COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111,* 2010 BCCA 447

Date: 20101015
Docket: CA037050

Between:

Coast Mountain Bus Company Ltd.

Respondent/
Appellant on Cross Appeal
(Petitioner)

And

National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111, on behalf of some members of CAW Local 111

Appellant/
Respondent on Cross Appeal
(Respondent)

And

British Columbia Human Rights Tribunal

Respondent/
Respondent on Cross Appeal
(Respondent)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe

On appeal from: Supreme Court of British Columbia, March 25, 2009
(*Coast Mountain Bus v. CAW-Canada*, 2009 BCSC 396)

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Place and Date of Hearing:	Vancouver, British Columbia March 24 and 25, 2010
Place and Date of Judgment:	Vancouver, British Columbia October 15, 2010

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] In June 1997, the Auditor General issued a report raising concern about the absenteeism rate among Vancouver-based transit operators. The Auditor General found that the average annual absenteeism rate of B.C. Transit operators was more than double the average rate of five other North American transit companies which were examined. B.C. Transit was the predecessor to TransLink, a subsidiary of which, Coast Mountain Bus Company Ltd. (the "Employer"), operates bus services in Metro Vancouver.

[2] As a result of the report, B.C. Transit introduced an attendance management program in an effort to reduce the costs associated with absenteeism of its employees. It is this program, as continued by the Employer and as modified from time to time up to 2006 (the "Attendance Management Program" or the "Program"), that is the subject matter of this appeal.

[3] It is the position of the appellant, National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111 (the "Union") that the Program is applied in a manner that is discriminatory to transit operators employed by the Employer, on the basis of physical and mental disabilities, in violation of s. 13(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210. The Union filed a complaint of systemic discrimination with the British Columbia Human Rights Tribunal (the "Tribunal").

[4] Following a 25-day hearing over the course of 14 months, a member of the Tribunal (the "adjudicator") issued a decision dated February 18, 2008 (2008 BCHRT 52) in which she found that the Program, as applied by the Employer, resulted in systemic discrimination against employees with chronic and recurring disabilities and that the Program was not exempted under s. 13(4) of the *Code* as a *bona fide* occupational requirement. The adjudicator granted various forms of relief.

[5] The Employer petitioned the Supreme Court for judicial review of the adjudicator's decision. In reasons for judgment dated March 25, 2009 (2009 BCSC 396), the chambers judge allowed the petition except for certain findings relating to specific employees.

[6] The Union appeals from the order of the chambers judge and requests that the order of the adjudicator be restored in its entirety. The Employer cross appeals and asserts the chambers judge erred in several respects.

Section 13 of the *Human Rights Code*

[7] The portions of s. 13 relevant to this appeal are subsections (1) and (4), as follows:

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

* * *

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Disability Plans

[8] In order to provide additional context for the Attendance Management Program, I will summarize the key aspects of the short term disability and long term disability plans available to the Employer's employees. These plans are provided for in the collective agreement between the Employer and the Union.

[9] The short term disability plan is funded by the Employer and is administered by an insurance company. The long term disability plan is funded by employee contributions and is administered by the same insurance company.

[10] Under the short term disability plan, an employee is entitled to take three days off work without providing a doctor's note. With supporting medical documentation, the employee is entitled to take additional time off work at 100% of regular earnings for up to eight weeks and at 85% of regular earnings for a further nine weeks.

[11] The long term disability plan covers absences beyond 17 weeks and requires medical justification. The employee receives 50% of regular earnings but, unlike payments under the short term disability plan, the payments are not taxable in the hands of the employee.

The Attendance Management Program

[12] The adjudicator described the Attendance Management Program in considerable detail in her decision. She gave a brief description of it in para. 16 (which the chambers judge quoted at para. 24 of his reasons), and she described it in more detail in paras. 81 through 167. Following is my summary of the key aspects of the Program as described by the adjudicator.

[13] The Attendance Management Program is a five-phase program beginning with the identification of employees with high absenteeism and ending with the potential termination of an employee. The five phases were referred to in the 2004 "Supervisor's Guide for Managing Employee Attendance" as an informal interview, three formal interviews (a Level 1 interview, Review of Attendance Record and Formal Indication of Concern; a Level 2 interview, Indication of Advanced Concern & Request for Medical Assessment; and a Level 3 interview, Medical Assessment Follow-up) and an Employment Status Review. Amendments in 2006 to the Guide, including removing the level numbers and collapsing Level 2 and 3 into one process in individual

cases, were distributed prior to the end of the hearing before the adjudicator. The references to the Guide in these reasons are generally to the 2004 Guide.

[14] Placement of employees into the Program begins at quarterly review meetings attended by supervisors and managers. A list of the employees who have absence rates consistently higher than the average absence rate of the Employer's employees, together with employees who show a trend towards higher than average absence rates, is discussed at these meetings. Employees who have been absent as a result of a disability are included on the list. If the participants at the meeting determine there is a concern about the ongoing attendance of an employee on the list, that employee is moved into the Program.

[15] The first phase of the Program consists of an informal interview of the employee conducted by his or her supervisor. The purpose of the interview is to let the employee know his or her rate or frequency of absences has been noticed and to give the employee an opportunity to provide the supervisor with some insight regarding the reason for the absences. The employee is told that the Employer expects all reasonable steps to be taken to minimize absences in the future and that attendance records are taken into account with respect to filling vacancies and promotions.

[16] A Level 1 interview takes place if the attendance of an employee has not shown satisfactory improvement after the informal interview (for reasons other than the employee having been assaulted on the job or involved in a motor vehicle accident while on the job). The purpose of the interview is to make the employee aware of the Employer's concern regarding his or her attendance record and to offer any assistance that would lead to more acceptable attendance. The employee is told by the supervisor conducting the interview that the only person to whom he or she is required to provide medical information is an occupational health nurse in the Employer's Occupational Health Group. The supervisor reviews the employee's absenteeism record and tells the employee the Employer will not tolerate a continuation of this level of absenteeism. The employee is subsequently given a form letter confirming the discussion at the Level 1 interview. The letter repeats the advice that attendance records are taken into account with respect to filling vacancies and promotions.

[17] A Level 2 interview is scheduled if the employee's attendance does not show significant improvement over the months following a Level 1 interview. One of the main purposes of the interview is to request a medical assessment from the employee to assist in determining the employee's ability to attend work on a regular basis and to ascertain whether the employee has a medical disability. If the medical assessment indicates the employee has a chronic medical issue, one of the Employer's occupational health nurses is supposed to have a discussion with the employee with respect to what the assessment indicates in terms of accommodation for the medical issue. However, the Employer's manager of corporate health testified that inquiries of the employee's doctor about accommodation were only made if the employee was unable to return to work, and no inquiry is made about accommodation with respect to periodic absences from work.

[18] A Level 3 interview is arranged after the medical information is assessed by the management representatives. The employee's supervisor communicates the Employer's attendance expectations and the possible consequences if the employee does not meet those

expectations. A letter is given to the employee during the interview. The letter advises that the Employer has established specific attendance guidelines, also referred to as attendance parameters, intended to measure the employee's ability to maintain acceptable attendance in the future. It goes on to advise that if the employee is absent more than a specified number of days in either of the following two years, which number has taken into account the particular circumstances of the employee, the Employer may conduct a review of his or her employment status, at which time termination of his or her employment for excessive, non-culpable absenteeism, will be considered. The evidence, however, of the Employer's director of corporate management was that the attendance parameters imposed at Level 3 were always based on the average absenteeism rate of the Employer's transit operators. The letter further advises that, in calculating the absence rate, days missed for Short-Term Disability, Long-Term Disability and Workers' Compensation Claims will be counted as absences. In conclusion, the letter states that the employee has now been clearly advised that continued, excessive absenteeism could result in the termination of his or her employment.

[19] An Employment Status Review may be conducted if the employee exceeds the absenteeism parameters set out in the letter provided during the Level 3 interview (for reasons other than the employee having been assaulted on the job or involved in a motor vehicle accident while on the job). The review is conducted by management representatives of the Employer, and a decision is made whether or not to terminate the employee.

Human Rights Tribunal Hearing

[20] A total of 16 witnesses testified during the 25-day hearing. They included two representatives of the Union and 12 transit operators who had been placed in the Attendance Management Program. The director of corporate attendance management and the manager of corporate health testified on behalf of the Employer.

[21] The transit operators who testified had disabilities such as Crohn's disease, diabetes, bile duct disorder, and osteoarthritis. A total of 11 employees had been terminated under the Program, of whom six successfully grieved their terminations and were reinstated by arbitration decisions.

[22] At para. 169 of her decision, the adjudicator observed that "the Union sought to show that the [Program] was applied mechanistically, and inexorably processed disabled operators towards termination". In contrast, the evidence of the Employer "sought to highlight the discretion and flexibility provided for in the [Program]".

Decision of the Adjudicator

[23] After reviewing the evidence of the witnesses in detail, the adjudicator began her analysis at para. 465 of her decision. She quoted ss. 13(1) and (4) of the *Code* and summarized the Union's position that while it recognized the Employer's right to have an attendance management program, it objected to the manner in which the Attendance Management Program was applied by the Employer.

[24] The adjudicator noted the Union's complaint was one of systemic discrimination, and she made reference to the decision of the Supreme Court of Canada in *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1138-39, 40 D.L.R. (4th) 193 (also known as "*Action Travail des Femmes v. CNR*") that described the concept of systemic discrimination. The adjudicator also quoted the well-known description of *prima facie* discrimination from *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 558, 23 D.L.R. (4th) 321 (commonly referred to as the *O'Malley* case):

> A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[25] Next, at para. 484, the adjudicator set out the test for a finding of *prima facie* discrimination on the basis of disability, quoting from *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, 2006 BCCA 57, 264 D.L.R. (4th) 478:

> [38] ... Therefore, under s. 13(1)(a), to establish a *prima facie* case of discrimination, an employee must establish that he or she had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment....

[26] At para. 487, the adjudicator stated her conclusion with respect to the effect of the Program on individual employees:

> 487 It is clear, on the evidence before me, that induction into the [Program] is perceived by many employees to be extremely stressful. In addition, it can have negative employment-related consequences, including being considered with respect to promotions and transfers. Finally, induction into, and progress through, the [Program] can, in some cases, lead to termination of employment.

[27] At para. 488, the adjudicator referred to the decision in *MacRae v. International Forest Products Ltd.* (*sub. nom. MacRae v. Interfor (No. 2)*), 2005 BCHRT 462, for the proposition that termination of an employee on the basis the employee is unable to attend work regularly due to a disability constitutes *prima facie* discrimination but that the termination could be justified if the employer could not have accommodated the employee's absenteeism without undue hardship. She then concluded at para. 489 that *prima facie* discrimination had been established with respect to some individual employees because some of them had received adverse treatment and their disabilities were factors in the adverse treatment.

[28] The adjudicator agreed with the Employer's argument that it was not sufficient for there to be *prima facie* discrimination with respect to any specific individual and held that it was necessary for the Union to establish that the Program itself, in its conception or application, was *prima facie* discriminatory (para. 492).

[29] The adjudicator set out her conclusion at para. 494 that the Program, as applied by the Employer, was *prima facie* discriminatory:

> 494 For the reasons outlined below, I find that there are a number of areas in which the [Program], in its application, has an adverse impact on those with disabilities, and in particular, those with chronic disabilities and those who suffer from a series of recurring disabilities that negatively affect their ability to attend work. By "chronic disability" I mean a disability which is

> ongoing for an extended period of time. By "recurring disabilities" I mean a series of disabilities over an extended period of time, which may or may not be related. I find, further, that the presence of a chronic disability or recurring disabilities is a factor in the adverse treatment. Below, I identify a number of issues which, taken together, lead to the conclusion that the [Program], as applied by [the Employer], is *prima facie* discriminatory.

[30] The adjudicator discussed the evidence in paras. 495 to 610 and found that the following five areas, taken together, led her to conclude that the Program, as applied by the Employer, resulted in systemic discrimination against some employees with chronic or recurring disabilities:

> 612 First, there is insufficient coordination and communication between various departments involved in the [Program], including the Attendance Management Group and the [Occupational Health Group]. These communication problems, whether caused by the [Employer's] understanding of confidentiality requirements or simply by communication breakdowns, have a particularly harsh effect on those with chronic and recurring disabilities. With respect to these employees, the lack of communication creates an environment in which accommodation is not considered at the earlier stages of the identification of disability issues affecting attendance. This, in turn, results in individuals being placed in and processed through the [Program] in situations where it may be inappropriate to do so.
>
> 613 Second, in applying the [Program], [the Employer] takes a narrow view of the points at which accommodation should be considered. Specifically, while [the Employer] has a fairly comprehensive structure in place for the accommodation of employees who are returning to work from an illness or injury (including [gradual returns to work] and returning to work in alternate positions), little consideration is given to employees who, although they are fit to return to work in their regular position, may still require some form of accommodation, including consideration of whether attendance parameters should be waived or relaxed.
>
> 614 Third, while [the Employer] did put forward instances where discretion was used not to advance employees in the [Program], the evidence indicated that, where an employee was advanced to Level 3 of the [Program], and placed on parameters, those parameters invariably reflected the "average" absenteeism of the operator group. This is despite the fact that the letter outlining the parameters states that, in arriving at those parameters, [the Employer] takes into account the circumstances of each individual case. This occurs even in instances where [the Employer] has information that indicates that an employee's disability may lead to elevated absence levels.
>
> 615 Fourth, when [the Employer] does consider whether an employee's disability-related absenteeism can be accommodated, the focus of the accommodation search is on accommodation in another position. In addition, the consideration occurs predominantly in the later stages of the [Program]. For example, there is no evidence before me that [the Employer] has ever considered modifying the [Program] standards as a possible accommodation, prior to placing an employee at Level 3 of the [Program] (and very few thereafter).
>
> 616 Fifth, I have found [the Employer's] treatment of partial day absences resulting from an employee being placed on a [gradual return to work] placement to be discriminatory. In my view, this practice is illustrative of an underlying problem, discussed in this decision, of the [Program] being poorly integrated with [the Employer's] accommodation policies.
>
> 617 Taken together, the evidence establishes that the [Program], as applied by [the Employer], results in systemic discrimination against some employees with disabilities and, in particular, employees with one or more chronic or recurring disability/ies.

[31] The adjudicator then considered whether the Employer's *prima facie* discrimination was justified under s. 13(4) of the *Code* on the basis of a *bona fide* occupational requirement. She set out the three-part test in that regard at para. 618, paraphrasing from *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 at para. 54:

> 1. The standard was adopted for a purpose or goal that is rationally connected to the function being performed;

2. The standard was adopted in good faith in the belief that it is necessary for the fulfillment of the purpose or goal; and

3. The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the [employer] cannot accommodate persons with characteristics of the [claimant] without incurring undue hardship.

[32] The adjudicator found that the Program met the first two steps of the *Meiorin* analysis (paras. 628 and 631), and stated the real issue was whether the Employer had "demonstrated that it is impossible to further accommodate individual employees within the [Program] without experiencing undue hardship" (para. 632). She concluded the Employer had failed to establish that it was not possible to further accommodate employees with chronic or recurring disabilities short of undue hardship (para. 639). In reaching this conclusion, the adjudicator reasoned as follows:

> 637 The evidence before me established that, in applying the [Program], [the Employer] treats individuals with chronic or recurring disabilities as "attendance problems" and forces them into the [Program] process. Although they may eventually be accommodated in the later stages of the process, this approach ignores the stress and anxiety experienced by employees who are placed on the [Program] and the frustration and anger which may result when the fact that they have a disability is seemingly ignored. It imposes on an employee a standard, average attendance, which the employee may be unable to meet. As outlined above, it is not sufficient to say that, at some point in the process, there may be an accommodation reached, after the employee has exceeded the standard. In fact, such an approach is contrary to the directions of the Supreme Court of Canada in *Meiorin* and *Grismer* [*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385], which indicate that there must be accommodation within the standard, not just a standard set with the possibility of accommodation at the end stages.

The adjudicator additionally noted that while the Employer introduced evidence of the substantial cost of employee absenteeism, it had not provided evidence by which the cost related specifically to employees with chronic or recurring disabilities could be assessed (para. 638).

[33] The adjudicator fashioned several remedies in view of her finding of systemic discrimination. She ordered the Employer to cease the contravention of s. 13(1) of the *Code* and to cease applying the Program to operators who would otherwise be subject to the Program but whose attendance is affected by chronic or recurring disabilities (paras. 709-710). She ordered the Employer to pay sums of money (either $5,000 or $6,000) to specified employees in respect of "injury to dignity, feelings, and self-respect", but excluded the terminated employees who had individual grievances decided or settled (paras. 711-712). The adjudicator ordered the parties to participate in Tribunal-assisted mediation to attempt to resolve certain issues, including revisions to the Program and payment of compensation to other employees with chronic or recurring disabilities who reached the Level 3 interview stage of the Program (para. 714). She retained jurisdiction to deal with any issues remaining after the mediation (para. 716).

The Chambers Judge's Decision

[34] The judge began his analysis by addressing the standard of review to be applied by him. He concluded that despite the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the four standards set out in s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (correctness, reasonableness, patent unreasonableness and fairness) apply to judicial reviews of decisions of tribunals whose enabling Acts do not contain a privative clause, as is the case for the

Tribunal (para. 78). The judge also referred to the decision in *British Columbia v. Bolster*, 2007 BCCA 65, 63 B.C.L.R. (4th) 263, aff'd [2007] S.C.C.A. No. 167, for the proposition that questions of mixed fact and law are to be reviewed under s. 59 on a standard of correctness (para. 79). He applied that standard to the questions he regarded as consisting of mixed fact and law, and he applied the standards of fairness and reasonableness to matters of procedure and findings of fact, respectively.

[35] After considering some preliminary issues that are not in issue on appeal, the chambers judge analyzed the matter under four general headings. He first considered several points with respect to the issue of whether the Program was discriminatory. He then considered the five areas of evidence that the adjudicator considered to be evidence of *prima facie* systemic discrimination in the application of the Program. He next dealt with the topic of *bona fide* occupational requirement. Lastly, he discussed the remedies granted by the adjudicator.

[36] The judge found that, on a standard of fairness, the adjudicator's selection of the group of operators with chronic and recurring disabilities, for the purpose of testing whether the Program was discriminatory as against at least that group, was not unfair (para. 91). He then discussed whether the application of the Program to operators with chronic and recurring disabilities was *prima facie* discriminatory. He found the adjudicator's reliance on *MacRae* to be inappropriate and, relying on comments by Madam Justice Abella in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, he concluded that, on a standard of correctness, the application of the Program to those operators was not discriminatory because they had not been included in the Program based upon stereotypical or arbitrary assumptions about persons with disabilities (para. 98).

[37] The judge next considered the issue of whether operators with chronic and recurring disabilities were subjected to adverse treatment due to the Program. He found that the reasoning used by the adjudicator in para. 637 of her decision was contrary to the reasoning in the cases of *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665; and *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, and that her conclusion based on that reasoning was incorrect (para. 107). He also concluded the adjudicator's finding that the Program caused stress and anxiety was incorrect because he accepted the Employer's submission that there is nothing systemically discriminatory about monitoring employee attendance and providing warning letters to employees (para. 110).

[38] The judge considered the findings of the adjudicator in paras. 612 to 616 of her decision (quoted above) as evidence that the application of the Program constituted *prima facie* systemic discrimination. Under the heading "Information/Confidentiality Issues", he concluded her finding in para. 612 was incorrect (para. 118). Under the heading "Accommodation and Delayed Accommodation", he found the adjudicator's general findings in para. 613 to be unreasonable (para. 125), but he did not overturn her findings of specific failures to accommodate individual operators (para. 126). In his analysis under "Use of Average Absenteeism Rates at Level 3 of the

AMP", "The Focus and Timing of the Petitioner's Accommodation Efforts" and "The Use of Partial Day Absences during Return to Work Efforts", the judge did not disturb the findings in paras. 614, 615 or 616, except that he held the first two sentences of para. 615 to be unreasonable.

[39] The judge then turned to the issue of whether the Program was a *bona fide* occupational requirement. He held that the adjudicator's statement of the third step of the *Meiorin* analysis at para. 632 of her decision was incorrect because it was incompatible with the reasoning in *Hydro-Québec* (para. 146). He concluded it followed from his finding the threshold selected for inclusion in the Program was not discriminatory that he was "unable to accept that the inclusion of those who meet the threshold for entry into the [Program] offends the third element of the *Meiorin* test" (para. 153).

[40] The judge went on to consider the issue of remedies. While recognizing that it was moot in view of his conclusions, he found that the adjudicator exceeded her jurisdiction when she ordered "Tribunal-assisted mediation" (para. 168). He also held that his conclusions left nothing to be remitted to the Tribunal for reconsideration (para. 178).

[41] The judge allowed the petition as it related to the claim of systemic discrimination, but he stated that he was upholding "those portions of it that relate to specific identified operators" (para. 179).

Appeal and Cross Appeal

[42] The Union appeals the order made by the chambers judge and asks that the order of the Tribunal be restored in its entirety. The Union says the judge erred:

(a) in finding that issuing letters of warning and inducting employees with chronic and recurring disabilities into the Attendance Management Program was not an adverse consequence;

(b) in finding that a *prima facie* case of systemic discrimination did not arise from the features described in paras. 612 to 616 in the adjudicator's decision;

(c) in finding that the Program was a *bona fide* occupational requirement; and

(d) in finding that the adjudicator exceeded her remedial jurisdiction.

[43] The Tribunal joins in the appeal on two issues. First, it makes submissions with respect to the standard of review to be used on judicial review applications involving decisions of the Tribunal. Secondly, it says the judge erred in finding that the adjudicator had no jurisdiction to order Tribunal-assisted mediation.

[44] The Employer cross appeals on three issues. It submits there was no basis for the individual damage awards in view of the judge's other findings, with the result that the adjudicator's order should have been set aside in its entirety. It also maintains the judge erred in declining to disturb the findings in paras. 614 and 616 of the adjudicator's decision. Further, the Employer says the judge should have found the adjudicator's selection of the group of operators with chronic or recurring disabilities to be unfair.

Discussion

(a) Standard of Review

[45] The chambers judge accepted the Employer's position that, pursuant to the decision of this Court in *Bolster*, the standard of review for a question of mixed fact and law answered by the adjudicator is one of correctness. On appeal, the Union does not take issue with this holding. However, the Tribunal participated in the appeal, as it is properly entitled to do, to make submissions with respect to the issue of the appropriate standard of review in this regard.

[46] Sections 58 and 59 of the *Administrative Tribunals Act* set out the standards of review to be applied in judicial review proceedings relating to tribunals whose enabling Acts make the *Administrative Tribunals Act* applicable to them. Section 58 applies to tribunals whose enabling Acts contain a privative clause (which is defined as a clause giving the tribunal exclusive and final jurisdiction and providing that decisions of the tribunal in respect of matters within its jurisdiction are final and binding). Section 59 applies to tribunals whose enabling Acts do not contain a privative clause.

[47] Sections 58 and 59 read as follows:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[48] There is no doubt that s. 59 applies to decisions of the Tribunal. The *Code* does not contain a privative clause, and s. 32 of the *Code* specifically states that s. 59 applies to the Tribunal.

[49] In *Bolster*, this Court was required to decide upon the appropriate standard of review in connection with a decision of the Tribunal awarding compensation to a complainant who was found to have been discriminated against in connection with the rescission of his driver's licence due to a vision-related disability. The particular issue in dispute on appeal was whether the Tribunal member properly awarded compensation in respect of the period preceding the decision of the Supreme Court of Canada in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385, ("*Grismer*") or whether the "*de facto* doctrine" precluded such an award on the basis that the Superintendent of Motor Vehicles relied in good faith on laws that were thought to be valid prior to the decision in *Grismer*.

[50] The Tribunal argued in *Bolster* that the application of a legal principle to a set of facts is a question of mixed fact and law, and that the reasonableness standard of review should apply to such a question. Madam Justice Levine, for the Court, considered the wording of s. 59, the context of the *Administrative Tribunals Act* and the intent of the Legislature in enacting the legislation. She concluded that there was no indication of an intention to exclude questions of mixed fact and law from the general rule of s. 59(1) that the standard of review is correctness.

[51] The Tribunal first says *Bolster* is distinguishable and this three-member division of the Court may determine the standard of review to be applicable in this case without being bound to follow *Bolster*. In the alternative, the Tribunal submits *Bolster* has been overtaken by the decisions of the Supreme Court of Canada in *Dunsmuir* and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, and this three-member division of the Court is not bound to follow *Bolster*. These two submissions were made, and rejected by Madam Justice Gray, in *Lavender Co-Operative Housing Association v. Ford*, 2009 BCSC 1437, the appeal of which, CA037648, was heard September 16 and 17, 2010, and is under reserve. In the further alternative, the Tribunal says even if the standard of review for questions of mixed fact and law is correctness, the courts should give deference to the Tribunal and can correct errors of law that can be extracted from questions of mixed fact and law but, otherwise, the courts should only interfere if the decision on a question of mixed fact and law is unreasonable (which is the standard of review applicable to findings of fact under s. 59).

[52] I agree with the reasons of Gray J. in *Lavender Co-Operative* that *Bolster* is not distinguishable. In my opinion, s. 59 does not permit the distinction urged by the Tribunal between a question of mixed fact and general law, and a question of mixed fact and law within the area of expertise of the Tribunal. While s. 58 recognizes expert tribunals and stipulates a standard of

review of patent unreasonableness for findings of fact or law in respect of matters over which they have exclusive jurisdiction under a privative clause, s. 59 does not address matters that may be considered to be within the expertise of the tribunal.

[53] I also agree with the reasons of Gray J. in *Lavender Co-Operative* that *Bolster* has not been overtaken by the decisions in *Dunsmuir* and *Khosa*. *Dunsmuir* dealt with standards of review at common law, and nothing said in that decision related to the interpretation of legislation mandating standards of review, which was the issue in *Bolster*. Although Mr. Justice Binnie referred in *Khosa* to the *Administrative Tribunals Act* and similar legislation, he was making the point that the content of a standard of review stipulated by legislation must be interpreted in the common law context. He was not saying that the common law meaning of a standard of review should affect the interpretation of legislation with respect to the applicable standard of review and, indeed, he observed that effect must be given to the standard of review of patent unreasonableness prescribed by s. 58 despite the fact that this standard of review no longer exists at common law after the decision in *Dunsmuir*.

[54] The third submission of the Tribunal is that the standard of correctness should be applied to questions of mixed fact and law in such a fashion that an error with respect to an issue of law extricable from a question of mixed fact and law will be corrected but, if an incorrect principle of law cannot be extricated from the question, the decision of the tribunal on the question will not be disturbed on judicial review unless it is unreasonable.

[55] While this approach has the attractiveness of being similar to the deference afforded by appellate courts to decisions of trial judges on questions of mixed fact and law (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36), it is my opinion that the language of s. 59 is not capable of being construed to create such a bifurcated standard of review. Subsection 59(1) states that the standard of review is correctness unless the question involves an exercise of discretion, findings of fact or the application of the principles of natural justice or procedural fairness (in which case the applicable standard of review is set out in subsections (2), (3) and (5)). This means that the standard of correctness is to be applied to all questions of mixed fact and law. The section does not provide that the standard of correctness is to be applied to a question of mixed fact and law only if an incorrect legal principle can be extricated from the reasons of the decision maker and that another standard is to be applied in other cases.

[56] Accordingly, the decision in *Bolster* is binding on this division of the Court, and the standard of review to be applied to questions of mixed fact and law decided by the adjudicator is one of correctness.

(b) ***Prima Facie*** **Systemic Discrimination**

[57] Both the adjudicator and the chambers judge quoted portions of a paragraph from *Action Travail des Femmes* which described the concept of systemic discrimination. Chief Justice Dickson described it in the following terms at 1138-1139:

> A thorough study of “systemic discrimination” in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it “to inquire into the most efficient, effective and equitable means of promoting employment

opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report:

> Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ....
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> This is why it is important to look at the results of a system ....

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10).

[58] This Court considered an allegation of systemic discrimination in *British Columbia v. Crockford*, 2006 BCCA 360, 271 D.L.R. (4th) 445. In para. 49 of her concurring reasons, Madam Justice Levine discussed the difference between complaints of systemic discrimination and an individual claim of discrimination:

> [49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see *Radek* [*Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302] at para. 513. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the *Code*. The types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.

[59] While there is the difference between the two types of discrimination as discussed by Levine J.A., the basic approach for determining whether *prima facie* discrimination has been established is the same for both. In the present case, the adjudicator quoted the three-step approach set out in *Health Employers Assn. of British Columbia* for determining the existence of *prima facie* discrimination, but she did not discuss how the approach should be utilized where the complaint is one of systemic discrimination. For ease of reference, I will paraphrase the three steps in terms of questions:

(a) Does the employee have (or is perceived to have) a disability?

(b) Has the employee received adverse treatment?

(c) Was the disability a factor in the adverse treatment?

In the companion appeal of *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58, 264 D.L.R. (4th) 495, heard and decided at the same time as *Health Employers Assn. of British Columbia*, Chief Justice Finch quoted with approval at para. 30 the articulation of the test by the arbitrator, who had expressed the third step in terms of whether "it is

reasonable on the evidence to infer that the disability was a factor (not necessarily the sole or overriding factor) in the adverse treatment".

[60] Chief Justice Dickson commented in *Action Travail des Femmes* that systemic discrimination in an employment context is discrimination that results from the operation of established procedures (in *Crockford*, Levine J.A. referred to practices, attitudes and policies as well as procedures). Chief Justice Dickson made specific reference to procedures of recruiting, hiring and promotion, but his comments apply equally to other procedures, policies or practices such as an attendance management program.

[61] As mentioned by Levine J.A. in *Crockford*, systemic discrimination is not proven simply by evidence of discrimination against some individual employees. In my view, it must be demonstrated in an employment framework that an employer's procedure, policy or practice is discriminatory against a class of employees. In order to demonstrate *prima facie* systemic discrimination, it is necessary to show that a group of persons sharing a protected characteristic has received adverse treatment and that there is a causal connection or link between the protected characteristic and the adverse treatment. In the context of this case, it is necessary for the Union to establish that a group of disabled employees has received adverse treatment and that there is a causal connection or link between the disabilities and the adverse treatment.

[62] I believe that the failure of the adjudicator to clearly identify in her reasons the discriminatory aspects of the Attendance Management Program (i.e., the adverse treatment received by a group of disabled employees) led to difficulties, both in the approach of the adjudicator and the review of her decision by the chambers judge. I also believe that broad statements made by the adjudicator gave rise to difficulties in the review of her decision.

[63] At para. 487 of her decision, the adjudicator made reference to some consequences of the Attendance Management Program (namely, stress, negative impact on promotions and transfers and, in some cases, termination of employment). She then referred to the decision in *MacRae v. Interfor (No. 2)* (which held that termination of employment due to absenteeism related to a disability constitutes *prima facie* discrimination) and concluded that *prima facie* discrimination had been established with respect to some individual employees. Unfortunately, the adjudicator did not explain how she used the reasoning in *MacRae* to reach her conclusion in this regard. The chambers judge found the adjudicator's reliance on this decision to be inappropriate because termination of employment does not necessarily occur under the Program.

[64] The adjudicator next turned to the issue of systemic discrimination. She reviewed the following five areas of evidence that she considered supported a finding of *prima facie* systemic discrimination:

(a) insufficient communication between the Occupational Health Group and the persons administering the Program (para. 612);

(b) the narrow view of the Employer as to the points at which accommodation should be considered (para. 613);