Ontario Court rules on vision requirements for paramedics: public safety trumps human rights protections

In *Simcoe County v. Ontario Public Service Employees Union Local 911* (December, 2009) the Ontario Divisional Court set aside a decision of an arbitrator that ordered Simcoe County to reinstate an employee to the position of paramedic, even though the employee did not meet the vision requirements necessary for him to drive an ambulance. The court overturned the arbitrator's decision on the basis that the health and safety concerns arising from a paramedic that is unable to drive gave rise to undue hardship.

Pursuant to regulations under the *Ambulance Act*, all ambulances in Ontario are required to be staffed by two paramedics who can both drive the ambulance and attend patients. Regulations under the *Highway Traffic Act* stipulate that a Class F licence is required to operate an ambulance. The legislation also provides certain minimum vision requirements that a Class F licence holder is required to meet.

David Rogers was a fully trained paramedic employed with the County of Simcoe (the "employer") for fourteen years. In 2002 he was diagnosed with a condition which affected his visual acuity. As a result, he was unable to meet the vision requirements under the *Highway Traffic Act* to hold a Class F licence. He therefore did not meet the legislative requirements to be employed as a paramedic in Ontario.

In 2004, the employer requested that the Ministry of Health and Long Term Care (the "Ministry") waive the Class F requirement in Rogers' case and allow him to drive an ambulance notwithstanding his inability to meet the applicable vision requirements. Rogers also contacted the Ministry in September of 2005. He requested permission to work as an "attend only" paramedic. At that time, a provision of the *Ambulance Act* exempted volunteer paramedics from the Class F requirement if they were working in an attend only capacity. That provision was revoked in July of 2008.

The Ontario Public Service Employees Union (the "union") supported Rogers requests for accommodation. The union asked the Ministry to review the regulatory regime for paramedics with respect to the *Human Rights Code*. In the meantime, Rogers, the union, and the employer signed an agreement in which Rogers would be accommodated in a position outside the bargaining unit. The agreement did not preclude the employee from seeking alternative accommodation. In October, 2005 the Ministry responded to Rogers and the union by way of letter indicating that it would not waive the Class F licence requirement.

Rogers filed a grievance alleging that the employer discriminated against him by failing to provide him with appropriate workplace accommodation. Rogers and the union took the position that he should have been permitted to work as an attend only paramedic. The employer denied the grievance on the basis that they were prevented from employing Rogers as a paramedic due to the regulatory requirements. The employer also took the position that it had complied with its duty to accommodate by placing him in a non-paramedic position. The grievance went to arbitration in 2007.

THE *MEIORIN* TEST FOR DISCRIMINATION IN EMPLOYMENT

A discriminatory workplace standard may be justified provided it satisfies the three-part test set out by the Supreme Court of Canada in the *Meiorin* decision. Pursuant to *Meiorin*, once it is established that a workplace standard is *prima facie* discriminatory, the onus shifts to the employer to prove on a balance of probabilities the following three requirements:

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 fulfillment 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 the individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In applying this test the arbitrator found that the licence requirement under the *Ambulance Act* regulation was adopted in good faith for a purpose rationally connected to the performance of paramedics – the safety of patients and the public. He also recognized that there could be delays in the provision of life-saving treatment if a paramedic is unable to drive an ambulance. Nevertheless, in terms of the third part of the test, the arbitrator ruled that the requirement that all paramedics be able to drive an ambulance was not reasonably necessary to achieve the safety-related purpose. Furthermore, the arbitrator held that the accommodation sought by the employee, to work in an attend only capacity, would not give rise to undue hardship for the employer. The arbitrator ordered the employer to place Rogers in an attend only paramedic position and to compensate him for any losses arising out of the failure to accommodate. The employer applied to the Ontario Divisional Court for judicial review of the arbitrator's decision.

JUDICIAL REVIEW

The court commenced its judicial review of the arbitrator's decision by stating that the appropriate standard of review was the reasonableness standard. The reasonableness standard was set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* (2008) as follows:

> "Reasonableness is a deferential standard ... 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 the law."

Next the court considered the reasonableness of the arbitrator's decision. It found that the "sole basis" for the arbitrator's decision was the absence of evidence that there were negative health and safety effects in the approximately 18 years during which volunteer paramedics had been permitted to serve in an attend only capacity. According to the arbitrator, based on the evidence, the health and safety concerns were "clearly hypothetical".

The court noted that the goal of the Ministry was to provide the highest level of safety in the provision of ambulance services. The exemption for volunteer paramedics which relieved them from the requirement to hold a Class F licence had been introduced to meet the service requirements of some northern areas of the province and reserves, the alternative being areas where no ambulance service could be provided. The court commented on the arbitrator's reliance on the minimum standard provided in these regions:

> "By applying a historic standard that provided minimum paramedic services through volunteers in some areas, the arbitrator usurped the Crown's authority to establish a goal of the highest level of health and safety for patients served by full-time employee paramedics in most areas of the province, including the County of Simcoe."

The court noted that different circumstances present different risks and therefore could require differing levels of safety. It stated that this was a case in which "there was simply no evidence to support the application of a lesser standard of safety in the County of Simcoe as a reasonable accommodation." In the absence of such evidence, "it was unreasonable for him to conclude that volunteer paramedics without a Class F licence had been "safely integrated into the system"".

The court allowed the employer's appeal concluding its analysis with the following remark:

> "An essential element of the job of a paramedic is to transport patients as quickly as possible. It was accepted by the arbitrator and admitted before us that there will be delays if a paramedic is unable to drive. Extending human rights protections to situations that will result in placing the lives of others at risk flies in the face of logic…"

The court allowed the application finding that to allow Rogers to be employed as a paramedic in an attend only capacity would impose undue hardship because it would give rise to an unacceptable level of risk to the health and safety of people being transported by ambulance.

In our view

It is interesting to note that in making its decision, the court referred to the case law surrounding the wearing of kirpans and the accommodation of the religious beliefs of Sikhs. The court observed that the wearing of kirpans has been permitted in schools, but not on airplanes or in the courts. These different results hinged on a careful consideration of the environment in which the rule was being applied. Schools were found to be a "highly circumscribed environment" unlike an airplane or a courtroom. In the case of paramedics and the requirement that they be able to drive an ambulance, the court found that an accident scene is "frequently chaotic" and certainly not a circumscribed environment. On the spot decisions regarding the allocation of crew members and where to transport patients for treatment must be made in "real time". In the court's view, the potential for delays if a paramedic is unable to drive and the resulting significant implications to health and safety would create an unacceptable risk giving rise to undue hardship. Leave to appeal to the Ontario Court of Appeal was refused on April 12, 2010.

Covert video surveillance in the workplace – Ontario arbitrator rules on admissibility

Riverview Gardens is a long-term care facility administered by the Municipality of Chatham-Kent. It serves as a residence for seniors in their final years of life. In the fall of 2006, management at the facility was faced with a difficult problem: personal property and money were being stolen from residents' rooms. The police were contacted, however, they were not able to recover the stolen items or identify the persons responsible. The Assistant Chief of Police recommended that the facility retain a security firm that had been successful in assisting in similar cases. In late November of 2006 Ms. Wilson, the Director at the facility, engaged the security firm. They recommended that the facility install hidden video cameras in the residents' rooms.

Ms. Wilson obtained the consent of two of the residents, or the person having power of attorney on their behalf, and authorized the installation of the surveillance cameras in their rooms. The union was not informed of the installation of these cameras. On February 12, 2007, one of the surveillance cameras recorded an employee (the "grievor") removing a resident's wallet from a cupboard in the room. The grievor was charged with theft under $5,000 under the *Criminal Code* and was suspended without pay. Her employment was terminated in March of 2007. The union grieved the discharge and the case went to arbitration.

At the outset of the arbitration hearing, a preliminary issue arose: could the employer rely on the video surveillance footage in support of its decision to discharge the grievor? In other words, was the video surveillance admissible as evidence in the arbitration hearing? The union argued that the surveillance video should not be admitted as evidence. They took the position that covert surveillance violated the privacy expectations of the employees. In *Chatham-Kent (Municipality) and C.A.W. – Canada, Local 127 (Jefferson)* (August 2009), the arbitrator was faced with balancing the privacy expectations of the employees against the employer's obligation to protect the personal property of the residents.

THE UNION'S POSITION

The union took the position that video surveillance fundamentally violates the employees' expectation of privacy. This expectation was purported to be greater in a workplace, as opposed to a public place. The union noted that the collective agreement between the parties was silent as to the use of covert video surveillance, neither authorizing nor precluding the use of such measures. The union argued that, given the lack of any reference to video surveillance in the collective agreement, the employer was

required to consult with the union to explore other means to deter and prevent acts of theft. The union argued that the employer is required to demonstrate that it exhausted all other means to deter theft from residents prior to resorting to covert video surveillance. According to the union, the employer was far too quick in its decision to resort to such surveillance.

ADMISSIBILITY OF SURVEILLANCE EVIDENCE

The threshold question was whether the videotape surveillance was admissible as evidence in the hearing. The general test for admissibility is simply one of relevance. Evidence is admitted if it is relevant to the proceedings and it is given the weight that it merits at the end of the case. However, a second standard for admissibility has emerged over the years. This test is described as the "reasonableness test" and it is applied in the following two stages:

- First, did the employer have a reasonable basis to engage in the video surveillance?
- Second, was the video surveillance conducted in a reasonable manner?

The arbitrator relied on his decision in *National Automobile, Aerospace, Transportation and General Workers' Union of Canada, Local 444 and Windsor Casino Limited* (2005) in which he commented on the reasonableness test as follows:

> "The case law under the reasonableness test suggests that an employer must explain why it opted for surveillance, whether it considered other options and if not, why not. In my judgment, an employer, under this first aspect of the test, is not required to establish that it exhausted all alternative means of confirming its suspicions. The test to repeat is one of reasonableness…."

Support for this approach was found in the *La-Z-Boy Canada Ltd. and Communications Workers of America, Local 80400 I.U.E.* (2005). The arbitrator in that case stated:

> "However, it is not obvious to me why an employer is necessarily obliged to exhaust all other reasonably available alternatives before it can resort to surveillance, whether or nor surreptitious or whether or not electronic. If surveillance is reasonably required then why isn't reasonably conducted surveillance one of the alternatives that the employer can choose from?"

In applying the reasonableness test, the arbitrator observed that it was clear that the employer was entitled to treat the theft of valuables as a serious matter. It was incumbent on the employer to take appropriate action to protect the property of the elderly and often vulnerable residents. The employer was justified in suspecting that someone within the facility was committing the thefts. The arbitrator also noted that, although not

determinative, the employer obtained the consent of the residents, or the person having power of attorney, to install the cameras.

In terms of whether management employed alternative measures to prevent occurrences of theft, the arbitrator found that management had not immediately resorted to video surveillance. Each occurrence of suspected theft was reported to the local police department. The police however were unable to assist. The employer also unsuccessfully attempted to catch the perpetrator by placing marked bills in a resident's Christmas card. In light of the above, the arbitrator was satisfied that the employer considered and employed a sufficient number of less intrusive steps prior to resorting to covert surveillance.

In assessing whether the employer conducted the surveillance in a reasonable manner, the arbitrator made the following observations:

- The cameras were only placed in the two specific rooms from which items and money went missing. They were not installed in every room "across the board".
- No particular employee was targeted.
- Although the cameras operated continuously, they were only reviewed by Ms. Wilson when an incident was reported to her.
- The cameras were promptly removed following the grievor being caught.

The arbitrator noted two additional items that were helpful to the employer. First, this was not a case in which the employer suspected a particular employee. As a result, the employer was not able to confront anyone regarding the thefts. Second, the union did not reference any other less intrusive options that the employer may have pursued prior to the installation of the cameras.

In light of these findings the arbitrator concluded that the employer had satisfied the reasonableness test and the video surveillance was admitted as evidence in the arbitration proceeding.

In Our View

This case provides valuable instruction to employers that are considering the use of surveillance in the workplace. The "reasonableness test" will require that the employer have a legitimate and pressing reason to use such surveillance, and does so in the least intrusive way possible. If an employer is not satisfied that it can meet the first part of the test, any surveillance in the workplace should be considered in consultation with the employees or the union

Arbitrator upholds dismissal for demeaning and degrading treatment of coworkers

Where an employer's disciplinary action is challenged by the employee the employer will be required to demonstrate that it had just cause for the disciplinary action, and that the discipline imposed was reasonable in terms of the employee's conduct. In establishing these elements, it is essential that the employer thoroughly document the conduct giving rise to the discipline, as well as any verbal or written warnings communicated to the employee. Essentially, an employer that imposes disciplinary action should attempt to create a detailed record that will stand up to the scrutiny of the courts. A recent arbitral decision proves just how invaluable such a record can be. In *Park Place Retirement Residence and U.S.W., Amalgamated Local 8327 (Francis) (Re)* (April 2010), Emond Harnden's own Porter Heffernan and Vicky Satta successfully defended the employer's disciplinary action in a case which turned heavily on the record the employer had established, and the credibility of the witnesses.

HARASSMENT AND INTIMIDATION

Mr. Francis (the "grievor") worked in the capacity of head cook at Park Place Retirement Residence (the "Residence"). In April of 2009, a coworker (the "complainant"), overheard a conversation in which the grievor made several degrading sexual comments. Although the comments were not aimed directly at the complainant, she was nevertheless offended and disgusted. She asked the grievor to stop. He responded by instructing her to plug her ears and stop listening. He continued to make further obscene comments in her presence.

The collective agreement governing the relationship between the employees and the Residence prohibited harassment. It defined harassment as follows:

> Personal Harassment
> Harassment means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.
>
> Harassment can be either psychological or physical or it can be a combination of both. It is any behaviour, whether deliberate or negligent which denies individuals their dignity and respect, is offensive, embarrassing or humiliating to the individual, and adversely affects the working environment.

> Where the alleged harasser is the person who would normally be involved with any of the steps in the grievance procedure, the grievance shall automatically be sent forward to the next step.

The grievor's actions fell squarely within the conduct prohibited by the collective agreement. The Residence issued a written warning to him citing the following:

- the demeaning, taunting and degrading treatment of coworkers;
- inappropriate conversations in the workplace;
- overall poor teamwork; and
- lack of professionalism.

The disciplinary letter also contained the following caution:

> "You are hereby advised that any retaliation by you related to the complaints described above, that is reported by coworkers will be managed by way of further disciplinary action, up to and including the termination of your employment."

In spite of this warning, it came to the Residence's attention that the grievor attempted to use his position as union representative to threaten and coerce the complainant into withdrawing her allegations against him. The grievor contacted another employee of the Residence and instructed her to call the complainant and inform her that if she did not withdraw her complaint against him, he would use his position in the union to have her fired. When this came to the attention of the Residence, it issued another disciplinary letter to the grievor, this one imposing a five-day suspension without pay.

Over the next few months, a number of further incidents involving the grievor came to the attention of the Residence. These included:

- harassment, intimidation, and retaliatory behaviour against coworkers;
- performance issues relating to tardiness, wastefulness, neglect of company equipment, and unsanitary work; and
- insubordinate behaviour.

According to employees at the Residence, on May 24, 2009 the grievor engaged in further inappropriate conversations of a sexual nature within earshot of the complainant. Later that same day, he followed the complainant around the kitchen as she attempted to work. The complainant testified that he stood very close to her, and stared at her saying nothing. This incident was witnessed by other employees of the Residence. The complainant became distraught and left work in tears prior to the end of her shift.

The Residence thoroughly investigated each of these incidents, even conducting interviews with the grievor in order to obtain his version of the events. These interviews

were met by the grievor with either refusals to discuss the incidents, or outright denials that they occurred. Nevertheless, other employees of the Residence went on record providing their observations of what happened. The Residence's investigation culminated in the termination of the employment relationship on July 23, 2009 by way of a disciplinary letter. The termination letter provided the reasons for dismissal in exacting detail.

The grievor contested both the termination and the five day suspension imposed in May of 2009.

THE ARBITRATION

At arbitration, the arbitrator adopted the two-phase approach in assessing the conduct of the grievor and the disciplinary measures applied by the Residence. First, did the employer establish that there was a basis for a disciplinary penalty? Second, was the penalty imposed a reasonable penalty in relation to the misconduct?

The arbitrator's analysis however was complicated by the fact that grievor completely denied committing any wrongdoing. Throughout his testimony, he maintained that his discharge was orchestrated by certain coworkers who had conspired to have him discharged. According to the grievor, these coworkers fabricated their allegations against him for their own personal motives. He further alleged that the management of the Residence was out to get him, implying that their motive was that the Residence would be better served without a union. This "anti-union animus" was repeated in the union's argument that the discharge was both an attempt at "union busting", and retaliation for the grievor successfully filing grievances in the past.

THE CREDIBILITY OF THE WITNESSES

The grievor's denial of the events giving rise to the termination was in direct contrast to the testimony of the complainant and other coworkers called as witnesses by the Residence. In light of the conflicting testimony, the arbitrator was required to assess the credibility of each of the witnesses. In doing so, the arbitrator took into account the following factors:

1. Was the evidence clear and consistent?
2. Was the evidence forthright and believable?
3. Was the evidence probable under all of the circumstances?
4. Did the evidence withstand the test of cross-examination?
5. Was the evidence self-serving.

In applying these factors to the grievor's testimony, the arbitrator had the following to say:

> "From the outset, I found the Grievor's testimony to be anything but forthright and believable…Further, at the hearing, the Grievor offered no explanation in examination in chief for many of the allegations against him. His explanations when given and such as they were, were only advanced when pressed in cross-examination…In my view the Grievor's failure to give an explanation at all times when given an opportunity to do so, weighs heavily against his credibility and the believability of his evidence at the hearing…All of the foregoing was a troubling theme that I find recurred throughout the course of the arbitration hearing."

The arbitrator found that on the balance of probabilities, the allegations of misconduct against the grievor were substantiated by the evidence.

DISCIPLINARY ACTION REASONABLE

The arbitrator had little difficulty in finding that the grievor's conduct warranted discipline. The next question was whether dismissal was reasonable in terms of the misconduct. In considering this, the arbitrator noted the grievor's lack of candour and honesty during his testimony, as well as his failure to admit any wrongdoing. The arbitrator cited a passage from *Re Dupont Canada Inc and Kingston Independent Nylon Workers Union* (1993) which seemed to speak directly to the case at hand:

> "To put the matter plainly: an employee who engages in serious misconduct, who mistreats his fellow workers, who denies it to his employer, who lies about it under oath, and continues to vilify the very persons he has harmed, is not a good candidate for reinstatement…Indeed, this stance merely reinforces the company's argument that discharge is necessary in the interests of general deterrence – to serve as a warning to others that this behaviour is serious and will not be condoned…"

The grievor's conduct was found to be particularly egregious in light of the fact that he was the union representative. In this capacity he was required to uphold the terms of the collective agreement. Instead, his conduct was found to have been in gross violation of those terms.

The arbitrator then considered whether there were any mitigating factors that could support the exercise of his discretionary authority to reduce the penalty. He found none. Instead, he dismissed the grievances, stating:

> "I am in agreement that the Employer's attempts to correct the Grievor's behaviour through a regime of progressive discipline did not have the desired effect and I am convinced that the Grievor's behaviour will not change if reinstated. Further, I am of the view, that to re-instate the Grievor would send a message to the employees of the Residence that "anarchy reigns"."

In Our View

The conduct of the Residence throughout the disciplinary process was beyond reproach. In addition to the detailed record they created, at every instance of investigation into the grievor's conduct, they afforded the grievor the opportunity to provide his version of events. Similarly, when discipline was imposed the reasons were provided along with an invitation to contact management with questions or concerns. In meeting their duty of procedural fairness in this way, the Residence ultimately strengthened its claim of just cause for dismissal at the arbitration. When the credibility of the witnesses was assessed, the grievor's refusal to engage with management in the investigation process adversely affected the believability of his testimony.

Off-duty comments on Facebook render employment relationship untenable

At what point does off-duty conduct provide an employer with just cause for disciplinary action? This is a question that human resources professionals, as well as arbitrators and judges, have struggled with over the years. Recently however, with the ever-increasing popularity of social networking websites, there is a growing body of arbitral jurisprudence that involves discipline imposed against employees for "posting" inappropriate comments, often about their workplace or coworkers, on the internet. In the age of personal blogs and Facebook profiles, there is no question that there is a new dimension to an old problem. Arbitrators however continue to apply legal tests that pre-date the electronic age when they determine whether such off-duty conduct is just cause for discipline. Perhaps surprisingly, these legal tests seem well-suited to address off-duty conduct in the age of the internet.

In *Wasaya Airways LP and A.L.P.A (Wyndels) (Re)* (May, 2010), an arbitration under the *Canada Labour Code*, the issue was whether comments posted on a Facebook profile were just cause for dismissal. The grievor was employed as a pilot for Wasaya Airways, a First Nation owned and operated airline. Wasaya provides air service to communities in the north of Ontario. Many of its employees and most of its customers are First Nations people.

In August of 2009, the grievor posted a "top-ten list" on his Facebook profile. The list was written in a David Letterman style and was entitled "You know you fly in the north when…" The list went on to contain several comments with racial undertones that were very offensive to First Nations people. When the posting came to the attention of Wasaya management, a meeting was scheduled with the grievor for September 9, 2009. At that meeting he was handed a disciplinary letter discharging him from his employment.

Wasaya's position was that the grievor's Facebook comments rendered him unable to perform his duties. The comments were in clear violation of Wasaya's Guiding Principles. These principles were based on First Nation values which include respect for all people. Given the racial undertones in the comments, coworkers would be reluctant and perhaps unable to work with the grievor. Furthermore, First Nations communities would be outraged by the comments. Wasaya submitted that if the grievor was not discharged such communities would ask that Wasaya not provide airline service to their regions. The economic impacts to the company would be devastating.

The Air Line Pilots Association, International contested the dismissal on behalf of the grievor. They did not take the position that the employer did not have just cause to discipline the grievor but instead submitted that dismissal was excessive in the circumstances and that a less severe discipline should be imposed.

JUST CAUSE FOR DISCIPLINE – THE *MILLHAVEN* TEST

In assessing whether the Facebook comments warranted dismissal, the arbitrator relied on the decision from *Re Millhaven Fibres Ltd., Millhaven Works and Oil, Chemical & Atomic Workers Int'l Union, Loc. 9-670* (1967). Pursuant to the decision in *Millhaven*, in order to establish just cause for dismissal for conduct away from the workplace, the employer must demonstrate any of the following:

1) the conduct of the grievor harms the employer's reputation or product;
2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily;
3) the grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him;
4) the grievor has been guilty of a serious breach of the *Criminal Code* and, thus, rendering his conduct injurious to the general reputation of the employer and its employees; or
5) the conduct places difficulty in the way of the employer properly carrying out its function of efficiently managing its works and efficiently directing its work forces.

Depending on the impact of the impugned conduct, any one of the above consequences may warrant discipline or discharge. The *Millhaven* test requires a real and material connection to the workplace. The employer must establish that the employee's off-duty conduct adversely affected its ability to conduct its affairs in an efficient manner, or that it affects other employee's ability to work with the employee. In terms of damage to the employer's reputation, *Millhaven* requires an assessment of the response of the community which the employer serves, should members of that community become aware of the conduct. It is not necessary to establish *actual* damage to the reputation. Rather, it is the extent to which the conduct has the potential to damage the employer's reputation.

In applying the first two elements of the *Millhaven* test, the arbitrator found that by posting comments in the public domain, it was reasonable to assume that the grievor knew there could be wide access to his statements. In doing so he created a circumstance of potential harm to the company's reputation in First Nation communities. As a pilot, the grievor was required to travel to those communities. His presence in those communities would have the same effect, rendering him unable to satisfactorily perform his duties.

In terms of the third *Millhaven* consideration, the arbitrator concluded that coworkers would be reluctant or unable to work with grievor. Since the grievor's conduct was not criminal, the fourth *Millhaven* element was not met. In assessing the fifth *Millhaven* factor, the arbitrator found that First Nations community responses to the grievor's statements could entail detrimental financial consequences for Wasaya. The arbitrator therefore concluded that there was a real and material connection between the grievor's conduct and the company. The arbitrator found that on a balance of probabilities, Wasaya's concerns about potential harm to its reputation and its ability to carry out its business were substantial and warranted.

THE APPROPRIATENESS OF THE LEVEL OF DISCIPLINE – THE *RE STEEL EQUIPMENT* FACTORS

In determining whether discharge was appropriate for the misconduct, the arbitrator applied the factors employed in *Re Steel Equipment Co.* (1964). These are:

1. The previous good record of the grievor.
2. The length of service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Whether there was provocation.
5. Whether the offence was committed on the spur of the moment as a result of a mandatory aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negativing intent e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances the board [of arbitration] should take into consideration.

In applying these considerations, the arbitrator found that the grievor had one instance of prior discipline. He was not a long-service employee, and his misconduct appeared to be an isolated event. There was no evidence of any provocation, and it was possible that his misconduct was spur of the moment. There was no evidence that the discipline imposed created a special economic hardship for the grievor. In assessing any circumstances that would negative intent, the arbitrator found that his Facebook statements, whether intended to be so or not, exhibited racial overtones. Nevertheless, the grievor and his family all lived in a First Nations community. The grievor was married to a First Nations person and there was no evidence of racial statements having been previously made by him.

Under the seventh consideration, the arbitrator found that the company did not uniformly enforce discipline for similar transgressions. Evidence in the proceeding showed that a manager in the company had once posted personal views on the internet containing an anti-union animus. The arbitrator found that these comments would also have damaged Wasaya's reputation, at least amongst unions and their members. Wasaya did not discipline this employee. In light of this, the arbitrator found that Wasaya had discriminated against the grievor to the extent that uniform discipline was not being imposed.

In terms of the tenth factor, and the existence of any other circumstances the arbitrator should consider, the arbitrator noted that the employer did not meet its duty of procedural fairness. It was found that the employer made the decision to dismiss the employee without providing the opportunity for the grievor to defend himself. Nevertheless, the arbitrator found that the defect was cured by way of the arbitration itself.

In consideration of all of the above, the arbitrator ruled that in other circumstances discharge would have been an excessive form of discipline. In the case at hand however, re-instatement was not an appropriate remedy. The arbitrator stated:

> "The grievor's misconduct has the potential for significant detrimental effect on the Company's reputation and ability to conduct efficiently its business. His misconduct has also poisoned the work environment, given the evidence of his immediate supervisor and other senior managers of the Company. In these circumstances, I find the grievor's misconduct has rendered the employment relationship untenable."

The arbitrator therefore made the following award:

1. The grievor is suspended for 4 months, effective to January 9, 2010.
2. The grievor is entitled to full compensation and benefits effective January 10, 2010 to April 9, 2010.
3. The grievor is to resign from the Company, effective April 10, 2010.

The letter of dismissal is to be expunged from the grievor's employment record.

In our view

The potential for off-duty conduct to damage an employee's reputation can be increased when the conduct is in the form of vexatious or offensive comments posted on the internet. As was noted in *Wasaya*, there is sometimes little ability to control the dissemination of internet content, and there are many examples of comments or pictures "going viral" on the web. With this increase in accessibility, employers may be caught flat-footed in attempting to respond to an employee's internet antics. Social networking websites, such as Facebook, are a relatively new technology and most workplaces have

unclear rules surrounding their use. Employers are well-advised to develop a code of conduct that not only governs the use of these technologies in the workplace, but also sets out the employer's expectations regarding how employees may associate themselves with, and how they represent their employer on the internet.

Canadian Human Rights Tribunal delivers landmark decision on "family status" under the *Canadian Human Rights Act*

In what has been hailed as a groundbreaking decision, the Canadian Human Rights Tribunal recently ruled that the Canada Border Service Agency (the "CBSA") discriminated against Fiona Johnstone by failing to provide accommodation that would allow her to meet her child care obligations. In *Johnstone v. Canada Border Services* (August, 2010), the Tribunal held that child care obligations fall within "family status", a prohibited ground of discrimination under the *Canadian Human Rights Act*. The Tribunal ordered the employer to cease its discriminatory practices against employees that seek accommodation on this basis, and to establish written policies which will address requests for such accommodation.

Fiona Johnstone, a customs inspector employed by the CBSA at Toronto's Pearson International Airport, took maternity leave in 2003. When she returned to work, she faced the challenge of finding child care in circumstances where both she and her spouse, a fellow customs officer, were required to be available for 24-hour-per-day rotating shifts. Johnstone asked her employer to accommodate her with three fixed 12-hour shifts per week so she could obtain child care for the time she spent at work.

The employer refused, citing its accommodation policy that restricted fixed shifts to 34 hours per week. The employer offered her fixed shifts over four days per week to a maximum of 34 hours. Eventually Johnstone settled on three 10-hour shifts per week because she determined it would not be cost-effective to come to work for one four-hour shift.

Dissatisfied that she had been forced to accept part-time employment in return for securing the fixed shifts, Johnstone complained to the Canadian Human Rights Commission. Although the Investigator appointed to look into her complaint recommended that the Commission proceed, the Commission instead dismissed her claim. Johnstone commenced an application to the Federal Court to quash the Commission's decision. The Federal Court allowed Johnstone's application and sent the matter back to the Commission to be decided on the merits.

"FAMILY STATUS" INCLUDES CHILD CARE OBLIGATIONS

The Tribunal first considered the meaning of "family status" under the *Canadian Human Rights Act* (the "Act") and whether the term encompassed child care obligations. Although the case law addressing this issue was inconsistent, the Tribunal applied a broad, purposive interpretation of the Act, and found that:

> "…the underlying purpose of the *Act* as stated is to provide all individuals a mechanism "to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society…" *It is reasonable that protections so afforded include those naturally arising from one of the most fundamental societal relationships that exists, that of parent to child*." [Emphasis Added]

A *PRIMA FACIE* CASE

Having found that child care obligations fell within the meaning of family status, the Tribunal then considered whether Johnstone had established a *prima facie* case of discrimination. Although the employer argued that there is a high threshold to meet in order to establish discrimination on the basis of family status, the Tribunal applied the lower threshold test from *Morris v. Canada* (2005):

> "…to establish a *prima facie* case the Complainant need only demonstrate that a policy has some differential impact on her due to a personal characteristic which is recognized as a prohibited ground of discrimination."

The Tribunal stated that an individual should not have to tolerate some "unknown level" of discrimination before being afforded the protection of the *Act*. The Tribunal found that a *prima facie* case had been established: the CBSA engaged in a discriminatory and arbitrary practice in the course of employment that adversely differentiated Johnstone on the basis of her family status.

NOT A BONA FIDE OPERATING REQUIREMENT

Pursuant to the Supreme Court of Canada's seminal decision in *Meiorin*, once it is established that a workplace standard is *prima facie* discriminatory, the onus shifts to the employer to prove that the impugned standard is a *bona fide* operating requirement (a "BFOR"). The test from *Meiorin* requires an employer to establish on a balance of probabilities the following three requirements:

4) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
5) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
6) 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 the individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The Tribunal expanded on the concept of "undue hardship" by citing the decision in *Council of Canadians with Disabilities v. Via Rail Canada Inc.* (S.C.C. - 2007):

> "undue hardship is reached when reasonable measures of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain".

The CBSA attempted to establish undue hardship by presenting evidence that suggested that the accommodation of Johnstone would open the floodgates to such requests, and that half of the employees at Pearson International Airport would seek similar accommodation. The Tribunal rejected this defence stating that "impressionistic evidence of increased expense will not generally suffice" in establishing undue hardship. It noted that other than what was submitted in preparation of the hearing, "no analysis has been done, no scientific study undertaken, no consultants brought in to look at accommodation issues…"

In the absence of any evidence to the contrary, the Tribunal found that the CBSA could not establish that its discriminatory practice was a BFOR, or that accommodating Johnstone would create undue hardship. It awarded Johnstone lost wages and benefits from January of 2004. In addition, the Tribunal awarded Johnstone $15,000 for damages for pain and suffering, as well as special compensation in the amount of $20,000 for the CBSA's willful and reckless conduct.

In our view

The decision in *Johnstone* provides much needed clarity in respect of an employer's legal obligation to accommodate the child care obligations of employees. These obligations are protected under the *Act* (as well as the provincial Human Rights Codes) under "family status". Employers should develop policies for addressing requests for accommodation for child care obligations. Although the policies will assist the employer in addressing the accommodation requests consistently, it is also important for employers to address each request for accommodation on an individual basis. Both Johnstone and CBSA have filed applications for judicial review.

Ontario Arbitrator awards over $500,000 in damages to terminated employee

Unionized employers should be aware that the playing field may have shifted for terminated employees claiming damages at arbitration. In his recent award in *Greater Toronto Airports Authority and P.S.A.C. Loc. 0004* (2010), Arbitrator Owen Shime awarded a total of more than $500,000 in damages to an employee terminated for sick leave fraud. In what can only be described as a ground-breaking decision, Arbitrator Shime found that the employer acted precipitously and in bad faith when it terminated an employee on the basis of its opinion that video surveillance evidence was inconsistent with her claim for sick leave.

In a series of novel legal findings, Arbitrator Shime held:

- that the employer had an implied duty to administer the collective agreement in good faith, and an implied duty to avoid acting in a manner calculated to destroy the confidence and trust between employer and employee;

- that the employer's breach of these duties, its bad faith in the termination, and its failure to conduct a proper and thorough investigation had destroyed the trust underlying the employment relationship and made reinstatement inappropriate;

- that the employee was entitled to an award of damages in respect of all future financial benefits she would have received had the employment relationship continued - in this case salary and benefits, including pension benefits for eight years through the grievor's early retirement date;

- that a main purpose of a collective agreement is to provide a psychological benefit or "mental security" to employees, and that the grievor could therefore recover and additional award of damages for mental distress, which Arbitrator Shime set at $50,000;

- that the employer's conduct stripped the collective agreement of any meaning, and that an award of $50,000 in punitive damages was therefore warranted.

This is the largest award of damages following the termination of a unionized employee that has ever come to our attention. In our opinion, it represents a marked departure from established principles of arbitral case law. The employer has applied for judicial review of the decision and we will keep readers informed of this case as it progresses.

Until such time as the award has been considered by the courts, employers should remember to exercise caution in terminating employees for cause, particularly where the employee is on disability leave. Employers should act only where the allegations of cause are supported by a clear evidentiary foundation, established after a proper and thorough investigation of the facts. Employers should also seek independent medical evaluation of an employee's restrictions where necessary.