination and which therefore formed the basis for the employer's decision (paras. 12-13).

[71] HCRS says the arbitrator erred in the "exclusion of this material 'subsequent-event evidence'." In *Toronto Board of Education*, *supra*, Cory J stated, at 519, that "such evidence can properly be considered 'if it helps to shed light on the reasonableness and appropriateness of the dismissal'" (citing *Cie minière Québec Cartier v Quebec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095, at 1101). HCRS goes on to assert that the arbitrator gave no "forewarning or indication of his intention to receive but not consider such evidence." The employer's position appears to be that the failure to describe the subsequent-event evidence in detail was "unreasonable" and amounted to a denial of procedural fairness and a breach of jurisdiction. HCRS suggests that its personnel enjoyed a right "to have their evidence and their concerns recorded as part of the evidentiary basis" of the arbitration, and this right was "prejudiced" by the arbitrator's treatment of the evidence. Counsel provides no authority for the suggestions that an error of law constitutes a breach of the arbitrator's jurisdiction or a denial of natural justice, nor is any authority offered in support of a notional right of the applicant's witnesses to have their "concerns recorded."

[72] As CUPE points out, the arbitrator admitted and considered post-discharge evidence, both oral and documentary. It is simply incorrect to claim that the arbitrator excluded or refused to admit such evidence. It is also incorrect to suggest that he did not consider this evidence. Post-discharge evidence was referenced in the arbitrator's reasons, in particular the evidence regarding MacNeil's failure to follow through with therapy with Kendra Popwell in early 2012. It would be wrong in law for the arbitrator to have categorically excluded any reference to post-discharge evidence, but that is not what he did. The applicant's true complaint is about the weight accorded to particular evidence, which is not for the court to second-guess.

[73] More broadly, HCRS accuses the arbitrator of "deliberately ignor[ing] the entirety of the evidence due to the failure to refer to "a lengthy history of homicidal ideation found within the evidentiary record." In support of this line of argument, HCRS cites a collection of excerpts from the medical record that allegedly demonstrate the unreasonableness of the arbitrator's conclusion that MacNeil's actions were a "one-off." This finding by the arbitrator was linked to inferences drawn from Dr. Theriault's report, which appear reasonable on a review of the report.

[74] Given the details disclosed after MacNeil's termination, HCRS says the arbitrator's findings of fact are unreasonable. MacNeil's words and thoughts, it is submitted, amount to misconduct of the kind described in *Toronto Board of Education*, where nothing can be salvaged of the employment relationship. HCRS says the dismissal letter set out the "broad factual matrix" of the decision, focusing on a broad period of time during which MacNeil refused to address his anger and dismissed safety concerns that were raised by HCRS. HCRS says the "underlying factual basis" for the dismissal was MacNeil's denial and refusal of treatment, although HCRS was not aware of the "visceral threats" of October 2010, and did not know about MacNeil's "long history of uncontrolled anger and rage…" Nevertheless, HCRS says it is entitled to rely on that subsequently-disclosed information as corroborative evidence that the workplace would not be safer if he returned than it was when he was terminated.

[75] CUPE says *Toronto Board of Education* is distinguishable on the basis that statements made in the context of a voluntary medical consultation are not misconduct similar to writing threatening letters. The union maintains that it was a

“sensible approach” within the arbitrator’s mandate,” to avoid delving into details of the doctor-patient relationship where possible. The Union argues that it was not unreasonable, or a denial of procedural fairness, for the arbitrator not to “warn” the employer that he would limit the discussion of confidential medical information. The absence of a recitation of the “graphic particulars” does not render the decision unreasonable.

[76] HCRS says the arbitrator’s failure to describe the threats in detail shows “an unreasoned analytical process that is unsupported by any legal precedent.” It appears that HCRS’s counsel believes that an arbitrator is obliged to describe all of the evidence that is admitted. He alleges that the arbitrator’s “declaration that admitted evidence will not be reported or considered by him, despite its admissibility … is a legal concept unknown to HCRS.” Going further, counsel accuses the arbitrator of “non-transparent manipulation of the evidence, to serve the interests of the Grievor…” He offers no authority for such a proposition, and the well-established principles governing the adequacy of reasons do not support it: see, for instance, *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paras. 11-17.

[77] It was certainly the case that the arbitrator, by his own admission, minimized his description of the specific details of the threats in the award. This does not, in itself, render his decision unreasonable. It should be noted as well that, at the time of MacNeil’s hospital stay, HCRS officials were aware of the threats, and were aware that a medical practitioner had found it necessary to breach confidentiality – a step which HCRS counsel insists was of enormous significance. Moreover, it is clear from the record that at the time Mr. Amit made HCRS’s request for a medical examination of MacNeil by Dr. Theriault, he was aware that MacNeil had expressed “homicidal ideation directed towards HCRS staff.” It was not the case that HCRS had no inkling of the gravity of MacNeil’s thoughts and words. It was not unreasonable for the arbitrator to conclude that no specific purpose would be served by setting out the specifics of the threats. Nor is it evidence that the arbitrator, in essence, misconducted himself in his treatment of the evidence – an implication that the court should reject.

[78] HCRS's submissions contain various allegations of conduct of the arbitrator bordering on impropriety, and colourful descriptions of his alleged attempts to find baseless reasons to reinstate MacNeil. The arbitrator is accused in the HCRS pre-hearing brief, for instance, of deciding to "dance around the graphic

particulars," then of "silently receiving evidence which he then selectively chose not to reference…" (para. 12). Counsel also claims that the arbitrator took it "upon himself to advocate a distorted perspective of the evidence sufficient to rationalize and justify the return of the Grievor to the workplace" (para 106). I wish to make it clear that I do not accept this description of the arbitrator's conduct, nor do I accept this sort of rhetoric – with its implicit accusations of something close to misconduct – as appropriate language to put before the court.

The arbitrator's use of the Theriault report.

[79] HCRS says the arbitrator did not provide an intelligible and transparent reasoning path connecting Dr. Theriault's opinion with the conclusion that MacNeil could be reinstated without risk. HCRS seems to be arguing that Dr. Theriault's opinion did not support the arbitrator's comments about it. Dr. Theriault's report includes (at 10) the following passage, upon which HCRS relies, as did the arbitrator:

> I do not believe that at this time Mr. MacNeil represents an immediate or imminent threat in the workplace to any of the individuals noted in a) through d) above. Mr. MacNeil has a reported history of lifetime anger issues; however, he has maintained full time employment over many years and has not (by self-report but not formal review) engaged in any activity that has led to criminal charges in many years. He seems, by report, to have fantasies of harming others at time [*sic*], particularly in times of stress but has never acted on them. In the instance of his hospitalization in October, he self presented for help, suggesting that he was aware that the ideas he was entertaining were inappropriate.

[80] I note that HCRS's brief omits the last sentence of this paragraph in its quotation, tending to undercut the argument.

[81] The arbitrator described Dr. Theriault's opinion as a "clear and unequivocal" one that MacNeil was "not a current threat" and was "able to return to work" with "no risk to co-workers, managers or clients." The arbitrator described these as "emphatic answers" to the questions put to Dr. Theriault by HCRS, which "strongly support a conclusion that the grievor's statements were at best a one-off expression resulting from stress and not in ordinary course a portent of things to come — or to be repeated" (para. 191).

[82] HCRS says the evidence – including Dr. Theriault's report, the other documents, and the oral evidence – did not support the arbitrator's conclusion that MacNeil's statements were a "one-off" threat that would not be repeated, and did not support the arbitrator's description of "an emphatic opinion that there would be no risk." In addition to being inconsistent with the evidence, HCRS says the arbitrator's finding of "no risk" is inconsistent with his own finding that "there is no reason to suppose that if [MacNeil] returns to work he will not begin to experience the same stress leading to the same problems with management." In short, HCRS says there is no reasoning path connecting the evidence and the arbitrator's findings with his conclusions.

[83] HCRS says the arbitrator misstated the evidence respecting the continuing risk, and failed to address the "uncontroverted evidence" that after Dr. Theriault's report MacNeil "remained unrepentant and unwilling to accept responsibility or take the remedial initiatives necessary to reduce the risk of his uncontrolled anger once again being exposed to the workplace." HCRS appears to be saying that the arbitrator overstated the definitiveness of Dr. Theriault's opinion, and understated the degree to which the opinion was conditioned on the specific time and circumstances of the IME. Somewhat contradictorily, HCRS goes on to say that MacNeil's "verbalized threats and preceding fantasies of workplace violence" after 3 May 2011 were so "egregious and sadistic" as to rule out a return to the workplace even if MacNeil "fervently complied with all of the medical advice and counselling he received." Moreover, the arbitrator allegedly ignored Dr. Theriault's opinion that MacNeil was capable of accepting responsibility for his behaviour, and that this was not a medical issue, but an "HR issue." HCRS says the minutes of a subsequent disciplinary meeting on 20 June 2011 demonstrate MacNeil's refusal to take responsibility for his actions, as does the 6 February 2012 report of Dr. Aquino and the Mental Health Services working notes of early 2012.

[84] According to CUPE, the employer's argument fails to take into account the testimony of Dr. Theriault and the post-report documentary evidence. Further, the reports of February and March 2012, prepared after Dr. Theriault's report, were nevertheless in evidence at the arbitration, as were other materials, such as the case disposition note of January 2012, the clinical social worker assessment and progress notes from January to March 2012, doctor's charts through March 2012 and Dr. Aquino's report of February 2012. I am satisfied that these materials were in evidence and were reviewed by Dr. Theriault prior to his testimony.

[85] It was for the arbitrator to interpret Dr. Theriault's evidence. HCRS submitted in argument that Dr. Theriault's report was "totally superseded" by subsequent events, to the extent that it, as well as Dr. Theriault's evidence at the hearing, was irrelevant. It was not unreasonable for the arbitrator to place significant weight on Dr. Theriault's report. Contrary to other submissions by HCRS, the arbitrator did not "ignore" evidence to the contrary. His reasons demonstrate that he was cognizant of evidence of MacNeil's ongoing unwillingness to fully commit to appropriate treatment. That he did not weigh the evidence in the manner preferred by the employer is not a matter for judicial review on a reasonableness standard. The weighing of evidence – both oral and documentary – was a matter within the arbitrator's jurisdiction and in which he was better placed than the court.

Arbitrator's assessment of supervisors' evidence

[86] As has been discussed, the arbitrator made certain findings about the nature of the threats, which he regarded as being in the nature of a "cry for help," and about the reaction of MacNeil's supervisors to the information, which he found to lack "the sense of immediate threat or terror that one often sees in the fact scenarios in the arbitral jurisprudence dealing with workplace violence" (paras. 189-190). HCRS says the arbitrator provided no "recitation" of the evidence of Mr. Amit, Ms. Dorrington and Ms. Pushie to support his finding of a "blunting effect" resulting from the indirect manner in which the threats were conveyed. According to HCRS, no reasonable person would take such an attitude. It says the inference "defies common sense or imagination." The absence of a "fair description" of the testimony, it is argued, leaves the court without an appreciation of "how objectionable these particular findings have become to HCRS and its supervisory staff."

[87] CUPE says the employer had no obligation to recite the evidence of the employer's witnesses. He was only required to "provide sufficient 'raw material' for the reviewing court to perform its function… He observed the demeanour of all witnesses. He contrasted the evidence of management witnesses with that encountered in scenarios of workplace violence. He found a distinction." He did not place "blinkers" on his review of the evidence. Mr. Amit, for instance, had access to the documentary evidence before testifying.

[88] As CUPE points out, the feelings of HCRS staff about the arbitrator's findings of fact are not on the record, nor do they create an obligation for the arbitrator to tailor his reasons to those subjective feelings. Such comments also amount to an attempt to bolster the witnesses' testimony after the fact and to maneuvre around the dismissal of the HCRS motion to supplement the record with affidavit evidence.

The "cry for help"

[89] HCRS says there was no evidence to support the arbitrator's characterization of MacNeil's actions and statements as a "cry for help." CUPE notes that the documentary evidence included Dr. MacNeil's note of MacNeil's assertion that "you think this is going to help me, you have cost me my job," as well as Dr. Theriault's comment in his report that MacNeil "self presented for help." In addition, according to the arbitrator, MacNeil testified that he sought medical attention because "the stress was so strong that worried he might act out. He was concerned about the thoughts and fantasies he was having" (para. 95).

[90] In my view the arbitrator could reasonably conclude that MacNeil's action in seeking medical assistance to deal with his violent thoughts was in the nature of a "cry for help." Likewise, he provided a reasonable basis for his finding that MacNeil did not have an actual intention or desire to act on his thoughts. The fact that he went to the hospital in search of medical help in itself provides an evidentiary basis for this.

[91] HCRS also says there was no evidence that "the very real risk of immediate threat and harm which existed on October 25, 2010 was a safe or harmless version of earlier fantasies of violence." CUPE points out Karen Dalton, the clinician MacNeil saw on October 25, did not find it necessary to seek involuntary commitment or to contact the police. HCRS says the arbitrator ignored the passage of two days between the disclosure to Karen Dalton on October 25 and the consultation with Dr. MacNeil on October 27 when describing MacNeil's statements as "at best a one-off expression resulting from stress and not in ordinary course a portent of things to come — or to be repeated." Counsel describes this as "a continuing threat over a period of two days." In fact, the arbitrator notes the chronology and points out that MacNeil was voluntarily committed for assessment during those two days (paras. 96-97).

[92] HCRS points to the undoubted significance of Dr. MacNeil's decision to breach medical confidentiality – which the arbitrator noted – and of the decision to seek involuntary confinement, in support of the argument that MacNeil's thoughts were not mere fantasy. Contrary to the interpretation HCRS would place on the arbitrator's decision, I do not see a basis to find that he unreasonably dismissed the gravity of the threat. He found that MacNeil's statements to Ms. Dalton and to Dr. MacNeil "would have been reasonably interpreted by anyone as a threat that if something was not done to help the grievor he might do something to seriously harm some members of senior management at HCRS" (paras. 163-164). He called the threats "serious" and "focussed." I see no basis on which to conclude that the arbitrator somehow minimized the threats that were made.

Unreasonable findings of fact

[93] Counsel for HCRS goes on to provide other "anecdotal" examples of the arbitrator's "transparently unreasonable findings of fact." For instance, he asserts that the arbitrator inconsistently treated the therapeutic setting as being of no consequence for disciplinary purposes, but also used the therapeutic context as a reason for "minimizing the threat to the safety of the workplace." As CUPE submits, the arbitrator merely rejected the union argument that MacNeil committed no misconduct. The test in *William Scott & Co v CFAW, Local P-162*, [1977] 1 CLRBR 1, 1976 CarswellBC 518 (BCLRB) then required a consideration of context as a potential mitigating factor. The *William Scott* decision stands for the proposition that it is an arbitrator's duty, "having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question": *William Scott* at para 13.

[94] HCRS accuses the arbitrator of "play[ing] doctor or amateur psychologist or psychiatrist" in finding that the "imminent threat was mere fantasy and not real … or naught but a 'cry for help'" in order to avoid describing evidence that did not support reinstatement. HCRS attacks the arbitrator's finding that MacNeil "had no immediate intention to act on these fantasies." According to HCRS, the arbitrator "presumes to know better than the professional psychiatrist" and "fails to differentiate between earlier fantasies" (i.e. prior to 25 October 2010) and "what had become a real and imminent danger of serious bodily harm" between 25 and 27 October, "both with an intention to carry out such threat and the means and

ability by which to implement such a threat." HCRS also claims that the arbitrator had no evidence on which to base the reference to the threat as "elicited" or to thereby treat it as "less of a threat."

[95] HCRS also says the finding that there was no "stated intention to commit an immediate or future act of violence" is inconsistent with the arbitrator's view that MacNeil's statements would reasonably have been interpreted as "a threat that if something was not done to help the grievor he might do something to seriously harm some members of senior management at HCRS." According to HCRS, by finding no "stated intention" on MacNeil's part, the arbitrator was dismissing Dr. MacNeil's opinion and turning her evidence "on its head" and thereby acting unreasonably.

[96] It is not clear where the alleged inconsistency lies. The arbitrator set out a basis upon which he could reasonably find that MacNeil had sought medical help due to a fear that he might act on the thoughts he was having, hence the "cry for help" characterization. Based on these findings, the arbitrator could reasonably conclude that this was not a situation where the employee had an intention to act on these thoughts. Nevertheless, it was reasonable (he concluded) for the medical professionals dealing with MacNeil to conclude that there was an existing threat that he might act. The arbitrator did not treat the threat as "less of threat" than some other notional threat; he simply described the way it presented itself, and noted that this did not follow a pattern analogous to the threats and violence encountered in the caselaw.

[97] HCRS says the arbitrator trivialized and minimized the fear felt by HCRS staff and "conveniently neglect[ed]" to refer to the security measures that followed the warnings from the police and Dr. MacNeil. HCRS calls on the court to question the omission of reference to this evidence. Essentially, HCRS wants the court to re-weigh the evidence. In any event, the arbitrator did make reference to safety protocols implemented by Mr. Amit, including locking doors, barring MacNeil from entering the premises, and seeking the services of police and security guards. Moreover, he acknowledged the "very real fright" experienced by HCRS staff (paras. 100 and 196).

[98] Among the specific comments complained of are the arbitrator's remark that it was "not entirely unreasonable" for MacNeil to feel singled out by his supervisors, which HCRS says was an unreasonable comment given MacNeil's

own knowledge of his psychological problems and the alleged rationalizing or minimizing of MacNeil's prior disciplinary incidents and difficulties with other staff members. HCRS does not dispute that those prior incidents are not of central importance. CUPE says the arbitrator merely found that, while there was no intention to single him out, it was not unreasonable for MacNeil to think this was the case, and that this was supported by findings on the evidence. As to other individual incidents, CUPE submits that the arbitrator was simply making findings on the evidence that did not necessarily reflect the views of the employer; for instance, in the case of the blister pack, the arbitrator weighed different items of evidence, rather than relying entirely on the notation on the blister pack as the basis for his findings. HCRS is seeking a re-weighing of the evidence.

[99] The arbitrator provided a detailed and comprehensible reasoning path for this conclusion. HCRS disagrees with it. That does not make it unreasonable.

[100] HCRS also criticizes the arbitrator's suggestion that, because HCRS staff are accustomed to the possibility of violence and threats from their residents, this voluntary assumption of risk also extends to "acceptance and/or condonation of an unsafe workplace by fellow co-workers" (para. 190). The arbitrator's actual words were that "while threats of assault are obviously matters of concern, they do not by the Employer's own evidence automatically rule out continued working with or for the persons having made such threats." CUPE suggests that the HCRS position ignores evidence respecting the functioning of HCRS and its health and safety procedures. I would tend to agree that it is not reasonable to equate violence or threats from a resident of a facility such as those run by HCRS with violence or threats from a co-worker. On this narrow point – which is of limited significance to the broader decision – there is no comprehensible reasoning path.

[101] HCRS says the arbitrator ordered MacNeil reinstated "notwithstanding the clear evidentiary [*sic*] pattern of previous returns to work after purported [*sic*] leaves of absence to address his anger management issues." HCRS says the arbitrator "ignores this pattern and concludes the [MacNeil's] return to work is safe and has no risk, despite the well proven pattern to the contrary." CUPE argues that, while the employer claimed his medical history should work against MacNeil, Dr. Theriault considered that his history worked in his favour, and the arbitrator weighed the respective positions. This was evidence that the arbitrator weighed in a manner with which the employer disagreed. It is not clear why MacNeil's previous difficulties would lead inexorably to the conclusion that it was

unsafe to allow MacNeil to return. Once again, the arbitrator had evidence that would allow him to reach this conclusion; the court cannot set it aside on the basis of simple disagreement.

Damages in lieu of reinstatement

[102] HCRS attacks the arbitrator's conclusion that this was not an "exceptional" case where damages could be ordered in lieu of reinstatement. Specifically, HCRS challenges the arbitrator's suggestion that residential counsellors spend a great deal of their time alone with residents, and that there was no evidence of threats to other residential counsellors. HCRS says this reasoning is "irrelevant and unintelligible," arguing that the arbitrator emphasized the less significant relationship between MacNeil and other counsellors when the relevant relationship was that between MacNeil and his immediate supervisors.

[103] HCRS also claims that the arbitrator ignored a provision of the collective agreement which would permit him to impose a "fair and equitable" remedy in the event that the discharge was unjust but reinstatement was not appropriate. HCRS says the standard of "appropriateness" would trump the common law standard of "exceptional circumstances" for awarding damages in lieu of reinstatement.

[104] All that being said, HCRS says the grievor should not receive damages for severance in lieu of reinstatement, since this would allegedly reward his refusal to seek medical treatment for his anger management problems. This was the reasoning in *College Printers*, *supra*: damages would send the wrong message. I note that this appears to be contrary to the position HCRS put to the arbitrator, which was that if the termination was not upheld, damages should be awarded in lieu of reinstatement, with an adjustment to reflect MacNeil's alleged failure to mitigate.

[105] CUPE says the arbitrator's reasoning in holding that damages should not be substituted for reinstatement was sound. I agree that this conclusion was not unreasonable in view of the arbitrator's reasoning.

OHS legislation

[106] HCRS appears to argue that the arbitrator forced it to violate OHS legislation by restricting disclosure of the threats to those at risk. Counsel refers to

the common law principle that an employer must maintain a safe workplace and the specific obligations arising under the *Occupational Health and Safety Act*, SNS 1996, c 7, s 13, and related regulations.

[107] CUPE says that any such issues should have been pursued at the arbitration. I see no basis on which to impugn the arbitrator's reasoning on this ground; it is not clear that this issue was ever raised with the arbitrator. Nor would this issue render the rest of the Award unreasonable.

Conditions of reinstatement

[108] HCRS submits that the conditions imposed by the arbitrator on MacNeil's reinstatement are "extraordinarily modest as to oversight, in comparison to comparable reported arbitral cases" as well as unreasonable, providing "no transparency of analysis and no evidentiary basis" to assure the court and HCRS that the conditions "will ensure a safe workplace for HCRS and its staff and residents, as of [MacNeil's] first day of return to work."

[109] The authorization of MacNeil's family doctor to provide details of his medication is said to be "of questionable value to HCRS, since HCRS has no familiarity with the details of psychiatric or other medical drugs being provided to [MacNeil.]" Furthermore, the only indication the doctor would have of MacNeil stopping his medication would be self-reporting, which is unlikely in view of MacNeil's reluctance to acknowledge his own mental health problems. The arbitrator, it is suggested, should have imposed "mandatory drug testing or independent medical examinations to ensure compliance with both psychiatric medication and bona fide therapy treatment."

[110] As to the arbitrator's order that MacNeil undertake therapy sessions, HCRS says he did not inquire as to the appropriate number of sessions required to deal with MacNeil's problems. Instead, it is suggested, he should have required that the sessions "continue until such time as a qualified medical expert can opine on the recovery of [MacNeil] and his ability to safely return to the workplace, without any reasonable possibility of reoccurrence."

[111] "Finally and most unreasonably of all," HCRS says, the arbitrator failed to consider the evidence of MacNeil's unwillingness to comply with such conditions, as well as his own factual findings about MacNeil's refusal to cooperate with

therapy. The obvious answer to this would appear to be that if he does not comply with the order, MacNeil will be fired.

[112] CUPE submits that the conditions imposed by the arbitrator were reasonable and accorded with his powers under section 43 of the *Trade Union Act* and with the collective agreement. CUPE denies that the arbitrator took a "minimalist" approach, as claimed by HCRS. I agree that the conditions as framed by the arbitrator do not render the Award unreasonable. He was entitled to impose conditions in accordance with his findings. Whether the court would have imposed identical conditions is not the issue.

Alleged failure to follow or distinguish caselaw

[113] HCRS argues that the arbitrator did not provide any "synthesis" of the relevant caselaw and did not explain why particular cases applied or did not apply to the circumstances. HCRS also says the arbitrator failed to distinguish (unidentified) cases submitted by the union which involved accommodation of medical disabilities. HCRS cites *Esco Ltd v. USW, Local 7175-03* (2008), 171 L.A.C. (4th) 182, 2008 CarswellOnt 6690 (Ont. Arb. Bd.), and other arbitration decisions, as authority for the proposition that where an employee has "committed an act of serious interpersonal violence at work," reinstatement will only occur where the arbitrator is satisfied that "the likelihood of recurrence is very small" (*Esco* at para. 14). As CUPE points out, *Esco* involved a physical assault at work. In this case, by contrast, there was no assault or threat outside the doctor-patient relationship. The arbitrator could reasonably conclude that the *Esco* standard was not applicable in this case.

[114] Other cases cited by HCRS include arbitration awards in *Canada Post Corporation v. Canadian Union of Postal Workers,* [2010] L.V.I. 3916-1, 2010 CarswellNat 3121 (Can. Arb. Bd.); *Coca-Cola Bottling Co. v. CAW-Canada, Local 973* (2009), 190 L.A.C. (4th) 45 (Ont. Arb. Bd.); *Toronto Transit Commission v. ATU, Local 113* (2005), 145 L.A.C. (4th) 139 (Ont. Arb. Bd.); *McCain Foods (Canada) v. UFCW, Local 114P3* (2002), 107 L.A.C. (4th) 193 (Ont. Arb. Bd.); *American Can of Canada Ltd v. Canada Workers' Federal Union, Locals 353* (1977), 17 L.A.C. (2d) 24 (Ont. Arb. Bd.); *College Printers Ltd v. GCIU* (2001), 101 L.A.C. (4th) 193 (B.C. Arb. Bd.); *Kingston (City) v. CUPE, Local 109* (2011), 210 L.A.C. (4th) 205 (Ont. Arb. Bd.); and the Supreme Court of Canada's decision in *Toronto Board of Education*, *supra*.

[115] CUPE says none of the cases placed before the arbitrator dealt with a factual scenario that matches this case. The cases all involved physical assaults, direct threats, or threatening language in the workplace. None of these cases arose from statements made in a clinical setting and conveyed to the employer indirectly by a medical professional. The arbitrator was not obliged to discuss all the cases cited by the parties.

[116] CUPE emphasizes the necessity of considering context, and says the arbitrator's approach resembled that in *Consumers Gas and CEP*, 1994 CLB 15044, and *City of St John's v Newfoundland and Labrador Human Rights Commission*, 2011 NLTD 83. HCRS says these cases are distinguishable. *Consumers Gas* involved an adjudicated settlement agreement, not an arbitration decision. The grievor had complied with medical advice and showed remorse, and was subject to psychiatric clearance before he could be returned to work. *City of St Johns* involved a human rights complaint arising out of a return-to-work agreement for an employee with bipolar disorder. There does not appear to have been an issue of violence or threats. I would agree that neither case has particular relevance here.

[117] HCRS responds with reference to several cases involving "indirect" threats: *Livingston Distribution v. IWA-Canada, Local 700* (2001), 94 L.A.C. (4th) 129 (Ont. Arb. Bd.); *Canadian National Railway v. CAW* (2004), 133 L.A.C. (4th) 190 (Can. Arb. Bd.); and *Vancouver (City) v. Canadian Union of Public Employees, Local 1004*, [2003] B.C.C.A.A.A. No. 285. These cases, generally speaking, involved threats made in the workplace to employees other than those who were the targets of the threats. HCRS says they support the view that it is no defence to claim that the threats were not seriously intended. Otherwise, they follow the pattern of the cases noted above.

[118] It was not unreasonable for the arbitrator to hold that the context of the threats was factually distinct from those in the decisions relied on by HCRS. None of the cases relied upon by either party addressed a situation where the threatening statements were made in a medical or psychiatric setting, let alone where the grievor could reasonably be held to have sought medical assistance in an attempt to avoid acting on violent thoughts. Quite simply, the arbitrator concluded that MacNeil did not wish to act on the thoughts he was having. That is not to say that MacNeil's statements were excusable or could not attract discipline. It does

indicate, however, that the general run of caselaw involving violence and threats in the workplace provide little guidance in this case, besides the reminder – also acknowledged by the arbitrator – that violence or threats cannot be taken lightly by the employer and will generally lead to serious discipline, including dismissal. The arbitrator was entitled to distinguish the facts before him from the cases cited by the employer. HCRS provides no authority to suggest otherwise.

Weighing aggravating and mitigating factors

[119] HCRS alleges that the arbitrator's consideration of mitigating and aggravating factors took the form of "listing by rote of … pluses and minuses," without "qualitative weighing or analysis," and that it therefore lacked a "transparent and intelligible reasoning path" to connect those factors with the result. HCRS also suggests there was no need for the arbitrator to consider mitigating circumstances, as this was a situation where the offence would constitute just cause for discharge under any circumstances, as contemplated by L'Heureux-Dube J's concurring judgment in *Toronto Board of Education*, *supra*. It seems to me that the arbitrator appropriately followed the analysis called for by the majority in that case.

[120] CUPE argues that the employer's claim that the arbitrator merely weighed the aggravating and mitigating factors without analysis is really a disagreement with the arbitrator's weighing of evidence and findings of fact. As one commentator has written, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it": Philip Bryden, "Standards of Review and Sufficiency of reasons: Some Practical Considerations," (2006), 19 C.J.A.L.P. 191 at 217, cited in *Newfoundland and Labrador Nurses Union*, *infra*, at para. 77.

[121] CUPE says the arbitrator's approach "does not render his reasoning unintelligible or non-transparent" and submits that his reasoning consisted of "valid considerations with sufficient qualitative consideration." The union argues that the employer is demanding an application of the reasonableness test that exceeds that required by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. In that case, Abella J. considered the application of the reasonableness standard to tribunal reasons. Noting that *Dunsmuir* requires that "the reasons must

be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (para. 14), she said:

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion... In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
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> [18] Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court, 2011 SCC 57, [2011] 3 S.C.R. 572, that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
>
> > When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[122] CUPE maintains that the arbitrator was alive to the question at issue and reached a reasonable conclusion within the range of reasonable outcomes.

[123] The purpose 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": *Toronto Board of Education*, *supra*, at 505. The majority in *Toronto Board of Education* went on to discuss the application of the most deferential standard of review – at that time patent unreasonableness, now reasonableness – to labour arbitrators' decisions. In particular, Cory J. commented, at 508-509, on the reviewing court's ability to examine the record:

> In order to decide whether a decision of an administrative tribunal is patently unreasonable, a court may examine the record to determine the basis for the challenged findings of fact or law made by the tribunal…
>
> Therefore, in those circumstances where the arbitral findings in issue are based upon inferences made from the evidence, it is necessary for a reviewing court to examine the evidence that formed the basis for the inference. I would stress that this is not to say that a court should weigh the evidence as if the matter were before it for the first time. It must be remembered that even if a court disagrees with the way in which the tribunal has weighed the evidence and reached its conclusions, it can only substitute its opinion for that of the tribunal where the evidence viewed reasonably is incapable of supporting the tribunal's findings.

[124] This warning against re-weighing the evidence contradicts the assertion by HCRS that it is the court's duty "to re-weigh the evidence to determine whether it transparently and intelligibly corroborates the factual findings and legal conclusions of the Arbitrator." Cory J. also quoted, at 514, the following "salutary caution" of Lamer J. (as he then was) in *Blanchard v. Control Data Canada Ltd*, [1984] 2 S.C.R. 476, at 499:

> As I mentioned earlier, the arbitrator was said to have erred in two ways, namely by deciding that appellant's wrongful act did not justify dismissal and by imposing a penalty which was too light in view of the seriousness of the act. The court will only intervene if it is persuaded that the arbitrator made an unreasonable award. In coming to such a conclusion, the courts should always be mindful of the fact that an arbitrator is in a far better position to assess the impact of the award. It needs to be said again that administrative tribunals exist to provide solutions to disputes that can be best solved by a decision-making process other than that available in

> the courts. Often, too, the administrative "judge" is better trained and better informed on the area of his jurisdiction, and has access to information which more often than not does not find its way into the record submitted to the court. To this must be added the fact that the arbitrator saw and heard the parties.

[125] These comments are of some significance in the present case, where the applicant's position rests heavily on claims of unreasonable fact-finding. HCRS maintains that the evidence before the arbitrator – including the information known to HCRS management at the time of the dismissal, and that which emerged later – could lead to no other conclusion than that the threats were real and could not be ignored. The court may only interfere in such instances where the record is not reasonably capable of supporting the inferences drawn by the arbitrator. This may be the case where, as in *Toronto Board of Education*, unexplained contradictions on crucial findings of fact are apparent from a review of the record. In that case, Cory J. found that "[a]ll the evidence before the Board" on the central issue of whether the grievor's conduct was temporary "not only contradicted the inference made by the majority that his conduct was temporary but rather confirmed that it persisted" (515). That being said, the award would not be quashed simply because the evidence appeared to be overwhelming. Rather, Cory J. could find "no other evidence reasonably capable of supporting the conclusion that the misconduct was a momentary aberration… Quite simply," he wrote, at 521, "the evidence that the arbitrators stated they were relying upon to support their findings pointed to the exact opposite conclusion."

[126] The thrust of the employer's position in this case is to challenge the arbitrator's weighing and selection of evidence. The proper question, however, is whether the record is reasonably capable of supporting the arbitrator's findings. Where the applicant seeks quashing of the arbitrator's decision, it is not sufficient to argue that the evidence should have led in the other direction; what is required is to show that the evidence before the arbitrator could not have led reasonably to the findings that were made.

[127] In this case, the employer's attempts to raise suspicions about the propriety of the arbitrator's conduct – consider, for instance, the allegations of deliberate suppression of evidence in order to reach a desired result – threaten to turn the concept of deference on its head. As Lamer J. said in *Blanchard*, at 499, the court must be mindful that "an arbitrator is in a far better position to assess the impact of the award" and that he has "access to information which more often than not does

not find its way into the record submitted to the court. To this must be added the fact that the arbitrator saw and heard the parties." The court cannot quash the award simply because the arbitrator did not exhaustively chronicle all of the evidence.

CONCLUSION

[128] The court's role when applying the reasonableness standard on judicial review is not to retry the case and re-weigh the evidence. As the Court of Appeal noted in *Casino Nova Scotia v Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, at para. 30, the elements of intelligibility and justification are not intended to "allow the reviewing court to analyze whether the tribunal's decision is wrong"; they are not "correctness stowaways crouching in the reasonableness standard." Whether the reviewing judge agrees with the arbitrator's decision is simply not the issue, and to dismiss an application for judicial review is not to affirm that the decision was correct. In this case, the applicant has not provided a persuasive argument that the arbitrator's decision was unreasonable.

Stewart, J.