Arbitrator upholds termination for employee breach of trust in long-term disability claim

In cases of employee dishonesty, particularly those related to misuse of employer benefits, there are few mitigating factors that can move an arbitrator to reduce the discipline imposed by the employer. Arbitrators generally take such misconduct very seriously and are usually more motivated by the desire to deter such behavior than the desire to rehabilitate a single employee. The recent arbitration decision of *VHA Home Health Care and OPSEU (T.(M.))* (September, 2013) demonstrates the seriousness with which arbitrators approach employee dishonesty in the context of sick leave.

FACTS

The employer, VHA Home Health Care (VHA), is contracted to community care access centres in the Toronto, Hamilton and Champlain regions and provides personal health care and support to clients in their homes, at school or at work. The grievor was employed by VHA as a Service Supervisor and oversaw approximately 50 Personal Support Workers. Her duties were typical of the supervisor level and included preparing performance appraisals, identifying training needs, investigating client complaints and occupational health and safety issues.

In early 2010 the grievor was diagnosed with colon cancer. She commenced an approved leave of absence at the end of March of that year. Following surgery in April, the grievor commenced a six month program of chemotherapy treatment. The treatments were debilitating and the grievor suffered from weakness, nausea and dehydration. During this time, the Grievor was approved for and received long term disability (LTD) benefits.

The grievor's eligibility for LTD benefits was dependent on two criteria. The first was that the employee be totally disabled in that she was wholly prevented from performing each and every function of her employment. The second was that the grievor not receive any remuneration from any employment. These criteria were clearly communicated by the employer's benefit carrier, Standard Life, to the grievor in a letter confirming her entitlement to receive LTD benefits.

In November of 2010, the employer became aware that the grievor was working as a real estate agent while she was on medical leave. The ensuing investigation revealed that the grievor had also been working at SPRINT, a subcontractor of VHA that provided personal support work to clients. The grievor was employed by SPRINT for years on a part-time basis as an after-hours Team Leader. Her duties required her to carry a cell phone and be on call between 10:00 pm and 6:00 am to provide various types of back-

office assistance to Personal Support Workers attending at clients' homes. VHA contacted SPRINT and found out that the grievor continued to work for SPRINT until September of 2010. SPRINT also informed VHA that in June of 2010, the grievor had contacted SPRINT and asked whether she could continue to work but have her wages withheld and paid at a later date. SPRINT stated that it denied the request.

VHA went on to inform Standard Life, the insurance company providing the LTD benefits, of the grievor's other employment. Standard Life conducted its own investigation and determined that the grievor was not entitled to LTD benefits because she had received income from other sources while receiving benefits. Standard Life terminated the grievor's benefits in January of 2011 and demanded repayment of the benefits.

Shortly after this, VHA concluded its investigation finding that the grievor engaged in misconduct by receiving LTD benefits and being on a medical leave of absence while working for two other employers. Although the extent of the grievor's other work activities and income were very modest, the employer found that the grievor had nevertheless misled the employer and the insurer. Based on the investigation, the employer terminated the employment for abuse of sick leave and breach of trust.

The union grieved the termination. It argued that it was undisputed that the grievor was legitimately off work while undergoing a difficult series of chemotherapy treatments. As such, the employee's medical leave was legitimate and she did not abuse sick leave. The grievor's efforts to maintain her part-time employment, although ill-conceived, did not establish that she could continue to work for VHA even on an accommodated basis. The union also argued that the employer was aware of the grievor's other employment and therefore there was no breach of trust. Finally, the union sought reinstatement with full compensation arguing that the employer's decision to terminate the employment was both rigid and unsympathetic in light of her significant service and good employment record.

The employer did not dispute the fact that the grievor was ill. It framed its arguments on the basis that the grievor was not totally disabled and was capable of performing accommodated work duties. This was evidenced by her ability to work for two other employers while on medical leave. Furthermore, the employer argued that the grievor misled the employer and the insurer about her work activities, and was not truthful or forthright during the investigation. In the employer's view, the grievor's actions had broken the necessary trust relationship. This trust relationship was all the more important due to the nature of the employer's operations (providing health care support to often vulnerable patients) and the fact that the grievor was a supervisor.

DECISION/REASONS

At arbitration, Arbitrator Cummings found that the additional work activities of the grievor were so modest they did not establish that the grievor could have performed meaningful work for VHA even on an accommodated basis. The grievor was granted a leave for the purpose of treatment and recovery for colon cancer and that was the purpose for which the leave was used. As such, Arbitrator Cummings concluded that there was no abuse of sick leave.

In spite of that finding, the arbitrator found that the employer's decision to terminate was still justified. The grievor had taken active steps to hide her additional employment and income from the employer's insurer. The arbitrator noted that fraud in respect of benefit claims is easy to commit and difficult to detect and therefore taken seriously in the arbitral jurisprudence. In the arbitrator's view, the grievor's dishonesty constituted serious misconduct justifying termination. The arbitrator also found that the grievor did not accept responsibility for her actions and was dishonest during the arbitration hearing. This was seen by the arbitrator to aggravate the already serious misconduct of the grievor. The arbitrator refused to exercise her discretion to impose a lesser penalty than termination and dismissed the union's grievance. Then dismissing the grievance the arbitrator commented:

> Concluding that a grievor has lied at the arbitration is often treated by arbitrators as an irreparable breach. In this case, I am concerned not only about the lying, when the grievor promised to tell the truth, but about the grievor's blaming of her manager. In her testimony, the grievor called her manager "stupid or incompetent" for telling her she could still carry the SPRINT cell phone during her leave. As set out above, I find that conversation did not take place. The grievor also asserted that her manager knew the grievor was working in real estate during her leave. The testimony is troubling, not only because it is lies, but because it shows that the grievor has not accepted any responsibility for her actions. I do not have confidence that if I ordered the grievor to be reinstated she would be an employee in whom the employer would have a basis to rebuild a relationship of trust. That is the central question arbitrators consider when contemplating reducing a penalty of discharge to a lesser form of discipline.
>
> I understand that the grievor was devastated by her diagnosis of cancer. Her life and the life she had planned for her children were threatened. The grievor endured more than six months of difficult treatment. But that is not enough to mitigate against the penalty of discharge for serious employee misconduct in respect of sick leave benefits that was aggravated by lying at the arbitration hearing. Such conduct must be punished and deterred.

In our view

The decision in *VHA Home Health Care and OPSEU (T.(M.))* is representative of the approach arbitrators will take when dealing with breach of trust or abuse in the context of disability claims. Arbitrators will be extremely reluctant to interfere with the discipline imposed by the employer in such cases. As Arbitrator Cummings noted, fraud in respect of benefits is often easy to commit and difficult for an employer to detect. The result is that misconduct in respect of benefit claims is seen to damage the core of the trust between employer and employee that is necessary for an ongoing employment relationship. Furthermore, significant discipline in such cases serves as a necessary deterrent for other employees and coworkers.

Alberta Court of Appeal upholds termination of employee who was too sick to work, but not too sick to play

Employee dishonesty in the context of sick leave will often lead to termination of the employment relationship. As the decision in *VHA Home Health Care and OPSEU (T.(M.))* (September, 2013) demonstrated, arbitrators are usually unwilling to substitute a lesser form of discipline for that imposed by the employer. The fundamental notion is that this type of dishonesty does irreparable damage to the trust between the employer and the employee that is necessary for the employment relationship. In addition, the cases reflect a strong desire to deter such conduct by other employees. In rare cases where an arbitrator does use his or her discretion to substitute a lesser penalty, that decision may be quashed by a court on judicial review. This was the case in *Telus Communications Inc. v. Telecommunications Workers Union, 2014 ABCA* (June, 2014).

FACTS

In *Telus*, the grievor was a service technician employed by Telus Communications Inc. for approximately five years. His duties included installing and servicing Telus equipment at the homes and businesses of customers. In June of 2011 the grievor made a request to have July 3, 2011 off work in order to play in a slo-pitch baseball tournament. Telus refused his request due to staffing concerns. Early in the morning on July 3rd, the grievor sent a text message to his manager stating that he would not be attending work "due to unforeseen circumstances". The coincidental timing of the grievor's absence made the manager suspicious. The manager went to the location of the baseball tournament and observed the grievor playing in the tournament.

The following day, the manager met with the grievor as part of an investigation. In that meeting, the grievor claimed that he was sick as a result of something that he ate over the weekend. When questioned about his activities on that day, the grievor admitted that he went to the ball park to watch his team, but insisted that he did not play. Upon further questioning, the grievor eventually admitted that he played in the tournament but claimed that he could manage his symptoms at the ball park, but could not do so at a customer's house.

Telus viewed the incident as very serious. The grievor had lied three times about the absence before being confronted with the truth and coming clean. The grievor's manager felt that he could no longer trust the grievor. In addition to the grievor's dishonesty, the absence had a negative impact on the customers who had been scheduled for service that

day, as those appointments would have to be rescheduled. Telus proceeded to terminate the grievor's employment and the union commenced a grievance.

DECISION/REASONS

At arbitration, the arbitrator found that it was plausible that the grievor was in fact sick, and that he could deal with the sickness at the ball park, but not in a customer's home. The arbitrator noted that Telus had no evidence to the contrary and could not prove he was not sick. The arbitrator also felt that because the grievor had called in, it was not an unreported absence, and therefore Telus could have taken steps to mitigate the effect on customers. In the arbitrator's view, the case was simply about the grievor lying about not playing ball until he was confronted with evidence. Although the grievor's dishonesty was misguided, the arbitrator found him to be contrite and remorseful. The arbitrator also noted that although trust is essential to the employment relationship, not every case of dishonesty destroys the relationship and warrants termination. The arbitrator concluded by reinstating the grievor and substituting a one month suspension for the termination. The employer applied for judicial review of the arbitrator's decision.

On judicial review, the judge found that the arbitrator's approach was unreasonable because it placed a burden on Telus to prove that the grievor was not sick. The judge also found that the arbitrator's conclusion that the grievor was actually sick was contrary to the preponderance of the evidence. The judge recognized that not every illness that requires an employee to miss work would render the employee incapacitated, but nevertheless, the conclusion that an employee who was too sick to work could be well enough to play in a baseball tournament defied logic. In the chambers judge's view, the only reasonable conclusion was that the grievor lied about being sick and therefore, Telus had just cause to terminate his employment. Although generally a judge would have sent the decision to a different arbitrator to determine the appropriate penalty, the chambers judge concluded that there was only one reasonable conclusion in this case – termination. The union appealed the decision to the Court of Appeal of Alberta.

Alberta's appellate court had little difficulty upholding the chambers judge's decision. The Court of Appeal agreed that it was unreasonable for the arbitrator to require Telus to prove that the grievor was not sick. Telus was required to establish just cause for terminating the grievor, however, once a prima facie case was made out, it was the grievor who was required to refute it. The question of whether the grievor was too sick to work was the central issue in determining whether there was just cause for termination. On this point, the Court of Appeal agreed with the chamber's judge and noted that the arbitrator had failed to conduct a thorough assessment of the grievor's credibility. When considering the totality of the evidence, it was unreasonable for the arbitrator to conclude that the grievor was credible. The Court of Appeal agreed that the arbitrator's decision was unreasonable in that it suggested that an employee may be too sick to work, but not too sick to play baseball.

Similarly, the Court of Appeal found that the arbitrator's decision to reinstate the grievor was unreasonable. It failed to take into account Telus' evidence that the trust relationship had been irreparably damaged and it also ignored the negative impacts to Telus customers as a result of the grievor's actions. The chamber judge's decision to uphold the termination was found to be consistent with the case law, public policy, and the supervisory role of the courts in the administrative process. The union's appeal was dismissed.

In our view

The arbitrator's decision in *Telus* was a clear departure from the arbitral jurisprudence relating to dishonesty in the context of sick leave, as demonstrated in *VHA Home Health Care and OPSEU (T. (M.))*. As noted by the chambers judge, and eventually the Court of Appeal, it is difficult to understand the arbitrator's reasoning in support of his decision to reinstate the grievor. On judicial review, the proper approach was applied and the damage to the trust relationship between the employer and the grievor was given appropriate weight in upholding the termination.

As demonstrated in *VHA Home Health Care and OPSEU (T.(M.),)* misconduct in respect of benefit claims is seen to damage the core of the trust between employer and employee that is necessary for an ongoing employment relationship. Furthermore, significant discipline in such cases serves as a necessary deterrent to prevent and discourage further abuse.

Failure by employer to properly investigate sexual harassment leads to increased damage award

In what was referred to as a "tragic case" by the arbitrator, a grievor was awarded over $800,000 in damages arising from sexual assault in the workplace. The grievor's damages were compounded by the employer's failure to properly investigate the incident. The arbitrator described the employer's actions in this regard as "a total failure on the part of those responsible to meet the obligations under the Collective Agreement, human rights legislation, occupational and health safety legislation and the City's Respectful Workplace Policy." The decision in *City of Calgary and Canadian Union of Public Employees, Local 38* (December, 2013) is a grave reminder to employers of the importance of properly investigating complaints of workplace harassment and violence.

FACTS

The grievor was employed as a clerk in Division 6 of the City of Calgary's Roads Division. She and a co-worker worked in an office, while the other employees assigned to Division 6 primarily worked outside of the office. In November of 2010 the co-worker, who was considered by the grievor as a powerful person in the workplace, began to sexually assault the grievor by fondling her while she sat at her desk. The assaults occurred on November 8, 15, 16, 17, 18, 22, 23, and 24. On November 24, the grievor reported the assaults to the manager of District 6. Although she did not provide the name of her assailant, it was found that she did provide enough information for the manager to know who the perpetrator was. The manager and the grievor discussed adding an extension to the grievor's desk to make it more difficult for someone to approach the grievor from behind. This extension was installed two weeks later.

Following the grievor's reporting of the incidents, the manager left for a one week vacation and left the perpetrator in charge of District 6. The assaults on the grievor continued throughout the week of November 29, 2010. The grievor had informed her husband of the assaults and, fearing that she would not be believed by management, the two of them installed a spy camera at her workstation. On December 3, 2010, the assault on the grievor was captured on the camera. The grievor's husband contacted the Director of Roads and a meeting was arranged for December 10, 2010 between the grievor and a senior manager. At that meeting, the grievor described the assaults and showed the photos caught by the spy camera. The senior manager in turn contacted corporate security, and although he stated that the pictures were inconclusive, he asked that corporate security conduct an investigation. A few days later, the perpetrator of the assaults was suspended without pay. He retired a few weeks later and eventually was charged by the police. After pleading guilty, he was sentenced to 90 days incarceration followed by two years' probation.

On December 20, 2010 when the grievor arrived at work she found that her keyboard was tampered with. The grievor thought that rat poison had been applied to the keyboard. There

was concern that this could be retaliation against the grievor for "ratting out" a co-worker. As such, the grievor was moved to a different district. Following this incident, on December 29, 2010 the grievor visited her doctor and was diagnosed as suffering from acute stress.

On January 6th, 2011 the grievor was directed to return to District 6. As the keyboard incident had not been resolved, the grievor became very agitated by this direction. In a heated e-mail exchange with management, she was chastised for her lack of respect towards management. Shortly after that exchange, her manager became aware that the grievor had stated to another worker that she would be meeting with the mayor. A meeting was convened between management and human resources to discuss the grievor's situation and determine what actions would be taken. As a result of that meeting, the grievor was asked to meet with a doctor for a medical assessment. On January 10, 2011, the grievor attended the assessment, however, when she learned that the assessment was being conducted by a psychiatrist, and that the City would be receiving the report, she refused to go through with the assessment. She went to her own doctor who diagnosed her with an adjustment disorder.

The grievor was off on a pre-planned vacation for the week of January 10. When she returned to work the employer required her to provide a fitness to return to work certificate from her family doctor. This requirement was imposed on the grievor notwithstanding the fact that she had not claimed any absences due to sickness. The grievor provided the letter on January 18 and returned to work. Upon her return, her immediate supervisor warned her that disrespectful behaviour would not be tolerated. The grievor felt that she was being blamed for the events in spite of the fact that she was the victim. A few days later, the grievor contacted her union and a grievance was filed on January 25, 2011, requesting, amongst other things, that she be transferred out of District 6. The grievor also filed a sexual discrimination complaint with the Alberta Human Rights Commission.

The City transferred the grievor to District 7 where she worked until April 2011. During this time, a number of incidents occurred that added to the stress she was undergoing (for example, a light bulb was stolen from her desk lamp and a foreman called her an insulting name). During her time at District 7, the employer responded to her grievance and took the position that it had done nothing wrong. This denial by the employer also took its toll on the grievor's mental health. The grievor was off sick intermittently and eventually her doctor diagnosed her with PTSD and directed that she not return to work in the Roads Division. The grievor was put in a clerical position at City Hall where she worked until August 3, 2011. During her time at City Hall, management had performance issues with the grievor, which they discussed with the union.

On August 9, the grievor was admitted to a hospital as a result of suicide ideation. From that point forward the grievor was undergoing counselling to the extent that she could afford it. She did not return to work and received LTD Benefits from her employee-funded benefits.

As part of the arbitration process, the grievor underwent an independent medical assessment by a psychologist jointly retained by the City and the union. The grievor was diagnosed with a number of psychological difficulties that significantly impaired her functioning. In what was referred to as a "guarded" prognosis, it was concluded that the sexual assaults were the

causal factor and that the grievor would require 2 to 5 years of extensive treatment in order to improve her functioning.

DECISION/REASONS

At the arbitration, the facts giving rise to the grievance were not disputed. The issue between the parties was what damages were properly payable to the grievor for what happened to her. The union took the position that the City's conduct involved a multitude of hostile and insensitive acts against the grievor. These began with the sexual assaults, for which the city was vicariously liable as the employer of the perpetrator, and followed by a complete failure to investigate and deal with the aftermath of the sexual assaults. The union argued that the City deliberately attempted to contain and hide the events. In such circumstances, there was ample authority for the arbitration panel to award general, compensatory and punitive damages against the City. The union sought these damages in the following amounts:

General Damages	$ 150,000
Compensatory Damages (for loss of past and future income)	$ 944,266
Punitive Damages	$75,000

The union also sought special damages for the costs of counseling and legal fees.

The City accepted that the grievor suffered a significant medical impact as a result of the sexual assaults but disputed the quantum claimed for general and compensatory damages, as well as the power of the arbitration to award punitive damages and the appropriateness of such an award. The City noted that the grievor continued to be employed by the City and would continue to earn LTD benefits until the age of 65 as well as continuing to participate in the pension plan. In the City's view, any disability benefits received by the grievor should be deducted from any lost wages award.

In making its decision, the arbitration panel noted a number of dramatic failures in the City's handling of the incidents involving the grievor. These included the fact that the first manager to whom the grievor reported the assault, did not immediately commence an investigation, and instead left on vacation, leaving the perpetrator in charge. The second manager, who was shown pictures decided that they were inconclusive and did not immediately remove the grievor from the workplace. He did not take any steps to ensure that there was no reprisal until after the grievor's keyboard was tampered with. Although he eventually removed her from the worksite, he required her to return before the investigation of the keyboard incident was completed. When she expressed concern over this, he claimed she was being disrespectful. She was only removed from the worksite when her doctor and the union intervened. Furthermore, throughout the grievance process, City management continued to take the position that there was no merit to the grievor's complaints.

Based on the above, the arbitration panel concluded that the misconduct by the City caused significant suffering on the part of the grievor. Her injuries would continue to affect her, however, there was the possibility that treatment could improve her illness. As such, general damages were awarded in the amount of $125,000.

In terms of damages for loss of income, the arbitration panel refused to deduct LTD benefits given that the relevant policies provided for the subrogation of rights. As a result, the arbitration panel awarded the grievor $135,630 for loss of past income. For loss of future income, the panel accepted the evidence of a vocational counsellor and the medical experts and based the award on the assumptions that the grievor would return to work on July 1, 2018; that she would retire in 2022 at the age of 55; that she would not work for the City; and that she would earn $30,000 per year. The resulting amount was $512,149 less a discount for a part-time contingency and a further discount reflecting forecasted interest rates. Since the arbitration panel assumed that the grievor would commence other employment in 2018 and cease to accumulate pensionable service, she was awarded an amount for pension loss of $68,243 (less a discount for the interest rate). Finally, the arbitration panel awarded special damages to cover counselling fees in the amount of $28,000.

In our view

It is clear that had the employer properly handled the grievor's report of sexual assault, most if not all of the grievor's injuries would have been avoided. The City's failure in this regard began with the grievor's initial report. The manager should have immediately begun to collect the pertinent information including who the perpetrator was, when the incidents happened, and whether there were witnesses. The failure to do so seems to be representative of the City's subsequent approach to the incident. The grievor should have been assured that no reprisal would be taken for coming forward with the information and the City should have immediately taken steps to ensure the safety of the grievor while the investigation was ongoing. In this case, based on the seriousness of the complaint, it may have been prudent for the City to hire an independent external investigator to conduct the investigation and interview the employees involved and any witnesses. The City should have developed a plan for the investigation and conducted a review of their workplace policies to determine which applied to the situation. It seems that in this case, the City never acted with the gravity that a complaint of sexual assault requires. Organizations must remember their legal obligation to provide a safe workplace which includes conducting thorough and objective investigations of workplace incidents.

Arbitrator finds termination for poor performance unrelated to disability

In cases of employees with physical disabilities, is an employer required to maintain the employment relationship at all costs? What if there are performance issues that are not related to the employee's disability? The recent decision in *Toronto Community Housing Corporation and Toronto Civic Employees' Union, Local 416, CUPE* (June 2013) directly considers those very questions. This case involved a grievance alleging that the employer failed to accommodate the grievor's disability when she was terminated for poor performance.

FACTS

The grievor was employed as General Maintenance Mechanic by the Toronto Community Housing Corporation, an operator and manager of housing units. The grievor's duties primarily involved cleaning and caretaking. The grievor had a long history of health issues. Since 1996 she had physical restrictions which impacted the performance of her job. The employer accommodated her physical restrictions in a number of ways over the years. These included changing her specific tasks, transferring her to different locations, and having other employees assist with some of her tasks.

The grievor's health continued to decline and by 2005 she was only able to perform light and sedentary duties. The employer assigned her to an office position, however, when it became clear that the physical restrictions were permanent, the employer engaged in an assessment to determine what position may be suitable for the grievor. It was determined that there were no positions in the grievor's bargaining unit that were suitable for her and in December of 2006 she was transferred to the position of Maintenance Enquiry Clerk (MEC) in the call centre which was in another bargaining unit. Her role was to monitor and respond to alarm signals from the various properties owned by the employer. If the alarm was in respect of a fire, it was the grievor's job to contact the fire department and dispatch them to the proper location. In February of 2007, the grievor fell and injured herself and was off work for a period of more than two years.

The grievor returned to work on October 5, 2009. She was re-trained along with new hires but seemed to have difficulties in performing her duties. On December 17, 2009, the grievor dispatched the fire department to an incorrect address. In response, the employer removed the grievor from her alarm-monitoring role and assigned her to administrative duties. On January 26, 2010, the grievor was advised that she was not

capable of performing the MEC role and that the employer did not have any other suitable work for her. She was then sent home.

A grievance was commenced and the union and the employer agreed that the employer would engage in another search of suitable work for the grievor. In conducting the search the employer met with the grievor to review her physical limitations and her skills and abilities. In July of 2010, the employer advised the grievor that it did not have any suitable work for her and asked that the grievor advise the employer if her condition changed at any point in the future.

The union grieved the employer's decision and claimed that the employer failed to meet its obligation to accommodate. The union did not take the position that the grievor was capable of performing in the role of MEC, but instead submitted that the employer could provide additional training for that role, or place her in a clerk position by way of trial or with modifications. The union sought an order directing the Employer to meet with the union and the grievor when vacancies arose for positions within the grievor's physical limitations to discuss whether the position was suitable for the grievor.

The employer submitted that there was no breach of the collective agreement or the *Human Rights Code*. The employer's view was that the MEC role was the simplest role in the call centre and, despite extensive training and coaching, the grievor was unable to perform the duties in this position. The other positions suggested by the union were considered by the employer, but were determined to be of the same complexity or more difficult than the MEC role. The employer disagreed with the union's suggestion that it could provide more training, and submitted that it was not required to provide training indefinitely. Furthermore, in the employer's view, it had provided more training to the grievor than other new employees and, based on the grievor's difficulties, it was evident that additional training would provide little value. Finally, the employer noted that its duty to accommodate was in respect of the grievor's physical disability. That duty did not extend to lowering performance standards that grievor was not able to meet.

DECISION/REASONS

The issue therefore for Arbitrator Parmar was whether the employer discharged its duty to accommodate the grievor to the point of undue hardship. Arbitrator Parmar commenced her analysis by noting that it was interesting that the union did not allege that the grievor's removal from the MEC position and the workplace as a whole was without just cause. Instead, the union's grievance was limited to the fact that the grievor had a disability. In the arbitrator's view, the grievance boiled down to whether the employer should have kept the grievor in the position of MEC regardless of whether the grievor could perform adequately.

The arbitrator noted that the purpose of accommodation is to ensure that the fact that an individual has a disability does not form a basis to exclude the individual from the

workplace. She stated, "In other words, accommodation is not about ensuring the individual remains in the workplace, but rather to ensure *the disability* is not a basis to exclude the individual. The requirement that the individual be "otherwise fit to work" remains unaltered."

As support for this proposition, the arbitrator cited the decision in *Robert Coulter v. C.H.R.C. v. Purolator courier Limited* (2004) in which the employer was not able to accommodate the employee in the role of courier. After passing proficiency tests the employee was transferred to an office position. Five months later, the employer terminated the employee based on the poor quality of his work. The employee grieved the termination claiming discrimination and argued that the conditions around his placement should be considered. The Tribunal rejected the argument and stated:

Does the duty to accommodate require the employment relationship be maintained at all costs? The duty to accommodate must be approached with some common sense. When the Complainant accepted a position that completely suited his abilities, he no longer required special accommodation for his limitations. The evidence does not show that the complainant had any limitation in his operator position. His problems in this position were essentially performance-related. From then on, he was subject to the same rules and performance evaluation as all the other employees.

The arbitrator also cited *Saskatchewan Union of Nurses v. Regina Qu'Appelle Health Region (Humphrey Grievance)* (2005) in which the union argued that by denying the grievor a position for which she applied and was unsuccessful, the employer had violated its duty to accommodate. The arbitrator in that case found that the job was consistent with grievor's physical restrictions but that the grievor did not have the ability to do the job. He stated that since her disability would not impact performance, there was no requirement to modify the position.

Arbitrator Parmar summarized the arbitral jurisprudence by stating that there is no obligation on an employer to modify a job for a disabled employee to address performance deficiencies that are unrelated to the employee's disability. She stated:

There is nothing unfair about a person not being given a job because he or she doesn't have the skills to adequately perform that job for reasons unrelated to the disability. That is the case for all employees. An individual who happens to have a disability is not entitled to any different treatment, or any greater level of job security, when the existence of the disability is unrelated to whether he or she can meet the skill and performance requirements.

In applying the above principles to the grievor's circumstances the arbitrator found that the grievor had significant performance-related issues in the MEC role that were not impacted by her disability. She observed that the employer had provided additional training beyond that of other new employees and accepted the employer's view that

additional training would be of little value. The arbitrator also found that the employer sufficiently considered other positions for the grievor, and that its conclusion that no other positions were suitable was reasonable. The arbitrator also looked favorably on the fact that the employer twice canvassed suitable alternative work for the grievor. In his view, the employer's efforts at accommodating the grievor were reasonable and consistent with its duty to accommodate to the point of undue hardship. There was no violation of the collective agreement or the *Human Rights Code* and the grievance was dismissed.

In our view

Arbitrator Parmar's decision properly reflects that the purpose of the duty to accommodate is to ensure that persons that are otherwise fit to work are not unfairly excluded from the workplace in circumstances where working conditions can be modified without undue hardship. As he noted, the requirement that the individual be "otherwise fit to work" remains unaltered. Therefore, performance issues that are completely unrelated to the employee's disability do not have to be accepted by the employer. In other words, an employer is not required to modify performance standards for a position which is consistent with the employee's limitations.

Arbitrators impose strict consequences for breach of confidentiality in settlement agreements

Labour disputes in Ontario are often resolved by the parties entering settlement agreements. Such agreements not only resolve the dispute but they also allow the parties to maintain their legal positions without admitting liability. One of the ways this outcome is achieved is by including strongly-worded confidentiality provisions in the settlement agreement. Two recent arbitration decisions in Ontario highlight the instrumental role that confidentiality plays in achieving labour dispute settlements. In both *Barrie Police Services Board and Barrie Police Association* (August, 2013) and *Globe and Mail v. CEP* (July, 2013), the employees were ordered to repay settlement amounts after they breached their confidentiality obligations by disclosing terms of their settlement agreements.

FACTS

In *Barrie Police Services Board v. Barrie Police Association*, the employer and union settled a grievance relating to the removal of a police constable from the Criminal Investigations Department. The terms of the settlement included an obligation on the employer to pay the grievor 28 months of compensation. The settlement agreement also contained a clear statement that the terms of the settlement were confidential and without prejudice. In spite of that clause, the grievor disclosed the terms of the settlement in an email sent to members of the Barrie Police Services in an effort to be elected as president of the Association. The e-mail stated, in relevant part:

> The grievance of my unlawful removal from CID, which was supported by the general membership, was resolved when the Service offered twenty-eight months back pay, even though I had been removed for a period of twenty two months. The Association Executive agreed to this resolution despite my wishes to proceed to a hearing to challenge the HONESTY, INTEGRITY AND CREDIBILITY of the Service's case. The Service's willingness to offer this monetary resolution, again, only served to validate my position on the grievance. [Emphasis in original]

At arbitration, the Board argued that the breach of the confidentiality obligation was not a slip of the tongue but instead was made for an ulterior motive, that being the grievor's political aspirations. The Board argued that on a continuum of the severity of a breach, the grievor's was the most serious and severe. The Board noted the broad powers of

arbitrators to make orders intended to preserve settlements and argued that an appropriate order in this case would be that the grievor not receive any of the 28 months compensation. In the Board's view, this was appropriate given the serious nature of the breach. Such a remedy would also serve as a deterrent by showing that there are consequences where confidentiality obligations are not adhered to.

The Association took the position that it was not clear whether there was a breach of the confidentiality obligation. This required a determination of the intentions of the parties and the context of the settlement agreement. The Association noted that the grievor was not a party to the collective agreement, or a signatory of the settlement agreement. Since the grievor was not a party to the agreement, the doctrine of privity of contract would apply. This doctrine holds that a contract cannot confer rights or obligations on a person that is not a party to the contract. As such, the confidentiality obligations in the settlement agreement only bound the Board and the Association – not the grievor. Furthermore, the Association argued that even if there was a breach of the confidentiality clause, the settlement agreement did not specify a penalty and therefore did not allow for a complete voiding of the agreement as sought by the Board. Instead, the arbitrator was required to address the damage to the Board in a proportional manner.

DECISION/REASONS

In making his decision, Arbitrator Marcotte rejected the argument that the grievor was not a signatory to the settlement agreement and therefore not bound by the confidentiality obligation. He noted that as exclusive bargaining agent for its members, the Association had the authority to bind the grievor, notwithstanding that the grievor had not signed the agreement. In determining the appropriate remedy, the arbitrator stressed the importance of confidentiality and sent a stern warning to future parties to settlement agreements:

> In my view…the deliberateness of the grievor's actions and the motive for doing so cannot be condoned to any degree whatsoever. In these circumstances, I find the appropriate remedy is for the grievor to return the money provided to him…Not only is this remedy warranted, but it serves to act as a deterrent to members of either party who, in the future, may be of the view that a confidentiality clause need not be adhered to or warrant the regard such a clause must have.

A similar order was made in *Globe and Mail v. CEP*. This case involved a settlement of grievances relating to the employee's termination and claim for sick leave. In addition to the confidentiality obligation, the settlement agreement contained an express clause stating that the grievor would be required to repay the settlement amount, should she breach her confidentiality obligation.

A few years following the settlement, the grievor published a book detailing her struggles with depression and the termination of her employment with the Globe and Mail. In the

book, although the grievor did not disclose the exact settlement amount, she made a number of references to the size of the settlement and the fact that she was successful. The employer commenced arbitration in order to enforce the requirement in the settlement agreement that the grievor repay the settlement amount should she breach the confidentiality requirement.

At arbitration, the employer noted that in the context of labour relations, the importance of enforcing a voluntarily negotiated settlement could not be overstated. It argued that the arbitrator's jurisdiction was limited by the settlement agreement language agreed to by the parties requiring the grievor to repay amounts paid to the grievor. The employer relied on the decision in *Veolia ES Canada Industrial Services Inc. v. I.U.P.A.T, Local 138* (2010), in which the arbitrator stated:

> In my view, it would be wrong in law and contrary to sound principles of labour relations to go behind the terms of a signed settlement document such as was entered into in this case. Put differently, arbitrators must hold parties accountable for the labour relations agreements they negotiate and execute in resolving their own disputes. Anything less would be irresponsible to the parties and those they represent as it would deny unions, employers and employees the opportunity to receive the benefits of the labour relations bargains they arranged and signed.

The union submitted that the grievor thought that she could disclose the fact that there was a settlement payment, provided that she did not disclose the precise amount. The union further argued that if there was a breach of the settlement agreement, it was technical and not substantial. The union argued that for such a breach, it would be unfair and unconscionable to require the grievor to bay back the money. The union claimed that there was an unequal balance of power between the employer and the grievor and the grievor was suffering from depression when she executed the settlement. In the union's view, given the vulnerability of the grievor it would be excessively punitive to require her to repay the settlement amount.

Notwithstanding the union's arguments, Arbitrator Davie had little difficulty upholding the provision of the settlement agreement which required the grievor to repay all of the settlement money upon breach of her confidentiality obligation. In the arbitrator's view, the settlement agreement was clear and unambiguous in setting out the consequences of such a breach. Furthermore, the employer had lost the benefit it had negotiated when the grievor disclosed aspects of the settlement. Finally, the arbitrator did not view the grievor as particularly vulnerable at the time she entered into the settlement agreement. In her view, the grievor was sophisticated and well-informed of the terms of settlement. The grievor was ordered to repay all the settlement money she received under the agreement.

The importance of confidentiality in the settlement process has also been recognized by the Human Rights Tribunal of Ontario. In *Tremblay v. 1168531 Ontario Inc.* (October, 2012) the minutes of settlement included the following clause:

> 2. The Applicant and the Respondents agree to maintain confidentiality of the terms of these Minutes of Settlement, and shall not discuss or disclose the terms of the settlement with anyone other than immediate family, or legal or financial advisors, or as required by law.

The employer, a Subway restaurant in Cornwall, refused to pay the amount agreed to in the Minutes of Settlement after it became aware that the employee posted the following messages on her Facebook account:

> Sitting in court now and _____ [blank in original posting] is feeding them a bunch of bull shit. I don't care but I'm not leaving here without my money...lol.
>
> Well court is done didn't get what I wanted but I still walked away with some...
>
> Well my mother always said something is better than nothing...thank you so much saphir for coming today…

The employer took the position that the employee's breach of the settlement agreement rendered the agreement null and void and that it should not have to pay the employee anything.

The employee did not deny that she wrote the posting, but argued that there was no proof she was talking about the respondents as she did not mention them by name. She also submitted that Facebook was private, and that there was no mention of the amount of the settlement.

The Tribunal found that the Facebook postings did in fact constitute a breach of the confidentiality obligation. In discussing the appropriate remedy for the breach, the Tribunal discussed confidentiality in the context of complaints under the *Human Rights Code* and quoted the following passage from *Saunders v. Toronto Standard Condominium Corp. No. 1571* (December, 2010):

> Respect for terms of settlement is not only a legally binding, contractual obligation, it also promotes essential *Code* values. A contravention of settlement can undermine the administration of justice by discrediting the human rights system and generating wrong disincentives to negotiation. The uncertainty created by a contravention of settlement potentially undermines the substantive and procedural provisions of the *Code*. An award of monetary compensation can help

> reflect both the private and public importance of complying with settlement terms.

In considering the appropriate remedy, the Tribunal took into account both the public nature of Facebook, especially in a small community such as Cornwall, and the fact that the employee did not disclose the actual amount of the settlement. The Tribunal ultimately reduced the settlement amount by $1000.

In our view

These decisions recognize the value in resolving labour disputes through settlements, and the importance that confidentiality plays in the settlement process. The serious consequences that will flow from an employee's breach of a non-disclosure obligation will enable employers to continue to negotiate settlements without fear that payment terms will set precedents for, or encourage, other grievances.