SUPREME COURT OF NOVA SCOTIA

Citation: *Cape Breton (Regional Municipality) v. Canadian Union of Public Employees, Local 933*, 2014 NSSC 97

Date: 2014-03-11
Docket: Syd. No. 418289
Registry: Sydney

Between:

Cape Breton Regional Municipality

Applicant

v.

Canadian Union of Public Employees, Local 933

Respondent

Decision on Judicial Review

Judge:	The Honourable Justice Robin C. Gogan
Heard:	February 25, 2014, in Sydney, Nova Scotia
Counsel:	Demetri Kachafanas, for the Applicant Susan Coen, for the Respondents

By the Court:

Introduction

[1] The Cape Breton Regional Municipality (the "**Employer**") applies for judicial review of an Arbitrator's Award dated July 9, 2013. The Award ordered conditional reinstatement of an employee (the "**Grievor**"). The Employer seeks to have the Award quashed.

[2] The employee is represented by The Canadian Union of Public Employees, Local 993 (the "**Union**"). The Union is of the view that the conditional reinstatement is appropriate and the Award should not be disturbed.

[3] This matter involves innocent absenteeism, mental health considerations, human rights issues, evidentiary questions and the duty to accommodate.

Background

[4] The Employer is a municipal government which operates multipurpose facilities. The Grievor was employed doing payroll, accounts payable and ice rentals in the Coxheath Rink and Center 200. She had been employed by the Employer since 1978. Her employment was uneventful until 2006.

[5] In 2006, the Grievor was diagnosed with cancer and became seriously ill. She was on extended leave from work for 23 months. She was able to return to work but struggled with illness and injury. She developed depression but did not understand what it meant or its implications. In 2007, the Grievor began to see a psychologist, was formally diagnosed with depression and received treatment.

[6] The Employer was aware that the Grievor was seeing a psychologist. It was not aware of the nature or extent of any medical condition. The Employer was not advised of any workplace limitations or need for any accommodation.

[7] In 2008, the Grievor's absenteeism became an issue with the Employer. The Grievor provided reasons for the absenteeism but none related to fatigue or depression. The Employer discussed its concerns with the Grievor and then provided warnings. The Grievor's absenteeism caused frustration and hardship amongst her co-workers.

[8] The parties participated in a meeting to discuss the Grievor's absenteeism on March 19, 2010. The Grievor was warned that continued excessive absences from the workplace may lead to termination. The Grievor acknowledged the seriousness of the issue and indicated that there would be no problem in the future. However, the problem continued.

[9] The Grievor was terminated on January 14, 2011 for excessive absenteeism. A grievance was filed by the Union on January 17, 2011. The grievance was heard on June 27 and 28, 2013. The Arbitrator released his Award on July 9, 2013.

[10] The Arbitrator found the termination of the Grievor justified based upon the information available at the time of termination. In ordering conditional reinstatement of the Grievor, the Arbitrator admitted information about the Grievor's medical condition. This information had been available at the time of termination but not provided to the Employer for consideration.

[11] The employer now seeks judicial review of the Arbitrator's Award.

Issues

[12] The parties argued a number of issues in their written and oral submissions. I would collapse the issues as follows:

(a) Did the Arbitrator err in allowing and relying upon "post-termination" evidence?

(b) Did the Arbitrator err in finding that a duty of accommodation arose "post-termination"?

[13] The focus of the judicial review hearing was the evidentiary issue as to whether the Arbitrator could consider "post-termination" evidence.

Decision Under Review

[14] The grievance was submitted to Arbitration pursuant to section 11.08 of the Collective Agreement between the parties. The parties agreed upon a single Arbitrator to hear the Arbitration.

[15] The Collective Agreement provided the Arbitrator with authority as follows:

> 11.10 The Arbitrator, or Board, as the case may be, shall not have the jurisdiction to alter or change any of the provisions of the Collective Agreement or, to alter, modify or amend, any of the provisions, **but shall have the right to dispose of any discharge or discipline as it deems just and equitable** (emphasis added).
>
> 12.01 A regular employee who has completed her probationary period may be dismissed, but only for just cause. The Chief Administrative Officer or designate may discipline, discharge or suspend an employee, but shall immediately report such action to the UNION, in writing. When an employee is disciplined, discharged, or suspended, she shall be given the right to have the reason given in the presence of the Chairman of the Grievance Committee or a member of the UNION executive.

[16] Before the Arbitrator, the Employer relied upon blameless absenteeism to justify termination of the Grievor. In response, the Grievor argued that:

(a) she had depression;

(b) depression was the reason for her absenteeism;

(c) her depression was a disability; and

(d) her disability should have been the subject of accommodation prior to termination.

[17] The Arbitrator succinctly summarized the issues before him at p. 3 of his Award:

> There are three specific issues. Firstly, whether there was just cause for termination as a result of excessive innocent absenteeism. The Employer argues that there was excessive absenteeism. The Grievor was warned of the situation and the implications of missing time. The missed time by the Grievor had a significant impact on the workplace and the other employees.
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> The second issue is whether the Employer had an obligation to accommodate the disability of the Grievor to the point of undue hardship. The Union argues that this is a requirement to be met before the Employer may terminate for innocent absenteeism.
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> The Employer argues it was unaware, as was the Union, of the disability and therefore did not have any reason to look to make accommodation. The Union's response was that the Employer was aware of the depression and should have made inquiries of the Grievor as to the nature of her illness to which the Employer again responded that it does not have the right to medical information concerning an employee, but that the Employer did offer to the Grievor services such as the EAP program and the LTD program.
>
> The third issue is to what extent I as an arbitrator have jurisdiction to consider subsequent event evidence concerning the Grievor's medical condition after the termination and her ability to work. As

> well, and more contentious, to what extent I, as an arbitrator have jurisdiction to consider evidence as to the nature of the Grievor's disability and depression which had not been known to the Employer but which was in existence prior to the Grievor's termination.

[18] After identifying the issues before him, the Arbitrator comprehensively reviewed the evidence presented through numerous witnesses during the two day hearing. The evidence was reviewed in 2 distinct parts; before and after 2008. The significance to this dividing line was that the employee had absenteeism before 2008 that was accommodated due to illness and injury. After 2008, the issue changed to one of apparent excessive innocent absenteeism.

[19] After reviewing the evidence presented, the Arbitrator made the following factual findings (starting at page 13 of the Award):

> I find that the depression suffered by the Grievor was of a serious and significant nature and was the cause of her fatigue and her inability to arrive at work on time in the morning which resulted in her absenteeism. It is a disability which would require an accommodation to the point of undue hardship in the workplace.
>
> I find that the Grievor was under considerable stress from a life-threatening illness together with other serious medical conditions requiring surgery with complications. In the circumstances based upon the prior medical condition, the continuing medical complications and the very nature of depression it is apparent (sic) Grievor did not fully appreciate the disability she was suffering. Her statements to the Employer that she would be on time for work in the future are understandable in the circumstances, as she had concerns about her employment and intended to make efforts as

> best she could to be on time and to provide that assurance to the Employer.
>
> I find that the nature and the extent of the Grievor's depression and its impact on her fatigue and ability to work, was not provided to the Employer or to the Union who were both unaware of this medical condition or any restrictions that the Grievor may have at all relevant times.
>
> I find that there is was (sic) insufficient information provided to the Employer which would have suggested to the Employer it should have done anything further in making inquiries as to the fitness to work of the Grievor and that the Employer did all that it could to assist the Grievor in this situation with the information made available to it.
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> I find that as a result of the Employer being unaware of the medical condition of the Grievor and the impact of the depression on her absenteeism, the Employer did not try to find an accommodation for the Grievor that would take into account her disability which was not known to the Employer.
>
> I find during the relevant period of time there was excessive absenteeism which had a significant and serious effect on the workplace and the other employees.

[20] In analysing the issues before him, the Arbitrator found that the dismissal of the Grievor would be justified if decided "on the basis solely of the information available to the Employer at the time of termination". In his view however, this conclusion did not end the required analysis. He went on to frame the issue before him at page 16 of the Award:

> ….the real issue is the lack of knowledge of both the Employer and the Union as to the disability being suffered by the Grievor. This

> information did not become available to either the Employer or the Union until after the termination.

[21] At page 20 of the Award, the Arbitrator further narrows the issue before him by asking whether information or evidence of the Grievor's depression and disability should be admissible before him as "it was first made known to the Employer post termination".

[22] The Arbitrator reviewed the authorities presented, including the relevant portions of the *Nova Scotia Human Rights Act* R.S., c. 241. On the question of the admissibility of the evidence not before the Employer on termination, there was extensive analysis of the Supreme Court of Canada decision in *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)* [1995] S.C.J. No 65, (hereinafter referred to as "***Quebec Cartier***").

[23] On the basis of *Quebec Cartier*, the Arbitrator concluded that he could not admit any evidence of factual matters which occurred or came into existence subsequent to termination. The Arbitrator concluded that he had jurisdiction to consider the medical condition of the Grievor which existed prior to termination. In his view, if such information had been known to the Employer at the time of termination, it would have triggered a consideration of the duty to accommodate.

The duty required an analysis by the Employer of accommodation to the point of undue hardship. In the circumstances, this analysis had not been done and the outcome was speculative.

[24] The Arbitrator went on to order a conditional reinstatement of the Grievor. He directed the Employer to conduct the appropriate review to determine whether the ability to accommodate to the point of undue hardship could be met.

Position of the Parties

The Employer

[25] The Employer submits that the Arbitrator was wrong in his analysis of the decision in *Quebec Cartier* and should not have admitted any "post-termination" evidence. Further, the Arbitrator was wrong to reinstate the Grievor given she had not requested accommodation prior to termination. Essentially, the Employer submits that the Grievor did not discharge her obligations to trigger the duty to accommodate and it can't be triggered post-termination.

The Union

[26] The Union argues that the Arbitrator's decision was reasonable in all respects. On the evidentiary point, the Union submits that the Arbitrator was wrong

in not admitting the post-termination medical evidence. Nonetheless, they argue, "arbitrators have the right to be wrong in determining relevance and the admissibility of evidence" and the decision "is within the realm of reasonableness".

[27] I will say more about the position of the parties under my analysis of the issues before me.

Analysis

The Standard of Review

[28] The parties submit, and I agree, that the standard of review in this case is reasonableness.

[29] Our Court of Appeal dealt with the applicable standard of review in *Communications, Energy and Paperworker's Union, Local 1520 v. Maritime Paper Products Ltd.*, 2009 NSCA 60. In that case, the appeal court considered the appropriate standard of review of an arbitrator's interpretation of a collective agreement. Fichaud J.A., reviewed the standard at para. 20:

> In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at paras 62,54, 57, Justices Basterache and Lebel said that, if existing jurisprudence has satisfactorily established the

> standard, the formal standard of review may be abridged. I refer to this court's summary of the *Dunsmuir* principles in *Casino Nova Scotia v. NSLRB*, 2009 NSCA 4 (CanLII), 2009 NSCA 4, at paras 24-28. For the application of the standard of review principles to a labour arbitrator's interpretation of a collective agreement, I refer to: *Cape Breton (Regional Municipality) v. CUPE*, Local 933, 2006 NSCA 80 (CanLII), 2006 NSCA 80 at paras 28-70; *Nova Scotia Government and General Employee's Union v. Capital District Health Authority*, 2006 NSCA 44 (CanLII), 2006 NSCA 44 at paras 36-48; *Nova Scotia Teacher's Union* at para 15; and the authorities cited in those decisions. Clearly, the reviewing court should apply reasonableness to an arbitrator's interpretation of the collective agreement.

[30] More recently, our Court of Appeal approved the use of the reasonableness standard to review a labour Arbitration award in *Halifax Regional Municipality v. Canadian Union of Public Employees, Local 1088*, 2014 NSCA 19.

Applying the Standard of Review

[31] If the appropriate standard of review is reasonableness, then how is that standard to be applied? In *Dunsmuir, supra*, the Supreme Court of Canada explained that reasonableness is a deferential standard and one which recognizes that the questions before administrative tribunals may have the potential for a number of reasonable conclusions. Reviewing courts must respect the decision making process of adjudicative bodies with regard to both the facts and the law as well as the reasons offered in support of a decision.

[32] In *Casino Nova Scotia*, *supra*, the Nova Scotia Court of Appeal elaborated on *Dunsmuir's* reasonableness test;

> [29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
>
> [30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to the process (*Dunsmuir*, para. 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120 (CanLII), 2008 NSCA 120, para. 36.
>
> [31] Under the second step, the court assesses the outcome acceptability, in respect of the facts and the law, through the lens of the deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime". This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundry of reasonableness. *Dunsmuir*, paras 47-49; Lake, para 41; *PANS Pension Plan [Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74, leave to appeal denied by the SCC Jan. 22, 2009], para. 63; *Nova Scotia v. Wolfson*, para. 34.

[33] It has been said in many cases that the reviewing judge must not set her own course in assessing reasonableness. Rather, the first task is to chart the decision

maker's reasoning. See *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), at paras 47-55; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141 (CanLII) at paras 42-44; *CBRM v. CUPE*, supra, and more recently, *Communications, Energy and Paperworker's Union, Local 1520 v. Maritime Paper Products Ltd.*, supra at para. 24 and *Halifax Regional Municipality v. Canadian Union of Public Employees, Local 108*, supra, at para. 14.

[34] I now turn to the review of the Arbitrator's award in the present case.

Issue 1: Did the Arbitrator err in allowing and relying upon "post-termination" evidence?

(a) The Arbitrator's Reasoning

[35] The Arbitrator in this case admitted evidence that was not available to the Employer at the time of termination. The evidence consisted of medical information that had been available prior to termination but had not been provided to the Employer for consideration. The information was made available to the Arbitrator who relied upon it in his decision to conditionally reinstate the Grievor.

[36] In deciding to admit and consider the "post termination" evidence, the Arbitrator carried out a detailed analysis of the issue. He recognized that the information had not been made available to the Employer and in that context, the Arbitrator found the termination completely justified. He then turned to the issue of whether he should consider the new information.

[37] In answering that question, the Arbitrator reviewed a number of authorities offered by the Employer and the Union. The Arbitrator recognized that many of the authorities offered by the parties had been superseded by the decision of the Supreme Court of Canada in *Quebec Cartier*. He considered the principles coming from the *Quebec Cartier* case at page 17 of his Award:

> This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time it was implemented. Accordingly, once an arbitrator concludes that a decision to dismiss an employee was justified at the time it was made, he cannot then annul the dismissal on the sole ground that the subsequent events render such an annulment, in the opinion of the arbitrator, fair and reasonable. In these circumstances, an arbitrator would be exceeding his jurisdiction.

[38] The Arbitrator then went on to consider the interpretation given to *Quebec Cartier* in *Crossely Carpet Mills Limited v. National Automobile, Areospace and Agricultural Implement Workers Union of Canada, Local 4612 (Ingram Grievance)* [203] N.S.L.A.A. No 22 and dated May 21, 2003. The Arbitrator reviewed the principles emerging from the cases and asked himself the following question at page 20:

> The issue is if the information or evidence of the depression and its disability had been known prior to the termination then it would have been admissible. However, should it now be admissible as it was first made known to the Employer post termination?

[39] In answering this question, the Arbitrator considered the implications of the *Nova Scotia Human Rights Act*, supra. He then considered and distinguished a series of authorities relied upon by the Union. He did so on the basis that the cases relied upon involved Employer's with some information as to the medical condition and disability of the employee at the time of termination.

[40] In the end, the Arbitrator decided that *Quebec Cartier* did bar consideration of facts which evolved subsequent to termination. Therefore, he did not admit evidence in this category.

[41] However, respecting facts which existed up to the time of termination, albeit unbeknownst to the Employer, no such bar existed. In his view, *Quebec Cartier* and subsequent cases permitted consideration of such evidence if it was relevant and admissible. The Arbitrator held that these facts were relevant and admissible. It was the Arbitrator's reasoning that had the information been known by the Employer, it would have triggered a consideration of the duty to accommodate.

(b) The position of the parties

[42] On this issue, the Employer argued that the Arbitrator was wrong in his interpretation of *Quebec Cartier*. In the Employer's view, the Arbitrator's finding that the termination was justified based upon the information known at the time was the end of the assessment. Information not before the Employer on termination did not meet the test for admissibility established in *Quebec Cartier* and therefore could not be admitted to annul the termination.

[43] The Union was of the view that the Arbitrator's decision on the evidentiary point was reasonable. It was their submission that the Arbitrator had two distinct categories of evidence under the umbrella of post-termination evidence; the first being "subsequent-event evidence" and the second "after-acquired evidence". The former category consisted of medical evidence that developed after termination.

The latter consisted of medical evidence that existed prior to termination but was not made available to the Employer before termination. The Union argued that the case law provided authority for both categories of evidence to be admitted in the circumstances, however, the Arbitrator's decision to only consider the "after-acquired evidence" was reasonable.

(c) Determination

[44] In my view, the reasoning of the Arbitrator on this issue is apparent on the face of the award. He identifies the evidentiary issues before him, identifies and reviews the parties' positions on the issue, analyzes the authorities provided, makes a decision and applies that decision to his consideration of the evidence. There is a logical and coherent flow to the reasoning path the Arbitrator followed. There is no apparent gap in the analysis or reason to wonder as to the factual and legal basis for the decision.

[45] The application of the reasonableness standard first requires that the reviewing judge assess the decision making process for justification, transparency and intelligibility. In argument before me, the parties did not advance any failures with this aspect of the Arbitrator's award.

[46] The reasons provided on the evidentiary issue provide intelligible and transparent support to justify the conclusions reached. The reasons further provide sufficient "raw material" to allow the reviewing court to move to the second stage of the reasonableness analysis. I therefore find that the Arbitrator's reasons on this issue satisfy the first step of the *Dunsmuir* reasonableness assessment.

[47] The contentious point relates to the substantive review. The Arbitrator's reasons on this issue must fall within the range of acceptable outcomes to survive judicial review.

[48] The context of the Arbitrator's reasons was his responsibility to decide whether the Grievor's termination was justified. Under the collective agreement, the Arbitrator had the authority to dispose of any discharge as he "deems just and equitable".

[49] As pointed out by the Union, *the Trade Union Act*, 1989, c 475 provides the Arbitrator with considerable latitude on evidentiary issues. Indeed, section 43B(2)(a) provides:

> (2) An arbitrator or an arbitration board may
>
> (a) receive and accept such oral or written evidence and information on oath, by affidavit or otherwise as the arbitrator or

> arbitration board deems fit, whether the evidence or information is admissible in a court of law or not.

[50] In *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 44, our Court of Appeal, at para. 43, referred to the earlier incarnation of section 43B(2)(a) as demonstrating the Legislature's recognition of arbitrators' "expertise and discretion in the admissibility of evidence…" In support of this conclusion, reference was made to *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd*, [1993] 2 SCR 316 where Sopinka J. said, for the majority:

> While provisions such as these do not oust judicial review completely, they enable the arbitrator to relax the rules of evidence. This reflects the fact that arbitrators are often not trained in the law and are permitted to apply the rules in the same way as would be done by reasonable persons in the conduct of their business. Section 84(1) of the Ontario *Labour Relations Act*, 1977 evinces a legislative intent to leave these matters to the decision of the arbitrator. Accordingly, an arbitrator's decision in this regard is not reviewable unless it is shown to be patently unreasonable. While failure to give effect to a rule of privilege or an exclusionary rule of evidence which embodies an important aspect of public policy might, without more, attract review, the use of extrinsic evidence to interpret a collective agreement is very much in the core area of an arbitrator's function. In this regard, the Court is not apt to intervene provided that the approach adopted by the arbitrator with respect to the to the use to be made of the evidence assists in determining the true intention of the parties.

[51] The authority provided to the Arbitrator under the collective agreement and the *Trade Union Act* provides the foundation for his assessment of the evidentiary issues before him. The Arbitrator was charged with deciding whether the termination was justified. In doing so, he was required to determine what evidence could be considered in his assessment of the overriding question. In other words, the evidentiary question was within his core functions as an arbitrator.

[52] In deciding the evidentiary issue, the Arbitrator referenced the *Quebec Cartier* decision. The parties before me took no issue with reliance on the decision in *Quebec Cartier*. Rather, the parties disagreed on the Arbitrator's application of *Quebec Cartier* principles to the facts before him.

[53] In *Quebec Cartier*, the Supreme Court of Canada dealt with "subsequent-event evidence". In that case, an alcoholic employee was dismissed for chronic absenteeism. The employee subsequently obtained treatment and dealt with his addiction issue. In considering evidence of events subsequent to termination, the Supreme Court of Canada found that the arbitrator had exceeded his jurisdiction by reinstating the employee on the basis of subsequent events. On the evidentiary point, the following passage is instructive:

> This brings me to the question that I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in

> ruling on a grievance concerning the dismissal by the Company of an employee. In my view, the arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and the appropriateness of the dismissal under review at the time it was implemented. (emphasis added).

[54] The Arbitrator then considered the principles of *Quebec Cartier* as applied in two Nova Scotia decisions. He adopted the interpretations of *Quebec Cartier* in those cases and in particular accepted the following passage from page 12 of *Crossley Carpet Mills Limited*, supra:

> In the result, at least as I see it, Quebec Cartier merely refines the occasion for the admissibility of a certain type of evidence tendered for a certain purpose. If subsequent event evidence comes in, it cannot be admitted for the purpose of constituting, the sole basis for setting aside an otherwise justifiable termination.

[55] The Arbitrator later concluded that he should not admit evidence of the Grievor's medical condition post termination, presumably on the basis of *Quebec Cartier*. He did, however, admit the medical evidence that existed prior to termination on the basis that it was relevant and admissible under the *Crossley Carpet* analysis. He explained his decision at p. 27:

> Had this information been known to the Employer at the time of termination, there is no question the information as to the disability

> would have required to have been considered by the Employer under the duty to accommodate.

[56] In *Ulnooweg Development Group Inc v. Wilmont*, 2007 NSCA 49, the Nova Scotia Court of Appeal, at para 41, interpreted *Quebec Cartier* as supporting the proposition that "presenting and considering evidence which is acquired later, and which bears upon the person's circumstances at the time of dismissal, is permissible, but not otherwise".

[57] In *Gables Lodge Ltd. V Canadian Union of Public Employees, Local 1315 (M Grievance)*(2009), 187 LAC (4^{th}) 286, Arbitrator Kydd declined to admit certain post-discharge evidence. At para 46 he stated:

> …in the context of all of the evidence…the evidence objected to was not relevant as it was offered to show a change in the grievor's abilities that occurred after she was terminated.

[58] Similarly, in *Highland Community Residential Services v. Canadian Union of Public Employees*, Local 2330, 2013 NSSC 132, the court, at paras 70-72, approved of the arbitrator's admission of post-discharge medical evidence of "statements of MacNeil to his doctors that were not known to the HCRS when MacNeil was terminated".

[59] There is further support for the Arbitrator's approach to this issue in the recent decision in *Re TRW Canada Ltd. And TPEA (Lockhart)* (2013) 229 L.A.C. (4th) 382 (Sheehan). At paras 33 and 34, the arbitrator dealt with both "after-acquired" and "subsequent-event" evidence:

> The decision in Quebec Cartier….does not stand for the proposition that all post-termination evidence is necessarily inadmissible. Acquired-after evidence pertaining to events or circumstances that existed at/or before the date of termination has generally always been viewed as being admissible if being advanced to contest, or support the decision to terminate. This view was expounded upon, and arguably expanded, by the Supreme Court of Canada in Toronto (City) Board of Education v. OSSTF District 15….where it held that subsequent event evidence should also be deemed admissible if such evidence "sheds light on the reasonableness and appropriateness of the dismissal."

[60] Finally, in *Ranni v. Halifax Regional Municipality and Nova Scotia Police Review Board*, 2011 NSSC 83, Wright J. found it reasonable for the decision-maker to consider evidence of events which occurred after the employee's termination. In so finding, Justice Wright relied upon the decision of the Supreme Court of Canada in *Toronto Board of Education v. Ontario Secondary School Teacher's Federation,* District 15 [1997] S.C.J. No 27 and found at para 39:

> The Supreme Court of Canada ruled that even though the third letter was written after the dismissal of the teacher, such evidence can properly be considered if it helps to shed light on the reasonableness and the appropriateness of the dismissal. The court went on to say that it would not only have been reasonable for the

> arbitrators to consider the third letter, it was a serious error for them not to do so. The court concluded that in the face of the letter, it was patently unreasonable (being the former standard of review being applied) for the arbitrator to conclude that the teacher's conduct was temporary and to return him to the classroom.

[61] There is no question that the use of post-discharge evidence has occasioned a debate in the arbitral case law. In *Collective Agreement Arbitration in Canada*, 4th ed (LexisNexis, 2009), Ronald Snyder, at para 6.57 considers the various inconsistent views arising from the arbitration decisions, and states:

> It is apparent that there remains considerable uncertainty in the arbitral jurisprudence regarding the admissibility of "subsequent event" evidence, particularly where it relates to the rehabilitation of employees who have been disciplined for addiction related employment offences. This uncertainty is compounded by the fact that arbitrators must consider and apply human rights legislation when interpreting collective bargaining agreements, and post-discharge evidence is often submitted in the context of whether the employer has complied with its duty to accommodate under the human rights legislation. In the latter instance, post-discharge evidence of a diagnostic (and not prognostic) nature may well be admissible to the extent that it touches upon the reasonableness of the employer's accommodation efforts, if any, before it made the decision to dismiss on either a disciplinary or non-disciplinary basis.
>
> It seems to me, therefore, that in such cases, where the question is whether the employer had accommodated the grievor's disability to the point of undue hardship at the point of termination, subsequent event evidence may be relevant and admissible to establish (a) that the employer's assessment of the grievor's condition at the point of discharge was incorrect or incomplete; (b) that the grievor's failure to cooperate in his or her accommodation was involuntary and an incident of his or her disability; (c) that the accommodation at issue was inadequate or unreasonable in view of the grievor's condition. At the same time, it appears to me, having

> regard to the judgement in *Quebec Cartier*, and in the circumstances of a non-disciplinary discharge, that subsequent event evidence is not relevant or admissible in such a case for the purpose of indicating that the grievor's prognosis has changed because of steps he or she has taken subsequent to termination, where that evidence lacks a diagnostic import.

[62] The foregoing authorities support the admission of evidence acquired after discharge but which relates to the circumstances prior to or at the time of discharge. Evidence respecting changes in circumstances after discharge is distinguishable.

[63] I have considered the submissions and authorities offered by the Employer on this issue. It is argued that it is wrong to admit "subsequent-event" evidence on the basis of *Quebec Cartier*. Whether or not I agree with this interpretation of *Quebec Cartier*, I note that the arbitrator in the present case declined to admit true "subsequent-event" evidence of the nature discussed in *Quebec Cartier*. At page 27 of his award, the Arbitrator clearly considered allowing medical evidence from the period post-termination but rejected this evidence on the basis of the *Quebec Cartier* principles.

[64] The real issue in the present case relates to the "after-acquired" evidence admitted and relied upon by the Arbitrator. This evidence is of a different character

than the "subsequent-event" evidence and, in my view, subject to different analysis. The test for admissibility is whether the information is relevant in that it sheds light on the reasonableness and the appropriateness of the dismissal. The Arbitrator in the present case employed the test and admitted the evidence. The Arbitrator's decision is entitled to deference.

[65] I find that the admission of the "post-termination" evidence in this case reasonable. It was clearly within the rational set of outcomes open to the Arbitrator reviewing the evidence.

Issue 2: Did the Arbitrator err in finding that a duty of accommodation arose "post-termination"?

(a) The Arbitrator's Reasoning

[66] In the present case, the Arbitrator determined that a duty to accommodate would have arisen had the Grievor's medical condition and disability been known and considered by the Employer. The Arbitrator summarized his reasoning at page 27 of his award:

> Had this information been known to the Employer at the time of termination, then there is no question the information as to the disability would have required to have been considered by the Employer under the duty to accommodate (*Canadian Human Rights Tribunal – Parisien and Meiorin*) It certainly would have

> influenced the decision of the Employer, simply because of its existence, who would have been required it to be taken into account. What the impact would or may be is unknown. The Employer, being unaware of the medical situation and the disability did not take it into account. It therefore did not have the opportunity to apply the principles of *Meorin* and other authorities in respect to how to apply the duty to accommodate to the point of undue hardship…..

[67] The Arbitrator's reasoning path with respect to the duty to accommodate is clear. Having admitted the "after-acquired" evidence as to the Grievor's disability, he was of the view that a duty to accommodate would have been triggered if the information had been provided to the Employer before termination.

[68] In arriving at this conclusion, the Arbitrator cited authorities provided by both parties before him and considered the relevant provisions of the *Nova Scotia Human Rights Act, supra*.

(b) The Position of the Parties

[69] On this point, the Employer submits that it was unreasonable for the Arbitrator to find that a duty to accommodate arose. The Employer emphasizes that this decision was particularly unreasonable given the factual findings made by the Arbitrator that the Employer was not aware of the Grievor's disability, the Grievor

did not request accommodation, and the termination was justified at the time it was made.

[70] The Union is of the view that the Arbitrator's decision on this point was reasonable.

(c) Determination

[71] As with the first issue, the parties before me did not raise any issues with respect to the first step of the reasonableness analysis. In my view, the reasoning path of the Arbitrator on this issue is sufficiently transparent. Flowing logically from his decision to consider the "after-acquired" evidence of the Grievor's disability, he reasoned that the duty to accommodate should have been triggered.

[72] The Arbitrator justified his conclusion on the duty to accommodate by reviewing the authorities provided and the applicable provisions of the *Nova Scotia Human Rights Act, supra*. His reasoning path was clear and I find intelligible on its face. Accordingly, I find that the decision on this issue survives the first stage of the reasonableness analysis.

[73] The Employer took issue with the substance of the decision and argued that the Arbitrator's decision was circumscribed by his factual findings and not

supported by the weight of legal authority. Specifically, the Employer argues that the conduct of the Grievor must be considered and her failure to raise a need for accommodation prior to termination disposes of the issue completely.

[74] I have reviewed the case law provided by the Employer. Reliance was placed upon the decision of the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud* (1992) 95 D.L.R. (4th) 577 for the proposition that there is a duty on the employee to assist in securing the appropriate accommodation.

[75] In *Central Okanagan*, the issue was whether an employee's religious beliefs could be accommodated by a change in work schedule. The Supreme Court of Canada, at para 43, found that the "search for accommodation is a multi-party inquiry" and that "there is also a duty on the complainant". There was no direction as to how that duty could be discharged by the employee in the circumstances of a mental health disability. Nor does this case stand for the proposition that termination extinguishes a duty to accommodate.

[76] The Employer further relies upon the decision in *Westmin Resources Ltd. v. Canadian Autoworkers, Local 3019*, (1997) 63 L.A.C. (4th) 134. In that case, the Grievor suffered from alcoholism and the evidence established that he had never

expressed a need for accommodation. The Arbitrator concluded at para 39 that, "The duty to accommodate requires something of the individual who would otherwise be the victim of discrimination. In this case the grievor gave the Company nothing."

[77] The Arbitrator in the present case had this issue squarely before him. At various points in his reasons, including his factual findings, he acknowledged that the Employer had done everything it could have in the absence of information about the Grievor's disability. The Arbitrator also found as follows at page 13:

> I find that the Grievor was under considerable stress from a life-threatening illness together with other serious medical conditions requiring surgery with complications. In the circumstances based upon the prior medical condition, the continuing medical complications and the very nature of depression it is apparent that the Grievor did not fully appreciate the disability that she was suffering.

[78] The Arbitrator goes on to conclude at page 27 that the authorities on the point did not deprive the Grievor of the right of accommodation simply because, through no fault of her own, information supporting the need was not made available to the Employer. As I understand the reasoning, the nature of the depression prevented the Grievor from recognizing her disability and asking for

accommodation. Failure to recognize the particular nature of depression would deprive the Grievor of protections afforded by the human rights legislation.

[79] The Employer's concern in response to this reasoning is that the approach deprives it of finality. The Arbitrator addressed this concern at page 26 of his award by adopting the reasons of the Canadian Human Rights Tribunal in *Parisien*:

> [53] The conclusions of the labour arbitrator in that case, though, serve to demonstrate that the respondent's concerns are, in fact, unwarranted. As pointed out in the decision, there are two issues to be considered in such cases: first, did the employer meet the tests set out in the labour relations jurisprudence to establish a case of non-culpable absenteeism, and then, second, whether the employer's conduct contravenes the human rights legislation. This latter issue is resolved by conducting a BFOR analysis, the approach for which was recently set out in Meiorin. It is the third step of the Meiorin test that maintains an employer's right to dismiss an employee in such cases, provided the employer demonstrates that it cannot accommodate the employee without imposing undue hardship on itself. Where an employer is able to establish these elements, its decision to dismiss an employee due to his or her non-culpable absenteeism will be justified.

[80] The Arbitrator in the present case was aware of the tension that existed between the protections offered by the human rights legislation and the need for the Employer to have authority and finality in matters of excessive absenteeism. Having made his factual findings and reviewed the competing authorities, the Arbitrator struck a balance that was fair and just. It recognized the nature of the

disability under consideration, ensured protections against discrimination while clearly maintaining the Employer's right to terminate in the future.

In my view, the balance struck by the Arbitrator is within the range of rational outcomes. Accordingly, I see no basis to interfere.

Conclusion

[81] I find that the Arbitrator's decision meets the first stage of the reasonableness standard as it is procedurally sound. The analysis is justifiable, intelligible and discloses a transparent reasoning path.

[82] From a substantive review, I find that the Arbitrator's decision on all issues falls within the range of acceptable outcomes.

[83] The application of the Employer is dismissed. The parties shall endeavor to agree on costs, failing which written submissions shall be filed no later than 30 days from the release of this decision.

J.