2012 HFX NO. 408234

SUPREME COURT OF NOVA SCOTIA

Citation: *“AA” v. Halifax Regional School Board*, 2013 NSSC 228

Between:

“AA"

Applicant

v.

HALIFAX REGIONAL SCHOOL BOARD

Respondent

DECISION

Heard: At Halifax, Nova Scotia on January 15, 2013

Before: The Honourable Justice Allan P. Boudreau

Decision: July 12, 2013

Counsel: Gail L. Gatchalian and Bettina Quistgaard, for the Applicant

Ian Pickard and Leah Kutcher, for the Respondent

Decision:

Introduction:

[1] This is an application by AA, ("the applicant") for Judicial Review of a decision of a one person ("William Kydd") Board of Appeal ("the Appeal Board") appointed by the Minister of Education pursuant to the *Education Act* of Nova Scotia. The Halifax Regional School Board ("the School Board") terminated the applicant's employment for improper internet (e-mail) contact with one of his female students ("the student"). The applicant had undiagnosed bipolar II disorder at the time of the e-mails, but he was under treatment at the time of his termination. The Appeal Board upheld the School Board's decision to terminate the applicant's employment as a teacher. He now applies to this Court to quash the Appeal Board's decision and to remit the matter to another Board of Appeal.

Issues:

[2]

1. What is the appropriate test/standard of review on this application; "correctness" or "reasonableness"?
2. If the appropriate test is correctness, did the Appeal Board correctly interpret and apply the law in this case?
3. If the appropriate test is reasonableness, is the Appeal Board's decision one which is supportable and justifiable in the circumstances?

Back Ground:

[3] The applicant was in his early 40's when the circumstances giving rise to his termination occurred in 2008. He had been employed as a high school teacher by the School Board since 1993. He had taught in several different high schools in the Halifax area. The record of the applicant's performance reviews demonstrates that he was regarded as an excellent teacher; describing him as dedicated, hard-working and talented. He had no disciplinary record.

[4] In September of 2008 the parents of the student discovered an extensive series of e-mails on their daughter's computer. These had been sent to the student

by the applicant and by the student to the applicant over the period June to September, 2008. It was noted and emphasized by the School Board that the communications occurred during the school summer recess, as opposed to when classes were in progress. The student was in grade 10 during the 2007 – 2008 school year which had just ended.

[5] The Appeal Board cited summaries of some of the text contained in the e-mails between the applicant and the student. These included the following:

- A recommendation to kill the student's parents that included a method to "chainsaw them in their sleep".
- A reference to travelling to British Columbia to "rescue" her from her parents.
- Several references to her weight and recommendations to purge food that had been ingested.
- Regular comparisons of his desire to leave his wife for another woman and her need to leave her parents.
- Derogatory names directed at her parents: father called a "child beater"; mother called "cow woman" and "nuts" and "a dolt".
- He criticized the therapy that her parents had arranged for her.
- He refers to one of her male friends as having a "small penis".
- The student invited him to meet her at McDonald's; he countered with an invitation to "drive to … and watch the ocean".
- A reference to his thinking of picking her up out of town for lunch at an inn and then "get good coffee and sit in the park and you can read and I'll strum an acoustic before we go home".

[6] The parents contacted the principal of the school and showed him some of the e-mails they had discovered. The principal then contacted the school's human resources department and a meeting between school officials, the applicant and a representative from his union ("the NSTU") was arranged and took place on September 15, 2008. Needless to say the school officials were extremely concerned with protecting vulnerable students. It appears that the school had experienced three suicides by students during the previous year. The need to protect students is

obviously a very high priority and a very sensitive issue. It implicates the integrity and the trust in the whole system.

[7] The meeting of September 15, 2008 proceeded with the applicant being asked about the e-mail communications. The applicant stated that he did not recall how the messaging between he and the student had started. He did however state that the student had told him during the past winter that she was having trouble at home and that he referred her to the school's guidance counselor. He at first stated that the e-mails were appropriate because he was trying to assist a student in need, but upon being referred to the actual text of some of the messages he agreed that they were inappropriate. The next day the applicant called in sick and he saw his family physician. He was immediately referred to various psychologists and mood disorder specialists. Toward the end of 2008, beginning of 2009, the applicant was diagnosed with bipolar II disorder. He has been in treatment for his condition ever since, with apparent success, but he has not worked as a teacher since September 15, 2008. After several meetings/hearings, the applicant's employment was terminated by the School Board in April of 2010.

[8] The applicant appealed his termination by the School Board to a one person Appeal Board appointed by the Minister pursuant to the *Education Act*. A hearing was held before the Appeal Board on April 8, 19, 20, 21 and 28, 2011. The written decision of the Appeal Board was issued on September 15, 2012, confirming the applicant's discharge from his employment by the School Board.

[9] The issues considered by the School Board and the Appeal Board centered on whether the applicant's bipolar II disorder posed a risk to students if another "hypomanic episode" (as had occurred in the summer of 2008) recurred; and, if there was such a risk, can that risk be accommodated and reasonably controlled without undue hardship to the School Board.

[10] The School Board concluded that there was a risk to the safety of students if another "hypomanic episode" occurred and that such risk could not be reasonably accommodated and controlled without undue hardship to the School Board. The Appeal Board concurred with the findings and the decision of the School Board.

[11] There was a plethora of evidence before the School Board and before the Appeal Board regarding the applicant's bipolar II disorder, how it was being treated and managed, how the onset of a future "hypomanic episode" could be detected, and how any potential effect on students could be prevented or minimized. The substantial amount of this evidence provided both the applicant

and the School Board with numerous arguments to support each of their concerns and positions. Many of the arguments advanced by the applicant in this proceeding could be considered as inviting this Court to review all of that evidence and to come to its own conclusion on the facts and opinions presented before the School Board and the Appeal Board.

The Authorities:

Standard of Review

[12] The applicant says the Appeal Board was required to be correct in interpreting and applying the *Bona Fide* Occupational Requirement ("BFOR") test. Alternatively, he says the Appeal Board's decision was unreasonable. The respondent School Board says the standard of review is reasonableness and that the Appeal Board satisfied that test requirement.

Dunsmuir

[13] Pursuant to the majority judgment in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, there are two standards of review: correctness and reasonableness. The correctness standard requires the reviewing court to show no deference to the decision-maker, but rather to undertake its own analysis of the question (*Dunsmuir* at para 50). Reasonableness requires the reviewing court to show deference to the decision-maker, and contemplates a range of possible outcomes (*Dunsmuir* at para 47). A court determining the applicable standard must first consider whether existing law determines the degree of deference to be accorded to that category of question. If it has not, the court must identify the proper standard of review. (*Dunsmuir* at para 62)

[14] The *Dunsmuir* majority commented on the types of questions that would be reviewed for correctness. These included questions of jurisdiction and certain questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise." This category would include "issues that are at the heart of the administration of justice" such as "complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process," (*Dunsmuir* at para 55) which the court had dealt with in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63. As to questions on which reasonableness is the applicable standard, the majority held that deference "will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity." (*Dunsmuir* at para 54)

[15] The Supreme Court identified several factors to consider in situations where the caselaw does not adequately determine the applicable standard, and a standard of review analysis is required:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> — A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> — A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> — The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[16] The majority noted that there is "nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated." (*Dunsmuir* at para 56)

[17] The Court of Appeal decision in *CR Falkenham Backhoe Services Ltd v Nova Scotia (Human Rights Board of Inquiry)*, 2008 NSCA 38, suggests a correctness standard for matters of law before a human rights Board of Inquiry. After reviewing *Dunsmuir*, the court held at para 26 that;

> if the nature of the problem being considered by the Board was strictly a matter of law, the required analysis will attract a standard of correctness. On the other hand, if the issue arises as a result of the Board's findings of fact, or inferences drawn from those facts, we will recognize the appropriate deference and margin of appreciation that is to be accorded such decisions and will apply a standard of reasonableness in our review.

[18] The issues in *Falkenham* arose from the Human Rights Board of Inquiry's award of damages. The Court of Appeal applied a reasonableness standard to the findings of fact and the application of the law to them. There was no suggestion that the issue was one of pure law, although the Board referred to and applied the

law. The respondent maintains that *Falkenham* indicates that reasonableness is the standard where the question is not one of pure law.

[19] The parties take note of a line of cases in which the standard of review of an Appeal Board under the *Education Act* has been considered. A correctness standard was applied in *Hudston v Halifax Regional School Board* (1999), 177 NSR (2d) 105, [1999] NSJ No 245 (SC), where Hood J said:

> 19 Because of the nature of the tribunal, that is, that it is not an expert tribunal, the fact that the subject matter of its interpretation is the provision of the *Education Act* dealing with the jurisdiction of the Board of Appeal and because of the weakness of the privative clause, I conclude that the standard to be applied to judicial review in this case is one of correctness.

[20] Similarly, in *Haché v Lunenburg Co District School Board*, 2004 NSCA 46, the Court of Appeal applied a correctness standard. Like *Hudston*, *Haché* involved a question of law going to jurisdiction, namely, whether there was, in law, a discharge for the Appeal Board to consider. In the present case, there is no suggestion that the issue is a question going to jurisdiction.

[21] In *South Shore Regional School Board v Speight*, 2012 NSSC 417, the applicant teacher was dismissed after pleading guilty to public indecency. In considering the standard of review of the Appeal Board's decision to substitute lesser discipline, Moir J distinguished the pre-*Dunsmuir* caselaw dealing with *Education Act* appeals, specifically *Haché* and *Hudston*. Both cases involved questions of jurisdiction. He said, of the question at issue before him:

> [15] The question that confronts us in this case is not about jurisdiction. It is about the third of the questions that are at the core of the appeal board's function. Those questions are: (1) Did the teacher do what he is alleged to have done? (2) If so, does the behaviour provide just cause for discipline? and (3) If so, should the teacher be dismissed or is some lower kind of discipline called for?...
>
> [16] As will be seen, I do not agree that any of the determinative issues decided by Professor Archibald are pure questions of law. They are questions of fact to which "deference will usually apply automatically" or questions "where legal and factual issues are intertwined", which usually attract the same standard: *Dunsmuir*, para. 53.

[22] Moir J went on to summarize the evolution of administrative law through to *Dunsmuir*, and to draw an analogy between an *Education Act* Appeal Board and a labour arbitrator:

> [17] The road travelled to modernize Canadian administrative law began with *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. The highest level of deference had to be accorded to a labour tribunal's interpretation of a statutory provision it was called upon to apply. The review of an arbitrator's determination of "whether the disciplinary measure of dismissal was too harsh" also had to be conducted at that level of deference...
>
> [18] *Dunsmuir* does not invite us to take a fresh look at established levels of deference. Especially, it does not take us to a place before *C.U.P.E. v. New Brunswick Liquor Corp*. The deference accorded to an arbitrator's discretion to substitute a lower penalty demanded by *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28 continued after *Dunsmuir* without resort to a fresh standard of review analysis...

[23] As such, the standard was reasonableness. In another recent decision of Moir J, *Halifax (Regional Municipality) v Canadian Union of Public Employees, Local 108*, 2013 NSSC 164, a municipal employee was terminated for alleged drug use and uncooperativeness with the employer's investigation. An arbitrator allowed the grievance and reinstated the employee. On judicial review, the employer argued that the standard of review was correctness, in part relying on its obligations under the *Occupational Health and Safety Act*, which it argued required it to take action against workplace drug-use by an employee who operated a motor vehicle. The employer claimed that the *Act* was outside the arbitrator's expertise. Moir J said:

> [8] The issue before the arbitrator was whether the discipline imposed by the municipality upon Mr Jeffery was justified. Public safety was part of the factual background in light of which the arbitrator had to decide justification, but the involvement of public safety obligations in this case did not give rise to a question of law separate from the core question: was the termination justified? <u>On that issue, a reviewing court owes deference to the judgment of an arbitrator...</u>
>
> [9] The municipality referred me to *Irving Pulp & Paper Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 30*, 2011 NBCA 58. That decision does not assist the municipality's position. There the question was whether the employer's alcohol and drug testing policy was legal. Arbitrator Ashley dealt with the entirely factual question of compliance, or proof of non-compliance, with the employer's policy.

> [10] … The question was not whether the municipality should have referred Mr Jeffery for assessment. The question for the arbitrator was whether his refusal constituted just cause, and an arbitrator's decision on that subject calls for deference.
>
> [11] <u>Therefore, the decision is to be reviewed for its reasonableness. This court must track the arbitrator's reasoning path and decide whether the result fell within the range of reasonable outcomes...</u>

[Emphasis Added]

[24] The parties also cite *Communications, Energy and Paper Workers Union, Local 440 v Kimberley-Clark, Nova Scotia* (2000), 185 NSR (2d) 145 (SC), where the arbitration decision was concerned with whether undue hardship had been established where an employee diagnosed with paranoid schizophrenia was dismissed for making death threats. He had been found not criminally responsible. However, Davison J. characterized the issue as a factual question whether the employer had breached a duty to accommodate … to the point of undue hardship. There was no dispute about the interpretation of the *Human Rights Act*. The matter dealt primarily with allegations of a breach of a duty to accommodate and the grievor's fitness to return to work. There was not advanced an argument that the arbitrator misinterpreted the *Human Rights Act*. The Act was incidental to the main question of fact. Davison J. found that deference was required.

[25] It is not controversial that the issue of just cause for dismissal is a core function of a labour arbitrator, on which deference is required. The standard generally applicable to a labour arbitrator's decision respecting discipline is reasonableness. In addition, as the Court of Appeal stated in *Halifax (Regional Municipality) v Canadian Union of Public Employees, Local 108*, 2011 NSCA 41, an "arbitrator's interpretation and application of a statute, such as the *Trade Union Act*, that is closely connected to the arbitrator's function is reviewed for reasonableness…" (*HRM v CUPE* at para 23)

[26] Human rights legislation is frequently encountered by labour tribunals, and there are lines of authority suggesting that this should result in deference. For instance, in *Canadian Union of Postal Workers v Canada Post Corp*, [1999] BCJ No 2133, 1999 CanLII 6592 (BCSC), the court applied a standard of reasonableness to a labour arbitrator's application of the *Canadian Human Rights Act*. Paris J said:

> 23 This case seems to be an example of the type … where a tribunal in the exercise of its specialized jurisdiction pursuant to a collective agreement

> "frequently encounters" problems raised in that regard by human rights legislation. Firstly, the arbitrator was called upon to make factual findings relative to the grievor's condition and to the operation of the Corporation's affairs. I cannot say those findings are unreasonable, much less patently unreasonable. Secondly, his resolution of the issues raised by the *Canadian Human Rights Act* in the circumstances of the case, namely the BFOR and accommodation issues, involved in some good measure matters of fact (or at least mixed fact and law) and matters peculiar to the operation of this particular collective agreement and employment relationship. It seems to me therefore that a degree of curial deference to the judgment of the arbitrator in that regard is clearly called for greater than the mere "correctness" standard, whether it be the patently unreasonable test at the other end of the spectrum, or something in between… In any event, I do not apprehend in the arbitrator's award any misinterpretation or misapplication of the *Canadian Human Rights Act* or the jurisprudence pursuant thereto.

[Emphasis Added]

[27] Similarly, in *Telecommunications Workers Union v TELUS Advanced Communications*, 2011 BCSC 1761, the British Columbia Supreme Court said:

> 40 The identification of *bona fide* occupational requirements and the consideration of whether accommodation does or does not impose undue hardship on the employer are clearly issues dealing with the proper functioning of the workplace and the employment relationship-matters on which the arbitrator is presumed to have expertise. The relevant provisions of the *Human Rights Act* must qualify as a statute "closely connected" to the arbitrator's function under both the *Labour Code* and the collective agreement and the arbitrator's application of them must be subject to a deferential standard of review.

[Emphasis Added]

[28] In *Ottawa Hospital v Ontario Public Service Employees Union, Local 464* (2009), 247 OAC 201, [2009] OJ No 809 (Ont Sup Ct J (Div Ct), the court considered an arbitrator's interpretation of human rights legislation. The applicant argued that no deference was warranted, as human rights law was not within the arbitrator's expertise. The reviewing court held otherwise:

> 8 It is clear … that the labour arbitrator was applying principles of human rights and evaluating allegations of discrimination in the context of this specific agreement. The question before the arbitrator was one of mixed fact and law. The *Labour Relations Act* expressly directs arbitrators to have regard to the *Human Rights Code*, and the collective agreement expressly incorporates the *Code*. In the labour context, application of human rights principles falls into the arbitrators' area of expertise.

> 9 In *Dunsmuir* ... the Supreme Court of Canada held that questions of mixed fact and law attract deference and the standard of review is reasonableness. The Divisional Court has also held that deference is to be accorded to decisions of arbitrators involving the exercise of expertise in applying the *Human Rights Code* where there are questions of mixed fact and law…
>
> 10 Of course, if the arbitrator misstates the legal test that is to be applied to those facts, the resulting decision fails any review for reasonableness…

[Emphasis Added]

[29] To a similar effect, in *CKY-TV v Communications, Energy and Paperworkers Union of Canada, Local 816,* 2009 MBQB 252, the court said:

> 15 … I will deal briefly with the union's position that the arbitrator's decision as it relates to his interpretation of the [*Canadian Human Rights Act*] … is a question of law arising from the statute closely connected to its function. Therefore, any conclusions reached by the arbitrator in relation to the CHRA (without regard to the *Charter* issues) should be assessed using the standard of review of reasonableness. I agree. To the extent that the arbitrator reached conclusions on questions of fact and of mixed fact and law, the standard of review is reasonableness…
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> …
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> 16 … I have no hesitation in upholding the arbitrator's conclusion on any of the factual issues before him and on any of the issues which could be considered to be mixed fact and law (or law itself as regards his interpretation and application of the provisions of the *CHRA,* the *Canada Labour Code*, and the collective agreement without regard to the Charter issues). In these areas, his decision is well-reasoned and his conclusions are reasonable.

[Emphasis Added]

[30] It is pertinent here to note the observation of Moir J in *Speight* that "[t]he differences are not great between an appeal board under the *Education Act* and labour arbitrators who determine just cause and disciplinary penalty. In the field of labour law, questions of the kind determined by Professor Archibald have long been recognized as demanding deference on review" (*Speight* at para 19).

[31] There are differing views, however, on the question of whether deference is due to a labour tribunal interpreting or applying human rights law. In *Lethbridge Regional Police Service v Lethbridge Police Assn*, 2013 ABCA 47, an arbitrator found that a probationary police constable was unfairly terminated and was

discriminated against and allowed a grievance challenging his termination. The probationary period had been marked by several physical injuries which restricted the constable's ability to perform his work duties, leading to stress and tension between him and management. The award was quashed on judicial review where the chambers judge applied a standard of correctness to the arbitrator's interpretation of the *Police Service Regulation* and the *Alberta Human Rights Act*. The Alberta Court of Appeal held at para 27 that the standard of review of the *Police Service Regulation* and the collective agreement was reasonableness. As to the human rights aspect, the court said:

> 28 Labour arbitrators are sometimes required to consider human rights and discrimination issues, and in this case the human rights issues were specifically referred to the arbitrator. Human rights issues are unusual in that they may be decided by a number of tribunals: human rights commissions, labour arbitrators, professional disciplinary bodies, and the ordinary courts... Where a number of tribunals have concurrent jurisdiction over an issue, consistency requires that review be for correctness... Likewise, the nature of human rights issues are that they are questions of law of general importance to the legal system. In the circumstances, the appropriate standard of review is correctness (even when such issues are decided by human rights panels)... However, the underlying factual findings of the arbitrator are still entitled to deference.

[32] The court said, however:

> 38 Apart from any errors of law which are to be reviewed for correctness, the arbitrator's overall decision is still entitled to considerable deference. This is particularly so with his findings of fact, and inferences he drew from the facts. Given this high level of deference, a detailed analysis is warranted to demonstrate why his ultimate decision is not transparent and intelligible, and therefore not one of the outcomes that is defensible in respect of the facts and law.

[Emphasis Added]

[33] This is a somewhat confusing conclusion. It suggests that a question of pure human rights law would be reviewed on a correctness standard, but all other aspects of the decision would attract deference.

[34] In *Irving Pulp & Paper Ltd v Communications Energy and Paperworkers Union of Canada, Local 30*, 2011 NBCA 58, the union appealed from dismissal of a grievance filed on behalf of an employee who had been subject to random alcohol testing pursuant to a policy implemented by the employer for employees in safety-sensitive positions. The majority of the arbitration board had held that the employer ;

> 2 …
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> failed to establish a need for the policy in terms of demonstrating the mill operations posed a sufficient risk of harm that outweighs an employee's right to privacy. Specifically, the majority concluded Irving had not adduced sufficient evidence of prior incidents of alcohol related impaired work performance to justify the policy's adoption. At the same time, the majority accepted that a "lighter burden of justification" was imposed on employers engaged in the operation of "ultra-hazardous" or "ultra-dangerous" endeavours. On the facts, however, the majority concluded that, while the mill operation represented a "dangerous work environment", the mill operation did not fall within the ultra-dangerous category such as a nuclear plant, an airline, a railroad, a chemical plant or a like industry. This explains why the majority went on to examine the evidence relating to alcohol use in the workplace. Based on the evidence adduced the majority concluded there was insufficient evidence of a "significant degree of incremental safety risk that outweighed the employees' privacy rights". The dissenting panel member characterized the workplace as "highly dangerous" and, therefore, evidence of an alcohol problem in the workplace was not a condition precedent to establishing the reasonableness of the policy. Alternatively, the dissenting member held Irving had adduced sufficient evidence of such a problem.

[35] On judicial review, the application judge had applied a reasonableness standard:

> 20 On the application for judicial review, the arbitration board's decision was set aside and the grievance dismissed. The application judge interpreted the board decision as requiring a history of accidents in a dangerous workplace in order to justify the policy of random alcohol testing and that such a requirement was unreasonable because it effectively meant that the employer would have to wait until a catastrophe occurred before being able to take pro-active measures to prevent a recurrence. The distinction the board drew between a dangerous workplace and ultra-dangerous one was found to be unreasonable by the application judge. He opined that once the board found the mill to be a dangerous workplace, the only question left for the board's consideration was whether the employer's policy was a proportionate response to the potential danger. Having regard to the minimally intrusive nature of the breathalyser and the fact the policy applies only to employees who hold safety sensitive positions, the application judge concluded the grievance should have been dismissed (NBCA at para 20).

[36] The parties had agreed with the application judge's determination that the standard of review was reasonableness. The Court of Appeal, however, found otherwise. Robertson JA held that the question of what analytical framework should be applied to determine whether drug and alcohol testing policies were

reasonable was one of pure law, on which arbitrators could not claim any expertise superior to that of the judiciary. He said:

> 22 … The central questions raised on this appeal require the decision maker to strike a proper balance between the right of an employer to adopt policies that promote safety in the workplace, and an employee's right to privacy or to freedom from discrimination in those cases where the challenge is brought under human rights legislation. When viewed through these prescriptive lenses, it is only natural to ask whether arbitrators possess a relative expertise that supports a finding that the Legislature intended that deference would be accorded to arbitration decisions involving drug and alcohol testing.

[37] Robertson JA went on to note that “the Supreme Court has yet to accord deference to an administrative tribunal with respect to questions of law umbilically tied to human rights issues…” (*Irving* (NBCA) at para 23). He emphasized the reliance of arbitral decision-makers upon judicial reasoning, which reflected;

> 24 …
>
> the general importance of the issues in the law and of the need to promote consistency and, hence, certainty, in the jurisprudence. Finally, I am struck by the fact that there comes a point where administrative decision makers are unable to reach a consensus on a particular point of law, but the parties seek a solution which promotes certainty in the law, freed from the tenets of the deference doctrine. In the present case, it is evident that the arbitral jurisprudence is not consistent when it comes to providing an answer to the central question raised on this appeal. <u>Hence, it falls on this Court to provide a definitive answer so far as New Brunswick is concerned. This is why I am prepared to apply the review standard of correctness...</u>

[Emphasis Added]

[38] Having found that correctness was the standard on the legal issue, Robertson JA stated that the standard of reasonableness would still apply to the arbitration board’s determination that “a kraft mill does not fall within the same dangerous category as a railroad or chemical plant” (*Irving* (NBCA) at para 26). He added that this aspect of the decision was unreasonable.

[39] It will be recalled that Moir J distinguished *Irving* in *HRM v CUPE, Local 108* (2013) on the basis that in *Irving* “the question was whether the employer's alcohol and drug testing policy was legal, as opposed to the entirely factual question of compliance, or proof of non-compliance, with an employer's policy” (*HRM v CUPE, Local 108* (2013) at para 9).

[40] On further appeal, the majority of the Supreme Court of Canada – 2013 SCC34 – set aside the New Brunswick Court of Appeal's decision in *Irving*. Abella J held that the Court of Appeal "erred in disregarding this Court's direction that decisions of labour arbitrators be reviewed for reasonableness and that deference be paid to their legal and factual findings when they are interpreting collective agreements" (Irving (SCC) at para 16). While the substantive concerns of the court – such as the application of management rights clauses in collective agreements, and issues concerning dangerous workplaces – are of limited relevance to the case at bar, Abella J, in concluding, provided a useful restatement of the reasonableness standard:

> 54 The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.

[Emphasis Added]

[41] The law is less clear than it might be on the question of whether deference is due to a labour tribunal's interpretation of human rights law, but I would suggest that the tribunal is entitled to deference when it is required to interpret and apply a statute that is closely connected to its mandate and which it encounters frequently. This would include provincial human rights legislation. That being said, some authorities suggest less deference on issues of pure human rights law. It may be that a pure question of law – such as the formulation of a legal test – would be subject to a correctness standard. However, where the tribunal correctly formulates the legal test in the course of determining an issue directly within its area of expertise and jurisdiction – such as justification for dismissal – the authorities support a degree of deference to the decision on the ultimate issue, which is whether termination was justified.

The Dunsmuir analysis

[42] In the alternative to the argument that the standard of review has been determined by previous caselaw, the respondent says the application of the *Dunsmuir* factors leads to the conclusion that the standard is reasonableness.

Privative clause

[43] Subsection 36(4) of the *Education Act* contains a privative clause which makes the Appeal Board's order "final and binding upon the teacher and the school board." In *Haché* the Court of Appeal quoted *Melanson v Halifax et al* (1977), 20 NSR (2d) 74 (SCAD), to the effect that this was a "very mild" privative clause. The precise language of the privative clause must be interpreted in the context of the circumstances of the particular case and such considerations as the legislative purpose and the nature of the issue: see *Cape Breton (Regional Municipality) v Canadian Union of Public Employees, Local 933*, 2006 NSCA 80. In the case at bar, the Appeal Board was conducting a function within its mandate. Given the legislative purpose of resolving disputes with finality by a specialized Appeal Board, the context, in the case at bar, supports an interpretation of the privative clause favouring a deferential standard.

Legislative purpose

[44] Section 36 of the *Education Act* creates a specialized tribunal to resolve disputes involving discharge of teachers in a manner that is prompt, final, and binding. The respondent contends this legislative purpose parallels that of a labour arbitrator.

Nature of the issue

[45] In the present case, there was no question of jurisdiction or of general law relevant to the legal system as a whole. Further, the legal and factual issues were intertwined and would not easily be separated.

Expertise of the Appeal Board

[46] The Appeal Board was appointed by the parties in accordance with the *Act*, and by virtue of his appointment he should be presumed to hold superior expertise relative to the reviewing court. Such a board will deal with human rights legislation as is required. In *Dunsmuir* the majority stated that adjudicators acting under a statutory mandate "can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir* at para 68). The Court of Appeal in *Haché*, suggested that an *Education Act* Appeal Board would not have superior expertise; however, the issue there was at least partly jurisdictional (*Haché* at paras 17-24).

[47] While the existing caselaw appears to have adequately answered the question, I find that a direct application of the *Dunsmuir* analysis, informed by the earlier *Education Act* case law (particularly the decision of Moir J. in *Speight*), would suggest that deference will be called for on the broad issue of justification for dismissal. The tribunal would be required to answer a question of pure human rights law correctly; however, the application of that law in answering the principal question – was the termination reasonably justified – would still require a deferential standard.

The law on Bona Fide Occupational Requirement ("BFOR")

[48] Section 5(1)(o) of the Nova Scotia *Human Rights Act* prohibits discrimination in employment on account of mental disability. Section 6 provides for an exception where the discrimination is based on a *bona fide* occupational requirement (BFOR). The onus to establish a BFOR is on the employer. Various factors in assessing undue hardship claims are reviewed in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, [1990] SCJ No 80. In that case, Wilson J said, for the majority:

> 62 I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar -- financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

[49] More recently, in *Moore v British Columbia (Education)*, 2012 SCC 61, the court confirmed that to establish justification "it must be shown that alternative approaches were investigated… The *prima facie* discriminatory conduct must also be 'reasonably necessary' in order to accomplish a broader goal... In other words, an employer or service provider must show 'that it could not have done anything else reasonable or practical to avoid the negative impact on the individual'…" (See Moore at para 49).

[50] Where a safety risk is a factor in assessing undue hardship, it is necessary to consider both the magnitude of the risk and the identity of those who bear it as elements of hardship. As the Supreme Court of Canada put it in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights),* [1999] 3 SCR 868 *(Grismer)*, risk can "be considered as an element of hardship, but not as an independent justification of discrimination" (*Grismer* at para 30). The court went on to say:

> 43 … The government authority knows why it makes the denial and is in the best position to defend it. The government must only establish its justification according to the relaxed standard of proof on a balance of probabilities. Common sense and intuitive reasoning are not excluded, but in a case where accommodation is flatly refused there must be some evidence to link the outright refusal of even the possibility of accommodation with an undue safety risk. If the government agency can show that accommodation is impossible without risking safety or that it imposes some other form of undue hardship, then it can maintain the absolute prohibition. If not, it is under an obligation to accommodate the claimant by allowing the person an opportunity to show that he or she does not present an undue threat to safety.

[Emphasis Added]

[51] The necessity of taking steps to determine whether accommodation is possible was considered in *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34, varied at 295 DLR (4th) 425 (Ont Sup Ct J). The tribunal had concluded that the employer had offered *ex post facto* justifications for dismissal of an employee with bipolar I disorder. The employee was a quality assurance specialist. The employer was involved in information technology. The tribunal had said:

> 152 Even assuming that ADGA could rely on *ex post facto* justifications for its actions and to avoid liability, I find that it did not do so. Given the high standard of proof that rests upon an employer who seeks to establish undue hardship, ADGA was content to rely upon the understandably self-serving testimony of Mr Sincennes and Mr Germain as sufficient to establish an environment in which it would have been put to undue hardship to accommodate Mr Lane. ADGA did not provide any independent or expert testimony as to the realities of a company in its position trying to accommodate a person with Bipolar I Disorder. In particular, given the testimony from Drs. Hall and Arboleda-Florez with respect to workplace strategies for managing the disorder and avoiding prolonged absences, it was simply inadequate to assert that Ms. Corbett was too busy for a monitoring role, and inadequate to ask the Tribunal to infer from that that no other form of monitoring with a view to early intervention was feasible. In short, the *ex post*

> *facto* justification for the failure to accommodate and the existence of undue hardship did not satisfy the onus of proof that the caselaw placed on the Respondent.

On judicial review, the Ontario court affirmed the aspect of the tribunal decision dealing with the duty to accommodate (*Lane* (Ont Sup Ct) at paras 123-128).

[52] Similarly, in *Gordy v Oak Bay Marine Management Ltd*, 2004 BCHRT 225, in dealing with a fishing guide with bipolar affective disorder, the tribunal found that there was no medical evidence contrary to a psychiatrist's opinion that the employee was fit to return to work. Further, the employer did not adequately consider methods of accommodation to the point of undue hardship.

[53] It is noted that neither of these cases involved a situation of risk to vulnerable third parties comparable to that of a school board dealing with the behaviour of a teacher. The employment contexts were not the same as that of a teacher in a school.

[54] A case that bears a stronger resemblance to the facts of this case is *Shuswap Lake General Hospital v British Columbia Nurses' Union (Lockie Grievance)* (2002), 67 CLAS 264, [2002] BCCAAA No. 21 (BC Arb) , which involved a nurse with bipolar disorder. The arbitrator in that case found that the employer's standard for finding undue hardship was "effectively one of absolute safety or perfection, not one of reasonable safety." The arbitrator went on to say:

> 142 … The Employer must point to evidence establishing, on a balance of probabilities, that a serious or unacceptable risk to patient safety would arise from the grievor's continued employment as a nurse; [*Meiorin*] and *Grismer*. If the risk to patient safety is low, the Employer must establish that the loss or injury that may result would be serious. The evidence must clearly identify the risks and demonstrate that it is impossible to reduce those risks to an acceptable level through reasonable accommodative measures: *Grismer*.
>
> 143 On the evidence before me, I cannot find the Employer has established either a "serious" or "unacceptable" risk to patient safety, or the "impossibility" of reducing that risk to an acceptable level through reasonable accommodative measures. The identity of those who bear the risk to safety is the patients on the unit. This undoubtedly poses a legitimate concern for the Employer. Patients reasonably expect the Employer to protect their health and safety while they are in hospital. <u>But the evidence fails to establish that the magnitude of the risk to patient safety is serious or unacceptable.</u>

[Emphasis Added]

[55] The arbitrator found that the grievor posed a "slightly higher" risk of medication errors compared to other nurses. There was no direct evidence of any specific loss or injury to any patient due to the grievor's medication errors, and no direct evidence relating to the seriousness of the loss or injury that may result… For those reasons, the Employer had failed to establish a serious or unacceptable risk to patient safety or, for that matter, to patient discomfort amounting to a safety risk due to medication errors (*Shuswap Lake* at paras 144-145). The evidence did not establish that it was "impossible to reduce the identified risks to an acceptable level through reasonable accommodative measures," due to several "material facts relating to the nature of the grievor's workplace, her disability and the way it manifests itself in the workplace..." (*Shuswap Lake* at para 151). These included:

> 152 First, the nature of the workplace provides certain implicit safeguards against any risk to patient health or safety escalating to a serious or unacceptable level. The grievor's duties are performed in a professional and team-based context. Unlike the solitary work of the fishing guide in *Oak Bay Marina Ltd.*, *supra*, the grievor can be easily observed by her co-workers for approximately 30 minutes at the outset of each shift during report. The grievor is also in ongoing contact with her professional colleagues throughout a shift at the nursing station, medication carts and in the hallways. Further, by virtue of their professional obligations to observe and report co-worker impairments of all sorts, the grievor's co-workers will not be required to shoulder any significant additional accommodative responsibility or stress over and above that which exists in relation to all other co-workers. On the evidence before me, I accept that it would not be a reasonable accommodative measure to impose on the grievor's co-workers an obligation to closely scrutinize her behavior in a formal monitoring system. RNs and LPNs nonetheless have a professional responsibility to observe and report co-workers' impairments to their supervisors, and I am satisfied the concerns expressed by the grievor's co-workers in this regard can be satisfactorily addressed through the provision of an educational workshop on bmd and clear instructions from management.
>
> 153 Second, the grievor's particular indicators of relapse have, in the past, been readily observed by her co-workers and reported to supervisory or management staff…
>
> 155 Fourth, although bmd is characterized by a loss of insight as an episode evolves, the evidence is that when fellow RNs have confronted the grievor with a possibility that she may be unwell, she has accepted their observations and has agreed she needs to be replaced…

[56] In the case at bar the Appeal Board distinguished *Shuswap Lake* on the basis that the nature of the applicant's workplace – a school with a demonstrated risk to student well-being and safety – did not provide the safeguards of a hospital environment. The applicant cites *Way v New Brunswick (Department of Education)*, [2011] NBHRBID No. 1, as an example of a case where the BFOR analysis was applied in the context of student safety. That case involved a general challenge to a policy imposing mandatory retirement on bus drivers at the age of 65. In that case the Board of Inquiry held that the Department had not established that accommodation was impossible without undue hardship because there was a lack of consideration of accommodation.

ANALYSIS:

The dismissal decision

[57] The Appeal Board heard evidence from Michael Christie, the School Board's Director of Human Resources. Mr Christie testified that he concluded from Dr Theriault's report that the 2008 hypomanic phase had affected the applicant, but did not exclude culpability. He took it that "a recurrence of hypomania was expected, and that there were many caveats in the report regarding a successful treatment." He testified that;

> he did not think it was possible to accommodate someone where there was such a risk of AA doing it again. He referred in particular to the following excerpt in the answer to question #10 in Dr Theriault's report: "with optimization of his medication and ongoing psychotherapeutic involvement it is possible that these cycles can be eliminated or reduced in severity duration [*sic*] or frequency". Mr Christie stated that this reliance on optimization left an unacceptable risk and that even with optimization he thought the risk unacceptable (Appeal Board decision at para 31).

[58] After Mr Christie convened a meeting in January 2010 to inquire into measures to protect students from future hypomanic episodes, the applicant, through the NSTU, provided a list of warning signs that could be given to the school principal. The NSTU indicated a willingness to discuss the scope of information that should be provided to the principal regarding the list (Appeal Board decision at paras 32-34).

[59] Mr Christie's evidence was that he considered all of the foregoing in the context of the School Board's duty to accommodate and whether it could do so

without undue hardship. In his recommendations to the School Board, he indicated that the warning signs identified by the applicant had not been endorsed by a medical professional; although Dr Theriault did endorse them during the hearing. He added that he was not contesting Dr Theriault's medical conclusions, but rather the particular aspects of effectively monitoring AA (Board decision at para 35).

[60] Mr Christie concluded that the applicant had been in a position of trust and that his conduct damaged the student's impression of herself and her relationships with her parents and friends; that the applicant was aware of her vulnerability and failed to refer her to guidance counsellors, administrators, or health professionals; and that he thereby breached his duties under the *Education Act*. He stated that, while the applicant was suffering from hypomania that impaired his judgment, this condition "did not eliminate AA's judgment nor his sense of right and wrong. He, in fact, knew what he was doing was wrong, as shown by the contents of his own communications, but proceeded nevertheless." As such, he opined that the standard test for just cause discharge had been met. Even if that were not the case, Mr Christie had stated, accommodation was not possible:

> … Even if AA's judgment was so impaired by his disability, that my conclusion … is wrong, [the School Board] cannot accommodate AA back into the workplace, based on the following:
>
> a. AA is still diagnosed as being bipolar.
>
> b. AA is always at risk of having another period of hypomania.
>
> c. There is no sure way of detecting AA's onset of hypomania.
>
> d. The potential damage to students that could be incurred by an undetected onset of hypomania is too significant to ignore (Appeal Board decision at para 36).

[61] As a result, the applicant was discharged in April 2010.

The Appeal Board's reasoning

[62] After reviewing the *Education Act* duties that the applicant had undisputedly breached, the Appeal Board stated that the issue on the appeal went to his "culpability and the risk he would pose if his employment as a teacher was reinstated" (Appeal Board decision at paras 49-50). Finding that the misconduct was a blend of culpable and non-culpable behaviour, the Appeal Board conducted an analysis in which the two strands – human rights and labour relations – were

considered separately (Appeal Board decision at paras 51-59). On the issue of just cause for termination, the Appeal Board applied the analysis from *Re Canada Safeway Ltd v RWDSU* (1999), 82 LAC (4th) 1, 1999 CarswellNat 3322 (Can Arb), where the majority of the Arbitration Board had said at para 61:

> … Where illness or psychological circumstances arise which are relied upon to explain the aberrant conduct, there are a number of necessary elements that must be established before an arbitration board can feel secure that reinstatement under any conditions is the proper course of action... Extrapolating from the past jurisprudence the elements that must be established before an arbitrator may consider reinstatement in a case where there has been a serious wrongdoing, such as a theft, which is attributed to illness would appear to include the following:
>
> > (1) It must be established that there was an illness, or condition, or situation being experienced by the grievor…
> >
> > (2) Once an illness or condition has been established, then a linkage or nexus must be drawn between the illness or condition and the aberrant conduct...
> >
> > (3) If a linkage between aberrant conduct and the illness or condition is established, an arbitration board must still be persuaded that there was a sufficient displacement of responsibility from the grievor to render the grievor's conduct less culpable...
> >
> > (4) Assuming the three elements set out above have been established, the arbitration board must be satisfied that the grievor has been rehabilitated. This involves an acceptance by the arbitration board that the grievor's fundamental problems are under control. Of course there can never be absolute certainty on this count nor should absolute certainty be required. However there must be a sufficient degree of confidence that the employee can return to the workplace as a fruitful employee and that the underlying problems that led to the improper behaviour in the first place have been resolved so that the risk of that behaviour, or similar behaviour, occurring in the future is minimized. Again, in addition to the evidence of the grievor, it is usual that expert evidence would be submitted to establish that rehabilitation has occurred.

[63] The Appeal Board found (1) that the applicant “was suffering from bipolar disorder when the aberrant conduct took place, and will continue to have the condition indefinitely”; (2) that there was “a strong linkage between the bipolar condition and the aberrant conduct”; and (3) that there was “sufficient displacement of responsibility to render the conduct less culpable” (Appeal Board

decision at paras 66-68). The Appeal Board held that the "non-culpable analysis" is not restricted to situations where the person was unable to appreciate the nature and quality of their acts and to know they were wrong. He was satisfied that that the applicant's "judgment was significantly impaired by a hypomanic condition at the material times" and found on a balance of probabilities that this impairment "significantly impaired his ability to choose to refrain from the misconduct." As such, he found that the first three steps of the *Canada Safeway* analysis had been satisfied.

[64] On the fourth and final stage of the *Canada Safeway* analysis – rehabilitation; the Appeal Board noted that bipolar disorder is a disability and triggers the *Human Rights Act*, RSNS 1989, c 214. It was therefore necessary to show "that the discrimination was based on the disability." The Appeal Board concluded at para 77 that it was clear from the evidence that the applicant was terminated because;

> … not just because of his actions in the summer of 2008, but because he continued to have the mental disability. In his case it was not just because he had bipolar disorder, but because of the way the disorder affected him, in that it affected his judgment so that he had willingly engaged in behaviour that put one of his students at risk. This result however is an aspect of the disorder, and the School Board decided that it was unwilling to continue his employment because of the continuing existence of the mental disorder. A *prima facie* case of discrimination has therefore been made out.

[65] The Appeal Board went on to consider whether a *bona fide* occupational requirement (BFOR) was established. The issue was whether the School Board had established that accommodation was impossible without undue hardship. The Appeal Board considered *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3, [1999] SCJ No. 46 (*Meiorin*), where the court set out a test for determining whether a standard that is *prima facie* discriminatory is a BFOR:

> 54 …An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> > (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> >
> > (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[66] The Appeal Board found that there was no issue in regard to the first two steps, and that the real issue was in regard to the third step. "In the circumstances of this case the question is whether the School Board has proven that allowing the appellant to return to work would create a risk to the students that would constitute undue hardship" (Appeal Board decision at para 79). The Appeal Board found that it was "probable that the appellant will have recurrences of the hypomania, despite the relative optimism of Dr Theriault's report. The Appeal Board concluded from his testimony that reoccurrences were probable. The Appeal Board was not persuaded that the NSTU's proposed safeguards were sufficient to give warning.

[67] At this point the Appeal Board considered authorities indicating that an employer's standard of "absolute safety or perfection" was not available on an undue hardship analysis. In particular, he referenced *Shuswap Lake (supra)*, where the arbitrator had allowed a grievance on the basis that the employer had not established that accommodation was impossible short of undue hardship. One reason for this was that the grievor, a nurse with bipolar disorder, worked in an environment which, by its nature, provided safeguards against escalating risks to patient safety. The Appeal Board distinguished *Shuswap Lake* from the present matter:

> [94] In contrast, the present case involves a teacher whose improper actions all took place outside of the school premises, in summer when school was not in session. Even in school there is not the same opportunity to observe the teacher, so that there are not the implicit safeguards in the workplace relied upon in *Shuswap Lake*.
>
> [95] The present case also differs because AA is a teacher and the risk of harm is borne by vulnerable students. The Supreme Court of Canada has given direction that because a teacher is given a unique trust, arbitrators should be rigorous in ensuring that schools maintain the public's trust and confidence when a teacher breaches that trust and puts students at risk. In [*Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487], the Supreme Court addressed the significance of misconduct outside the classroom by a teacher, at para. 57:

> … it is essential that arbitrators recognize the sensitivity of the educational setting and ensure that a person who is clearly incapable of adequately fulfilling the duties of a teacher both inside and outside the classroom is not returned to the classroom. Both the vulnerability of students and the need for public confidence in the education system demand such caution.

[68] The Appeal Board concluded:

> [96] There was no evidence in this case contesting the School Board's assertion that AA's type of conduct could have disastrous consequences for a vulnerable student such as BB. The opinion evidence expressed by Dr Theriault that in his view there would be a low risk if AA was returned to the workplace is based upon his expectation that the monitoring of blood levels and observations by others in the workplace would signal the school authorities that a hypomanic episode was developing, and that the school authorities could take appropriate action such as removing AA from the workplace until the illness subsided. He did not have the advantage of hearing the School Board's evidence regarding the impracticability of relying on the principal to monitor AA, or imposing that duty on all of the other teachers. More importantly he did not consider the fact that AA was using his position as a teacher to carry on the relationship when school had closed for the summer. I therefore think that there is significantly more risk than indicated by Dr Theriault. For all of the foregoing reasons I find that, using the spectrum analysis in *Grismer*, the compelling need to have trust in our schools, combined with the serious consequences if another student was drawn into such a relationship, <u>means that the tolerated level of risk must be extremely low, and in this case exceeds that level…</u>

[Emphasis Added]

[69] The applicant says the "interpretation and application" of the BFOR analysis was a question of law which the Appeal Board was required to decide correctly. The applicant agrees that the Appeal Board stated the test correctly, but says it misapplied the test by finding that the school board had met the onus for establishing a BFOR.

[70] As set out in *Meiorin* (see para 63 above) there are three steps when conducting a BFOR analysis. The applicant says the Appeal Board erred by finding that there was no issue in regard to the first two steps of the BFOR analysis, and that the only dispute was on the third step. According to the applicant, the Appeal Board had to identify the standard used by the School Board to justify the termination, and then determine whether that standard had a discriminatory foundation. The applicant says the reference in the investigation report to there being "no sure way" of detecting the onset of his hypomania indicates that the School Board required that there be no risk that a hypomanic episode could go

undetected and untreated. Accordingly, the applicant contends the School Board did not show that a "zero risk to student safety" standard accorded with the first two stages of the BFOR test; ie., the rational connection to the performance of the job and honest and good faith belief in its necessity to fulfill a legitimate work-related purpose.

[71] The respondent says the Appeal Board did not ignore the first two elements, but that it found there was no issue with them, and that the applicant raised no contrary argument regarding those steps. The real question is whether the School Board and the Appeal Board actually applied a "zero risk" standard contrary to the authorities. The Appeal Board stated that "the tolerated level of risk must be extremely low…," not nonexistent (Appeal Board decision at para 96). In effect, the applicant is saying that the Appeal Board applied a different standard than the School Board had used, without any evidence being led to establish whether a BFOR was established on that standard. The applicant's argument appears to ignore the facts that; (1) it was the Appeal Board's role to determine, on the evidence, whether a BFOR was established; and (2) that it is the Appeal Board's decision on that point which is under review, not the reasons given by the School Board.

[72] I am not convinced by the applicant's claim that the School Board terminated him because there was no way to guarantee that a relapse would be identified in time to prevent further harm. The Appeal Board took specific note of the comments in *Shuswap Lake* distinguishing a standard of "absolute safety or perfection" from one of "reasonable safety" (Appeal Board decision at para 92). He was clearly aware of this distinction, and he did not indicate that he believed the School Board had actually demanded "zero risk." Moreover, Mr Christie's own reasons were not limited to the words complained of ("no sure way of detecting"). Rather, the detection issue was one of four factors weighed in reaching the conclusion that accommodation was not possible. In particular, the uncertainty of detection was weighed against the magnitude of harm that could be caused by an undetected onset of hypomania (Appeal Board decision at para 36). In effect, the combination of problems of detection and potentially serious damage, in the circumstances, led to an unacceptable level of risk.

Incorrect application of the burden of proof

[73] According to the applicant, the Appeal Board incorrectly applied the burden of proof on the School Board to establish on a balance of probabilities that it could not accommodate without undue hardship. The applicant claims that the Appeal Board's decision as to the level of risk that would be posed by returning him to work was without an evidentiary basis.

[74] The steps taken in considering accommodation consisted of obtaining Dr Theriault's opinion and meeting with the applicant to consider how students could be protected from another episode, leading to the production of a list of symptoms. The applicant contends that, having adopted a standard of "zero risk", the School Board did not consider methods of accommodation, and decided to dismiss him without satisfying the duty to accommodate to the point of undue hardship. He also contends that establishing undue hardship required the School Board to show that it had seriously considered how to accommodate, that it had reasonably rejected all viable forms of accommodation, and that it could not do anything else reasonable or practical to avoid termination; further, that the evidence for undue hardship could not be anecdotal or speculative.

[75] The School Board did consider the proposed monitoring measures suggested by the NSTU, such as monitoring lithium carbonate levels in the applicant's blood, expecting his wife to report symptoms to the school, and monitoring by other school staff. The School Board responded, *inter alia*; that the applicant would be able to withdraw his consent to disclose blood test results; that there was little it could do to monitor his conduct in the summer, when the risk of recurrence was greatest; that there was evidence questioning the reliability of self-monitoring and spousal monitoring; that the principal had not noticed the onset of symptoms the first time; and that the principal, who had limited day-to-day contact with the applicant, had little time to effectively monitor his behaviour. The Appeal Board also noted that there was no indication of a willingness by the applicant to have other staff put on notice of the situation (Appeal Board decision at paras 82-91).

[76] The applicant maintains that the School Board's objections were based on the type of anecdotal and *ex post facto* reasoning that the Supreme Court of Canada warns against. For instance, the applicant says there was no evidence that he would actually withdraw his consent to disclose his blood test results, and that in any event his reinstatement could be made conditional on abiding by the monitoring regime. As for the concerns that warning signs would be missed, the applicant says there was no evidence that the symptoms could not or would not be identified now that there is a diagnosis. It is also argued there is no evidence that it would constitute undue hardship for the principal or other teachers to be required to set

aside time for monitoring. The applicant says the concerns about the possibility of an onset in the summer are speculative, and that the school board did not establish that it would constitute undue hardship to create measures to monitor his activities in the summer months.

[77] The concerns expressed by the School Board and the Appeal Board were specific and concrete and based on the evidence before them. The Appeal Board found that Dr Theriault's opinion did not take into account the evidence of impracticality of monitoring by school staff, or the fact that the misconduct had occurred in the summer, when school was closed. This led the Appeal Board to conclude that there was "significantly more risk" than Dr Theriault suggested, and that based on the *Grismer* analysis, "the compelling need to have trust in our schools, combined with the serious consequences if another student was drawn into such a relationship, means that the tolerated level of risk must be extremely low, and in this case exceeds that level." As such, accommodation was determined to constitute undue hardship (Appeal Board decision at para 96).

[78] According to the applicant, the Appeal Board accepted the School Board's evidence of "impracticality" without making a finding that this amounted to undue hardship. Further, he alleges, the Appeal Board erred by distinguishing Dr Theriault's opinion of the level of risk with allegedly irrelevant considerations, thereby finding that a higher level of risk existed. In essence, the argument is that the School Board failed to meet the onus of establishing undue hardship, and that the Appeal Board incorrectly found that it had been met.

[79] The respondent submits that the School Board's knowledge and expertise was based on specific knowledge about the functioning of the school and how the accommodation measures would function. The School Board did consider the potential accommodations and weighed them against the risk to vulnerable students in the event of another hypomanic phase. The respondent points to the Appeal Board's reference to Dr Theriault's acknowledgement on cross-examination that if the same level of hypomania recurred, there was no reason to think that the applicant would not again form the belief that he was above the rules and that his "role" was more important than the teacher-student relationship (Appeal Board decision at para 30).

[80] The School Board's concerns were based on medical evidence and upon the actual behaviour that occurred during the hypomanic episode. The Appeal Board was fully aware of evidence that could reasonably be regarded as barriers to the suggested forms of accommodation in the school setting;

(1) The applicant could withdraw his consent to have warnings of inadequate levels of lithium carbonate from being sent from the Mood Disorder Clinic to the school.

(2) If problems arose in the summer there was little the school board could do the stop the applicant from having a personal relationship with a student.

(3) Although the applicant had responded well to lithium carbonate, Dr Theriault acknowledged that the effectiveness could wane with the passage of time.

(4) The applicant's wife only noticed peculiar sleep patterns and a high level of unproductive activity that indicated he was in a hypomanic state. She did not notice other indicators.

(5) The school board would have to rely on reports from the applicant's wife and his self reporting to identify those indicators. The Appeal Board referred to Dr Theriault's evidence that often when people monitor the condition they can mistakenly identify the onset of a hypomanic phase and this can eventually cause problems identifying an actual onset.

(6) In September of 2008, the Principal of the applicant's school noticed no unusual sings [*sic*], indicators or speech patterns during the meeting with the applicant in September. The Appeal Board concluded this evidenced that it was questionable if a monitor in the school could identify the symptoms.

(7) The applicant's "warning sign" list suggested that the responsibility of monitoring would be placed solely on the principal to conduct monitoring within the school. The Appeal Board concluded that the evidence is that this would be both impractical and unworkable because the Principal has little contact with teachers when they carry out their duties, and would not have time to effectively monitor the applicant.

(8) There was no suggestion that the applicant was willing to have other staff notified and enlisted to monitor him.

[81] This evidence was not merely impressionistic. The School Board was entitled to consider, from its vantage point of expertise and experience, whether accommodation was possible in the school context. It was in the Appeal Board's prerogative to assess the reasons and accept or reject the evidence provided.

[82] The Appeal Board's conclusions did not rest on mere impression or anecdote. The School Board had raised objections to the proposed monitoring measures that were based in part on prior experience during the applicant's hypomanic episode. The Appeal Board placed particular emphasis on the fact that the greatest risk was in the summer, during the school break, when it would be difficult or impossible for the School Board to sustain systematic monitoring of the applicant's behaviour. Those concerns were substantiated by the fact that the first episode, when real damage was caused by the applicant's behaviour, did indeed occur during the summer. This was not speculative. Likewise, it does not appear to have been in dispute that the applicant only proposed to be monitored by the principal, not by other teachers and staff. The Appeal Board was quite within its rights to find that this would be a detriment to effective monitoring of the applicant's behaviour.

Incorrect threshold of risk

[83] As has been mentioned above, the applicant says the Appeal Board applied an incorrect threshold of risk as constituting undue hardship. The Appeal Board referred to a "spectrum analysis" derived from *Grismer* (Appeal Board decision at para 96), which would be applied in defining the purpose or goal of an employer in order to determine whether it was "rationally connected" to a function and whether the standard is made in good faith and is "reasonably necessary".

[84] The applicant points to the court's statement in *Grismer* that risk has a limited role in determining undue hardship, and that the old notion that 'sufficient risk' could justify a discriminatory standard is no longer applicable; however, risk can still be considered as an element of hardship, but not as an independent justification of discrimination… (*Grismer* at para 30). The applicant says that "risk" was the "overwhelming", if not the only, consideration in the case at bar. He says a moderate amount of risk must be accepted, otherwise the protection afforded by human rights legislation would be too easily defeated. He says the nature of the potential harm "does not justify lowering the acceptable level of risk to a *de minimis* standard."

[85] The Appeal Board considered the School Board's risk assessment by reference to Mr Christie's report, which indicated that there would be an ongoing risk of another period of hypomania that may not be detected. However, the Appeal Board did not find that the School Board adopted a "zero risk" standard. I am not convinced that the applicant has established that the School Board was

applying a "zero risk" standard. Further, both the identity of those bearing the risk and the nature of the workplace are relevant in assessing the standard of acceptable risk. For instance, students were theoretically at risk in *Way v New Brunswick*, which involved a blanket challenge to an age-based mandatory retirement policy for bus drivers; however, that case is of limited assistance because the case at bar involves an individual whose specific behaviour gave rise to the risk and his ultimate dismissal.

[86] A more useful comparison is with *Shuswap Lake*, which, as noted earlier, the Appeal Board distinguished. That case included a specific finding by the arbitrator that the employer's standard was "effectively one of absolute safety or perfection, not one of reasonable safety." By contrast with the case at bar, in *Shuswap Lake* there was "no direct evidence of any specific loss or injury to any patient due to the grievor's medication errors, and no direct evidence relating to the seriousness of the loss or injury that may result." As such, the Employer had "failed to establish a serious or unacceptable risk to patient safety or, for that matter, to patient discomfort amounting to a safety risk due to medication errors." In the present case, there is no dispute as to the facts of the past conduct. It was undisputed that serious harm occurred as a result of behaviour stemming from the applicant's condition. Nor was the potential harm that could occur in the event of another such episode in dispute.

[87] It could be easy to forget that the "risk" that was allegedly over-emphasized by the School Board and by the Appeal Board was not a theoretical risk, but was grounded in evidence of actual events. The Appeal Board framed the issue as whether it was established that the risk created undue hardship in accommodation. As the court said in *Grismer*, when risk is one of the bases for undue hardship, there must be "some evidence" to link the refusal to accommodate with an undue safety risk. That evidence may be considered in the prism of "common sense and intuitive reasoning." The justification need only be established on a balance of probabilities (*Grismer* at para 43). Likewise, in *Shuswap Lake*, it was necessary for the employer to advance "evidence establishing, on a balance of probabilities, that a serious or unacceptable risk to patient safety could arise from the grievor's continued employment as a nurse."

[88] The School Board was required to establish on a balance of probabilities that a serious or unacceptable risk to student safety would arise from the applicant's continued employment as a teacher. While the Appeal Board did not use these

exact words, it seems to me that is the substance of its conclusion that "the compelling need to have trust in our schools, combined with the serious consequences if another student was drawn into such a relationship, means that the tolerated level of risk must be extremely low, <u>and in this case exceeds that level.</u>" (Appeal Board decision at para 96) [Emphasis Added]

Alternative argument: the Applicant says the Board's decision was unreasonable Applying the reasonableness standard

[89] The content of review for reasonableness was described in *Dunsmuir* in the following terms:

> [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.
>
> [48] … What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286…

[90] The Supreme Court commented on the reasonableness analysis in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador*

(Treasury Board), 2011 SCC 62, [2011] 3 SCR 708, elaborating on the Dyzenhaus article cited in *Dunsmuir* above:

> [12] … In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added in *Newfoundland*.]

[91] The Supreme Court in *Newfoundland* also stated that in reviewing for reasonableness, "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." The reviewing court does not substitute its own reasoning, although it may consider the record in assessing the reasonableness of the outcome. The court continued:

> [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.

[Emphasis Added]

[92] The applicant says the Appeal Board's interpretation and application of the BFOR analysis is unreasonable. He submits that the decision offers no reasoning that rationally supports the conclusion that a BFOR was established on a balance of probabilities. He says the failure to identify and scrutinize the standard applied by the School Board, and the adoption of a different standard, led to an unintelligible application of the third step of the BFOR test. The applicant, in essence, asserts that not only did the alleged errors lead to an incorrect result, but that they also led to an unreasonable one.

[93] The Appeal Board reviewed the evidence in a manner that demonstrated that he closely and carefully considered and understood all the evidence which was presented. He reviewed the medical evidence and considered the questions put to Dr Theriault, as well as his report and oral evidence. This included Dr Theriault's discussion of effective monitoring in the work environment, the unreliability of self-diagnosis in the hypomanic phase, and the seasonal pattern of the hypomanic phases. The Appeal Board noted Dr Theriault's agreement on cross-examination that if the same level of hypomania recurred, "there was no reason to think he would not again believe he was above the rules, and that his 'role' was more important than the teacher-student relationship" (Appeal Board decision at para 30).

[94] The Appeal Board did not contest Dr Theriault's medical conclusions, but rather commented on the particular aspects of whether the School Board could effectively monitor/accommodate the applicant in the school environment. In tracing the Appeal Board's reasoning path, the Court notes that it considered the School Board's termination decision, and specifically the reference to Mr Christie's view of Dr Theriault's reliance on "optimization" of the applicant's treatment program as a basis for eliminating the hypomanic cycles, or for reducing them in severity, duration, or frequency. As the Appeal Board put it, "Mr Christie stated that this reliance on optimization left an unacceptable risk and that even with optimization he thought the risk unacceptable" (Appeal Board decision at para 31).

[95] The Appeal Board summarized the parties' positions and provided extensive reasoning for its decision. He referred to the correct authorities, legal tests and statutes. Having accepted "uncontradicted" evidence that the Appellant's behaviour breached his duties under the *Education Act* and "put a vulnerable student in a dangerous situation," he held that the issue on the appeal went to the applicant's "culpability and the risk he would pose if his employment as a teacher was reinstated" (Appeal Board decision at para 50). He considered the standards applicable to culpable and to non-culpable conduct, and recognized the need for a

human rights law analysis. He considered whether the applicant was responsible for his activities, and whether he should be reinstated, by reference to the *Canada Safeway* test and the *Grismer* analysis. Concluding that the medical evidence established that the applicant's judgment was "significantly impaired by a hypomanic condition at the material times," the Appeal Board held that, on a balance of probabilities "this impairment in judgment significantly impaired his ability to choose to refrain from the misconduct" (Appeal Board decision at para 73).

Conclusion:

[96] I find that the standard of review in this case is one of reasonableness. I also find that the Appeal Board applied the proper tests in coming to its conclusions on both the issues of "level of risk" and the requirements and "burden of proof" to establish a BFOR on the part of the employer. I am not convinced that the reasoning path of the Appeal Board was unintelligible or that it led to a result outside the range of justifiable, possible or rational results. It was therefore reasonable.

[97] I therefore dismiss the application to quash the Appeal Board's decision.

[98] I should make it a clear that this decision should not be interpreted as confirming that the School Board had just cause, in the traditional sense, to terminate the applicant. This may still be a contentious issue, particularly keeping in mind the comments made about the culpability of his behavior in relation to his illness. This situation is clearly tempered by Human Rights legislation and caselaw. I am simply dismissing the application for Judicial Review of the Appeal Board's decision dated 15 of September, 2012, based on the legal tests for such a review.

[99] I will hear the parties on the issue of costs at a mutually convenient time, if that question is not resolved by agreement.

[100] I will issue an order accordingly prepared by the respondent and consented as to form by both parties.

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Boudreau, J