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2007 FC 28 (CanLII)

Ottawa, Ontario, January 16, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CHANDER P. GROVER

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The National Research Council of Canada (NRC) suspended Dr. Chander P. Grover's employment indefinitely without pay because he would not undergo an examination by a physician chosen by the employer. The adjudicator ruled that the NRC did not have sufficient grounds to make such a request and allowed Dr. Grover's grievance. The Applicant asserts that the adjudicator erred and that the decision should be quashed.

JUDICIAL PROCEDURE AND ISSUE

[2] The present application for judicial review concerns a decision by an adjudicator with the Public Service Labour Relations Board (Board). The case raises a significant issue for labour and employment law: what is the balance to be struck between an employee's right to privacy and an employer's legitimate duty to maintain a safe workplace?

BACKGROUND

[3] Dr. Grover is a physicist specializing in the field of optics. He began work for the NRC in 1981. In 1996, Dr. Grover was appointed as the Director of a newly created section, the Radiation Standards and Optics Section with the Institute of National Measurement Standards (INMS). The section was comprised of four groups: Ionizing Radiation Standards, Optics, Photometry & Radiometry, and Photonic Systems. (Decision of the Adjudicator, dated October 3, 2005 at paras. 9-10; Applicant's Application Record (AAR), Vol. 1, Tab 2, p. 7; Exhibit E-15, Transcripts of the Canadian Human Rights Tribunal, dated May 21, 1996; AAR, above, Tab 5-80, pp. 377 and 381)

[4] Dr. Grover's appointment as Director, and the creation and structure of his section, was the result of a finding of discrimination against the NRC. Three other human rights complaints by Dr. Grover from the 1990s remain outstanding before the Canadian Human Rights Commission. There is also an ongoing action for discrimination under the *Canadian Charter of Rights and Freedoms*, Schedule B, Part I to the *Canada Act 1982 (U.K.) 1982 c.11* filed in 2002. (Exhibit E-15, above; AAR, above, p. 373; Decision of Adjudicator, dated October 3, 2005, at paras. 9-10; AAR, above, Vol. 1, Tab 2, p. 7)

[5] On August 1, 2003, Dr. Peter Hackett, a Vice President with the NRC, was appointed the Acting Director General for the INMS in addition to his regular duties. Dr. Grover attended a management committee meeting with the new Acting Director General on September 3, 2003. He found that Dr. Hackett treated him poorly during the meeting and began to suspect that the real purpose of Dr. Hackett's appointment was to address his own situation. (Decision of the Adjudicator, above, at paras. 12-13; AAR, above, Vol. 1, Tab 2, p. 8)

[6] Dr. Grover wrote to Dr. Arthur Carty, the President of NRC, to express his concern that "this arrangement is directly linked to my situation, and that Dr. Hackett has been sent to deal with me." He closed his letter by saying, "The aggregate of these issues has caused me considerable stress." (Exhibit G-6: Letter from C. Grover to A. Carty, dated September 8, 2003; AAR, above, Vol. 3, pp. 423-423)

[7] Dr. Hackett also wrote to Dr. Carty about the September 3, 2003 INMS management committee meeting. He reported that he found Dr. Grover's, conduct during the meeting to be inappropriate. He ended his memo by stating: "Dr. Grover's behaviour would make it very difficult to manage the INMS using the management committee as the primary management instrument. I shall consider other approaches." (Exhibit G-5: Memo to Arthur Carty; AAR, above, Vol. 3, p. 321)

[8] Throughout the fall of 2003, Dr. Grover became increasingly uncomfortable with Dr. Hackett's approach towards him and the management of the INMS. The situation came to a head when the two again openly disagreed during a management committee meeting held on January 14, 2003. Among other things, Dr. Grover had expressed concerns about Dr. Hackett's plan

to expand the management committee to include Group Leaders. Dr. Grover again found that Dr. Hackett treated him poorly during the meeting in front of his colleagues. (Decision of the Adjudicator, above, at para. 17; AAR, above, Vol. 1, Tab 2, p. 8; Exhibit E-2: Letter from C. Grover to A. Carty, dated January 20, 2004; AAR, above, Vol. 2, p. 310)

[9] After the January 14, 2003 meeting, Dr. Hackett confronted Dr. Grover. According to Dr. Grover, Dr. Hackett accused him of being disruptive “and said that he would not tolerate this any further.” Dr. Grover wrote again to the NRC President to protest what he viewed as mistreatment by Dr. Hackett. He stated: “It seems as though Dr. Hackett is purposefully trying to antagonize me, and minimize my role within the Institute. This has caused me a significant amount of stress and has made it difficult for me to function effectively.” (Exhibit E-2, above; AAR, above)

Medical Certificates and Increasing Friction with NRC

[10] Not long after this letter to Dr. Carty, Dr. Grover attended with his regular physician, Dr. Marcel Reny. A medical certificate was issued by Dr. Reny which prescribed that Dr. Grover take “stress leave for four weeks, spread over eight weeks, as required”. Dr. Hackett accepted this certificate and the sick leave was authorized. (Decision of the Adjudicator, above; AAR, Vol 1, Tab 2, p. 8)

[11] Over the ensuing months, other issues arose between Dr. Hackett and Dr. Grover. In February 2004, Dr. Hackett directed Dr. Grover to participate in a performance and merit review. Dr. Grover explained that the NRC President had exempted him from such reviews since the human rights settlement of 1996. On March 8, 2004, President Carty wrote to Dr. Grover that: “as Dr.

Hackett communicated to you in his letter dated February 19, 2004, I expect PPRs and Merit Reviews to be conducted for all managers here at the NRC.” (Decision of the Adjudicator, above; AAR, above, Vol. 1, Tab 2, pp. 8-9)

[12] Dr. Grover testified before the Board that he did not interpret Dr. Carty’s letter to mean that the 1996 agreement regarding his participation in these process was specifically rescinded. He simply could not believe that the President would do that. At the same time, Dr. Hackett began to threat Dr. Grover with discipline if he did not participate. (Decision of the Adjudicator, above at para. 20; AAR, above, Vol. 1, Tab 2, p. 9; Affidavit of Chander Grover at para. 9; AAR, above, Vol. 4, Tab 9, p. 939)

[13] Dr. Hackett also wanted Dr. Grover to urge his employees to participate in the “Evolution” process, which was established to review and re-organize the INMS. Given that co-operation was voluntary, Dr. Grover explained that he regarded constant reminders to his staff as “arm twisting”. Dr. Hackett took objection to Dr. Grover’s views, advising on March 4, 2004, that he regarded Dr. Grover’s responses as “insubordination and misconduct”. (Exhibit G-10; Series of email between P. Hackett and C. Grover; AAR, above, Vol. 3, pp. 523-525, 524 for quote)

[14] On March 30, 2004, Dr. Grover returned to his physician and was issued a second medical certificate with the same prescription as before – 4 weeks sick leave, to be used over 8 weeks as required. Dr. Grover generally used this sick leave by taking off those days – Mondays and Fridays – when management committee meetings were scheduled. He testified before the Board that he was

intentionally avoiding Dr. Hackett because he found the encounters to be extremely stressful.

(Decision of the Adjudicator, above at paras. 21 and 25; AAR, above, Vol. 1, Tab 2, p. 9)

[15] Dr. Hackett had noted Dr. Grover's absence from management committee meetings and the fact they coincided with the days Dr. Grover took for sick leave. Dr. Hackett testified before the Board that he regarded attendance at these meetings to be a primary responsibility for managers. In April 2004, Dr. Hackett changed the days of the week on which the meetings were scheduled to see if this would improve Dr. Grover's attendance. He found that Dr. Grover's sick days changed to those same days. (Decision of the Adjudicator, above at para. 30; AAR, above, Vol. 1, Tab 2, p. 10)

[16] Following an analysis of Dr. Grover's use of sick days over this period, another NRC manager, Mr. Steve Blais, reported to Dr. Hackett that it was evident that Dr. Grover was using sick leave to avoid management committee meetings. Mr. Blais, who was advising Dr. Hackett on his handling of Dr. Grover throughout this period, concluded that this was a "flagrant misuse of the leave". (Exhibit E-1, Tab 9: Email from S. Blais to P. Hackett, dated June 3, 2004; AAR, above, Vol. 1, Tab 5-B-9, p. 80; Exhibit G-11: Email between S. Blais and P. Hackett, dated April 28, 2004; AAR, above, Vol. 3, p. 528)

[17] Dr. Hackett never told Dr. Grover about the concerns regarding his absences from management committee meetings. Dr. Hackett also testified that he was not ready to accept the conclusion that Dr. Grover was abusing sick leave. (Decision of the Adjudicator, above at para. 34; AAR, above, Vol. 1, Tab 2, p. 10)

[18] Another disagreement arose between Dr. Grover and Dr. Hackett with respect to the nomination process for a group leader position in Dr. Grover's section. On April 26, 2004, Dr. Hackett formally disciplined Dr. Grover with a written reprimand. Further disciplinary action was taken on the same issue on June 1, 2004, with the imposition of a three day suspension without pay. (Decision of the Adjudicator, above at para. 23; AAR, above, Vol. 1, Tab 2, p. 9)

[19] On the same day the discipline was levied, Dr. Grover had attended for a medical appointment. His regular physician, Dr. Reny, was unavailable, so he attended with Dr. A. Saeed, a colleague of Dr. Reny's. Dr. Saeed issued a medical certificate with the same prescription for sick leave as previously recommended by Dr. Reny. Dr. Grover provided the medical certificate to the NRC on June 2, 2004. (Decision of the Adjudicator, above at para. 27; AAR, above, Vol. 1, Tab 2, p. 10; Exhibit G-12: email from C. Grover to P. Hackett, dated June 2, 2004; AAR, above, Vol. 3, p. 530)

Medical Certificate Rejected

[20] After being notified of the June 1 discipline, Dr. Grover advised Dr. Hackett that he would be on sick leave from June 4, 2004 to June 28, 2004. Dr. Hackett responded with a letter dated June 10, 2004, which observed that this latest request for sick leave followed the June 1, 2004 discipline matter specified above. The letter further noted that it "is the third such certificate which you have produced since February 2, 2004 providing identical prescribed treatment and from two different physicians." (Exhibit E-1, Tab 8: Email from C. Grover to P. Hackett, dated June 3, 2004; AAR, above, Vol. 1, Tab 5-B-8, p.79; Part of Exhibit G-14: Letter from P. Hackett to C. Grover, dated June 10, 2004; AAR, above, vol. 3, p. 539)

[21] Dr. Hackett's letter further advised that the NRC would not accept the latest certificate "until such time as your medical situation has been confirmed by a physician of the NRC's choosing."

This physician would "determine both the validity of your current medical situation as well as your medical capacity to resume your duties and responsibilities." Dr. Grover was directed not to return to the workplace until Dr. Hackett received the results of this assessment. (Part of Exhibit G-14: Letter from P. Hackett to C. Grover, dated June 10, 2004; AAR, above, vol. 3, p. 539)

[22] At the time of Dr. Hackett's June 10, 2004, letter, Dr. Grover had been away from work less than 40% of the time since he tendered the first medical certificate dated January 27, 2004; however, he had maintained all of his duties with the exception of attending management committee meetings with Dr. Hackett. Dr. Grover was a senior manager with 44 employees reporting to him. He was also actively filling three Group Leader positions and did not have an administrative assistant. The NRC acknowledged that he had an unusually heavy workload, but also agreed that he was meeting his obligations with the exception of the management meetings. (Exhibit E-1, Tab 28: Memo re Dr. C. Grover sick Leave se; AAR, above, Vol. 1, Tab 5-B-28, p. 139; Exhibit E-1, Tab 1: INMS Organization Chart; AAR, above, Vol. 1, Tab 5-B-1, p. 72; Decision of the Adjudicator, above at paras. 29-30, 48 and 142; AAR, above, Vol. 1, Tab 2, p. 10, 13 and 29)

[23] Dr. Grover replied to Dr. Hackett's letter through his legal counsel. On June 18, 2004, counsel asked Dr. Hackett to identify the specific problems with the medical certificate and why it was deficient. Dr. Hackett was also advised that Dr. Grover attended with a new physician because his regular physician was unavailable. It was also explained that the new physician was provided with the previous medical certificates and "saw no reason to vary from the treatment which had

been prescribed” by the regular doctor. (Letter from D. Yazbeck to P. Hackett, dated June 18, 2004; AAR, above, Vol. 3, p. 546)

[24] Legal counsel for the NRC responded by letter that an assessment by “a physician designated by the NRC” was still required. On June 28, 2004, Dr. Grover returned to work. Dr. Hackett called him into his office and ordered him to leave the workplace. Dr. Hackett testified that it was a calm meeting whereas Dr. Grover described the encounter as being very difficult and that it left him humiliated and even scared. (Letter from R. Snyder to D. Yazbeck, dated June 23, 2004; AAR, above, Vol. 3, p. 548; Decision of the Adjudicator, above at para. 40; AAR, above, Vol. 1, Tab 2, p. 11)

[25] The NRC unilaterally scheduled a medical assessment for Dr. Grover with Comcare Health Services on June 30, 2004. Dr. Grover notified the NRC that he would not attend. This was met with a letter from Dr. Hackett on June 29, 2004, indicating that failure to attend would be considered insubordination. (Decision of the Adjudicator, above at para. 41; AAR, above, Fol. 1, Tab 2, pp. 12-13)

[26] Dr. Grover did not attend the scheduled examination. On July 7, 2004, Dr. Hackett wrote to advise Dr. Grover that a previously scheduled trip to Tokyo was cancelled. This was followed by a letter dated July 19, 2004, which explicitly disciplined Dr. Grover because he refused to attend with the NRC’s chosen physician. The letter stated, “Your persistent refusal to follow direction by continuing to blatantly disregard my instructions is unacceptable and cannot and will not be tolerated.” He was advised that he was suspended for three days without pay and that he may be

subject to further discipline, including termination. In a separate letter of the same date, Dr. Hackett advised that a new appointment with Comcare was scheduled within the next 48 hours and that Dr. Grover would be subject to discipline if he failed to attend. (Decision of the Adjudicator, above at paras. 42-44; AAR, above, vol. 1, Tab 2, p. 12)

[27] Also on July 19, 2004, the NRC's counsel wrote to Dr. Grover's counsel, expressly advising that Dr. Grover would not be entitled to participate in selecting a physician to conduct an independent medical evaluation. NRC counsel also emphasized again that failure to attend with the physician chosen by NRC would "attract consequences". (Part of Exhibit G-14: Letter from R. Snyder to D. Yazbeck, dated July 18, 2004; AAR, above, Vol. 3, p. 570)

[28] Dr. Grover wrote a letter to Dr. Hackett dated July 20, 2004. It indicated that he would not attend an examination with the NRC's chosen physician, but he would be prepared to subject himself to "an assessment by an independent physician agreed to by both myself and NRC". Dr. Hackett and the NRC did not bother to respond to this proposal. (Part of Exhibit G-14: Letter from C. Grover to P. Hackett, dated July 20, 2004; AAR, above, Vol. 3, p. 571)

[29] Dr. Hackett did write to Dr. Grover on July 28, 2004. He advised that "your refusal to attend the rescheduled IME set for July 21, 2004 with Comcare Health Services constituted a further act of insubordination". Dr. Hackett imposed a penalty of five days suspension without pay, to be served upon Dr. Grover's return to the workplace. In the same letter, Dr. Hackett further advised Dr. Grover that, due to his refusal to attend with Comcare, he was now in a "no work, no pay" situation

effective July 21, 2004, and his salary was ceased. (Part of Exhibit G-14: Letter from P. Hackett to C. Grover, dated July 28, 2004; AAR, above, Vol. 3, p. 675)

[30] On August 1, 2004, Dr. Hackett was replaced by Dr. Sherif Barakat as the Acting Director General of the INMS. Dr. Grover viewed this as an opportunity to resolve the situation. He wrote to Dr. Barakat indicating that he had been under stress since January 2004, but he was now ready to return to work. As evidence, he attached an updated medical certificate by his regular physician, Dr. Reny. (Decision of the Adjudicator, above at para. 50; AAR, above, Vol. 1, Tab 2, p. 3)

[31] Dr. Barakat sought advice about the situation from NRC Human Resources. Upon learning the background, he wrote to Dr. Grover, advising that his latest medical certificate was refused. He also refused Dr. Grover's request for vacation pay, thereby depriving Dr. Grover of any pay whatsoever. Finally, Dr. Barakat advised that the "no work, no pay" status would continue until Dr. Grover attended for an IME as scheduled by NRC. (Decision of the Adjudicator, above at paras. 51-52; AAR, above, Vol. 1, Tab 2, pp. 13-14; part of G-14: Letter from S. Barakat to C. Grover, dated August 10, 2004; AAR, above, Vol. 3, p. 588)

[32] On August 16, 2004, Dr. Grover wrote to Dr. Barakat. He again offered to undergo a medical assessment by a physician chosen by both NRC and himself. In the event this offer was refused, Dr. Grover asked for a rationale. This letter went unanswered by NRC. (Decision of the Adjudicator, above at para 53; AAR, above, Vol. 1, Tab 2, p. 14; Letter from C. Grover to S. Barakat, dated August 16, 2004; AAR, above, Vol. 3, p. 603)

[33] Dr. Grover requested a meeting with Dr. Barakat and they met on August 17, 2004. Dr. Grover wanted clarification on the matter and details on exactly what the NRC was looking for. He did not obtain any further information other than being informed that an NRC policy applied to his situation. He asked for a copy of this policy and the NRC's Occupational Health and Safety Policy was provided to him a few weeks later. (Decision of the Adjudicator, above at paras. 54-56; AAR, above, Vol. 1, Tab 2, p. 14)

[34] Dr. Grover tried to return to work on August 18, 2004, as he believed he was entitled to do pursuant to a confusing letter he received from NRC's Pay and Benefits Section. Dr. Grover was confronted by Dr. Barakat and ordered to leave the premises. (Decision of the Adjudicator, above at paras. 55-56; AAR, above, Vol. 1, Tab 2, p. 14; Decision of the Adjudicator, above at para. 41; AAR, above, Vol. 1, Tab 2, pp. 12-13)

[35] Over the ensuing months, Dr. Grover tried to resolve the situation on a number of occasions. He continued to refuse to attend with a physician chosen by NRC and explained that he was still unclear about the NRC's concerns. Several of his own concerns had still to be addressed by the NRC. (Decision of the Adjudicator, above at paras. 58-60; AAR, above, Vol. 1, Tab 2, pp. 12-13)

[36] During the same period, Dr. Grover learned that the NRC was proceeding to reorganize the INMS and his own Section. He was later informed that his section was being dismantled with two groups being taken away. As well, his section was going to be transferred to another Institute within the NRC, where Dr. Grover would be reporting to an individual who he viewed as part of the discriminatory cases from the 1990s. (Letter from S. Barakat to C. Grover, dated October 28, 2004;

AAR, above, Vol. 3, p. 681; Letter from C. Grover to S. Barakat, dated November 4, 2004, AAR, Vol. 3, p. 689)

[37] On December 1, 2004, Dr. Grover received a letter from Dr. Andrew Woodsworth, an NRC Vice President. The letter indicated that, in a “final” attempt to resolve the situation, the NRC set out 12 points that justified the NRC’s concerns and position. Dr. Woodsworth further informed Dr. Grover that the three day and five day suspensions for refusing to attend the IME were being rescinded, but he would remain in a “no work, no pay” status. (Part of G-14: Letter from A. Woodsworth to C. Grover, dated December 1, 2004; AAR, above, Vol. 3, pp. 703-706)

[38] Another Vice President, Mr. David Simpson, took over from Dr. Woodsworth in February 2005. On February 24, 2005, Dr. Grover wrote to Mr. Simpson and set out five options that could resolve the matter. These options were refused by NRC. (Decision of the Adjudicator, above at paras. 62-63; AAR, above, Vol. 1, Tab 2, p. 16)

[39] The NRC and Dr. Grover engaged on the possibility of a referral to Health Canada for an examination. Dr. Grover was agreeable to this proposal provided the consent to the release of his personal information could be modified. He was told that this was impossible. The matter was at this point at the time the Board hearings commenced in April 2004. (Decision of the Adjudicator, above at paras. 63 and 66; AAR, above, Vol. 1, Tab 2, p. 16)

ANALYSIS

Standard of Review

[40] It is well-established that courts must determine the appropriate standard of review through a pragmatic and functional approach. The factors to be considered are: (1) the presence or absence of a privative clause; (2) the relative expertise of the decision-maker; (3) the purpose of the statute and provision in question; and (4) the nature of the problem. (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226)

[41] There is no privative clause in the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (PSSRA). This could suggest a lower standard of review were it not for the significance of the second factor, the relative expertise of the decision-maker. The Federal Court and Federal Court of Appeal have repeatedly held that adjudicators under the PSSRA generally deserve the highest standard of deference in light of their particular experience and expertise in the field of labour relations. (*Public Service Alliance of Canada v. Canada (Canadian Food Inspection Agency)*, 2005 FCA 366, [2005] F.C.J. No. 1849 (QL) at paras 18-19-20-21-22)

[18] It is generally accepted that the interpretation and application of a collective agreement, including references under the PSSRA alleging its violation fall within the purview of the PSSRB's expertise and call for the highest degree of deference known as patent unreasonableness (see for instance, *Barry v. Treasury Board* (1997), 221 N.R. 237 (F.C.A.); *Connors v. Canada (Revenue B Taxation)*, [2000] F.C.J. No. 477 (T.D.), (Q.L.); *Attorney General of Canada v. Social Science Employees Assn. et al.* 240 D.L.R. (4th) 335; *White v. Canada (Treasury Board)*, [2004] F.C.J. No. 1231, 2004 FC 1017).

[19] However, the applicant contends that the decisions of the Supreme Court in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 and *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 have altered the standard of review applicable in labour disputes. According to the applicant, these decisions stand for the general proposition that the interpretation or application of collective agreements in the context of labour disputes no longer call for the highest degree of deference. I do not believe that to be the case.

[20] The two decisions relied upon have not been construed as the applicant suggests. Indeed, the Ontario Court of Appeal specifically refused to adopt the approach proposed by the applicant in *Lakeport Beverages v. Teamsters Local Union 938* (2005), [2005] O.J. No. 3488, as did the *Federal Court in Currie et al. v. the Queen (CCRA)*, [2005] F.C.J. No. 922, 2005 FC 733. I am aware of no decision in which the pronouncement of the Supreme Court in *Voice Construction* and in *Lethbridge Community College* has been applied as the applicant proposes.

[21] In addition, unlike the arbitrator in the *Voice Construction* decision, the Chairperson of the PSSRB is not an ad hoc adjudicator appointed by the parties. The PSSRB is a statutory tribunal created by Parliament by virtue of the PSSRA. In my view, this institutional expertise favours a more deferential standard of review, which is in stark contrast to the nature of the standard applied in *Voice Construction*.

[22] Furthermore, the question of whether the provisions of the collective agreement were triggered on the facts of this case is one of mixed fact and law. This again distinguishes the present application from the issue which arose in *Voice Construction*.

[42] The purpose of the statute is the expeditious resolution of labour disputes in the federal public sector by adjudicators experienced in the area. This factor similarly militates towards a higher standard of deference.

[43] With respect to the fourth factor, nature of the problem, it must be recognized that most kinds of issues arising out of decisions by the Board's adjudicators will always attract the highest standard of deference. Exceptions would be purely jurisdictional issues or questions of law that are not within the normal area of expertise of such adjudicators. In the present case, the Applicant's issues are almost all related to findings of fact or findings of mixed fact and law. The Applicant does generally contest two questions of law, namely the meaning of discipline and the test for barring an employee from work for safety reasons; however, these are legal questions that fall squarely within the field of labour relations, with due deference owed to the adjudicator. (*Public*

Service Alliance of Canada v. Canada (Canadian Food Inspection Agency), 2005 FCA 366, [2005] F.C.J. No. 1849 (F.C.A.) (QL))

[44] The Applicant has relied on the case of *Canada (Attorney General) v. Assh*, 2005 FC 734, [2005] F.C.J. No. 923 (QL), for the proposition that determinations related to disguised disciplinary action are jurisdictional and therefore attract a less deferential standard of review. Therefore, for the case at bar, the analysis in *Archambault v. Canada (Customs and Revenue Agency)*, 2005 FC 183, [2005] F.C.J. No. 229 (QL), and upheld by the Federal Court of Appeal 2006 FCA 63, [2006] F.C.J. No. 207, on this issue is preferable. In this case, Justice Danièle Tremblay-Lamer of the Federal Court explained that such questions attract the highest standard of review:

[15] ...Whether the employer acted in good faith in terminating the employment relationship for employment-related reasons or rather took disciplinary action under cover of employment-related reasons is an issue that falls squarely under the jurisdiction conferred on adjudicators under the Act. Even if, ultimately, the issue is of a jurisdictional nature, it requires a thorough investigation of the facts relating to the intentions and actual conduct of the employer.

[16] Put simply, jurisdiction under paragraph 92(1)(c) of the PSSRA depends on whether the employee's dismissal was the result of disciplinary action. That is a pure finding of fact, so in my view the applicable standard of review is patent unreasonableness.

[45] All of the issues raised by the Applicant, whether fact, law, or mixed fact and law, are within the particular expertise of PSSRB adjudicators. The applicable standard of review is patent unreasonableness.

Disciplinary action

[46] The PSSRA established a regime for the resolution of grievances by employees in the federal public sector. In accordance with this regime, some grievances are classified as non-

adjudicable, which means that the final level of decision-maker is the employer and there is no right to independent adjudication; however, employees have the right to adjudication before the Board for other kinds of issues that are regarded as more significant. Early on, the Courts recognized that some employers might try to avoid adjudication by attempting to mischaracterize the true nature of their actions. The Board adjudicators are required to look at the substance of an action rather than its form to determine whether they have jurisdiction. In the words of the Court of Appeal, “A camouflage to deprive a person of a protection given by statute is hardly tolerable.” (PSSRA, above, sections 91 and 92; *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), [1989] F.C.J. No. 461 (QL); *Archambault*, above at paras. 9-12)

[47] Under subsection 92(1) of PSSRA, employees have the right to adjudication in respect of disciplinary action resulting in a financial penalty. Consistent with *Penner*, above, the caselaw of the Board and its predecessor recognize that sometimes employers engage in “disguised discipline” to avoid adjudication. As a threshold issue, adjudicators must determine whether employer’s actions that are, on their face, administrative in nature are in reality disguised discipline. In reaching this determination, adjudicators must look at all the surrounding facts and circumstances. (PSSRA, section 92; *Nolan and Treasury Board (Health and Welfare Canada)*, [1994] C.P.S.S.R.B. No. 115 (QL); *Tobin and Treasury Board (Fisheries and Oceans Canada)*, [1990] C.P.S.S.R.B. No. 11 (QL))

[48] In the present case, Dr. Grover grieved the employer’s actions in putting him on involuntary leave without pay status for failing to undergo a medical assessment by a physician of the NRC’s own choosing. The NRC claimed that this was only an administrative action intended to protect the

safety of the workplace. Dr. Grover maintained that the NRC's actions were in fact disciplinary, or disguised discipline, and therefore the adjudicator had jurisdiction. The adjudicator ruled in favour of Dr. Grover and the Applicant now contests that finding.

[49] The thrust of the Applicant's arguments on this issue are that the adjudicator made some errors of fact and that she failed to appreciate that employers who suspend employees for safety reasons are doing so for administrative reasons. (Applicant's Memorandum of Fact and Law, paras. 97-98 and 108-118; AAR, above, Vol. 5)

[50] The latter point, argued at paragraphs 108 to 117 of the Applicant's Memorandum of Fact and Law, can be summarily dismissed. As a matter of labour law, the adjudicator clearly understood the difference between administrative and disciplinary action; however, she simply rejected the NRC's arguments that it was truly acting without any intention to punish Dr. Grover or correct misconduct. As stated by the adjudicator:

[120] ...the simple fact that the employer characterised its actions as administrative by referring to an administrative policy or prerogative does not automatically make them so. An analysis of the facts and context will be determinative.

[51] The adjudicator highlighted several facts which led her to the conclusion that the decision to cease Dr. Grover's salary and bar him from the workplace was in fact disciplinary. Perhaps most significantly, she observed that in the beginning the NRC expressly treated the matter as disciplinary. She correctly points out that "Dr. Hackett was telling the grievor [in his letters] that a failure to an administrative measure would be considered insubordination, and therefore, a disciplinary matter. Only later on did the employer characterise its actions as also administrative."

(Decision of the Adjudicator, above at paras. 123 and 124 for quote; AAR, above, Vol. 1, Tab 2, pp. 25-26)

[52] The NRC explicitly levied discipline on the grievor twice – a three day suspension and a five day suspension – for failing to attend with a physician chosen by the NRC, calling his actions “insubordination”. It was only at the time of the second suspension that the NRC then purported to take administrative action by ceasing Dr. Grover’s salary indefinitely.

[53] The adjudicator also noted that the NRC did not offer Dr. Grover the opportunity to exhaust his sick leave and it refused his request for vacation leave. There was no reason to deny Dr. Grover in this way unless the motivation was to punish or otherwise compel a different course of conduct on his part. These are the very hallmarks of disciplinary action. The adjudicator clearly demonstrated that she understood the proper principles of discipline by stating, “The measures were used to bring compliance on the part of the grievor.” (Decision of the Adjudicator, above at paras. 135 and 138 for quote; AAR, above, Vol. 1, Tab 2, pp. 22-23)

[54] While the adjudicator’s reasoning is sound, it is worth noting that Board jurisprudence on similar facts have applied similar reasoning. In *Tobin*, above, the Department of Fisheries and Oceans ordered the grievor to submit to a medical examination. When he failed to attend, he was suspended indefinitely without pay. The employer objected to the adjudicator’s jurisdiction for the same reasons as in the present case, but the adjudicator ruled that under the circumstances, the indefinite suspension was “disciplinary in nature”.

[55] The adjudicator in the present case also made reference to the correspondence and the “overall context and attitude of the employer”. The employer sent literally dozens of letters to Dr. Grover from June 2004 until April 2005. Almost every single one suggests or states that Dr. Grover was insubordinate, guilty of misconduct, or was facing termination. The tone of these letters is unmistakable and hardly reflects compassion for Dr. Grover’s health, the ostensible reason for the NRC’s “administrative action”. (Decision of the Adjudicator, above at para. 134; AAR, above, Vol. 1, Tab 2, p. 27)

[56] The Applicant further attacks the decision by arguing that the adjudicator made several factual errors in the following passage:

...The grievor was also found to be insubordinate by not attending management meetings. He was found to be insubordinate by not cooperating and by resisting preparing a performance review for himself. He was perceived to be uncooperative, as regards the reorganisation of his section and of the Institute itself, as implemented by Dr. Hackett...

(Decision of the Adjudicator, above at para. 134; AAR, above, Vol. 1, Tab 2 p. 22; Applicant’s Memorandum of Fact and Law, paras. 95-101; AAR, above, Vol. 5, pp. 964-965)

[57] Dr. Grover agrees with the Applicant that formal discipline was not imposed in any of the circumstances described above. However, the Applicant is placing too much emphasis on the word “found” and misapprehends the adjudicator’s meaning. Based on the adjudicator’s more fulsome summary of the evidence at paras. 19-34 of her decision, it is obvious that she understood formal discipline was not imposed in these cases. She nevertheless concluded, quite reasonably, that the NRC regarded Dr. Grover as insubordinate for failing to attend management meetings and resisting a performance review.

[58] Specifically, Mr. Blais, Manager of Employee Relations, felt that Dr. Grover was avoiding management meetings by way of a “flagrant misuse” of sick leave. Dr. Grover also testified that he was threatened with discipline by Dr. Hackett for resisting a performance review. In both instances, there is evidence that the NRC regarded Dr. Grover as insubordinate, though discipline was not imposed. (Exhibit E-1, Tab 9: Email from S. Blais to P. Hackett, dated June 3, 2004; AAR, above, Vol. 1, Tab 5-B-9, p. 80; Affidavit of C. Grover, para. 9; AAR, above, Vol. 4, Tab 9, p. 939)

[59] With respect to co-operation with the reorganization of the Institute, the evidence is clear that Dr. Hackett threatened Dr. Grover with discipline because he refused to pressure his employees to participate in the “Evolution” process. Again, the adjudicator’s finding is correct and based on the evidence. (Affidavit of C. Grover, para. 9; AAR, above, Vol. 4, Tab 9, p. 939)

[60] The Applicant has asserted that the adjudicator’s decision should be quashed because she improperly relied on a particular document in finding that the employer’s actions were disciplinary. Both parties to the adjudication had entered one large exhibit with numerous documents. The NRC’s legal counsel advised the adjudicator that the employer did not object to Dr. Grover’s exhibit provided all of the documents were subsequently authenticated in the course of the hearing. Dr. Grover’s legal counsel later verified the authenticity of all the documents through the testimony of Dr. Grover. The Applicant never objected to this, nor did the Applicant object at the time of final arguments. The Applicant now submits that it can rest on its objections as to admissibility of documents until it gets to the Federal Court. This it cannot do and the argument is dismissed.

[61] The Applicant further submits that the adjudicator was “cherry picking” the evidence by relying on the document in question, a letter from Dr. Grover, without due regard to other related documentation, namely the employer’s response. The employer’s letter must be read together with Dr. Grover’s subsequent letter, which demonstrates that the employer’s points were erroneous. No doubt the adjudicator had proper regard for all of the surrounding correspondence. (Applicant’s Memorandum of Fact and Law, para. 106; AAR, above, Vol. 5, p. 966; Part of Exhibit G-14: Letter from S. Barakat to C. Grover, dated September 24, 2004; AAR, above, Vol. 3, p. 118; Part of Exhibit G-14: Letter from C. Grover to S. Barakat, dated September 27, 2004; AAR, above, Vol. 3, p. 120)

[62] Based on all the foregoing, the adjudicator’s findings with respect to the disciplinary nature of the NRC’s actions were correct. In any event, the adjudicator had considerable evidence on which to rely and it cannot be said that her decision was patently unreasonable.

Legal Standard to be met by NRC before barring Dr. Grover’s from work until attending a physician not of his own choice

[63] The Applicant argues in respect of two points in regard to the adjudicator’s decision in relation to her identification of the legal standard or test that the employer had to meet in the circumstances. First, the Applicant contended that the adjudicator misinterpreted the relevant labour law jurisprudence regarding the employer’s right to require a medical examination for the purpose of maintaining a safe workplace. In a similar vein, the Applicant argued that the adjudicator failed to liberally interpret the NRC’s policy on this very issue.

[64] The adjudicator's analysis and her definition of the appropriate legal standard, springs directly from the applicable labour law jurisprudence. The foundational principle is that employees have a strong right to privacy with respect to their bodily integrity and a medical practitioner; therefore, a trespass is committed if an employee is examined against his or her will. Consequently, the employer cannot order an employee to submit to a medical examination by a doctor chosen by the employer unless there is some express contractual obligation or statutory authority. (*Thompson and Oakville (Town)* 1963), 41 D.L.R. (2d) 294 (Ont.H.C.) at p. 302)

[65] Notwithstanding the above, it is also well established that employers have an important obligation to ensure a safe workplace. This means employers have the right to know more about an employee's medical information if there are reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace.

[66] It does not follow that an employer can automatically demand that an employee undergo a medical examination. Rather, to balance the employee's right to privacy and bodily integrity, the employer must explore other options to obtain the necessary information. If the employer is dissatisfied with these other options, including and in particular a medical certificate tendered by the employee, it has the duty to clearly explain to the employee or state the reasons why the information is insufficient. Again, this respects the employee's rights to privacy and allows him or her to assess the employer's objections and produce other information if needed. It is only after all of these steps have been canvassed that an employer can in certain instances insist that an employee must attend a doctor chosen by the employer. (*Air Canada and Canadian Airline Employees Association* (1982), 8 L.A.C. (3d) 82 (Simmons) at pp. 13-14; *Riverdale Hospital and Canadian Union of Public*

Employees, Local 79 (1985), 19 L.A.C. (3d) 396 (Burkett) at pp. 406-407; *Nelsons Laundries Ltd. and Retail Wholesale Union, Local 580* (1997), 64 L.A.C. (4th) (Somjen) at pp. 125-127)

[67] The Ontario Divisional Court recently affirmed the arbitral jurisprudence in this regard. In *Ontario Nurses' Association v. St. Joseph's Health Centre* (2005), 76 O.R. (3d) 22 (Ont.Div.Ct.), the Court ruled as follows:

[19] We were referred to a number of arbitral cases canvassing the issue of what information an employer can require of an employee returning from a medical leave. Not surprisingly, in view of the privacy interests involved, limits of reasonableness have been developed by arbitrators.

[20] The weight of the arbitral cases is that employers are entitled to seek medical information to ensure that a returning employee is able to return to work safely and poses no hazard to others. The employee's initial obligation is to present some brief information from the doctor declaring the employee is fit to return. If the employer has reasonable grounds on which to believe that the employee's medical condition presents a danger to herself or others, the employer may ask for additional information to allay the specific fears which exist, explaining the reasons to the employee. The request must be related to the reasons for absence; no broad inquiry as to health is allowed. In my view, these are sound principles.

[68] It is also important to emphasize again that the employer's interest must relate to safety. Concerns about the validity of an employee's sick leave cannot justify a demand for a medical examination. Indeed, there is a "fundamental difference" between requiring a medical examination for fitness to work versus testing the validity of an illness. (*Riverdale Hospital*, above at pp. 405-406)

[69] The Applicant takes issue with the adjudicator's statement that "the request for an independent medical examination to determine fitness to work should be considered only in exceptional and clear circumstances". The Applicant argues that the articulation of a need for

“exceptional and clear circumstances” is somehow inconsistent with the jurisprudence. There is no merit to this argument.

[70] Numerous cases speak to the requirement that a medical examination must be shown to be “necessary” due to a “legitimate doubt”. The onus lies on the employer, who must be prepared to call “cogent evidence” to support its position. The need for a medical examination is described as “drastic action” which must have a “substantial basis” and will only be required in “rare cases”. In light of such arbitral commentary, the adjudicator’s description of the need for “exceptional and clear circumstances” clearly arises from the cases. (*Riverdale Hospital*, above at pp. 406-407; *K. Nicholson and Treasury Board (National Defence)*, [1/991] C.P.S.S.R.B. No. 267 (QL) at pp. 10-11; *Dennison and Treasury Board (Solicitor General)*, [1983] C.P.S.S.R.B. No. 89 (QL) at p. 20; *Consumers Glass and C.A.W., Local 29* (1990), 18 C.L.A.S. 171 (Marcotte) at paras 40 and 44; *Nelson Laundries*, above at p. 123)

[71] Finally, the Applicant argues that the adjudicator should have interpreted the NRC’s Occupational Health and Safety Policy in a more “liberal” fashion. The policy indicates there must be “sufficient evidence” for a management to be concerned over the ability of an employee to perform his or her job “without creating a safety risk”. Basically, the Applicant asserts that the employer met this requirement if it could show a potential risk of some kind.

[72] Again, the Applicant’s argument has no merit and is inconsistent with the arbitral jurisprudence. The significance of the risk will depend on the seriousness of the illness and the nature of the employee’s duties. Furthermore, “reasonable and probable grounds” must exist for

assuming the employee is a danger. This would necessarily exclude speculation or conjecture. Indeed, in the words of one arbitrator, “An employer may not refuse to allow an employee to return to work on the mere possibility of medial problems in the future.” The NRC policy is consistent with this jurisprudence and it was properly interpreted by the adjudicator. (*Air Canada*, above; *Kolski and Treasury Board (Agriculture Canada)*, [1994] C.P.S.S.R.B. No. 149 (QL) at p. 21; *Inco Ltd. and United Steelworkers* (1988), 35 L.A.C. (3d) 108 (Burkett) at pp. 112-113; *Nelsons Laundries*, above at pp. 126-127)

Failure by NRC to justify demand that Dr. Grover see physician not of his own choice

[73] The Applicant does not agree with the adjudicator’s conclusion that the NRC did not have sufficient reasons to demand a medical assessment. No grounds exist whatsoever to suggest that the adjudicator’s decision was patently unreasonable in this regard.

[74] The “mere possibility” that an employee may be ill or otherwise presents a safety risk does not amount to “reasonable and probable grounds” for so believing. Significantly, throughout the numerous letters to Dr. Grover, the NRC does not specify any particular grounds for believing Mr Grover is a safety risk. During the hearing, NRC witnesses testified that Dr. Grover was witnessed having health problems in the workplace. Notably, these observations were never mentioned previously. If the concerns were bona fide, they would have been raised at the appropriate time.

[75] Finally, the Applicant makes no mention of the procedural aspect of this test. The Applicant apparently accepts that employers must show that they have reasonable and probable grounds to be

concerned about a safety risk caused by the employee's health; however, there is also a "procedural fairness" component as well. According to the case law, the employer must clearly explain its reasons for doubting an employee's medical certificate. More significantly, it must be open to other options to satisfy its concerns short of demanding an assessment by a doctor not of the employee's choosing. (*Nelsons Laundries*, above at p. 125)

[76] In the present case, Dr. Grover offered to attend other doctors, including a doctor mutually agreed upon by the parties. The NRC failed to acknowledge this written proposal the first few times it was presented. The NRC did not provide a rational explanation as to why it refused this option. The grievances clearly would have been successful for this reason alone. Similarly, this application for judicial review must be dismissed because, regardless of any other alleged errors, the decision as a whole is reasonable. (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paras. 55-56)

No Reviewable Error on Findings of Fact

[77] It is well established, and the applicant concedes, that the findings of fact by an administrative tribunal will attract the highest standard of deference. The patently unreasonable standard is so high that it has been described as something that is clearly irrational. (*Dr. Q.*, above)

[78] The adjudicator made a statement that the NRC failed to address Dr. Grover's health concerns with him. Based on the full summary of evidence, it is clear that the adjudicator recognized that Ms. Lorna Jacobs had raised a health concern with Dr. Grover; however, the adjudicator's period of reference was following Dr. Hackett's order of June 10, 2004, that Dr. Grover must stay home until he attends with a physician of the NRC's choosing. At no time from

June 10, 2004 until the hearing before the Board were those concerns raised with Dr. Grover. There is no patently unreasonable finding here. (Decision of the Adjudicator, above at paras. 36-37; AAR, above, Vol. 1, Tab 2, p. 11; Applicant's Memorandum of Fact and Law, paras. 27-69; AAR, above, Vol. 5)

[79] The Applicant also asserts that the adjudicator erred by concluding that Dr. Grover never had an opportunity to provide further information from his physicians because it was never clear what the NRC was looking for. This finding of the adjudicator is closer to one of mixed fact and law. The adjudicator noted that Dr. Grover was understandably confused by the NRC's actions. The NRC was saying he was so ill that he was a safety risk at work, while at the same time questioning the validity of the sick leave. The adjudicator noted other inconsistencies, for example, the fact that the NRC was informed about the reasons for two different physicians with the same prescription, yet continued to raise the issue without explaining why it was apparently rejecting the explanation. The adjudicator was entitled to reach this conclusion based on the evidence. (Decision of the Adjudicator, above at para. 119; AAR, above, Vol. 1, Tab 2, p. 25; Applicant's Memorandum of Fact and Law, paras. 72-75; AAR, above, Vol. 5)

CONCLUSION

As the Supreme Court has taught, courts on judicial review should not at every element of a decision subject it to a test of reasonableness. Rather, the decision as a whole must be considered. If there are sufficient reasons to support the decision, it should not attract interference by the Courts. In light of the adjudicator's reasons in the present case, the decision is upheld. (*Ryan*, above at paras.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed with costs.

Obiter

Prior to this case reaching the Federal Court, at the first instance adjudicative level:

Had a case been made for the insubordination of an individual, the outcome may have been different, but it was not!

Had a case for disciplinary measures been made in respect of an individual for not cooperating within an institutional hierarchy, thus, being a detriment to the hierarchy and the institution itself, the outcome may have been different, but it was not!

Had a case been for the incompetency of an individual within an institutional structure, again, the outcome may have been different, but it, certainly, was not!

The case is imply about whether an institution can demand of one of its employees to be examined by a physician of its choice (barring the privacy of the individual from his choice) for behaviour which it decides is detrimental to the institution – because that behaviour may put the institution and its work at risk (What that risk is, is never spelled out), nor was any case made in that vein; had it been made, the outcome may have been different, but it was not!

However, the above underlying themes, in regard to what the case is not about, surfaced on a continuous basis, and had to be separated from what the case is about.

It is a fact-driven case in judicial review to which it is a challenge to peg general legal or jurisprudential principles without recognizing and considering the narrative, in and of itself, in all of its details which were available to the first instance, trier of fact, adjudicator; and then to remind the applicant, due to the nature of the pleadings, that this was not an appeal but a judicial review in which the standard of review is critical (as in all judicial reviews); and, consequently, it was for this Court not to lose sight, due to the various themes which surfaced, of whether the adjudicator was in her right to decide as she did, on the basis of the evidence before her.

Thus, the Court came to its conclusion on the basis of the four corners of the adjudicator's decision stemming from the evidence, itself, made available to the Court.

Whether this Court would have arrived at the same decision was not at issue; it was simply whether the decision of the adjudicator is logically inherent to the point-specific evidence, assessed in light of the appropriate standard of review to the case.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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v. CHANDER P. GROVER

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DATED: January 16, 2007

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