SUPREME COURT OF NOVA SCOTIA

Citation: *Public Service Alliance of Canada v. Commissionaires Nova Scotia*, 2014 NSSC 286

Date: 20140724
Docket: Hfx No. 419612
Registry: Halifax

Between:

Public Service Alliance of Canada

Applicant

v.

Commissionaires Nova Scotia

Respondent

Judge: The Honourable Justice M. Heather Robertson

Heard: February 19, 2014, in Halifax, Nova Scotia

Decision: July 24, 2014

Counsel: David Yazbeck, for the applicant
Eric Durnford, Q.C. and Amy Bradbury, for the respondent

Robertson, J.:

[1] This is an application for judicial review with respect to an Arbitration Board (the "Board") decision dated August 13, 2013. The Board appointed pursuant to the *Canada Labour Code* (the "*Code*") upheld the termination of the grievor Miles States, from his position as a commissionaire at the Stanfield International Airport. The Board found that the grievor had committed an unprovoked and serious assault on a co-worker Ms. Holly Potter by pushing her hand towards the steering wheel of her car. The grievor had denied that the assault ever occurred or that he had even touched Ms. Potter. The case turned on the credibility of the grievor and the complainant.

[2] The arbitrator made the following facts based on the evidence:

1. There was an unprovoked assault by the grievor on Ms. Potter on October 17, 2012. (Award p. 40, para. 35)
2. Ms. Potter suffered severe injuries, received 35 physiotherapy treatments and continues to suffer from the assault. (Award pp. 36-37, para. 28)
3. Ms. Potter's evidence was clear, concise and compelling and without fabrication. (Award p. 36, para. 28)
4. The grievor's denial that the assault occurred and that he never touched Ms. Potter did not accord with the preponderance of probabilities. (Award p. 39, para. 34)

[3] The applicant union and the respondent employer take violence in the workplace very seriously and recognized that violence, especially against a female co-worker, cannot be tolerated. (Award p. 41, para. 38) The applicant does not dispute these findings of fact by the Board. The applicant says the Board made three critical legal errors and based its decision on a number of findings of fact with no evidentiary foundations. The applicant submits:

> First, the Board effectively relied on a presumption that termination was a *prima facie* justifiable penalty and consequently reversed the burden of proof, such that the onus was on the Applicant and the Grievor to prove that termination was unjust and unreasonable. Second, the Board ignored relevant evidence of multiple mitigating factors which supported a lesser penalty, erroneously finding that only one mitigating factor had been put before it. Third, the Board ignored clear

> evidence that the Respondent's decision to terminate the Grievor was based on his status as a union official and compounded this error by subsequently relying on this irrelevant consideration as an aggravating factor itself.

Further the applicant submits that the Board's analysis of the disciplinary penalty disregarded well established legal tests that govern termination relating to the employer's burden to establish just cause.

PRIOR FINDING Re: Affidavit Evidence

[4] The court dealt with a preliminary motion by the applicant to introduce the affidavit evidence of Patricia Harewood, who represented the union before the Board. The applicant submitted that they seek the introduction of this affidavit evidence solely to provide the court with a basis of determining whether relevant considerations were omitted from the Board's decision. The applicant acknowledged that the evidence contained within the affidavit was put before the decision-maker through oral testimony and closing submissions. After canvassing the cases each side relied on in their briefs, the court declined to admit the affidavit evidence.

[5] This evidence did not fall within one of the recognized limited circumstances for admission on judicial review:

1. Allegation of fraud, bias or denial of natural justice (jurisdictional errors).
2. A finding based on no evidence (which is a jurisdictional error).
3. A refusal to admit evidence by a decision maker (a denial of natural justice).
4. The record itself is missing documentation.

[6] As there is no recording or transcript of the evidence given at the hearing before the Board, it would be inappropriate for this court to selectively hear oral evidence or oral argument. This very type of evidence was specifically rejected by this court in *Communications, Energy and Paper Workers Union, Local 440 v. Kimberly-Clark, Nova Scotia* (2000), 185 NSR (2d) 145 (SC) at paras. 35-38. The affidavit evidence of Patricia Harwood was excluded from this application.

ISSUES ON JUDICIAL REVIEW:

1. What is the appropriate standard for review?
2. What does "reasonableness" as a standard of review mean?
3. Is the Arbitration Board's decision reasonable?

[7] Counsel for the appellant and the respondent both agree that the appropriate standard of review is reasonableness, following *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("Dunsmuir") at para. 47:

> 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.

[8] The Supreme Court of Canada has recognized that arbitral awards under a collective agreement are as a general rule subject to the reasonableness standard of review. *Dunsmuir, supra,* paras. 58-61; *Nor-Man Regional Health Authority Inc. v. MAHCP*, 2011 SCC 59 at paras. 31, 35-36; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 26.

[9] The Supreme Court noted in Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 at para. 34:

> 34 The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate

> standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[10] The issue of the arbitrator's role in finding whether there is just cause for dismissal is a matter deserving of considered deference. In *Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050*, 2011 NSCA 9, at para. 25; applied in *Highland Community Residential Services v. Canadian Union of Public Employees, Local 2330*, 2013 NSSC 132, at para. 58.

> 25 The arbitrator's mandate, into which s. 40(1) dovetails, was to apply principles of arbitral jurisprudence to determine whether there was just cause for dismissal within the meaning of the collective agreement. That is a labour arbitrator's core function, and within the court's zone of deference, attracting a reasonableness standard of review: *Communications, Energy and Paperworkers' Union, Local 1520*, para. 20 and cases there cited. Section 40(1) is "closely connected" to the arbitrator's function in this grievance, under the principle from *Dunsmuir*, para. 54.

[11] In *A.A. v. Halifax Regional School Board*, 2013 NSSC 228, at para. 25, the court also noted that the issue of just cause for dismissal is a core function of a labour arbitrator, which deserves difference.

[12] While agreeing the standard is reasonableness, the appellant cautions the court to recognize that a flawed analysis of the justifiability and reasonableness of a disciplinary penalty, may require the courts to intervene. The appellant points out that this has been done in the face of a variety of different errors; where a decision maker reverses the legal burden of proof or relies on a presumption contrary to an established legal test, or fails to consider relevant evidence or relies on irrelevant consideration.

[13] *Defence Construction Canada Ltd. v. Girard*, 2005 RC 1177, at para. 71; *Dell v. Canada (Treasury Board)* (1995), 97 FTR 63 at paras. 19, 21, 23*; Canada (Attorney General) v. Basra*, 2010 FCA 24, at paras. 22-23; *Canada (Attorney General) v. Tobin*, 2008 FC 740, at paras. 47-48, 55, affirmed on this point, 2009 FCA 254; see also *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] 2 SCR 164 at 174.

[14] With respect to the Board's assessment of the penalty of termination, the appellant relies on the leading case of *Wm. Scott & Co. v. Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can. LRBR 1 and submits that the Board must engage in the necessary analysis of proportionality between the severity of the misconduct and the severity of the penalty imposed.

> The point of that overall inquiry is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. . . . Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question. . . .

[15] This issue of proportionality was also addressed in *Canadian Office and Professional Employees v. Yellow Pages Group Co.*, 2012 ONCA 448 at paras. 17-18, 23, leave to appeal refused [2012] SCCA 386 citing at para. 18:

> 18 In *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, the Supreme Court made it clear that the principle of proportionality is the focus in the determination whether termination of an employment relationship is the appropriate sanction in response to employee misconduct. The requisite balancing of the severity of the conduct in issue with the severity of the penalty reflects an acknowledgment of the importance of work to a person's life and identity. The analysis is a contextual one with the unique facts of each case ultimately informing the key issue whether the employee's misconduct is reconcilable with sustaining the employment relationship.

[16] The respondent asks the court to show deference to the Board's decision to uphold the termination because they say the termination decision falls within a range of possible, acceptable outcome within the reasonableness standard. Relying on *Dunsmuir, supra,* at paras. 47-49:

> 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 . . . 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" *(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 (quoted with approval in Baker, [1999] 2 S.C.R. 817 at para. 65, per L'Heureux-Dubé J.; Ryan, [2003] 1 S.C.R. 247 at para. 49).
>
> 49 . . . In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[17] And, *Canada (Citizenship and Immigration) v. Khosa,* 1009 SCC 12, at paras. 59 and 61, the Supreme Court further discussed the reasonableness standard:

> 59 Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.
>
> 61 . . . I do not believe that it is the function of the reviewing court to reweigh the evidence.

[18] The most important recent case providing refinement on the reasonableness standard of review is *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, at para. 12, as the court commented on what is meant by "justification, transparency, and intelligibility":

> 12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". 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.]
> >
> > (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)
>
> . . .
>
> 13 This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir's* conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

[19] The respondent urges the court to look to the reasons and the outcome to determine if the result falls within the range of possible outcomes again relying on *Newfoundland and Labradors Nurses', supra*:

> 14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as

> advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- 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. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[20] It is not appropriate for the reviewing court to substitute its own view of the proper outcome. It is appropriate to reflect on the arbitrator's decision by reading the reasons and examining the outcome, not in a formalistic sense but as an "organic exercise" as recommended by *Newfoundland and Labrador Nurses", supra*, para. 14:

> 14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- 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. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[21] The applicant finds fault with paras 36, 37 and 38 of the Board's award. They read:

> 36 Having found the Employer had grounds to discipline the Grievor there remains the question of whether the termination of the Grievor was the appropriate response.
>
> 37 The onus is on the Grievor to show mitigating factors that should be taken in to account if the penalty of discharge is to be substituted with another penalty.
>
> 38. As a result this Board finds that the Grievor, being the Shop Steward and the local Union President, committed an unprovoked assault on a female co-worker. Aside from his 15 ½ years' service there were no other mitigating factors provided by the Grievor that this Board could take into account. Moreover, as the Grievor denied the assault there can be no acknowledgement by him of any wrongdoing. Accordingly, there can be no remorse or sincere apology on his part.

> To reduce the discharge to some lesser penalty would not be appropriate in these circumstances.
>
> Violence in the workplace, especially against a female co-worker, cannot be tolerated. The Grievor acknowledged that if he were found to have committed an assault as alleged this would be a very serious matter. The Union and the Employer take the matter of violence in the workplace very seriously. To return the Grievor to the workplace in these circumstances after having been found to have committed an unprovoked assault, despite his denial that any assault took place, would surely send the wrong message to everyone.

[22] The appellant submits that he is not arguing that the Board's reasons are inadequate. He submits that the onus is on the employer to show that termination is the correct response. At para. 37 the applicant submits the onus was reversed by the Board, requiring the grievor to show what factors the Board should take into account, if there ought to be a substituted penalty, a lesser penalty than termination. The applicant finds fault with the Board's analysis of the proportionality of the penalty. The applicant also says the Board had a duty to weigh the mitigating factors; spell them out and address their merit. The Board at para. 38 noted that "aside from his 15 ½ years' service there were no other mitigating factors provided by the grievor that this Board could take into account." The applicant says the Board ought to have addressed at this juncture the evidence of the grievor's clean record and good character, as testified to by Messrs. Dan Robichaud, Chief Shop Steward and Gary Toohey, Shop Steward and Mark Rogers (Union witness).

[23] With respect to the penalty of termination upheld by the Board, it is conceded by the Union and the employers that violence in the workplace is a very serious matter. Aggravating factors to the finding that an assault occurred are the accepted facts that the greivor was Ms. Potter's supervisor, the offence occurred at night, the assault was against a woman, it was unprovoked, but for her fast response it might have been a more serious impact upon the steering wheel, the result of the assault has been ongoing injury to Ms. Potter.

[24] It is also of note that the collective agreement found at Tab 10 of the record before the Board provides:

> ARTICLE 14: DISCIPLINE AND DISCHARGE
>
> 14.01 CNS agrees that normally discipline will be progressive in nature and, depending on the specific infraction (for example, some offences such as

> theft, being very serious, will like result in discharge as the initial action), will normally commence with counselling and/or verbal warning before resorting to a written reprimand, suspension and discharged. . . .

[25] The applicant relies on a series of cases dealing with workplace penalties including penalties for assault: *Simon Fraser University v. A.U.C.E., Loc. 2* (1990), 17 L.A.C. (4th) 129; *Allied and Technical Workers, District 50 v. Liquid Carbonic Canada Ltd.* (1972), 24 L.A.C. 309; *Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203* (1975), 11 L.A.C. (2d) 84; *Ontario Store Fixtures v. United Brotherhood of Carpenters & Joiners of America, Local 1072 (Phinn)* (1993), 35 L.A.C. (4th) 187; *Cadbury Adams Canada Inc. v. United Food and Commercial Workers Canada, Local 175 (Brayall)* (2007), 162 L.A.C. (4th) 1; and *Toronto Parking Authority v. Toronto Civic Employees' Union, Local 416 (Rodriguez)* (2007), 167 L.A.C. (4th) 223.

[26] All of these cases are very fact dependant, as indeed is the grievor's case. These cases dealt with assaults in the workplace where individuals admitted the offence and some also apologized, impacting greatly the consideration of the penalty. In each case the rehabilitative potential of the offending employee was considered, if not deemed to be irreparable.

[27] However in some cases the fact and circumstances of the offence in the workplace are so serious, that no mitigation can apply.

In *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 SCR 487, Cory J. at para. 91 stated:

> . . . to be applied in the circumstances of this case. If a single offence, standing alone, is serious enough to constitute just cause for discharge under any circumstances whatsoever, then an employee's past record or his potential for future rehabilitation cannot turn that just cause into an unjust one. Therefore, contrary to the proposition set forth by the arbitration board, a "concept of just cause" does not necessarily imply an automatic acceptance of the employee's seniority and service record as mitigating factors in all cases. There can be some cases where an offence is so grave that no factor would be sufficient to mitigate the discharge, and other circumstances where an offence is so critical to the employment relationship that mitigation simply cannot come into play.

[28] In *A.T.U., Local 279 v. Ottawa (City)* (2007), 229 OAC 328, at paras. 90-93, the Ontario Divisional Court found that the arbitrator's failure to refer to mitigating factors did not make the decision patently unreasonable (now unreasonable):

> The majority arbitral award considered s. 60 (2) of the *Canada Labour Code* which gave the arbitrators the power to substitute a penalty other than discharge that seemed just and reasonable to the arbitrators. They decided, however, that they would not interfere with the decision of the City to discharge the grievor. After stating that the grievor was entirely responsible for the accident with no reasonable explanation for his inattention to the road, they dealt with the issue of mitigation as follows:
>
> > The only significant mitigating factor is the grievor's long record of good service. In circumstances such as this however where the Employer operates a public transit service, and where death and serious injury have resulted from the gross negligence of the grievor, this factor is not sufficient to convince the Board that it is just and reasonable in the circumstances to reinstate the grievor to employment either as a bus driver or into a non-driving position.
>
> This decision by the majority arbitrators was one within their discretion under s. 60 (2) of the *Canada Labour Code*. The contention of the applicant is essentially that the arbitrators ought to have considered and acted on other mitigating factors of the kind referred to other labour cases and that they out to have set aside the discharge. It was the position of the union at the arbitration that the grievor accepted that he should not be reinstated to the position of a bus driver but rather should be reinstated into a non-driving position.
>
> What other arbitrators in other arbitrations may have decided is not binding in any other case. The discretion to the arbitrators under s. 60 (2) under the *Canada Labour Code* is one to be exercised by the arbitrators on the basis of the evidence in the case before them. It was open to the majority arbitrators in this case to conclude that the only significant mitigating factor was the grievor's long record of good service and that other mitigating factors to which it had referred earlier in its reasons were not sufficient to lead them to require the grievor to be reinstated into another position.
>
> It is not the role of a reviewing court to engage in a re-weighing of the evidence or to substitute for the arbitrators' decision a result that it might consider to be a more reasonable decision. The decision of the majority arbitrators is to be accorded substantial deference. In this case I am not satisfied that the decision of the majority arbitrators to not reinstate the grievor into a non-driving position was patently unreasonable.

[29] If one reads the arbitrator's decision in its totality, it is clear that the Board by a majority consensus upheld the just cause termination of the grievor. The Board weighed the evidence before it and made findings of credibility accepting Ms. Porter's version over that of Mr. States who repeatedly denied this serious assault occurred.

[30] The issue of just cause for dismissal is a core function of labour arbitration and this court should accord a high degree of deference. *A.A. v. Halifax Regional School Board,* 2013 NSSC 228 at para. 25.

[31] It is correct to say that an arbitrator may use its discretion to substitute a lower penalty and would in that case also be entitled to significance judicial deference.

[32] In *Cape Breton-Victoria Regional School Board, supra,* Justice Fichaud addressed the arbitrator's discretion for substitution of a lower penalty at paras. 41-44:

> In *Heustis v. N.B. Electric Commissioners*, 1979 CanLII 26 (SCC), [1979] 2 S.C.R. 768, at pp. 772, Justice Dickson (as he then was) for the Court discussed the topic:
>
> > The question for the adjudicator was whether the employer had just and sufficient cause to discharge the appellant. In deciding this question the adjudicator had three tasks before him. First, did the employee engage in the conduct alleged? **Second, was the conduct deserving of disciplinary action on the part of the employer? Third, if so, was the offence serious enough to warrant discharge?** [emphasis added]
>
> Similarly, in *Toronto Board v. O.S.S.T.F.*, Justice Cory said:
>
> 49 The first step in any inquiry as to whether an employee has been dismissed for "just cause" is to ask whether the employee is actually responsible for the misconduct alleged by the employer. **The second step is to assess whether the misconduct gives rise to just cause for discipline. The final step is to determine** whether the **disciplinary measures selected by the employer are appropriate** in light of the misconduct and the other relevant circumstances. [emphasis added]
>
> *Brown & Beatty*, vol. 1, ¶ 7:4000 summarizes the law:
>
> In any grievance in which an employee challenges the propriety of a disciplinary sanction, arbitrators and the courts are agreed that there are two **distinct**, though necessarily related, issues that must be addressed. First, it must be determined whether the employer had cause to discipline the employee and then a **separate** assessment must be made about whether the penalty it selected was appropriate. On the issue of cause, the arbitrator must be satisfied that the grievor did what the employer claims justified it in invoking its disciplinary powers and that the conduct was of a character that warranted punishment. **In cases where both such conditions have been met**, arbitrators have consistently perceived their mandate, which is now codified in all federal and provincial labour relations legislation [citing the *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 43(1)], is then to assess the

> fairness of the particular penalty imposed. If an arbitrator finds that the penalty chosen by the employer was not just and reasonable in all the circumstances, he or she will substitute one that is. [emphasis added]
>
> Section 43(1)(d) of the *Trade Union Act*, R.S.N.S. 1989, c. 475, as amended says:
>
> > 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement. . .
> >
> > (d) **where**
> >
> > > (i) **he or it determines that an employee has been discharged or disciplined by an employer for cause**, and
> > >
> > > (ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration,
> >
> > has power to substitute for the discharge or discipline any other penalty that to the arbitrator or arbitration board seems just and reasonable in the circumstances; [emphasis added]
>
> The two questions – cause for some discipline and substitution of penalty – are "distinct" and warrant "separate assessment". Section 43(1)(d) of the *Trade Union Act* and the authorities permit substitution of a penalty "where [the arbitrator] determines that an employee has been discharged or disciplined by an employer for cause".

[33] It is the separate assessment of substitution of penalty that is the problem in this case.

[34] Even when one reads the Board's decision as a whole, one cannot ignore the obvious errors made when the Board stated:

> Having found that the Employer had grounds to discipline the Grievor there remains the question of whether the termination of the Grievor was the appropriate response.
>
> The onus is on the Grievor to show mitigating factors that should be taken into account if the penalty of discharge is to be substituted with another penalty.

[35] The Board did not engage in the necessary analysis of the grounds for discipline, whether the misconduct was sufficiently serious to warrant a penalty as severe as discharge. The Board did not articulate both mitigating and aggravating factors and weigh these against the seriousness of discharge to determine if the respondent had met its burden.

[36] The Board seems to have assumed the seriousness of the conduct warranted the penalty of discharge and then looked to the appellant to show why anything but discharge should be considered.

[37] This is not the appellant's burden. The Board has failed to discuss the substitution of the lower penalty by reviewing any mitigating factors, except long service. The Board did not weigh other factors in evidence, such as a previously clear discipline record or evidence of good character. Had the Board performed this analysis they may well have still concluded that no lesser penalty was appropriate, particularly in light of the grievor's outright denial and lack of remorse.

[38] It would also have been helpful if the Board had discussed and determined if the grievor's status as a union representative, was in any way a motivation for the employer to choose the ultimate penalty of dismissal. The Board had the right to consider the grievor's role and responsibility of leadership but ought to have weighed the opposing representation made as to his union role.

[39] In light of this obvious error in misplacing the burden upon the appellant, and the failure to conduct a proper analysis of mitigating factors that might have led to a lesser penalty, I cannot say that the Board's decision was made upon a reasonable foundation.

[40] I will allow this application for judicial review and am prepared to sign an order setting aside the decision of the Arbitration Board. The matter should be remitted back to the Arbitration Board to be reconsidered in light of these findings and in a manner that will meet the required legal tests.

Justice M. Heather Robertson