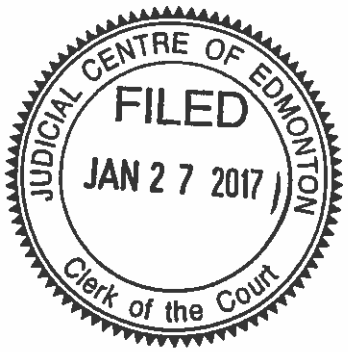
Court of Queen's Bench of Alberta



Citation: Edmonton (City) v Amalgamated Transit Union, Local No 569, 2017 ABQB 59

Date:
Docket: 1503 13460
Registry: Edmonton

Between:

City of Edmonton

Applicant

- and -

Amalgamated Transit Union, Local No. 569

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] This is an application for judicial review of the award of a Labour Arbitration Board decision, ***Amalgamated Transit Union, Local No. 569 v Edmonton (City) (Stuart Grievance)***, [2015] AGAA No 35. The City of Edmonton argues that the Majority of the Board erred in a number of respects concerning its decision that the City did not have just cause to dismiss the Grievor on the basis of innocent absenteeism.

[2] This application focuses on the City's Attendance Management Policy (the "AMP") and its application to the Grievor.

[3] The Board's Decision was from a grievance filed by the Grievor's union against the employer under the provisions of the collective agreement between the Amalgamated Transit Union and the City.

Background

[4] Few of the facts in this matter are in dispute. Much of the grievance arbitration proceeded on the basis of an agreed statement of facts.

[5] The Grievor worked for the City as a full-time transit operator from June 5, 2006 to the time of his dismissal on April 1, 2014. His date of birth is August 12, 1952.

[6] Until January, 2010, there was nothing in the Grievor's attendance record that the City relied on for his termination. In his first four years with the City, the Grievor had a total of 21 incidents and missed 47.5 shifts.

[7] However, starting in January, the City alleges that the Grievor was chronically absent from work. In characterizing his absences as chronic, the City compares the Grievor's attendance record with the average attendance of all other City transit operators.

[8] The Grievor's dismissal in April, 2014 flows from the provisions of the AMP. The AMP is a City policy concerning employee attendance. It is not part of the collective agreement.

[9] It is not clear when an AMP was first implemented by the City. It was updated in June, 2009. Feedback and suggestions were sought from the unions having bargaining relationships with the City, but the unions did not approve the AMP, nor did it become incorporated into their collective agreements with the City.

[10] The relevant AMP has four levels:

> Level I – attendance falls within acceptable standards;
>
> Level II – attendance suggests an emergency absenteeism concern. Either the number of days or the number of incidents is in excess of acceptable standards;
>
> Level III – An identified attendance concern continues. Absences remain above applicable standards and may be occurring in a distinguishable pattern. Efforts at Level II have failed to significantly improve attendance; and
>
> Level IV – Absenteeism persists to the point of termination of employment.

[11] When the AMP was updated in June, 2009, all employees who had been on Level II or Level III under the previous AMP were "given the opportunity to repeat their current level".

[12] Following implementation of the AMP, the unions having bargaining relationships with the City (including the Amalgamated Transit Union) filed a policy grievance. That grievance was settled as between the parties to the policy grievance without going to arbitration. Evidence at the grievance arbitration was that the City had confirmed that it would not use absences compensable under the *Workers' Compensation Act* to move an employee from one level to another. That led to the unions withdrawing the policy grievance.

[13] The City's evidence at the grievance arbitration was that the "acceptable standards of attendance" are based on the average number of days and non-culpable absence in a 12-month period of employees in a similar occupational classification.

[14] All transit operators were classified together. The applicable averages for transit operators in 2010 were three incidents or 15 days absent. For 2011 through 2014, the standards were three incidents or 13 days absent.

[15] Under the AMP, the employee's record could not be considered to be excessive unless the employee had been chronically absent in excess of the applicable standard for at least three consecutive years.

[16] The City notes that there was no allegation in the grievance arbitration that any aspect of the AMP was unreasonable or not compliant with law respecting an employer's right to introduce policies into its workplace.

Grievor's employment and absences

[17] The Grievor's absences were reviewed in great detail at the grievance arbitration. Two absences in the Grievor's record were excluded from consideration in the AMP process. One was the time off relating to wrist surgery on the Grievor's right wrist (the time off related to wrist surgery on the Grievor's left wrist was included). The second was an absence covered by the *Workers' Compensation Act*.

[18] The Grievor's record was thus computed as involving 31 incidents versus the average of 13 over the same period of time. His time off was 136.09 shifts versus the average 58 over the same period of time.

[19] From January 21, 2010 to March 12, 2014, representatives of the City met with and/or counselled the Grievor on 19 occasions. Records were made by the City's representative at such meetings, detailing what was discussed.

[20] The Grievor was asked on both November 23, 2010 and March 13, 2012 whether he had any disability preventing him from attending work regularly. He responded "no" on both occasions. It was during one of these counselling meetings that the City representative agreed that the upcoming right wrist surgery would not be used if termination were to be contemplated.

[21] In November, 2010, the Grievor was moved from Level I to Level II. He had missed 32 shifts. The reasons for the eight incidents are flu (chills), stomach problems, flu, twisted ankle, flu, flu and stress, lost a crown, and had a tooth pulled.

[22] At the end of November, 2011, the Grievor's records show that for the past 12 months, he had seven incidents and missed 15 shifts. The incidents were for flu, stomach problems, flu, sinus infection, flu, flu, and sinus infection.

[23] In February, 2012, the Grievor was moved from Level II to Level III. Between December 1, 2011 and January 11, 2012, he missed 30 days because of surgery on his left wrist. He returned to work, but missed 2.34 shifts because of another illness. His previous 12 months showed eight incidents and 44.34 shifts missed.

[24] He remained on Level III from February, 2012 until March 29, 2014. From February, 2012 to February, 2013, there were seven incidents involving sinus pain, food poisoning, a reaction to medication, tachycardia, bronchitis, flu and again flu. Twenty-three shifts were missed.

[25] From February, 2013 to February, 2014 the Grievor missed 58 shifts as a result of eight incidents. One of the incidents was the right wrist surgery, following which the Grievor missed 36 shifts. The other incidents were for heat exhaustion, hurt back, back problems, two WCB days, pneumonia, flu, and chest problems.

[26] At the beginning of March, 2014, the Grievor missed a shift due to the flu, and then nine shifts because of bronchitis. Following that last incident, his employment was terminated.

[27] Following the termination of employment, the Amalgamated Transit Union grieved the dismissal, leading to the arbitration hearing.

[28] The arbitration hearing was conducted from April 14 to April 16, 2015. The Award was issued on August 7, 2015. One of the panel members dissented.

[29] The City notes that at the beginning of the hearing, the Union and the City agreed that the Arbitration Board was required to consider and apply the four-part test established by arbitral jurisprudence, specifically ***Shelter Regent Industries v Industrial, Wood and Allied Workers of Canada, Local I-207***, [2003] AGAA No 114.

[30] The Majority concluded that the Grievor had been wrongly dismissed, upheld the grievance and ordered that the Grievor be reinstated.

[31] Because of the unavailability of time for judicial review in the Court of Queen's Bench, the judicial review of that decision could not be heard until September 16, 2016 despite being moved diligently by the parties.

Majority Award

[32] The essence of the Majority award is found at paragraphs 62 through 64.

[33] In paragraph 62, the Majority reviewed the evidence of the various witnesses and in particular the testimony of the City's senior negotiator. The negotiator testified that in recommending that the Grievor's employment be terminated, she and her colleagues "considered all of the (Grievor's) absences including the wrist surgeries when they recommended that the grievor be terminated, but the second wrist surgery was "discounted".

[34] The Majority wondered what "discounted" meant in the context of the AMP. They found that it was clear on the evidence that "the City relied on the first wrist surgery as the trigger for elevating the grievor from Level II to Level III." They noted that "Three months later, after being absent for 30 days for his wrist surgery, he was elevated to Level III...Had the grievor not been elevated to Level III at that point, perhaps he would not have been reviewed for progression to Level IV in March 2014."

[35] They held at paragraph 63:

> 63 ...we conclude that the City should not have relied on the grievor's absences due to disability to justify his termination as it had not endured any undue hardship accommodating those absences.

[36] The Majority stated at paragraph 64:

> 64 In all of the circumstances, we conclude that this is not one of those "very serious situations" warranting termination for non-culpable absenteeism. The record of absences shows that the corrective measures initiated by the City to improve the grievor's attendance had a positive impact and the conditions that caused the grievor's longest absences from work appear to have been resolved. For these reasons we cannot say that it is unlikely the grievor will be able to attend regularly in the future. Further, the grievor's absences for his two wrist surgeries and the incident of acute stress disorder should not have been relied upon to support termination. When those absences are removed from the record of absences, the grievor's record is not so excessive as to support termination, either in the context of the average number of incidents and absences of his co-workers or more generally in the context of other cases of termination for innocent absenteeism.

[37] The Minority arbitrator found at paragraph 41 of his decision that the Grievor had been accommodated in the case of his disability-related absences as they were "accommodated at the time they arose by giving the Grievor time off and access to sick leave/income replacement. No ongoing accommodation was required nor requested."

[38] He found that the City had not discriminated against the Grievor by having improperly relied on the Grievor's absences that were due to any disability.

Standard of Review

[39] The City argues that all errors are reviewable on the standard of reasonableness except for the interpretation of the test for *prima facie* discrimination, which must be reviewed on a standard of correctness. To support this position, it relies on ***Stewart v Elk Valley Coal Corp.***, [2015] AJ No 728 (ABCA), 2015 ABCA 225. That case is under appeal to the Supreme Court of Canada. It was only argued on December 9, 2016, so it is unlikely that a decision will be handed down anytime soon.

[40] The City cites paragraphs 57 and 58 of that decision:

> [57] In the result, correctness applies to the legal interpretation of the Meiorin and Moore standards by the Tribunal and for that matter to the decisions of the chambers judge and this Court on the same questions.
>
> [58] Correctness would not apply to the underlying fact findings such as respecting what is; (a) the specific work environment; (b) the taxonomy of relevant and reasonable occupational requirements in that environment; (c) the reality of employer-employee relations in that environment; (d) the content of collective agreements or other arrangements involving the employer and employees, would deserve deference. Equally, matters such as the credibility of witnesses or the value of expert evidence and so on are matters of fact or are contributors to conclusions of mixed law and fact. For those things, a review standard of reasonableness is appropriate with the deference associated therewith being owed: Saguenay.

[41] ***Lethbridge Regional Police Service v Lethbridge Police Association***, [2013] AJ No 97 (ABCA) is cited for its reference to ***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at paragraph 59:

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

[42] The Union agrees that the standard of review is reasonableness, and also agrees that the legal interpretation of human rights law tests would warrant a correctness standard of review, but argues that the legal interpretation of human rights law tests does not arise in this case.

[43] The issue to be determined is the extent to which the Majority considered the legal test for *prima facie* discrimination.

Errors alleged by the City

[44] The City alleges that the Majority erred in its review of the ***Shelter Regent*** tests.

A. Were the Grievor's absences excessive?

[45] Under this heading, the City alleges four errors on the part of the Majority, in that:

1) They unreasonably applied a different legal test than the one it identified by adding two additional requirements that do not form part of the excessiveness assessment contemplated by ***Shelter Regent***;

2) If the element of "burden" is a requirement of the excessiveness assessment, the Majority made an unreasonable finding with respect to the spare board minimizing the burden when the spare board itself must satisfy any burden requirement;

3) They erred in removing the first wrist surgery and the acute stress absence from the excessiveness assessment by incorrectly interpreting and/or unreasonably applying the "onus" and/or "connection" components of the test for *prima facie* discrimination in Part Four (of the ***Shelter Regent*** tests); and

4) Its reasons were inadequate or they were not justifiable, transparent and intelligible to conclude that the record of absences was not excessive having regard to the average number of incidents and absences of co-workers and the case law.

1. Different legal test

[46] The City's complaint is that the Majority erred by considering undue hardship in the context of its analysis of whether the Grievor's absences were "excessive". The Majority suggested that the level of absenteeism necessary to satisfy the test of excessiveness had to be at a level "so as to justify termination".

[47] The City argues that justification only arises on an assessment of all applicable parts of the ***Shelter Regent*** tests. It argues that the real concern under ***Shelter Regent*** is the "Grievor's continuing inability to sustain regular attendance", citing ***Tolko Industries Ltd. v Industrial, Wood and Allied Workers of Canada, Local I-207***, [2012] AGAA No 68, aff'd 2013 ABQB 169, aff'd 2014 ABCA 236.

[48] The City contrasts this approach with the approach under collective agreements that stipulate a level of past absence, which will result in dismissal. That situation was discussed in ***McGill University Health Center (Montreal General Hospital) v Syndicat des employes de l'Hospital general de Montreal***, [2007] 1 SCR 161.

[49] The City advocates the approach taken by Arbitrator Ponak, focusing on consideration of the number of absences and the length of these absences relative to the plant average. It cites

UAW v Massey-Ferguson Ltd., 1969 CarswellOnt 1074, and ***Public Service Alliance of Canada v Saskatchewan Gaming Corp.***, [2015] SLAA No 27.

2. Unreasonable assessment of burden

[50] In the alternative, the City argues that if the Majority was entitled to consider the burden of absences on the employer in considering whether the Grievor's absences were excessive, their determination that the City's spare board minimized the burden on the City was unreasonable.

[51] The spare board is the system organized by Edmonton Transit to cover absences when an operator is unable to work or simply doesn't show up.

[52] The City notes that it must maintain the spare board so that transit service is not disrupted by operator absences, and that it must pay another operator to perform the work in addition to paying an absent worker away on short-term sick benefits.

[53] The City urges the approach suggested by the dissenting arbitrator:

> [a]bsenteeism in and of itself creates a burden and the steps taken by an employer to minimize the impact of absenteeism does not in any way diminish the burden experienced by an employer arising from such absences. (at paragraph 74)

[54] According to the City, "it cannot ever be reasonable that the spare board created and funded by the Employer will make it more onerous for the Employer to establish that an absence record is excessive as suggested by the Majority's reasoning. The spare board is the burden."

3. Improper removal of disability related absences

[55] The City submits that the Majority erred by concluding that the employer should not have relied on absences associated with carpal tunnel syndrome and acute stress disorder because it did not address the Grievor's onus to prove *prima facie* discrimination in relation to those medical conditions.

[56] The City notes that the Majority implicitly found that the Grievor's absences were excessive if all absences, including the absences associated with carpal tunnel syndrome and stress, are considered.

4. Unreasonable Assessment of Excessiveness

[57] The City challenges the Majority's finding that the Grievor's record was not so excessive to support termination and says the finding is neither reasonable, is not intelligible and lacks transparency.

[58] As regards co-workers, the City notes that the Greivor's absences exceeded the transit operator average by a significant percentage each year starting in January, 2010:

2010 – 118% total days absent and 133% in number of incidents;

2011 – 192% total days absent and 167% in number of incidents;

2012 – 80% total days absent and 100% in number of incidents;

2013 – 31% total days absent and 133% in number of incidents; and

2014 (January to April 1) – 92% total days absent and 67% in incidents.

[59] The City calculates that over the full four years and three months, the Grievor's absences exceeded the average by 135% in total days absent and by 138% in terms of absence incidents.

[60] The City argues that "the conclusion that the Grievor's absences in excess of four years were not excessive when compared to the average of his co-workers in the face of the indisputable, objective, numerical evidence to the contrary and is devoid of transparency and not intelligible. Outright and unexplained rejection of the conclusion that the objective evidence overwhelmingly supports is not what a reasonable adjudicator would do."

[61] The City also submits that the Majority was unreasonable in not comparing the absences here to the absence record in ***Loblaws Companies Ltd. v United Food & Commercial Workers, Local 247***, [2014] BCCAAA No 17.

B. Likelihood of Regular Future Attendance

[62] Part Three of the ***Shelter Regent*** test is whether there is a positive prognosis for regular future attendance at the time of dismissal.

[63] On this test, the Majority concluded on the evidence that "we cannot say it is unlikely that the grievor will be able to achieve acceptable attendance in the future. By that, we do not mean that the grievor will necessarily achieve the AMP standard representing the average number of absences and incidents of others in his classification. But it is likely that he could achieve reasonable levels of attendance and not impose any significant hardship on the City's operations."

[64] The City argues that the Majority erred in:

1) Not applying the ***Shelter Regent*** test and unreasonably applied a different test that included reaching a "reasonable" level of attendance that did not impose a significant hardship on the City's operations";
2) Breaching procedural fairness as the Employer did not know the case to meet and was not given an opportunity to be heard on these "new parts" to the test;
3) Failing to determine and draw the refutable inference/onus shift on the issue of likelihood of regular future attendance which was unreasonable having regard to all relevant evidence and all relevant case law leading to reasons that were not justifiable, transparent and intelligible on whether the Employer has met this onus; and
4) Relying on irrelevant factors or findings that are unsupported by the evidence or otherwise not justifiable, transparent and intelligible.

1. Unreasonably applying a different test

[65] The City argues that the Majority unreasonably disregarded the City's standard for expected attendance and instead and without reasons "rewrote its KVP complaint policy standard on expected regular attendance", referencing the criteria in ***KVP Co. v Lumber & Sawmill Workers' Union Local 2537***, [1965] OLAA No 2.

[66] According to the City, its requirement that the Grievor comply with the average rates of absence for his occupational group was reinforced on a large number of occasions.

[67] More significantly, the City complains that the first they learned that its standard of expected attendance as a measure of regular attendance was in the Majority award itself.

[68] Its position on this appears to be that its standard should be treated as reasonable because the union did not specifically argue that it was not reasonable.

[69] Management rights and the employer's "right to expect absences to cease at some point, or at least come within a range of reasonable expectation" are discussed in ***KVP***, ***Massey-Ferguson*** and ***Crouse-Hinds Canada Ltd. and United Automobile Workers***, [1981] OLAA No 98.

2. Breach of procedural fairness

[70] The City argues that the failure of the Majority to give the City notice of its concerns over the reasonableness of the standard and to respond was a breach of its right to be heard, in violated procedural fairness.

[71] It cites ***SEIU-West v Saskatoon Regional Health Authority***, [2015] SJ No 102.

3. Failure to draw refutable inference

[72] The City submits that the Majority correctly identified the onus shift and "refutable inference", relating to the onus on the employee pertaining to the likelihood of regular attendance in the future, but that it erred by not actually making a determination of that issue. The Majority recognized the issue, stated that it will depend "on the nature of the illnesses, the timing of the illnesses and the improvement, if any, in attendance over the relevant period of time."

[73] According to the City, the Majority should have made a specific finding on the subject of future attendance, and its failure to do so makes its reasons less than intelligible and transparent.

[74] The City relies on ***Shelter Regent*** and ***Tolko Industries***, noting that in ***AltaLink***, the Arbitrator had evidence that the employee's medical condition was treatable, which allowed him to find that the employee had rebutted the inference.

[75] It also cites arbitral authority in other jurisdictions and in particular ***Coast Mountain Bus Co. v Canadian Auto Workers, Local 111 (Knight Grievance), [2000] BCCAAA No 44. ("Coast Mountain Knight")***, where the arbitrator held at para 72:

> 72 The union submits the employer prematurely advanced Mr. Czapiewski under its Attendance Management Program and incorrectly applied its Program to him in a mechanistic manner. There was no Occupational Health Nurse at the employment status review meetings in August 2002 and management did not have the medical information obtained in support of the workers' compensation appeal. That information would have had an effect on the review and recommendation. There was no notice to Mr. Czapiewski that his dismissal was imminent.

[76] The City says the Grievor's absences are similar to those described in ***Coast Mountain (Knight)***, and argues that "it is difficult to fathom on the Grievor's record of absences how the Majority refused to draw a refutable inference" and that their assessment was not conducted "within the principles of justification, transparent, and intelligible consistent with reasonable adjudication."

4. Unreasonable assessment of excessiveness

(i) Four ailments

[77] The City argues that the Majority erred by focusing on four ailments, namely the two wrist surgeries in 2011 and 2013, the stress disorder following the death of his wife in 2010 and the tachycardia that occurred in 2012. It emphasizes the Grievor's "propensity for illness in general", which is the proper focus.

[78] The City notes that notwithstanding the apparent resolution of these four ailments, the Grievor never achieved the required standard following his return to work. In particular, the City focuses on the Grievor's attendance record during the last nine months of his employment.

[79] The City employee who made the decision to terminate the Grievor's employment testified that she had "discounted" the second wrist surgery when contemplating the Grievor's dismissal.

[80] The City submits that the Majority failed to reasonably consider the Grievor's frequent absences due to flu, which was the ailment causing the most incidents. If it had done so, it would undoubtedly have concluded that the Grievor's propensity to the flu was the most significant cause of his inability to maintain regular future attendance.

[81] Findings relating to the unlikelihood of a recurrence of tachycardia were made without any evidentiary basis. According to the City, the Majority was unreasonable in "importing a 'known root cause' analysis onto an absence record that is caused by a 'classic case' of intermittent and unpredictable and unrelated ailments."

(ii) Linking unrelated absence without medical evidence despite contrary evidence

[82] The City criticizes the Majority for its conclusion the incidents in the first three months of 2014 may have been related, and that the City failed to explore these absences in any detail with the Grievor. Those conclusions appear to have informed the Majority's decision relating to the likelihood of regular future attendance, and were arrived at without any supporting evidence.

[83] The Majority's conclusion was not supported by a path of reasoning that fit within the principles of justification, transparency and intelligibility.

[84] Further, the possible relatedness was based on pure speculation, and was in fact contrary to the evidence. The City points to sick notes and discrepancies in the Grievor's reporting of the reasons for his absence that would otherwise support some connection among the ailments.

(iii) Undue reliance on an unreasonable finding of improvement

[85] Essentially, the City argues that the Majority ignored the fact that any "improvement" in attendance by the Grievor still had the Grievor more than double the days absent standard. What the employer looked for under the AMP was a period of at least one year where the employee met the standard.

[86] The City says that the time for analysis of the likelihood of regular future attendance is the time of the dismissal, and that the Majority erred by using a different period. The Majority should have used the analysis performed by the arbitrator in ***Tolko*** and its consideration of improvement needing to "rise to the level of demonstrating that the Grievor is capable of regular attendance."

[87] The City also disagrees with the Majority's characterization of "unpredictable and sporadic" illnesses and it not having included the tachycardia in that category.

[88] Ultimately, the City argues that the Majority unreasonably focused on:

1) the resolution of four of sixteen different medical ailments;
2) the possible relatedness of the three last absences; and
3) the Grievor's attendance improvement based on the absence record.

C. *Prima facie* discrimination

[89] The City argues that the Majority erred in two aspects of its analysis of discrimination and accommodation.

[90] First, the Majority incorrectly interpreted and applied the "onus" and "connection" components for the test for *prima facie* discrimination in assessing three isolated and resolved ailments (the acute stress and carpal tunnel surgeries).

[91] Second, the Majority's conclusion that the Grievor had discharged his onus to prove *prima facie* discrimination were conclusions that were not available on a correct interpretation of the test for *prima facie* discrimination, following ***Quebec v Bombardier Inc.***, [2015] 2 SCR 789.

1. Onus and connection

[92] The City cites paragraph 52 of ***Quebec v Bombardier***:

> [52] In short, as regards the second element of prima facie discrimination, the plaintiff has the burden of showing that there is a connection between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a factor in the distinction, exclusion or preference. Finally, it should be noted that the list of prohibited grounds in s. 10 of the Charter is exhaustive, unlike the one in the Canadian Charter: City of Montréal, at para. 69.

[93] At paragraph 65, the Supreme Court specified the applicable degree of proof for *prima facie* discrimination:

> [65] Thus, the use of the expression "prima facie discrimination" must not be regarded as a relaxation of the plaintiff's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which he or she must still meet. This conclusion is in fact supported by the passage from O'Malley quoted above, in which the Court stated that the case must be "complete and sufficient", that is, it must correspond to the degree of proof required in the civil law. Absent an exception provided by law, there is in Quebec law only one degree of proof in civil matters, namely proof on a balance of probabilities ...

[94] Citing ***Sunrise Poultry Ltd. v United Food and Commercial Workers' Union***, [2016] BCCAAA No 53, the City notes that the Majority reasons make no reference to *prima facie* discrimination or the key elements of the requisite connection between disability and adverse treatment.

2. Presumption not supported by facts

[95] The City disagrees with the Majority finding that once a disability-related absence exists, *prima facie* discrimination is to be automatically presumed, shifting the onus to the Employer to establish undue hardship.

[96] That presumption is inconsistent with ***Shelter Regent***. There, the arbitrator noted that the identified disability-related absence was acid reflux disease and gallstones, whereas the real cause of absences was the Grievor's untreated substance abuse problem.

[97] He queried whether the employer should be held responsible for failing to realize at the time of discharge that the Grievor had a substance abuse problem that might have been connected with his absenteeism, and answered the question in the negative. (at paragraphs 52-54).

[98] The City argues that the Majority erred by relying on two Ontario arbitration authorities, ***Town of Ingersoll v Canadian Union of Public Employees, Local 107***, [2003] OLAA No 554, and ***City of Hamilton v Canadian Union of Public Employees, Local 5167***, [2002] OLAA No 73, as support for their statement that "disabilities cannot be relied upon to justify termination for innocent absenteeism unless there has been accommodation to the point of undue hardship."

[99] In ***Ingersoll***, the town had essentially conceded that the Grievor's migraines were the cause of his absenteeism. There, the real issue was accommodation and undue hardship.

[100] The City is critical that the arbitrator's analysis, below, was not considered by the Majority:

> As such, the amount of accommodation made on account of Ms. Alyea's disability prior to July 22, 2002, is not known, the calculation of cost to show accommodation to the point of undue hardship cannot be made, and the employer is unable to demonstrate it has accommodated the disability to the point of undue hardship.

[101] That is significant because it demonstrated that the real issue was whether the town could demonstrate undue hardship, not whether there had been *prima facie* discrimination.

[102] In ***Hamilton***, had a disability-related absence not been relied on as a trigger for termination, the employee would not have exceeded the employer's attendance threshold.

[103] According to the City, that case is distinguishable (as is ***Ingersoll***) because the *prima facie* discrimination was "abundantly clear" in both cases.

[104] The City argues that ***David Thompson Health Region*** is distinguishable as it was a policy grievance and is of limited application.

[105] The City notes that in ***Coast Mountain Bus Co v National Automobile, Aerospace, Transportation and General Workers of Canada, Local 111***, [2006] BCAA No. 87 ("***Coast Mountain*** (2006)") the employer had "segregated out" absenteeism from disability-related causes. The arbitrator recognized that and noted that the employee had not sought any accommodations, noting as well that the employee had been absent for 103.5 days in 2004 for reasons unrelated to his depression disorder.

[106] In this case, the City argues that the key question for the arbitrators to ask was "did the union discharge its onus to prove on balance the requisite connection between each of his resolved disabilities and dismissal?".

[107] No evidence was led on the disability absences, and the City detailed in its argument the absence of any requests by the Grievor for accommodations, his denials that he suffered from any "medical disability preventing him from attending work on a regular basis" and the City's numerous steps under the AMP including counselling.

[108] With respect to the second wrist surgery, which was "discounted" by the City in making the final decision to terminate the Grievor's employment, the City argues that the Grievor's absences were well above the standard even ignoring the absences related to the second wrist surgery.

[109] A "Final Opportunity for Improvement" letter was sent out following the second wrist surgery, but the decision to terminate was made following a further period of unacceptable attendance.

[110] The City notes that it is "incomprehensible" that the Majority would have rejected the City employee's evidence as to "discounting" the second wrist surgery without asking any questions of her, while accepting that the WCB absence was not considered. This, according to the City, makes the reasons unintelligible and not transparent. It concludes its argument stating:

> The Board's Award does not offer any comprehensible reasoning with respect to the contrary evidence and the connection of the Grievor's resolved disabilities to his dismissal, which makes the decision unreasonable.

Grievor's response

[111] The Grievor agrees that the four-part test from ***Shelter Regent*** is the framework for determining whether just cause exists for non-culpable absenteeism, noting however that any termination based on non-culpable absenteeism must still comply with the just cause provisions for termination in the collective agreement.

[112] In dealing with Part One of the ***Shelter Regent*** framework – excessive absenteeism – the Grievor relies on ***Coast Mountain Bus Co. v National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada) Local 111, [2003] BCAAA No. 294, ("Coast Mountain (2003)")*** for the proposition that absenteeism above a workplace average is not necessarily excessive. He argues that this proposition applies to a unilaterally imposed rule such as the AMP.

[113] On Part Three of the test – future regular attendance – the Grievor agrees that there is a switching onus provided the employer has satisfied its initial onus of persuading the arbitrator that the past absenteeism should lead to the inference that future regular attendance is unlikely. The Grievor relies on ***Altalink Ltd v United Utility Workers' Association*** and ***Tolko Industries Ltd and IWA-Canada, Local 1-207***.

[114] In ***Altalink***, the Arbitrator noted at paragraph 62:

> 62 The cases on the "prognosis for future attendance" aspect of the test, when dismissal occurs in a case like this, rests on the employer, but often the employer is entitled to rely upon a reasonable inference based on past

> experience. This is not a fixed presumption; rather it is a matter of convincing the board that such an inference, based on all the circumstances, is appropriate. An arbitration board, in deciding that question, must assess the legitimacy of the employer drawing such an inference at the time of its decision to terminate. In our view, the reasonableness of drawing such an inference cannot be divorced from the type of illness, the medical information known of the condition, its anticipated length of treatment, certainty of diagnosis and so on. Also, the reasonableness of such an inference cannot be divorced from the requirement for a warning to the employee. It is one thing to draw such an inference when the employee has been asked if and when they will be back to work, and if necessary, subject to what restrictions. It is quite another if the employee has not been asked.

[115] For Part Four of the test – disability and accommodation – the Grievor relies on ***Ingersoll.***

[116] The Grievor submits that the Majority "accounted for, followed and applied all of the foregoing legal principles."

[117] The Grievor notes that the Majority did not expressly deal with Part One of the test – excessive absenteeism – because of the focus of the arguments before it, which related to the third and fourth parts of the ***Shelter Regent*** analysis.

[118] He references paragraph 35 in the Majority decision, which describes how the Majority approached its task on the arbitration:

> 35 Accordingly, our task is not simply to determine if the grievor exceeded the absenteeism standards set by the City and confirm that the AMP was properly administered. Rather, we are required to determine whether, in all of the circumstances, the grievor's absences were so excessive and imposed such a burden on the City, that termination was justified

[119] The Grievor argues that it was reasonable for the Majority to determine that for excessive absenteeism to be capable of justifying dismissal, there must be a degree of absenteeism that "significantly burdened the employer". He submits that the interpretation of "excessive" is a matter of law concerning the operation of the collective agreement, and as such, deference should be given to the expertise of the Majority.

[120] Regarding the issue of the onus of demonstrating that the Grievor is likely to achieve future regular attendance, the Grievor notes that the Majority stated at paragraph 43 of its decision:

> Not every record of excessive absenteeism will, on its own, shift the onus of proof from the employer to the employee regarding the likelihood of regular attendance in the future. It will depend on the nature of the illnesses, the timing of the illnesses and the improvement, if any, in attendance over the relevant period of time.

[121] The Grievor argues that the Majority's analysis of his absences was reasonable, and that in light of its analysis, it was not unreasonable for them to conclude that it was not unlikely that the Grievor would be able to work regularly in the future.

[122] The Grievor pointed out that his absenteeism was far less than the absenteeism in ***Tolko*** and in ***Loblaws Companies Ltd. v United Food and Commercial Workers, Local 247.***

[123] He argues that the Majority was reasonable in concluding that "a unilaterally imposed attendance management program does not displace an arbitrator's role in assessing whether termination occurred with just cause."

[124] The Grievor submits that the City provided no evidence that the Grievor would be unable to regularly work in the future, other than asking the arbitrators to infer that from the Grievor's past attendance record. The City did not seek any medical evidence of its own, nor did it question the prognosis from the Grievor's doctor of "good". Thus it was reasonable for the Majority to allow the grievance.

[125] As for the City's argument that the Majority breached procedural fairness by imposing a test different from that in ***Shelter Regent*** relating to future levels of attendance, the Grievor argues that the Shelter Regent framework is only to determine if non-culpable attendance levels justified termination and that it was not unreasonable for the Majority to equate regular attendance with "reasonable, non-excessive attendance that does not significantly burden the City."

[126] The Grievor submits that "regular attendance" is not to be equated with the City's own AMP expectations. Those expectations or standards do not bind arbitrators in determining whether just cause existed.

[127] As to procedural fairness, the Grievor says that the City had the opportunity to address each of the factors it now expresses concern over.

[128] Regarding the City's argument that the Majority relied on irrelevant factors, the Grievor argues that the fact findings were reasonable inferences from the evidence submitted.

[129] The Grievor says that the Majority made no errors relating to discrimination and accommodation. He argues that the City did not argue undue hardship before the arbitrators and as such the Majority only dealt with whether some of the absenteeism was caused by "disability."

[130] From the decision, it is clear that the Majority concluded that carpal tunnel syndrome and acute stress disorder were disabilities, based on case law, but also held that there was insufficient evidence for them to decide if tachycardia, pneumonia, bronchitis or chest issues were disabilities.

[131] The Grievor emphasizes the Majority's conclusion at paragraph 60:

> With respect, an employer cannot escape a finding of discrimination by accommodating an employee while he is disabled and then terminating him once he recovers based on those same absences.

[132] The Grievor submits that termination itself is a form of adverse treatment that constitutes *prima facie* discrimination if disabilities are a factor in it. As such, the Grievor argues that the Majority was correct to hold that the timing of a disability does not matter in this context and that the City cannot rely on absences caused by disabilities to justify his termination.

[133] He notes that the Majority found it significant that the City's senior negotiator testified that she and her colleagues "considered all of the absences including the wrist surgeries when

they recommended that the Grievor be terminated but the second wrist surgery was "discounted". The Majority also noted that the Grievor's elevation from level II to level III was the result of the first wrist surgery.

[134] According to the Grievor, these fact findings "entailed a reasoned assessment of the relevant evidence. They are justifiable, transparent and intelligible."

[135] In response to the City's submissions concerning the Majority's application of Part Four of the ***Shelter Regent*** framework, the Grievor submits that there was no misapplication by the Majority and that they did not apply an automatic presumption that the Grievor's disabilities factored into the termination. Rather, he argues that the Majority made an assessment of the evidence and concluded that there was a link between disabilities and termination.

[136] The Majority's failure to specifically detail the test for *prima facie* discrimination does not mean that they failed to apply the correct test. The Grievor submits that the Majority drew the conclusion it did regarding the connection between disabilities and termination based on the evidence.

[137] Ultimately, the Grievor submits that the City's arguments are really challenges on fact findings, and that the Majority is entitled to deference on these findings.

[138] As to the merits on these issues, the Grievor asserts that the Majority was reasonable in relying on ***Ingersoll*** to the effect that an employer cannot rely on disability-related absences to terminate employees unless the employer has accommodated to the point of undue hardship.

Analysis

[139] This case is an interesting mix of labour relations and employment law. The principles involved are common law employment issues, while the forum is determined under the provisions of the collective agreement binding the parties.

[140] The AMP is not part of the collective agreement. It is curious that the Union describes the AMP as having been unilaterally imposed on the City's employees, but makes no submissions concerning the reasonableness of the policy, or its constancy with employment law. I assume that is because the policy grievance launched after the implementation of the AMP was settled such that it may be awkward for the Union to make such submissions.

[141] Nevertheless, under employment law, innocent absenteeism is a basis for termination of employment only when an employee's inability to attend work on a regular basis is tantamount to frustration of the employment relationship or contract.

[142] At common law, an employer's right to terminate an employee's employment for innocent absenteeism is very limited. Illness is not grounds for summary dismissal because it does not constitute misconduct. However, if sufficiently serious, non-culpable illness can lead to frustration of contract and thereby bring the employment relationship to an end.

[143] Frustration arises where there is a supervening event that is the fault of neither party and for which there is no provision in the contract. As a result contractual performance "becomes a thing radically different from that which was undertaken by the contract": ***Naylor Group Inc v***

Ellis-Don Construction Ltd, [2001] 2 SCR 943, 2001 SCC 58. The frustration of a contract results in both parties being discharged from their obligations.

[144] In the context of a contract of employment, frustration can arise where an employee experiences a permanent illness or disability. This was established in ***Dartmouth Ferry Commission v Marks*** (1903), 34 SCR 366, which remains good law. Therefore, when an employee becomes ill or disabled, the critical question is whether the ailment is permanent and thus sufficient to frustrate the contract.

[145] In ***Yeager v R. J Hastings Agencies Ltd***, [1985] 1 WWR 218 at para 85, "permanent" is not to be used in its most literal sense of "indefinite", but rather in a business sense. A "permanent" illness is one that puts an end to the business relationship whereas a "temporary" illness will have no such effect.

[146] Canadian courts have adopted the analytical approach set out by the English Court of Appeal in ***Marshall v Harland & Wolff Ltd***, [1972] 2 ER 715 at pages 718-719, where the court stated that what must be asked is whether the incapacity was "of such a nature or did it appear likely to continue for such a period, that further performance of his obligations in the future would be either impossible or would be radically different" from what the parties had initially agreed. The court also suggested that an answer to this question should consider the following factors:

(a) the terms of the contract, including provisions for sick pay;

(b) how long the employment was likely to last in the absence of sickness;

(c) the nature of the employment;

(d) the nature of the illness or injury and how long it has already continued and the prospect of recovery; and

(e) the period of past employment.

[147] These factors are interrelated and cumulative, but are not exhaustive and other relevant factors may be considered. The presence of such a broad range of factors shows that the court's approach requires a fact-specific and contextual analysis. Each case will be heavily fact-driven and the precedential and persuasive value of other cases will thus be limited.

[148] A contextual analysis means that determining "permanent" or "non-permanent" is not a mere counting exercise in order to determine whether the length of an illness surpasses a particular numerical threshold. It is interesting to note that in the common law employment world, the Ontario Court of Justice found in ***Fraser v UBS***, 2011 ONSC 5448 that a three-and-a-half-year absence was sufficiently permanent to frustrate a contract, whereas a five-year absence was found to be temporary in ***Naccarato v Costco Wholesale Canada Ltd***, 2010 ONSC 2651.

[149] Parties can generally make their own arrangement and can generally contract out of legal positions. In other words, the parties bargain away their legal rights.

[150] Employers may impose terms in an employment contract that differ from what might be the result under common law, so long as the other party agrees.

[151] It is beyond the scope of this decision to delve into whether or to what extent an employer might be able to incorporate workplace rules into the contract of employment. In a unionized setting, the contract of employment is essentially replaced by the collective agreement.

[152] It is clear, however, that contractual provisions that are contrary to the *Alberta Human Rights Act* are unenforceable: ***Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)***, [1996] 2 SCR 3, and ***Parry Sound (Dist.) Social Services Administration Board v. O.P.S.E.U., Local 324***, 2003 SCC 42.

[153] It seems to me that the AMP here has a significant potential to discriminate against some employees on the basis of their health and to discriminate against some employees on the basis of their age. I do not think that it takes expert evidence to establish that as one ages, one becomes more prone to health issues such as arthritis, heart issues, breathing issues and the like. Repetitive strain injuries undoubtedly increase with age. Even healthy bodies begin to break down at some stage. The fountain of youth has not yet been discovered.

[154] An AMP might be used to get rid of an employee in failing health due to age rather than any specific cause that might be described as a "disability". Doing so would prevent the employee from the benefits of a long-term disability plan that the employee might have been able to access by demonstrating a "disability" that fell within the definitions in the disability policy.

[155] I see no clear justification for the determination of averages for workplace incidents and days absent from work being based on the statistics for all employees doing the same job, regardless of age. In particular, I cannot see that the health-related absences of a newly-hired 18-year-old should be treated the same as the health-related absences of a 64-year-old. Or vice versa. Averaging the two employees' absences leads to a formula that really fits no one.

[156] That may make sense from an organizational point of view, but it has employees treated as removable and replaceable parts.

[157] ***York Univeristy v York Univeristy Staff Association***, 2012 CanLII 41233 (OLAA) is a grievance arbitration about York's attendance management program. The arbitrator stated at paras 31 – 33:

> 31. However, an employer's management right to impose a unilateral attendance management program is not unfettered. A unilaterally promulgated attendance management program is void and unenforceable to the extent that it conflicts with the collective agreement or applicable legislation.
>
> 32. Further, an attendance management program must not be structured or applied in manner that is arbitrary, discriminatory or in bad faith. It must be structured and administered reasonably; that is, in a manner which considers both employer and employee collective agreement and statutory rights, and legitimate interests. The test for reasonableness is an objective one. It is not a matter of perspective. It does not depend on the subjective views of the employer, the union, or any employee or group of employees.
>
> 33. The KVP analysis has been applied in many attendance management program cases. Such programs were rare (perhaps nonexistent) in the mid-1960's when that case was decided, and that case did not in any event concern an attendance management program. Nevertheless, when paraphrased to suit, the first 5 *KVP* "rules" or criteria (i.e. consistent with the collective agreement, reasonable, clear, brought to employees'

> attention, notice of consequences) provide a suitable basis for review of an attendance management program. Although the 6th criterion (consistent enforcement) may appear problematic because of the flexibility and discretion that are inherent in a properly structured and administered attendance management program, it also applies in the sense that an attendance management program should include sufficient flexibility and discretion to permit it to be administered with consistent fairness and due regard for individual circumstances.

[158] There are clear differences between York University's AMP and the AMP here. The most obvious one is that the "starting point" in York University's AMP was a 10.5% per quarter absence standard set in the AMP versus the campus services and business operation unit average of 5.46% per quarter.

[159] The arbitrator there relied on ***McGill University Health Center (Monteral General Hospital) v syndicat des employes de l'hospital general de Montreal***, [2007] 1 SCR 161, stating at paragraph 34:

> 34. However, it has long been recognized that even such innocent absenteeism can result in termination of employment in the employer's discretion (see, for example *Massey-Ferguson Industries Ltd. and U.A.W., Local 458*, (1972) 24 L.A.C. 344 (Shime)). It is well established that an employer may terminate the employment of an employee when the employee has been unable to attend work with reasonable regularity and there is no reasonable prospect that the employee will to be able to do so in the foreseeable future even with available accommodation to the point of undue hardship. This is so whether or not excessive absenteeism is due to a compensable or non-compensable disability, and whether or not the employment relationship is governed by a collective agreement. In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4 (CanLII), Abella J. wrote (correctly, in my respectful view) as follows:
>
> 62 Non-culpable absenteeism, including the failure to achieve a reasonable degree of attendance because of illness, is accepted in arbitral jurisprudence as a just cause for dismissal. ....
>
> 63 This does not target individuals arbitrarily and unfairly because they are disabled; it balances an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage. ...

[160] He concluded at paragraphs 50 and 51:

> 50 I am satisfied that the AMP satisfies the *KVP* criteria, and that there is nothing in it that is contrary to the collective agreement, or to the *Occupational Health and Safety Act*, the *Human Rights Code* or any other legislation. I am satisfied that the AMP is the product of a reasonable exercise by York of its management rights.

> 51 If there is a concern about the application of the AMP to a particular employee, that can be the subject of an individual grievance. If there is a concern about the application of the AMP to an occupational or other identifiable group of employees, that can be the subject of a group or possibly a policy grievance. If there develops a systemic concern about the application of the AMP, that can be the subject of a policy grievance. However, the onus is on YUSA to provide cogent evidence to establish that the *prima facie* reasonable AMP in fact is not, or that it has been or is being applied in a manner that is contrary to the collective agreement or legislation, or otherwise unreasonably. There is no such evidence before me.

[161] In the case before me, there is no direct attack on the reasonableness of the AMP. The specifics of the AMP were not argued before me, and I was not asked to rule on the reasonableness or validity of any portion of it. For the purposes of this application, that may have the effect of deeming the AMP to be reasonable, and that it is now part of the "contract of employment" between the City and the Grievor. I make no such findings here, but will proceed with my analysis on the basis that the AMP is both of those things.

[162] That still requires a detailed analysis of the various parts of the ***Shelter Regent*** test and keeps the *Alberta Human Rights Act* in play, and in particular Part Four which asks if the employer attempted to accommodate the employee to the point of undue hardship prior to dismissal if the absenteeism was caused by an illness or disability, or was somehow age-related.

[163] Accordingly, I essentially agree with the Union's position that the real issues in this matter relate to Parts Three and Four of the ***Shelter Regent*** test. Doing so allowed the matter to be argued without attacking the reasonableness of the AMP itself.

[164] The City's arguments revolve around their apparent presumption that:

> the AMP is reasonable; and
>
> so long as it establishes that the employee's absences exceeded the workplace averages; and
>
> the City has followed the stated processes in moving the employee through the various levels;
>
> termination for cause is justified unless the employee can prove on balance that he is likely to be able to return to regular attendance as mandated in the AMP; and
>
> the City only has to deal with accommodation and undue hardship if the employee has proven *prima facie* discrimination in his termination.

[165] With due respect to the City's position, I do not think that the arbitration panel's role was quite so simple. What that ignores is what the Grievor emphasizes: the AMP does not bind an arbitrator's hands as to what constitutes just cause, and the AMP does not bind an arbitrator's hands in determining what constitutes reasonable attendance for the purpose of assessing just cause.

[166] To the extent that arbitral decisions can be interpreted as holding that an AMP binds an arbitrator on these issues, those decisions are not binding on the Court. The Supreme Court of Canada has held that there is no *stare decisis* within the arbitration community: arbitration

awards do not bind an arbitration tribunal nor are they binding in the courts: ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.***, 2013 SCC 34 at para 6.

[167] In that regard, I am of the view that ***Windsor (City) v Canadian Union of Public Employees, Local 543,*** [2002] OLAA 153, and ***Coast Mountain (2003)*** are applicable to this case on that point.

[168] The City argues in its brief that the AMP is a KVP-compliant policy, relying on the Union not having taken express issue with the reasonableness of the AMP in this matter.

[169] The Majority thus proceeded on the basis that the AMP was not by itself objectionable. That does not mean that a breach of the provisions of a City policy that is not part of the Collective Agreement will automatically result in just cause for termination. The AMP is itself permissive in terms of the disciplinary measures that may be imposed for a breach.

[170] Thus, that leaves the issue of just cause to be determined, not just whether the City complied with its policy. The Collective Agreement reserves the management right to discipline an employee for just cause. While not express, discipline includes the right to terminate employment. Just cause is not defined, such that the common law provisions relating to just cause apply.

[171] To the extent that the Majority decision might be seen as suggesting that termination for excessive non-culpable absences can focus on past illnesses, I agree with the City that would be an error. As set out in ***Shelter Regent***, and other cases dealing with termination for non-culpable absenteeism, a major focus is whether the employee is likely in the future to return to a reasonable level of attendance, not merely the quantification of the employee's past absences.

[172] This background leads me to consider the City's specific complaints about the Majority decision.

A. Were the Grievor's absences excessive?

[173] Unreasonable application of a different legal test than the one it identified by adding two additional requirements that do not form part of the excessiveness assessment contemplated by ***Shelter Regent.***

[174] The City has four complaints. The first one is that the Majority appears to have felt that dismissal for past innocent absenteeism could occur. The next is that the Majority considered the impact of the Grievor's absenteeism on the City, rather than simply looking at a numeric assessment. Third is that the Majority erred by removing the first wrist surgery and the stress disorder from its consideration of "excessiveness". Fourth is alleged inadequacy of reasons.

1. Wrong test

[175] To analyze the alleged errors here, it is important to look closely at ***Shelter Regent.*** I would observe at the outset that ***Shelter Regent*** is an extremely well considered and well written decision, and has justifiably been followed innumerable times by arbitrators.

[176] ***Shelter Regent*** is a case about excessive absenteeism, not about an AMP. In Shelter Regent, the collective agreement provided that seniority would be lost for "chronic absenteeism which was substantially in excess of the absenteeism rate."

[177] There, the plant average was 3-4% absenteeism, including disability and workers' compensation. The grievor's absences were in the 16-45% range.

[178] The union agreed that the grievor's absences were excessive, but argued that discharge was not appropriate.

[179] However, the Majority did not base its decision on any such premise. The main difficulty with the City's argument here is that it equates excessive absence with its calculated average and its policy that deems anything above the average to be excessive.

[180] That is not the type of excess considered by the arbitrator in ***Shelter Regent***. In that case, the arbitrator looked at the grievor's absences in the context of the plant average and came to his own conclusion as to whether the absences were "substantially in excess" of the absenteeism rate.

[181] The arbitrator also noted that the employee's absences were disruptive of the employer's operations.

[182] ***Tolko***, decided by the same arbitrator as in ***Shelter Regent***, does not involve an AMP. In that case, as in ***Shelter Regent***, the arbitrator compared the grievor's attendance with the plant average. He noted at paragraph 68 that the grievor's absenteeism had been "extremely high" for years in both absolute terms and relative to other employees. His best years had still been three to four times the average. He concluded that "five years of extremely poor attendance sandwiched by two years of, at best, very mediocre attendance, easily meets a definition of excessive absenteeism."

[183] The significant issue in that case was the fact that the grievor's attendance record was the best in the last year of his employment, where he was absent for "only" 13.4 % of the time compared to the plant average of 4.6%.

[184] ***Coast Mountain (Knight)*** did involve an AMP. It does not appear that the terms of the AMP were particularly relevant to the decision, as the grievor's absences had amounted to an average of 45.9% over three years. The panel noted at paragraph 63 "that her absences were excessive is neither challenged by the union nor the grievor herself". There was no determination that the excessive absenteeism sufficient to trigger the rebuttable onus was defined by the AMP.

[185] ***Hamilton*** also involved an AMP. The arbitrator noted there that the issue before him related to the administration of the AMP process in the grievor's circumstances (at paragraph 3).

[186] At paragraph 5, the arbitrator referenced ***KVP*** and stated:

> Those are the "KVP requisites" an employer must meet. Even if, as was suggested in the case before me, the Union historically acquiesced or participated in the operation of the attendance management program, the actual administration and application of such a program in individual cases will be open to review at arbitration on grounds of reasonableness and the standard of just cause.

[187] That case turned on the arbitrator's review of how the employer had treated absences for workplace injuries.

[188] I do not view ***Shelter Regent*** as a formula that must be approached in sequence. I also do not see that the ***Shelter Regent*** tests are watertight compartments within themselves. I do not think that the Majority erred by refusing to apply the City's definition of excessive absenteeism

as contained in the AMP and instead attempting to determine in the context of this employee and this employer what "excessive absenteeism" should be held to mean.

[189] ***Shelter Regent*** does not define "excessive". That appears to have been taken for granted based on the percentages of absenteeism, although the arbitrator noted as well that the absenteeism was "disruptive to production" (at para 40).

[190] It is interesting to note that the arbitrator in ***UAW v Massey-Ferguson Ltd***, 1969 CarswellOnt 1074, [1969] OLAA No 2 noted at paragraph 4:

> 4 The first basic principle is that innocent absenteeism cannot be grounds for discipline, in the sense of punishment for blameworthy conduct. It is obviously unfair to punish someone for conduct which is beyond his control and thus not his fault. However, arbitrators have agreed that, in certain very serious situations, extremely excessive absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. Because the relationship is contractual, and the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter. If an employee cannot report to work for reasons which are not his fault, he imposes losses on an employer who is also not at fault. To a certain extent, these kinds of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached, the accommodation of the legitimate interests of both employer and employee requires a power of justifiable termination in the former.

[191] The City cites ***Public Service Alliance of Canada v Saskatchewan Gaming Commission,*** [2015] SCAA No. 27, to the effect that the arbitrator did not consider the imposition of any burden on the employer as part of the first ***Shelter Regent*** test of excessive absenteeism. The arbitrator concluded at paragraph 79 that the employee's average 21.2% absenteeism was excessive, noting however that "there was no debate between the parties as to whether the First Test was met."

[192] That arbitration turned on the sufficiency of warnings given to the employee, not the absenteeism itself or any hardships or accommodations.

[193] I do not see that the absence of discussion about impact on the employer makes this a precedential case on absenteeism.

[194] I agree with Arbitrator Weiler's description of the law on the subject as it was in 1969. The common law on the subject remains the same, in that it is no easier for an employer to dismiss an employee for innocent absenteeism now than it was before.

[195] It is not clear how Arbitrator Weiler's description of "extremely excessive absenteeism" has been watered down in the arbitration cases to "excessive" absenteeism. It is certainly permissible for an employer and a union to negotiate something less than "extremely excessive" in the collective agreement, as appears to have been the case in ***McGill University Health Center (Montreal General Hospital) v Syndicat des employes de l'Hopital general de Montreal***, [2007] 1 SCR 161.

[196] But that is not the case here. The collective agreement is silent on discipline or termination for innocent absenteeism.

[197] In my view, it was reasonable for the Majority to consider what constitutes excessive absenteeism, and that it was not unreasonable for them to look beyond the AMP in doing so.

[198] I conclude that the Majority did not err in failing to follow the ***Shelter Regent*** test, as ***Shelter Regent*** gives little guidance as to the determination of "excessive absenteeism."

[199] The Majority here reasonably considered the impact of the Grievor's absenteeism on the City in determining whether the Grievor's absences were "excessive."

[200] In my view, it would have been unreasonable for the Majority not to have considered the impact of absence on the employer. While "impact on the employer" overlaps to some degree with consideration of excessiveness and accommodation, just because impact on the employer is an important factor in looking at accommodation and undue hardship, that should not preclude an arbitrator from considering it in the context of whether an employee's absenteeism is excessive.

[201] The situation here should be contrasted with that in ***Alberta v AUPE***, [2008] AGAA No. 35. There, the arbitrators dismissed the grievance, holding at para 169:

> 169 The fourth question is, if the absenteeism is caused by an illness or disability, did the Employer attempt to accommodate the employee to the point of undue hardship prior to dismissal. This question raises several issues. First, Mr. Gregoire testified before us that, at certain times, he suffered from and took medication for depression caused by personal circumstances and by what he perceived to be workplace harassment. Mr. Gregoire's own evidence on this was vague and lacked particulars as to treatment, duration and so on. It was open to him to call supporting medical evidence and he did not do so. It was open to him to tell Dr. Fischer or Dr. Sood about this, or to take up the offers we find were in fact made for an EAP referral. He did none of those things.

[202] Their analysis of excessiveness recognized that the employer's need for regular attendance was "particularly high" (at para 163).

[203] The panel also questioned "whether the centre average is a very helpful benchmark", but noted that "he is so well beyond that debate on that question is of virtually no consequence" (at para 163).

[204] Neither of these factors is present in this case.

[205] A "one size fits all" rule is potentially problematic. It may be very disruptive to an employer when a key employee or an employee performing a unique function is absent; it may cause little disruption when an employee, whose work can easily be done by another competent and qualified employee, is absent.

[206] In any event, I find no reviewable error by the Majority on this issue.

2. Unreasonable finding with respect to the spare board minimizing the burden

[207] The City argues that the presence of the spare board system to cover absences proves that it was impacted by the Grievor's absences. It notes that the City must pay the absent employee's

short-term sick benefits as well as the pay for the replacement worker. It says that this amounts to an "adequate level of burden" to satisfy any burden requirement on the City's part.

[208] The City cites the dissenting reasons, and the dissenting arbitrator's conclusion that the spare board itself creates a burden, and that it would be unreasonable to treat transit operators differently from non-transit operators who may not be replaced under a spare board system.

[209] The dissent emphasizes the "one size fits all" approach, which ignores individual traits. I recognize that is part of the collective bargaining system, but the AMP does not arise in the system. It was unilaterally imposed by the City and in my view is to be viewed in the light of common law employment principles.

[210] I see nothing unreasonable in the Majority considering the spare board system as a responsible way of protecting the public from transit system interruptions caused by all kinds of operational situations, and not just innocent absenteeism.

[211] I find no error or unreasonableness under this category.

3. Error in removing the first wrist surgery and the acute stress absence from the excessiveness assessment by incorrectly interpreting and/or unreasonably applying the "onus" and/or "connection" components of the test for *prima facie* discrimination in Part Four of *Shelter Regent*

[212] The City argues that the Majority erred by removing disability-related absences from its consideration of excessiveness and then concluding that the Grievor's absences were not excessive. The City also argues that the Majority erred in concluding that consideration of disability-related absences for termination of employment was unlawful, "unless continuing the grievor's employment creates undue hardship."

[213] The two types of absence considered in this category were the Grievor's two carpal tunnel surgeries and absences related to "acute stress."

[214] I do not think the Majority was unreasonable in removing the disability-related absences from the Grievor's record when looking at whether his non-culpable absences were excessive for the purpose of a termination analysis. It seems incongruous that what might push an employee over the top of excessiveness is absence caused by disability.

[215] What the City appears to be arguing is an end run around the *Human Rights Act*, attempting to do something indirectly that it cannot do directly. This is inappropriate, and the Majority acted reasonably in excluding consideration of the disability-related absences.

4. The reasons were inadequate or they were not justifiable, transparent and intelligible to conclude that the record of absences was not excessive having regard to the average number of incidents and absences of co-workers and the case law

[216] The City argues that the Majority erred by concluding that the Grievor's absences were not so excessive as to warrant termination in the context of the co-worker average or in the context of terminations in other cases where termination for innocent absenteeism was upheld.

(i) Grievor's record compared to co-workers

[217] As noted by the City, the Grievor's absence record exceeded the average in each of 2010 to 2014 by margins of 31% to 192%. The 192% year (2011) was the year of the first carpal tunnel surgery. The next highest year (2010) was 118%.

[218] Adjusted by removing the disability-related absences, the absences apart from the first three months of 2014 were between 15 and 19.75 shifts compared to the average number of shifts missed, being 13 to 15 shifts.

[219] Having concluded that the Majority was reasonable in ignoring disability-related absences, the Majority recognized that the Grievor's absences exceeded the averages, stated "our task…is to determine whether, in all of the circumstances, the Grievor's absences were so excessive and imposed such a burden on the City, that termination was justified."

[220] I conclude that the Majority was reasonable in taking the approach it did: not considering itself bound by the fact that the Grievor's absences (viewed either with or without the disability-related absences) exceeded the worker average.

[221] The Majority's approach was in keeping with the approach taken in ***Coast Mountain (Knight)*** and in ***UAW v Massey-Ferguson,*** and meets the reasonableness test and the test for the sufficiency of reasons.

(ii) Grievor's record compared to other cases

[222] The City argues that the Majority should not have relied on cases that were not on point, especially ones that were not submitted by either party. Indeed, the City argues that the excessiveness analysis should have ended with the determination that the Grievor's absences exceeded the averages.

[223] I do not see that the Majority did any more than consider the Grievor's record with the records of employees in other cases where the arbitrators characterized the absences as "serious situations, extremely excessive absenteeism."

[224] The essence of the Majority's decision in this area is that "excessive absenteeism" is not defined by the City-imposed standard under the AMP. In this regard, they were reasonable to do so. The reasons meet the test for sufficiency.

[225] I find no error on the part of the Majority in referencing the absenteeism in other cases.

B. Likelihood of Regular Future Attendance

[226] Part Three of the ***Shelter Regent*** test is whether the employee is likely to be able in the future to maintain a reasonable level of attendance. The City argues that the Majority erred by applying a different test than that discussed in ***Shelter Regent***; that procedural fairness was breached by the Majority when it applied a different test without giving the City an opportunity to respond; that the Majority unreasonably failed to draw the refutable inference from the Grievor's excessive absenteeism that he was unlikely to return to regular attendance in the future; and the Majority's assessment of excessiveness was unreasonable.

1. Unreasonably applying a different test

[227] The City's complaint here is that the Majority considered hardship to the City in the context of "regular future attendance", when ***Shelter Regent*** deals with hardship only in the context of the duty to accommodate, if such a duty arises.

[228] The City's position is that future regular attendance is to be defined by the AMP. Because of the AMP and the settlement of the policy grievance by the unions having bargaining relationships with the City, the City says that the Majority was unreasonable by applying a different test or benchmark.

[229] The City relies on ***Massey-Ferguson*** for the point that the employer is entitled to expect that excessive absenteeism will cease or at least "come within the range of reasonable expectation for the employees" (at para 8). ***Re Crouse-Hinds Canada*** repeats that concept, but again couched in terms that the employer's expectations must be reasonable.

[230] I do not see that the Union is estopped from challenging the AMP in the context of an individual dismissal. Estoppel is not argued by the City, and no law was cited to me to suggest that the settlement of a policy grievance has the effect of rendering an employer's policy reasonable and enforceable in all situations.

[231] The Majority was not unreasonable in going beyond the AMP to determine the parameters of what might constitute attendance within the range of reasonable expectations for the employer. The case law does not give any particular guidance on the subject, and it bears repeating that this is an area where each case turns on its own facts and precedent is of limited value.

[232] ***Shelter Regent*** is not the be-all and end-all of cases on the subject of non-culpable absenteeism. It is not unreasonable for arbitrators, such as the Majority here, to attempt to define what, in the circumstances of the case before them, might constitute reasonable attendance.

[233] It is also not unreasonable, in my view, for an arbitrator to consider reasonable attendance in the context of the impact of absences on the employer. As a result, I find no reviewable error here.

2. Breach of Procedural Fairness

[234] The City suggests that the Majority erred by dealing with the reasonableness of the AMP requirements in the context of the prospective return to regular attendance. It says that the Majority did so without any notice to the City and without giving the City an opportunity to argue the point.

[235] The City suggests that if the Majority had given notice of its intention to consider the matter in the way it did, the Union might have conceded that the Employer's standard amounted to a reasonable standard of regular attendance.

[236] As such, the City submits that *audi alterum partem* was violated. Breaches of natural justice are generally dealt with on a correctness standard.

[237] While I agree that decision-makers should give those appearing before them the opportunity to know the case they have to meet, the City's argument is entirely speculative. I have no doubt that there was common ground at the hearing that the Grievor was unlikely to

return to regular attendance in the future to the extent that regular attendance was defined by the AMP.

[238] For the reasons expressed above, I have concluded that it was not unreasonable for the Majority to decide that it was not bound by the AMP in determining whether the Grievor's absences were excessive for the purpose of terminating his employment. I have also concluded that it was not unreasonable for the Majority to decide that the prospective return to regular attendance was also not governed entirely by the AMP.

[239] From a review of the arguments submitted by the parties following the hearing, it is clear that the Union did argue that the arbitrators should consider the impact on the City in the context of consideration of the likelihood of the Grievor returning to regular attendance in the future. It also argued that the AMP provisions were not determinative in assessing whether the Grievor's absenteeism could justify termination.

[240] The test for the duty of procedural fairness was discussed in ***SEIU-West v Saskatoon Regional Health Authority***, 2015 SKQB 61. There, at paragraph 45, CL Dawson J referenced *Jones and de Villars, Principles of Administrative Law*, 3d ed (Scarborough: Carswell, 1999) at p 514:

> Perhaps the better way to look at this question is to articulate a separate test for judicial review of alleged breaches of natural justice: namely, would a reasonable person, reasonably knowledgeable about all the facts, reasonably perceive that the process is unfair? This echoes the way the Rule Against Bias is usually articulated, but it can be generalized to apply to all alleged breaches of natural justice. Of course, the reasonable person is the court. If this question is answered affirmatively, then the standard for review has been tripped, and the delegate's proceedings should be quashed.

[241] That case discusses arbitration awards where the arbitrator made his decision based on considerations not argued. In particular, the City relies on the Court's finding that the "arbitrator proceeded to analyse the grievance on a basis of and on a method of analysis not presented or argued by the parties" (at para 62). As a result, the award was overturned and remitted to the same arbitrator to hear further argument.

[242] ***AltaLink*** contains a similar analysis at paragraph 54.

[243] Here, I am not satisfied that the City has shown that it was caught by surprise by the approach taken by the Majority, or that it had no opportunity to argue the contrary viewpoint to what had been argued by the Union. The City may have had a belief that its arguments concerning the AMP would prevail, but I do not see that the Majority's approach created any procedural unfairness. The arguments submitted to the arbitrators following the hearing demonstrate that the process was fully adversarial.

[244] This ground of review is unsuccessful.

[245] As an alternative approach, if the Majority should have given the City some opportunity to respond to its approach concerning the refutable inference, as discussed in the section below, this issue is in any event moot because the fact findings relating to Part One, excessiveness, did not create any circumstance where the refutable inference might arise.

3. Failure to draw refutable inference

[246] The Majority did not in the circumstances draw the inference from the Grievor's absences that he would not be able to return to regular attendance. In addition, the Majority did not put the onus on the Grievor to demonstrate on balance that he would be able to do so.

[247] As a result, the City says the Majority decision was unreasonable because they failed to apply the appropriate test from ***Shelter Regent***.

[248] At the end of the analysis, the City's argument depends on a finding that the Grievor's absences were excessive. That in turn depends on two things: that the AMP defines excessiveness, and that the Majority erred by not including disability-related absences.

[249] I have concluded above that they made no error, and they were not unreasonable, in assessing "excessiveness", for them to go beyond the AMP and look at other factors. I have also concluded that it was not unreasonable for the Majority to have excluded the Grievor's disability-related absences.

[250] That essentially ends any complaint about the Majority's failure to draw the refutable inference described in ***Shelter Regent***. The refutable inference arises only when the trier of fact has concluded that the employee's absences were excessive. Here, the Majority concluded that the absences were not excessive, so the inference does not arise.

[251] As a result, the approach to the third test in ***Shelter Regent***, and repeated in ***Tolko***, is really not relevant to this case.

[252] In ***AltaLink***, Arbitrator Sims stated that the refutable inference was "usually" drawn, stating at paragraph 183:

> 183 The second significant requirement for a non-culpable termination is just such a prognosis. We accept that we must consider the entire course of employment in addressing this issue. We also accept that in many cases it is reasonable to infer, from the past, that the employee will not be able to work with reasonable regularity in the future. However, the appropriateness of drawing such an inference depends upon the overall circumstances. The medical reasons for Ms. Merrell's absence were not indeterminate; there was an expectation of a measure of cure and a potential for improvement through surgery. While there were chronic aspects to her condition, it was a condition that she had lived with throughout her adult life while maintaining employment. That condition had been aggravated by an accident, but that aggravation was not expected to be permanent.

[253] It is thus not necessary for me to decide the issue as to whether the Majority would have been required to draw the refutable inference had they concluded that the Grievor's absences were excessive. I do find the analysis in ***AltaLink*** persuasive. It is an offshoot of the fact that each case will generally turn on its own facts.

[254] I conclude that there was nothing unreasonable about the Majority here not drawing the refutable inference sought by the City. The inference did not arise on the facts as found by the Majority.

4. Unreasonable assessment of excessiveness

[255] There is some overlap in the arguments concerning excessiveness under step one of ***Shelter Regent*** and the return to a reasonable level of attendance under the third step. The City amplified its arguments concerning the reasonableness of the Majority's fact findings in this regard in the context of the third step. It argues that the Majority was unreasonable in its assessment of the evidence on excessiveness by relying on irrelevant factors, making findings that were unsupported by the evidence, and making findings that were not justifiable, transparent or intelligible in their reasons.

[256] In particular, the City argues that the Majority unreasonably considered and relied on four ailments, instead of recognizing that the Grievor had "a pattern of intermittent and recurring absences due to a variety of unrelated illnesses or injuries which have been unpredictable and unrelated", citing ***Coast Mountain (Knight)*** at paragraph 72.

[257] Additionally, the City submits that the Majority erred by linking unrelated absences without medical evidence, and that the Majority relied unduly on findings of improvement that were not made out in the evidence.

[258] These are fact findings, such that the City bears a strong onus to demonstrate that the Majority's decisions should not be given considerable deference.

(i) Four ailments

[259] The City's complaint is that there are four ailments the Majority focused on, and that each of them had essentially resolved. The Majority failed to consider all of the other absences, and the fact that these other absences constituted the "classic case of intermittent and recurring illnesses or injuries" reference in ***Coast Mountain (Knight)***.

[260] These four ailments were two that the Majority concluded were disabilities (carpal tunnel syndrome and acute stress) and two that were not found to be disabilities (tachycardia and the 2014 chest-related illnesses).

[261] The City notes that despite the non-recurrence of the four ailments, the Grievor's absences for his last three months of employment were significantly above the employee average. The City also notes that the majority of incidents involved the flu, which was not considered by the Majority. These two factors demonstrated that the Grievor was unlikely to return to regular attendance because of his "propensity for illness in general". The City characterizes the Majority's focus on the four ailments and the absence of focus on the flu as an unreasonable weighing of the evidence.

[262] Concerning one of the four ailments, tachycardia, the City argues that it was unreasonable for the Majority to agree with the Union's submission that it had resolved.

[263] I do not see any merit to the City's arguments in this area. The Majority made fact findings, based on the evidence they heard. Fact finders are entitled to draw inferences from the evidence. The weight to be given to particular pieces of evidence is for the trier of fact. Rarely will a fact finding be found to be unreasonable because a reviewer might have given more weight to something than did the trier of fact.

[264] I do not see that there was anything irrelevant considered that had any apparent impact on the Majority decision. It was not unreasonable for the Majority to agree with the Union that the

tachycardia had resolved. It arose in October, 2012 and caused the Grievor to miss nine shifts. There was no recurrence up to the time of the Grievor's dismissal some 18 months later.

[265] Even if the Majority should have required medical evidence on the point, and the medical evidence was to the effect that the tachycardia had not resolved, I am not sure where that gets the City. Unresolved tachycardia suggests an ongoing disability, which may have been problematic and may have required accommodation. I do not see it as an error of any kind for the Majority to find that the tachycardia had resolved on the facts before it, when the Grievor was arguing that it had and was not trying to argue that it was an ongoing problem. If the City had some concern over this particular ailment, it had the opportunity if it wanted to call evidence on the point. For the purposes of the argument before the arbitrators, the City seemed to be content to rely on what it characterized as the Grievor's failure to call sufficient medical evidence concerning his ability to return to regular attendance.

[266] It simply makes no sense that the City now argues that the Majority's finding on tachycardia "in and of itself amounts to a reviewable error" and that the "Majority's determination on regular future attendance cannot survive judicial review."

[267] In summary, these were not unreasonable fact findings and the Majority is entitled to deference.

(ii) Linking unrelated absence without medical evidence despite contrary evidence

[268] The Majority speculated that the Grievor's absences during the last three months of his employment may have been linked. It noted that "the City, who bears the ultimate onus in this case, did not explore the reasons for these absences in any detail with the Grievor."

[269] The City argues that the Majority's "conclusion with respect to likelihood of regular attendance was based significantly on the Majority's reasoning and finding that the absences … were all due possibly related to one condition or illness."

[270] The Majority's reasons must be read as a whole. At paragraph 47, they concluded:

> 47 Looking at the record of absences as a whole over the period between January 1, 2010 and March 31, 2014 and giving consideration to both the apparent resolution of the conditions that caused the longest absences and the improvement in the grievor's attendance during that time period, we can not say that it is unlikely that the grievor will be able to achieve acceptable attendance in the future. By that, we do not mean that the grievor will necessarily achieve the AMP standard representing the average number of absences and incidents of others in his classification. But it is likely that he could achieve reasonable levels of attendance and not impose any significant hardship on the City's operations.

[271] It was indeed up to the City to demonstrate that termination was justified. No "refutable inference" applied in this case because of the Majority determination that the absences were not excessive under Part One of the ***Shelter Regent*** test. In the absence of that onus being placed on the Grievor, I see no error on the Majority's part in recognizing the City's onus.

[272] I do not read the Majority reasons as making a fact finding that the 2014 absences were related; the reasons expressly say that the absences might be related. There was no challenge to

the fact finding the City did not explore these absences with the Grievor in any detail. What the Majority did say is that they were concerned about the 2014 absences (at paragraph 45), but that it had no significant medical evidence on these.

[273] The City says this speculation was contrary to the evidence, as sick notes referenced pneumonia, chest and bronchitis. Without medical evidence, I do not see that the City can suggest that pneumonia, chest and bronchitis are unrelated, any more than the Grievor can suggest they are.

[274] I do not see that there was any reliance one way or the other on this gap in the evidence. I do not see that the Majority's finding as to the likelihood of improved attendance was improperly or inappropriately influenced by the Majority's speculation. There was nothing unreasonable in their conclusion in that regard.

(iii) Undue reliance on an unreasonable finding of improvement

[275] At paragraph 46 of the Majority decision, they stated:

> 46 The AMP indicates that one of the preconditions to contemplating termination is "attempts to rectify the identified problem have failed to result in a significant improvement in attendance." This is consistent with the jurisprudence. A review of the grievor's record over the four years in question suggests that the City's attempts to reduce the grievor's number of absences resulted in improvement in the grievor's attendance. As outlined above, after the grievor was placed on Level II in November 2010, his attendance dramatically improved, largely because he did not have a reoccurrence of the acute stress disorder, which had accounted for 40% of his absences in 2010. He was absent for only seven incidents and 15 shifts and on that basis he was not moved to Level III. Similarly, in the first year following being elevated to Level III (February 24, 2012 to February 24, 2013) he was absent for only seven incidents and 23 shifts, with the tachycardia accounting for nine of those shifts. So the absences attributable to unpredictable, sporadic illnesses amounted to only six incidents and 14 shifts during that year.

[276] The City says that the Majority gave undue weight to their unreasonable finding of improvement. This is again largely a factual determination by the Majority. The Majority's finding is entitled to deference.

[277] The City argues that any improvement in attendance should have been analyzed from the time of the dismissal "taking into account the employee's entire absence record in question and in thi case having regard to the Employer's reasonable AMP with the attendance standards it provided for (annual incidents of 3 or less and annual days of absence, 13-15)".

[278] The City suggests that improvement must therefore be assessed in the context of the City's expectations.

[279] Additionally, the City argues that the Majority unreasonably relied on improvements dating back to 2013, noting that the Grievor's absenteeism for the year preceding his dismissal was significant even disregarding the second wrist surgery and WCB incident.

[280] The City also takes issue with the Majority discounting the tachycardia absences from the period of observed improved attendance, arguing that "it was also inexplicable and unreasonable for the Board to discount" these absences, as it provided no explanation for its determination that tachycardia was not an "unpredictable and sporadic" illness.

[281] I cannot say from my review of the City's arguments and the Majority reasoning that there is anything unreasonable in the conclusion they came to. They were entitled to draw inferences from the evidence. The City quoted with approval the ***Tolko*** decision and the approach taken by the arbitrator there at paragraph 73:

> 73 If the hernia condition was the main reason for the Grievor's poor attendance, its resolution, albeit with restrictions, should have resulted in a significant attendance improvement following the Grievor's return to work in July 2008, rebutting the presumption that the Grievor's past poor attendance was unlikely to change. If following the surgery the Grievor's attendance improved to an acceptable level, then it would be reasonable to conclude that the medical treatment of his hernia had resulted in a positive change in Grievor's prospects for regular attendance, notwithstanding an extremely poor attendance record pre-surgery. On the other hand, a failure to achieve acceptable attendance after surgery would lead to the opposite conclusion -- that there was little likelihood of regular future attendance.

[282] Indeed, their conclusions were reasonable in the framework of their decision: reasonable attendance in their definition of reasonable attendance, not the definition provide by the AMP.

[283] There is nothing that it not justifiable, transparent and intelligible about their reasoning.

C. *Prima facie* discrimination

[284] The Majority stated that the City had not claimed undue hardship "so it may not rely upon the absences due to disability to justify termination" (at para 60).

[285] In its analysis of the Grievor's absences, the Majority noted that the City had agreed the carpal tunnel surgeries and related absences fell within the definition of disability. It reviewed the medical report from the Grievor's doctor and concluded from it that the stress following the death of the Grievor's wife fell within that category as well. Those conclusions were not unreasonable.

[286] The Majority felt that it did not have enough information to determine if the tachycardia and the 2014 chest-related illnesses were "disabilities" requiring accommodation under the *Human Rights Act*. They correctly noted that the Grievor had not sought any accommodations before his dismissal. They did not consider absences relating to those ailments as "disabilities" for the purpose of their decision. That too was not unreasonable.

[287] The Majority concluded at paragraph 63:

> 63 Like Arbitrator Williamson in Ingersoll, we conclude that the City should not have relied on the grievor's absences due to disability to justify his termination as it had not endured any undue hardship accommodating those absences. If those absences (carpal tunnel syndrome; acute stress disorder) are removed from consideration, the following represents the grievor's absenteeism each year beginning January 1, 2010:

2010 -- 6 incidents and 19.75 shifts

2011 -- 7 incidents and 15 shifts

2012 -- 5 incidents and 16.34 shifts

2013 -- 7 incidents and 16 shifts

2014 (to March 31) -- 5 incidents and 26 shifts

[288] The City argues that the Majority should not have considered discrimination at all because there was no connection or link between the "disability" absences and the Grievor's dismissal. It also argues that the Majority erred by not applying the correct degree of proof.

[289] According to the City, the Majority reasons are flawed because they make no reference to *prima facie* discrimination and the balance of probabilities. It points to ***Sunrise Poultry Ltd v United Food and Commercial Workers' Union*** as an example of where the arbitrator took the correct approach.

[290] The City also argues that the evidence did not support the Majority's conclusion.

1. Onus and connection

[291] I do not need to spend a lot of time with the City's argument in this regard. It relies on ***Quebec v Bombardier Inc***, [2015] 2 SCR 789, regarding *prima facie* discrimination. The City focuses on onus and argues that the Grievor did not meet the necessary onus of proof on him to demonstrate *prima facie* discrimination.

[292] ***Quebec v Bombardier*** is a case under the Quebec *Charter of Human Rights and Freedoms*. In that case, a Bombardier employee sought a remedy under the Quebec *Charter* claiming that he had been discriminated against in his employment. The onus was clearly on him to prove the three elements of *prima facie* discrimination (differential treatment, that the treatment was based on a prohibited ground, and impact).

[293] The case is most important for its conclusion that the second element requires that the discrimination be a factor in the differential treatment.

[294] While the arbitrator in ***Sunrise Poultry*** correctly recited the test for *prima facie* discrimination, that case turned on the arbitrator's decision that the relevant absence was not a disability within the meaning of the BC Human Rights Code. It does not deal with the other parts of the test. It is readily distinguishable here, as the City conceded at the hearing that the carpal tunnel syndrome was indeed a disability.

[295] The issue here is really the connection or factor issue, and not any of the other parts of the test.

[296] I frankly see no difficulty or error in the manner in which the Majority approached the issue of disability. It recognized that the Grievor had established to its satisfaction that the stress and carpal tunnel injuries were due to disabilities. Differential treatment was obvious: the Grievor was dismissed. There was a connection between the disability and the dismissal as the City negotiator acknowledged that she had reviewed the Grievor's entire record of absences and had considered the first carpal tunnel surgery absences in her decision to terminate. She said she had "discounted" (whatever that meant) the second carpal tunnel surgery absence. There was

accordingly an obvious link or connection between the differential treatment and a prohibited ground. It clearly had an impact on the Grievor.

[297] I place no significance on the fact that the Majority did not say "we find this to be so on a balance of probabilities". I think triers of fact such as labour arbitrators are entitled to deference in their fact findings, regardless of whether they recite the legal burden of proof or not. There is only one burden of proof in a labour arbitration: a balance of probabilities. There is nothing in the decision to suggest that the Majority ignored the necessary burden of proof, or that they misplaced the onus.

[298] I see no legal error in the Majority treatment of *prima facie* discrimination.

2. Presumption not supported by facts

[299] The real issue is the City's contention that the Majority erred by considering disability-related absences in its decision, as the disability-related absences had resolved long before the termination.

[300] The City seeks to distinguish ***Ingersoll***, on which the Majority heavily relied, because in ***Ingersoll***, the employee was still suffering from a disability at the time of his dismissal. It also notes that in ***Hamilton*** (also an AMP case), removal of the disability-related absence from consideration brought the employee under the employer's threshold.

[301] I do not read ***Hamilton*** as suggesting that if the employee's record was still over the employer's threshold after removing the disability-related absence, his dismissal would have been upheld.

[302] At paragraph 10 of ***Hamilton***, the arbitrator stated:

> I conclude here that it (the employer) may not, in any individual case like this one, rely upon or apply the program rules such that a statutorily protected absence at Level 7 (of the employer's AMP) would be part of the grounds relied upon for termination.

[303] The arbitrator did not qualify his conclusion by saying "so long as the absence occurred shortly before the dismissal."

[304] I agree whole-heartedly with the Majority's comment at paragraph 60:

> 60 With respect, an employer can not escape a finding of discrimination by accommodating an employee while he is disabled and then terminating him once he recovers based on those same absences. Section 7 of the Act expressly prohibits terminating employment because of physical or mental disability. If the City relied upon the grievor's absences due to disability to terminate his employment, that termination is unlawful unless continuing the grievor's employment creates an undue hardship. In this case, the City does not claim undue hardship so it may not rely upon the absences due to disability to justify termination.

[305] As for the City's concerns about the sufficiency of evidence relating to the extent to which unlawful discrimination needs to be a factor in the dismissal, *prima facie* discrimination is made out when a prohibited ground becomes an identifiable factor in the differential treatment.

[306] That is clearly made out on the evidence here as the first carpal tunnel syndrome absences played a factor in the decision to terminate. It is unclear if the second carpal tunnel syndrome absence was considered as the negotiator used the term "discounted" relating to that absence. The plain meaning of "discount" is different from "ignore". When merchants "discount" their prices, they reduce them, not eliminate them altogether. I accept, however, that the negotiator may have intended to equate discount with "ignore". This matter should not turn on the parsing of words, and does not need to do so as the negotiator was candid in acknowledging that the first carpal tunnel syndrome absence was considered.

[307] The City relies on ***Coast Mountain (2006)*** where the arbitrator noted at paragraph 48 that the employee's most recent absence was "unrelated to the chronic condition" but that after "discounting" the chronic condition absences, the employee's absenteeism was still unacceptable.

[308] In that case, there was evidence that while the employee's past medical conditions were chronic, they were "not disabilities because they were controllable". At paragraph 104, the arbitrator noted that the employee's "depression related absenteeism was a factor in the employer's monitoring and interventions under the Attendance Management Program", but it was not a reason for his dismissal."

[309] That was a fact finding made by the arbitrator on the evidence before him. In this case, the Majority made a contrary fact finding that is supported by the evidence: the Grievor suffered from a disability (carpal tunnel syndrome) and it was considered in the decision to dismiss him.

[310] The City's argument here is really that the Majority should have treated the carpal tunnel syndrome absences like the arbitrator in ***Coast Mountain (2006)*** treated the employee's depression. That is entirely a question of fact finding, and there was evidence on which the Majority could reasonably conclude that previous disability was a factor in the Grievor's dismissal.

[311] There is accordingly nothing unreasonable about their fact findings in this regard or the Majority's decision on *prima facie* discrimination.

Conclusion

[312] The City has not demonstrated that the Majority decision was unreasonable in any way that affected their decision. No errors of law have been shown in the Majority's understanding of and application of the relevant legal principles involved in this case.

[313] Essentially, the City's application is founded on their submissions that the AMP is a reasonable policy and is binding on its employees. The Grievor's absences, however analyzed and characterized, exceeded the permitted absences under the policy. The Grievor failed to demonstrate that he would likely be able to attend work in accordance with the AMP in the future. There was no relevant element of unlawful discrimination such that the Grievor's dismissal was justified.

[314] In dismissing the City's application, I have found as follows:

1. An AMP that is not part of the collective agreement is not a term or condition of the employee's employment;

2. When disciplinary action is contemplated or taken as a result of non-compliance with an AMP, a grievance arbitrator is not bound to apply the provisions of the AMP and the grievance arbitrator may consider other factors including those relating to the common law doctrine of frustration of contract;

3. Absences described in an AMP as "excessive" are not necessarily excessive for the purposes of considering whether an employee's attendance record is excessive to the extent necessary to justify dismissal for innocent or non-culpable absenteeism;

4. In considering whether an employee will likely be able to return to reasonable attendance in the future, "reasonable attendance" is not necessarily defined by the provisions of the AMP, and a grievance arbitrator is entitled to consider other relevant factors in considering what "reasonable attendance" may be for the particular employee performing the particular type of work for that employer; and

5. Employees may establish *prima facie* discrimination if they can demonstrate that one of the prohibited grounds of discrimination under the *Human Rights Act* was a factor in differential treatment, regardless of when the discrimination occurred.

[315] I understand the City's interest in encouraging regular attendance. Absences cause employers operational challenges. However, I do not see the law as having moved to where the City would like it: that they can by implementing an AMP blow through the common law doctrine of frustration of contract.

[316] As a result of my analysis, the City's application is dismissed. I am satisfied that the Majority decision was a reasonable decision and that it was unaffected by any reviewable error.

[317] The City's attack on the Majority decision resembled the "line-by-line treasure hunt for error" decided in ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd***, 2013 SCC 34 at para 54, cited by Phillips J in ***CITC v Communications, Energy and Paperworkers' Union of Canada, Local MI***, 2014 ABQB 329 at para 32.

[318] The Majority decision, analyzed as an "organic whole" is reasonable and should not be disturbed.

[319] If the parties are unable to agree on costs, they may contact me within 45 days from the date of this decision to arrange a process for resolving any dispute.

Heard on the 16th and 21st days of September, 2016.
Dated at the City of Edmonton, Alberta, this 27th day of January, 2017.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

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