IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Coast Mountain Bus v. CAW-Canada,***
2009 BCSC 396

Date: 20090325
Docket: S082663
Registry: Vancouver

In The Matter Of The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241
And In The Matter Of The *Human Rights Code*, R.S.B.C. 1996, c. 210

Between:

Coast Mountain Bus Company Ltd.

Petitioner

And

National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada) Local 111, on Behalf of Some Members of CAW Local 111

Respondents

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Petitioner	Peter A. Csiszar Scott A. McCann
Counsel for Respondents	M. Jeanne Meyers
Counsel for the B.C. Human Rights Tribunal	Katherine A. Hardie
Date and Place of Hearing:	October 29, 30 and 31, and November 5 and 6, 2008 Vancouver, B.C.

INTRODUCTION

[1] The petitioner seeks judicial review of the decision of the British Columbia Human Rights Tribunal (the "Tribunal") dated February 18, 2008 that the petitioner's Attendance Management Program (the "AMP") is discriminatory. The decision is styled ***National Automobile, Aerospace, Transportation, and General Workers of Canada (CAW – Canada), Local 111 v. Coast Mountain Bus Company (No. 9)***, 2008 BCHRT 52.

[2] The Petition is brought pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 [***JRPA***]. The petitioner seeks a declaration that the Tribunal erred in finding that the AMP is discriminatory; together with orders that the decision of the Tribunal is quashed, and that the respondent's complaint is dismissed with costs to the petitioner, throughout the complaint process before the Tribunal and in these proceedings.

THE PARTIES

[3] The petitioner is the successor to B.C. Transit. The petitioner employs some 3,000 transit operators who provide bus, shuttle and SeaBus service to members of the public in what the Tribunal member described as the Greater Vancouver area.

[4] The respondent is the exclusive bargaining agent for the petitioner's transit operators. The terms and conditions of the transit operators' employment with the petitioner are governed by a Collective Agreement between the petitioner and the

respondent. Other groups of the petitioner's employees are represented by other unions.

THE TRIBUNAL

[5] The Tribunal sought limited standing to make submissions on the hearing of the petition.

PROCEEDINGS TO DATE

[6] The respondent filed a grievance with the B.C. Labour Relations Board respecting the AMP. Attempts to mediate the grievance were unsuccessful, and the grievance was heard by way of an arbitration conducted by James E. Dorsey in October and November of 2000. On December 13, 2000, Mr. Dorsey published his award, allowing certain aspects of the grievance: [2000] B.C.C.A.A.A. No. 461.

[7] Thereafter, the respondent filed a complaint with the Tribunal respecting the AMP.

[8] The initial complaint to the Tribunal concerning the AMP was a representative one filed by the respondent's Vice President, Robert Freeman on July 21, 2003. It stated that it was filed on behalf of "Members of CAW Local 111 employed by [the petitioner] as Transit Operators who have disabilities and as a result have been placed in [the petitioner's] Attendance Management Program because of their higher than average non-culpable absenteeism rates", and identified seven specific operators. On March 21, 2005, by consent, the respondent replaced Mr. Freeman as the representative complainant.

[9] The respondent's complaint to the Tribunal was heard by a single member (the "Tribunal member") over 25 days spread between September 19, 2005, and November 1, 2006. For what were said by counsel for the Tribunal to be reasons of economy, no record of evidence before the Tribunal is kept, and certainly none was kept in this case. It is difficult to accept that there is real economy to be achieved by such a practice, and the policy makes the task of judicial review all the more difficult.

[10] On February 18, 2008, the Tribunal member issued her decision which is the subject of the petition in this case. She found that the AMP as applied by the petitioner resulted in systemic discrimination against some employees with disabilities, and, in particular, employees with one or more chronic or recurring disability.

[11] In particular, she found that:

a) There was insufficient coordination and communication between various departments involved in the AMP, including its Attendance Management Group and its Occupational Health Group.

b) In applying the AMP, the petitioner took a narrow view of the points at which accommodation should be considered.

c) The parameters used by the petitioner at Level 3 of the AMP invariably reflect the "average" absenteeism rate of the operator group.

d) The focus of the petitioner's search for an accommodation was on accommodation in another position and occurred predominantly in the latter stages of the AMP.

e) The petitioner's treatment of partial day absences resulting from an employee being placed on a graduated return to work is discriminatory.

f) The AMP was not a *bona fide* occupational requirement.

g) The petitioner failed to show that it is impossible to accommodate those with "chronic or recurring" disabilities short of undue hardship.

[12] The Tribunal member ordered as follows:

a) That the petitioner cease and desist in its application of the AMP to operators with chronic or recurring disabilities, where those disabilities were the cause of some or all of the absenteeism considered excessive under the AMP.

b) That the parties participate in Tribunal assisted mediation to attempt to resolve various issues.

c) That she would retain jurisdiction and, if necessary, hear evidence on the issue of a systemic remedy, in the event that no agreement was reached between the petitioner and the respondent within 6 months or such longer date as the parties and she feel is necessary.

d) That the petitioner pay various monetary awards to specific operators.

[13] On May 16, 2008, the Tribunal member granted an adjournment of the Tribunal-assisted mediation, pending judicial review of her decision: 2005 BCHRT 173.

[14] On July 30, 2008, Mr. Justice Cullen of this Court granted a partial stay of the orders of the Tribunal member on specific terms, until October 31, 2008: 2008 BCSC 1135.

[15] I ordered a continuation of the stay ordered by Mr. Justice Cullen, until 48 hours after these reasons for judgment are sent to counsel.

BACKGROUND

[16] In 1997 the Auditor General of British Columbia determined that absenteeism from sickness among operators cost B.C. Transit in excess of $8 million per year in direct costs. The Auditor General recommended that B.C. Transit implement a comprehensive strategy for the attendance management of its employees, define more clearly the goals and priorities of its attendance management process and ensure that those goals and priorities were understood throughout its organization. That year, as a result of the recommendations, B.C. Transit introduced an AMP which applied to all of its employees, including its transit operators.

[17] When it assumed the provision of transit services formerly provided by B.C. Transit, the petitioner continued the AMP that B.C. Transit had introduced.

[18] The AMP is administered by a number of the petitioner's departments including the Attendance Management Department, which reviews the attendance of employees, provides resources and training with respect to attendance management to supervisors, and generates bi-weekly reports for senior management.

[19] A second department of the petitioner that is involved in the administration of the AMP is the Occupational Health Group. This group is staffed by Occupational Health Nurses and performs a variety of tasks, including:

a) overseeing and implementing rehabilitation and return to work initiatives;

b) administering the petitioner's Disability Management Policy;

c) administering the petitioner's Accommodation of Employees with a Permanent Disability Policy;

d) administering the petitioner's Substance Abuse Policy;

e) obtaining pre-placement medical reports;

f) initiating and maintaining contact with ill or injured employees;

g) liaising with health care providers, disability carriers, the Workers Compensation Board and management; and

h) coordinating and evaluating return to work options, discussing limitations and restrictions, coordinating the petitioner's Employee Assistance Program, and managing the petitioner's Peer Defuser Program.

[20] The Tribunal member who heard the complaint prepared an extensive decision. In her decision the Tribunal member summarized the respondent's complaint as one on behalf of transit operators, "who have disabilities and, as a result, have been placed in [the petitioner's] Attendance Management Program …

because of their higher than average non-culpable absenteeism rates". The Tribunal member noted at para. 1 that the respondent, "alleges that the AMP discriminates against operators with respect to their employment on the basis of both actual and perceived mental and physical disabilities, contrary to s. 13" of the ***Human Rights Code***, R.S.B.C. 1996, c. 210 [the ***Code***], and recorded that the petitioner, "denies that the AMP is discriminatory".

[21] The Tribunal member noted that in 1997, the Auditor General had compared the attendance statistics of the petitioner's transit operators with those of five other North American transit companies, and found that the average annual absenteeism of the other companies was 13 days per year. At B.C. Transit, the rate for transit operators averaged 37 days absence per year for all absenteeism, and 27.4 days per year with respect to absences for up to one year only.

[22] The parties before the Tribunal member agreed that absenteeism among the petitioner's urban transit operators was higher than in other occupations. The Tribunal member accepted at para. 11 that some of the reasons for the higher absenteeism rate related to the requirements and stresses of the jobs.

[23] The Tribunal member identified that the first published description of the AMP was published as "the Supervisor's Guide for Managing Employee Attendance" in 1998. She also found that this guide has been regularly revised since that date, and summarized in 2006 in a Corporate Policy Statement entitled "Attendance Management".

[24] The Tribunal member found at para. 16 that the AMP:

> … is in essence, a program through which [the petitioner] first identifies operators who have unacceptable levels of absenteeism and then provides them with notice that it considers their attendance to be unacceptable. [The petitioner] reviews the attendance of its employees every three months, at what are termed "quarterly meetings". Employees identified pursuant to this process may simply be monitored, or may be progressed through a series of stages. First, employees may have informal discussions with their Supervisors about their attendance. If there is insufficient improvement, employees will be advanced to Level 1, and provided with a formal letter outlining [the petitioner's] concerns. If there continues to be insufficient improvement, employees are advanced to Level 2, at which [the petitioner] may ask them to provide a medical assessment from their physician with respect to their state of health. After considering the information provided in this medical assessment, [the petitioner] may proceed to a Level 3 interview, at which time an employee is provided with a formal letter requiring them to meet prescribed attendance targets, also known as parameters. If an employee fails to meet those parameters, [the petitioner] may proceed to consider whether or not the employee should be terminated at an Employment Status Review ("ESR"). Employees may be terminated for failure to meet Level 3 parameters.

[25] The Tribunal member found that the representative of the transit operators had significant concerns with the AMP from its inception, seeing it as mechanistic and punitive and failing to address the underlying causes of absenteeism.

[26] The Tribunal member summarized Mr. Dorsey's award at paras. 29-31 as finding that:

> … the AMP was, in some cases, being administered in an unfair and unreasonable manner, and to this extent allowed the grievance. For example, the arbitrator found that treating time at work doing something other than operator duties (*e.g*. graduated return to work ("GRTW"), and alternate duties) as an absence was contradictory, unfair and unreasonable (p. 95). The arbitrator also found that using absenteeism beyond the employee's control, such as an absence while receiving WCB benefits as a result of being assaulted while at work, or as a result of a motor vehicle accident, to induct or progress an employee in the AMP was unreasonable and unfair (p. 100 and 103).

> However, the arbitrator also found that these issues were subject to individual grievances and did not render the AMP as a whole unfair and unreasonable.
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> The arbitrator ordered [the petitioner] to amend the Program in some regards: for example, to expressly state, and to illustrate with examples, absenteeism circumstances that will not trigger induction of a transit operator into or progress an operator through the Program (p. 101).
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> [References are to Mr. Dorsey's award.]

[27] The Tribunal member also recognized that Mr. Dorsey found that the petitioner had failed to give appropriate notice of the AMP to its employees, and ordered it to do so. The Tribunal member found that the petitioner gave that notice to its employees in January 2001.

[28] The Tribunal member recognized that the AMP existed alongside and interacted with: provisions of the Collective Agreement between the parties; benefits and policies, including the short and long term disability benefit plans; and the obligation under the Collective Agreement to maintain the confidentiality of medical information, unless its disclosure was agreed to by the employee in question.

[29] The Tribunal member described the petitioner's Disability Management Policy as a policy to provide rehabilitation work for employees who were temporarily unable to perform their regular work duties. She also described the petitioner's policy to accommodate employees with permanent as opposed to temporary difficulties to the point of undue hardship, as the petitioner's obligation under the ***Code***.

[30] The Tribunal member recognized that the respondent accepted that the petitioner was entitled to have an attendance management program, but objected to

the manner in which the AMP was applied by the petitioner. The respondent argued that the AMP was applied to operators based upon statistical information without appropriate consideration of individual circumstances and lacked any clear-cut policy or accommodation.

[31] The Tribunal member considered the application of the AMP to twelve specific and named employees of the petitioner, and one unnamed employee. The complaint was summarized by the Tribunal member at para. 466 as, "… not one of a single complainant, nor even of a series of individual complainants, it is a representative complaint of systemic discrimination practised against an identifiable class", and proceeded to consider that complaint in light of the provisions of s. 13 of the ***Code***. The relevant subsections of that section provide:

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

[32] The Tribunal member first addressed the complaint of systemic discrimination, and in so doing, relied upon the decision of the Supreme Court of

Canada in ***C.N.R. v. Canada (Human Rights Commission)***, [1987] 1 S.C.R. 1114 [***Action Travail des Femmes***]. She found at para. 473 that systemic discrimination, "can be established both where a 'system' operates on the basis of presumed, rather than actual, characteristics; and also where the 'system' fails to take into account the actual characteristics or circumstances of those with disabilities".

[33] The Tribunal member then went on to consider whether the evidence before her was sufficient to meet the onus on the respondent to establish a *prima facie* case of discrimination within the test established by the British Columbia Court of Appeal in ***Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union***, 2006 BCCA 57 at para. 38, (*sub nom.* ***Health Employers Assn. of British Columbia v. B.C.N.U.***) 54 B.C.L.R. (4th) 113:

> Discrimination is defined in s. 1 of the Human Rights Code to include conduct that offends s. 13(1)(a). A finding that there was a "refusal to continue to employ a person" on the basis of a prohibited ground is discrimination. 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….

[34] Not surprisingly, the petitioner conceded before the Tribunal member that some of its employees had disabilities which in some cases were contributing factors to their excessive absenteeism and subjection to the AMP. The Tribunal member said at para. 487 that it was clear, on the evidence before her, that induction into the AMP was perceived by many employees as extremely stressful and as having potential employment-related consequences.

[35] The Tribunal member referred to para. 104 from an earlier decision of another panel of the Tribunal in ***MacRae v. Interfor (No. 2)***, 2005 BCHRT 462, (*sub nom.* ***MacRae v. International Forest Products Ltd. (No. 2)***) 54 C.H.R.R. D/223 [***MacRae***], with respect to the termination of an employee:

> The present-day arbitral approach reflects what, in my view, is the inescapable conclusion that anytime an employer terminates an employee's employment due to absenteeism related to a disability, a *prima facie* case of discrimination on the basis of disability will have been established. Depending on the facts and circumstances, that discharge may ultimately be justifiable as having been based on a *bona fide* occupational requirement ("BFOR") under the analysis prescribed by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("Meiorin"). That includes showing that the employer could not have accommodated the employee's disability without undue hardship. But in all cases, the employer will be called upon to justify the discharge of a disabled employee's employment on the basis of excessive absenteeism as a BFOR.

[36] The petitioner argued before the Tribunal member that even if individual instances of discrimination are proven, that does not prove that an entire policy like the petitioner's AMP is *prima facie* discriminatory. The Tribunal member addressed this argument at para. 491 of her decision:

> I have some concerns with this argument. It is difficult to conceive of how one would establish that a policy itself was discriminatory without looking at the outcomes (both individual and aggregate) of that policy. The Court in *Action Travail des Femmes* made this point when it endorsed the statement that it is important to look at the outcomes of a system. In my view, this includes the outcomes in individual cases.

[37] The Tribunal member concluded at para. 489 that:

> It is clear that some [of the petitioner's] employees have received adverse treatment, and that their disabilities were factors in that

> adverse treatment. With respect to some individual employees, then, a *prima facie* case has been established.

[38] The Tribunal member defined at para. 494 a chronic disability as, “a disability which is ongoing for an extended period of time”, and a recurring disability as, “a series of disabilities over an extended period of time, which may or may not be related”. The Tribunal member then found that there were a number of areas in which the AMP, in its application, had an adverse impact on those with chronic disabilities and those with recurring disabilities. Having made this finding, the Tribunal member then found that the presence of a chronic or recurring disability was a factor in the adverse treatment, and that the AMP as applied by the petitioner was *prima facie* discriminatory.

[39] One of the collective agreement provisions that the Tribunal member considered was the treatment of personal information respecting a particular employee as confidential, unless the employee agreed to its disclosure. She reasoned that this provision created difficulties in the application of the AMP, as those with chronic or recurring disabilities were assessed by the petitioner’s Occupational Health Group which had the medical information, while the Attendance Management Department when involved at specific stages in the consideration of the application of the AMP perhaps did not.

[40] The Tribunal member considered evidence of individual examples of supervisors who were said to have ignored the offers of medical information. She concluded on this and other evidence at para. 537 that the impact of the Confidentiality Policy agreed to between the petitioner and the respondent resulted

in a failure within the AMP to consider reasonable accommodation at an early stage, and the subjection of employees to the stress of being placed on the AMP and advanced through it in a situation where that might not be appropriate.

[41] The Tribunal member then went on to consider whether or not accommodation of employees with disabilities was addressed under the AMP at a sufficiently early stage of the AMP. She concluded at para. 538 that the petitioners' understanding of when accommodation was to be considered had led to systemic problems with the AMP.

[42] The Tribunal member concluded at paras. 541-542 that average attendance rates played an important role as a yardstick against which to measure an individual's attendance at two stages of the AMP: first, when lists of employees were compiled for consideration at quarterly meetings; and second, when attendance parameters were set at Level 3 of the AMP. She found at paras. 545-546 that all of the circumstances of the employees were not taken into account in setting the parameters at Level 3, thus reflecting a further systemic problem at that stage, even if the parameters were not enforced in individual cases.

[43] The Tribunal member concluded at paras. 549-550 that if an employee provided a medical opinion that he or she was, "fit to return to work", that did not necessarily mean that he or she was capable of regular attendance, and that such an assumption was not justified. She further concluded that a medical opinion that an operator was fit to return to work did not mean that the operator was no longer

affected by his or her disability or did not need accommodation in his or her return to work.

[44] The Tribunal member held at paras. 571-572:

> In my view it is contrary to human rights principles to process [individuals who had suffered absenteeism as a result of a chronic or recurring disability and were placed in the AMP] through the AMP first, and to determine whether the employee can be accommodated later. Mr. Kelly testified that, in his view, it would be discriminatory for [the petitioner] to assume that those with chronic conditions would have higher rates of absence. However, that is not the situation pointed to in the evidence. Rather, where [the petitioner] has specific information from the employee's physician that the employee's condition will likely result in an above average rate of absenteeism, it is discriminatory to fail to take this information into account.
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> Assuming that if an employee is declared fit to return to work, there is no need to accommodate that employee, is a systemic issue. Ignoring medical information that indicates that an employee will likely experience elevated rates of absenteeism as a result of a disability is a systemic issue. Placing employees on parameters when [the petitioner] has significant medical information indicating that the employee will not be able to meet those parameters, or will experience serious difficulty in meeting them, without first considering accommodation options, is a systemic issue. These issues, taken together, give rise to discrimination *vis-à-vis* employees which affect their attendance.
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> [Emphasis in original.]

[45] To the extent that the petitioner attempted to accommodate its operators with disabilities, the Tribunal member found at para. 581 that there was a "complete lack of any acknowledgement that some operators have disabilities which simply make them more likely to have a higher rate of absenteeism" and a "dearth of circumstances in which [the petitioner] has been prepared to consider relaxing the attendance parameters, or not applying them at all, in respect of absences relating to an employee's chronic or recurring disability".

[46] The Tribunal member said at para. 582- 585:

> This reluctance is inconsistent with [the petitioner's] own policies relating to accommodation. For example, under the Accommodation of Employees with a Permanent Disability Policy, the first step which [the petitioner] must take is to look at whether it is possible to modify an employee's own job. If the job cannot be modified appropriately, [the petitioner] will then look at whether the employee can be accommodated in another position.
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> …
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> … there is little indication that [the petitioner] considered how much variance from the normal attendance target would be appropriate for employees with one or more chronic or recurring disabilities….
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> In the evidence before me there was only one example of consideration being given to formally modifying the attendance target for an employee (E04998). Further, in that case, the employee had progressed through the stages of the AMP and was at the point of an ESR before consideration was given to this alternative.

[47] The Tribunal member did accept that there were occasions where operators employed by the petitioner had their Level 3 parameters relaxed after exceeding them, before any ESR, but she concluded that in each instance the operators experienced stress when unable to meet their Level 3 parameters. The Tribunal member found at para. 590 that the petitioner's approach in this regard did not constitute a provision for accommodation within the standard itself, and was an example of what the Supreme Court of Canada found to be discriminatory in both ***British Columbia (Public Service Employee Relations Commission) v. BCGSEU***, [1999] 3 S.C.R. 3 [***Meiorin***]; and ***British Columbia (Superintendant of Motor Vehicles) v. British Columbia (Council of Human Rights)***, [1999] 3 S.C.R. 868 [***Grismer***].

[48] The Tribunal member found further support for her finding of *prima facie* discrimination by the petitioner based upon it treating absences as partial days, that its employees were unable to work while on rehabilitation or gradual return to work assignments. She reasoned at para. 603 that while taking such partial days into account may have no significant effect on the calculation of an employee's absenteeism rate, it equally can have such an effect. Although she did not find any evidence that the practice had worked to the detriment of any specific employee, she nonetheless concluded at para. 609 that the policy constituted a penalty for employees who sought an accommodation, and thus supported a finding that the policy was *prima facie* discriminatory.

[49] The Tribunal member recognized at para. 611 that there were "several examples of discretion and accommodation" established in the evidence before her, but that other evidence established that the application of the AMP had resulted in systemic discrimination against some employees who suffered from chronic or recurring disabilities. She summarized her findings at paras. 611–617, as detailed above in para. 11).

[50] Having addressed the issue of *prima facie* discrimination, the Tribunal member then addressed whether the AMP was nevertheless a *bona fide* occupational requirement. To do so she addressed what she described at para. 618 as the three requirements that an employer must establish to justify its conduct pursuant to ***Meiorin***:

> 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 reasonably accommodate persons with characteristics of the complainant without incurring undue hardship.

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[51] The Tribunal member then considered which standard was at issue. Recognizing that this step of the ***Meiorin*** analysis can be problematic where a complaint alleges systemic discrimination, she purported to follow the prior decision of the Tribunal in ***Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)***, 2005 BCHRT 302, (*sub nom.* ***Radek v. Henderson Development (Canada) Ltd. (No. 3)***) 52 C.H.R.R. D/430, and focussed instead on whether the "'practices, policies and attitudes' were rationally connected to the function being performed; whether they were adopted in good faith; and whether they were reasonably necessary to accomplish their purpose or goal".

[52] The Tribunal member accepted at para. 625 that the general purpose of the AMP was to identify and address disruptive and costly absenteeism rates, and concluded at para. 628 that the adoption of the petitioner's AMP met the rational connection test in ***Meiorin***.

[53] The Tribunal member next accepted at para. 631 the position of the petitioner that the AMP was adopted in the honest and good faith belief that it was necessary to identify and address unreasonable absenteeism problems, and that there was "absolutely" no other evidence before her that it was adopted for any ulterior purpose. She therefore found that the second ***Meiorin*** test was met.

[54] The Tribunal member next turned to what she described at para. 632 as the "real issue" in before her, which she identified as determining whether the AMP was a *bona fide* occupational requirement," defined as "whether [the petitioner] has demonstrated that it is impossible to further accommodate individual employees within the AMP without experiencing undue hardship".

[55] Although the Tribunal member accepted that there were before her a number of examples in which employees of the petitioner had exceeded their parameters and were not terminated, and that there had been accommodation in individual cases, she concluded at para. 635 that the accommodation was inadequate based upon the duty set out in ***Meiorin*** at para. 68:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. … The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.
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> [Empahsis in original.]

[56] The Tribunal member concluded at para. 636 of her decision that accommodation within an attendance standard is no different than accommodation within any other standard that is applicable in a work place, and stated at para. 637 that:

> The evidence before me established that, in applying the AMP, [the petitioner] treats individuals with chronic or recurring disabilities as "attendance problems" and forces them into the AMP 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 AMP 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*, which indicate that there must be accommodation within the standard, not just a standard set with the possibility of accommodation at the end stages.]

[57] The Tribunal member found at para. 638-639 that there was no evidence before her as to the specific cost of accommodation of employees with chronic or recurring disabilities before her, and thus held that the petitioner had failed to establish that it was not possible to further accommodate such employees short of hardship. She therefore concluded that the petitioner had failed to establish that its AMP was a *bona fide* occupational requirement, and the petitioner had failed in establishing a defence to the complaint of discrimination.

[58] Having found that the petitioner's AMP was *prima facie* discriminatory on a systemic basis, and having rejected the defence that it was a *bona fide* occupational requirement, the Tribunal member turned finally to the issue of appropriate remedies. At para. 642 she noted that the Tribunal has "broad authority to remedy discrimination" under s. 37 of the ***Code*** and quoted that section. She then stated at paras. 643-644 that:

> In this case, the Union seeks that:
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> a) The AMP be struck down;
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> b) Those members of the Representative Group who have been terminated as a result of non-culpable absenteeism under

> the AMP from six months prior to the filing of the complaint should be reinstated and made whole; and
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> c) Those members of the Representative Group who have been placed at the third level of the AMP from six months prior to the filing of the complaint should be made whole by compensation for injury to dignity, feelings and self-respect.
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> [The petitioner] did not specifically address the remedies sought by the Union, arguing instead that there was no breach of the Code and therefore no remedies were indicated.

[59] The Tribunal member concluded at para. 649 that she was required by s. 37(2)(a) of the ***Code*** to order the petitioner to cease and desist applying its AMP to operators with chronic or recurring disabilities, where those disabilities are the cause of some or all of the absenteeism considered excessive under the AMP. At para. 650 she ordered the parties to engage in "Tribunal-assisted" mediation to discuss revisions to the AMP or its application which would address the systemic concerns that she had identified, as well as the circumstances of those operators who were then involved in the AMP.

[60] The Tribunal member also declared at para. 651 that she would "retain jurisdiction, and, if necessary, hear evidence on the issue of a systemic remedy" if the parties were unable to reach agreement within six months of her decision, or longer if the parties and the mediator felt further time was necessary.

[61] The Tribunal member then turned to individual remedies for what she described as "members of the class" who had not already been the subject of arbitration awards. She found that all employees but one who had been terminated under the AMP had participated in the arbitration process, and that she should not grant them individual remedies. The one exception was an employee identified by

number only. The Tribunal member was unable to determine if he had participated in arbitration. In the result, she ordered at para. 660 that:

> With respect to employee E05299, if the issues pertaining to the termination of this employee have not been the subject of arbitration or settlement between the parties, I order the parties to engage in Tribunal-assisted mediation with respect to the circumstances of this employee. If the parties are unable to reach agreement on issues relating to this employee, I retain jurisdiction to hear evidence and argument with respect to the circumstances of this employee's situation.

[62] With respect to operators who had been placed at Level 3 of the AMP, the Tribunal member found that operators Mr. Da Luz, Mr. Prasad, Mr. Templeman, Ms. Lieb, Mr. Fernandes, and Mr. Watson, were employees with chronic and recurring disabilities placed at Level 3 of the AMP who, "may suffer injury to their dignity, feelings, and self-respect", and should thus be awarded compensation pursuant to s. 37(2)(d)(iii) of the ***Code***. She also concluded that others who had been placed at Level 3 were not identified.

[63] The Tribunal member recognized that the determination of such an award required an assessment of the impact of the discriminatory conduct on the complainant, and would therefore depend on the specific facts of each individual case. She proceeded to assess the following awards with respect to these identified operators: $6,000 each to Mr. Da Luz, Mr. Prasad and Mr. Watson; and $5,000 each to Mr. Templeman, Mr. Fernandes and Ms. Lieb.

[64] Regarding operators who were not terminated, but who had been placed at Level 3 of the AMP by the date of her decision, the Tribunal member ordered at para. 707-708 that:

> … the parties are to meet to discuss the list of operators who have been placed at Level 3 of the AMP. The parties are to identify:
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> a) those operators who they agree have chronic or recurring disabilities which have contributed to their placement at Level 3 of the AMP; and
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> b) those operators with respect to whom there is a dispute about whether they have chronic or recurring disabilities that have contributed to their placement at Level 3 of the AMP.
>
> The parties will then enter into Tribunal-assisted mediation with a view to resolving the issue of the appropriate identification of and compensation payable to those operators. If the parties are unable to resolve these issues, I remain seized of the matter and will hear the evidence and argument necessary to decide the issues outlined above.

THE POSITIONS OF THE PARTIES

a) The Petitioner

[65] The petitioner described the AMP as an administrative tool and guide for management that provided a disciplined and systematic approach to communicate management's concern to employees and to investigate the causes of absenteeism. It says that at any point during the AMP process, an employee may request accommodation, and all accommodation options are considered by the petitioner, including the possible removal of the employee from the AMP.

[66] The petitioner argued that the Collective Agreement and the provisions of the ***Labour Relations Code***, R.S.B.C. 1996, c. 244, provide a full and complete process to determine any challenges to the legal propriety of any decision that may involve

an employee's termination or of any employer policy such as the AMP. It says that employees who believe that they should not be included in the AMP, or that they have been treated unfairly, can file a grievance under the Collective Agreement.

[67] The petitioner further argued that its Accommodation of Employees with a Permanent Disability Policy specifically recognizes its duty to accommodate physical and mental disabilities of employees to the point of undue hardship. It says that this Policy determines if the employee's duties can be modified to allow the employee to return to his or her pre-disability job, and if not, whether alternative accommodation options can be utilized to accommodate the employee. The petitioner cites 101 Gradual Return to Work programs, 86 temporary alternate placements and 8 permanent employee placements in other positions in the first half of 2006, some even before interviews were conducted under the AMP.

b) The Respondent

[68] The respondent did not argue that the petitioner does not have the right to some form of AMP, but did argue that the AMP chosen by the petitioner had no clear policy "within" it to accommodate disabled operators who are unable to meet the petitioner's standard of attendance either permanently or periodically.

[69] The respondent argued that the petitioner's AMP was implemented as a device to cut the costs of absenteeism and that it uses past absenteeism to project future attendance. The respondent said that the guiding standard for the AMP was that "all employees are expected to attend work on a regular basis". This, the respondent argued, unfairly included short term disability, long term disability and

Workers Compensation Board absences, even if they were due to work-related injuries and illnesses.

c) The Tribunal

[70] In its written submissions, the Tribunal largely, but not entirely, avoided taking position on the merits of its member's decision. It restricted its submissions primarily to the record of proceedings, the applicable standards of review, its remedial jurisdiction, and the relief available pursuant to the ***JRPA***, as permitted pursuant to ***CAIMAW v. Paccar of Canada Ltd.***, [1989] 2 S.C.R. 983 [***Paccar***]. To the extent that it failed to properly restrict its submission, I have ignored the portions of its submissions on the merits of the decision.

THE ISSUES

[71] The issues to be determined on this review were asserted as grounds for review by the petitioner. They are:

(a) That the Tribunal member incorrectly concluded that the application of the petitioner's AMP was *prima facie* discriminatory;

(b) That the Tribunal member incorrectly concluded that the petitioner's AMP resulted in systemic discrimination against some employees with chronic or recurring disabilities;

(c) That the Tribunal member reached incorrect and/or unreasonable conclusions with respect to:

i. the insufficiency of the coordination and communication between various departments involved in the administration of the AMP;

ii. the view taken by the petitioner of the points at which accommodation should be considered was too narrow;

iii. the parameters used by the petitioner at Level 3 of the AMP invariably reflected the average absenteeism of the operator group;

iv. the petitioner's focus on a search for accommodation in another position occurs predominantly in the latter stages of the AMP; and

v. the petitioner's treatment of partial day absences for employees on a Gradual Return to Work placement was discriminatory.

(d) That the Tribunal member incorrectly concluded that the AMP is not a *bona fide* occupational requirement;

(e) That the Tribunal member incorrectly concluded that the petitioner had failed to show that it was impossible to accommodate those with chronic or recurring disabilities, short of undue hardship.

STANDARD OF REVIEW

[72] In ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 [***Dunsmuir***], the Supreme Court of Canada stated that, depending on the nature of the issue to be reviewed, there are but two standards of review: correctness for

issues of jurisdiction and other questions of law; and reasonableness for issues of fact, discretion or policy.

[73] The standard of review of decisions of many administrative tribunals in British Columbia is, however, legislated under the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 [***ATA***].

[74] The Tribunal is constituted pursuant to the ***Code***. At the relevant time, s. 32 of the ***Code*** provided that "[s]ections 1, 4 to 10, 17, 29, 30, 34 (3) and (4), 45, 46, 48 to 50, 55 to 57, 59 and 61 of the Administrative Tribunals Act apply to the tribunal."

[75] Section 59 of the ATA states that:

> (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
>
> (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.

[76] In ***Evans v. University of British Columbia***, 2008 BCSC 1026, Macaulay J. dealt with the application of ***Dunsmuir*** to s. 59 of the ***ATA***. Macaulay J. found at para. 6 that the "clear legislative intent" of s. 59 is "to codify the applicable standard of review for the various types of tribunal decisions amenable to review", and noted at para. 8 that ***Dunsmuir*** does not address legislated standards of review. He held at para. 11 that importing the new definition of "reasonableness" from ***Dunsmuir*** into the ***ATA*** "goes too far and would require me to ignore the clear legislative intent underlying s. 59".

[77] Although the Supreme Court of Canada collapsed the standards in ***Dunsmuir***, the Court there did not take issue with the definitions of reasonableness *simpliciter* and patent unreasonableness set out by Iacobucci J. in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 [***Southam***], and instead quoted them at para. 37:

> … In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

[78] In s. 59 of the ***ATA***, the legislature expressed a clear intention to establish a standard of patent unreasonableness for review of discretionary decisions and findings of fact. In the result, despite ***Dunsmuir***, four standards of review continue to be applicable on judicial review in British Columbia pursuant to s. 59 of the ***ATA***,

depending upon the nature of the question or questions raised: correctness, reasonableness, patent unreasonableness, and fairness.

[79] In ***British Columbia v. Bolster***, 2007 BCCA 65, (*sub nom.* ***Bolster v. British Columbia (Ministry of Public Safety & Solicitor General))*** 63 B.C.L.R. (4th) 263, leave to appeal ref'd [2007] S.C.C.A. No. 167 [***Bolster***], Levine J.A. for a unanimous Court of Appeal held that a question of mixed fact and law that is reviewed pursuant to s. 59 of the ATA is to be reviewed on a standard of correctness.

ANALYSIS

a) Preliminary Issues

i) Affidavit Evidence

[80] Although it filed affidavits that attested to evidence said to have been given before the Tribunal member, the petitioner did not really attempt to challenge the findings of fact by the Tribunal member. Given the practice of the Tribunal not to record or transcribe its proceedings, a party who takes issue with a finding of fact by the Tribunal is faced with a daunting task if it wishes to satisfy a court on judicial review that there was no evidence to support a factual finding, or that the finding was otherwise unreasonable.

[81] Having said that, I accept that my power to admit affidavit evidence is a power that is to "be sparingly exercised": see ***Keeprite Workers' Independent Union v. Keeprite Products Ltd.***, [1980] O.J. No. 12 (Div. Ct.), appeal allowed on other grounds ***Re Keeprite Workers' Independent Union et al. and Keeprite Products***

Ltd. (1980), 114 D.L.R. (3d) 162, 29 O.R. (2d) 513 (C.A.). Given that the petitioner did not really attempt to challenge the Tribunal member's factual findings, it would be improper for me to consider the affidavits submitted by any of the parties. I am not prepared in this case to admit and consider the material contained in the affidavits filed by the petitioner, or those filed by the respondent in response thereto.

ii) Petitioner's Jurisdictional Argument

[82] The petitioner argues that the appropriate remedy for employees included in the AMP is a grievance under the Collective Agreement and the ***Labour Relations Code***. I reject that argument. In my view, the employees have the ability to seek a remedy under either the Collective Agreement and the ***Labour Relations Code*** or under the ***Human Rights Code***.

b) The Tribunal Member's Conclusions on *Prima Facie* Systemic Discrimination

[83] The petitioner asserted that the approach of the Tribunal to the claim of systemic discrimination represents a significant divergence from the established arbitral and judicial jurisprudence on that issue. The petitioner may be entirely correct in so saying, but such a divergence may simply be the result of viewing the issue through the lens of Human Rights legislation, as opposed to the lens of labour law or civil law.

[84] While Mr. Dorsey found that the petitioner's AMP did not lead inexorably to dismissal, and did not discriminate on the basis of disability nor transgress principles of provincial rights legislation, the Tribunal member found that the AMP amounted to

systemic discrimination. In my view this is a finding of mixed fact and law, subject therefore to a standard of correctness on review. My review cannot, however, proceed on the basis that the conclusion reached by Mr. Dorsey is necessarily the correct one.

[85] Mr. Dorsey reached his conclusion based in part on his finding that the employees who were subject to the AMP had recourse to the collective agreement grievance process at any stage of the AMP. The Tribunal member did not mention this recourse in her decision.

[86] The recourse cannot render the AMP non-discriminatory, if indeed that is what it is, but neither can an analysis of the AMP ignore the context in which the AMP is administered.

[87] The Supreme Court of Canada set out the *prima facie* test in Human Rights law in ***Ontario (Human Rights Commission) v. Simpsons-Sears Ltd. et al***, [1985] 2 S.C.R. 536 at 558, in the following terms:

> … 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….

[88] The leading case on systemic discrimination is ***Action Travail des Femmes***. In delivering the judgement of the court, Chief Justice Dickson described the term at 1183 in the following way:

> … 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). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged….

[89] I will consider the Tribunal member's specific conclusions with those comments in mind.

i) The Selection of the Group of Operators by the Tribunal Member

[90] In her consideration of whether or not the respondent had established that the AMP raised a *prima facie* case of discrimination, the Tribunal member identified a group of operators who she described as those with "chronic and recurring disabilities". The petitioner argued that this created an arbitrary and artificial distinction between such employees and those employees whose absenteeism might be the result of a disability due to a cause that was neither "chronic nor recurring".

[91] While the group identified by the Tribunal member does distinguish some operators from others, based upon the cause of their disability, she chose that group in order to test whether the AMP was discriminatory as against at least that group. Her selection of the group that she chose was a procedural matter and her conclusion that the group she chose was discriminated against does not mean that a similar finding might not be made with respect to other groups of operators as well.

As her selection of the group was a procedural matter, I find that the selection must be reviewed as one of fairness, and I am unable to find that the selection was unfair.

ii) The Application of the AMP to the Group Selected by the Tribunal Member

[92] After selecting the group that she did, the Tribunal member then considered the application of the AMP to that group. Having accepted, as the respondent did, that some form of AMP was justified, the Tribunal member considered the petitioner's AMP.

[93] I am unable to accept that the Tribunal member's reliance on ***MacRae*** discussed in para. 35, above was appropriate. The passage that she referred to from ***MacRae*** dealt with termination, which might never occur under the petitioner's AMP. While one might easily conclude that termination based specifically on an employee's disability would be *prima facie* discrimination, the acceptance that some form of AMP was appropriate for the petitioner's operators makes the reliance on ***MacRae*** unwarranted.

[94] The examples of supervisors who were said to have ignored the offers of medical information with respect to specific operators equally cannot support a finding of systemic discrimination, as it is the individual supervisors and not the AMP that are the problem in those cases.

[95] Also, if some form of AMP was appropriate, then some threshold for entry into an AMP is necessary. Placement into Level 1 of the petitioner's AMP, while

potentially stressful, is not, absent specific evidence to that effect, a sufficient basis for a finding of systemic discrimination.

[96] In ***McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hopital general de Montreal***, 2007 SCC 4, [2007] 1 S.C.R. 161 [***Montreal General Hospital***]. Abella J., concurring with McLachlin C.J. and Bastarache J., discussed the requirements to support a finding of *prima facie* discrimination. At paras. 49-50 she held:

> … there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.
>
> If such a link is made, a *prima facie* case of discrimination has been shown….

[97] Abella J. continued at paras. 50 and 53:

> … It is at this stage that the *Meiorin* test is engaged and the onus shifts to the employer to justify the *prima facie* discriminatory conduct. If the conduct is justified, there is no discrimination.
>
> …
>
> There is no need to justify what is not, *prima facie*, discriminatory. Unlike Deschamps J., then, the issue for me is not whether the employer has made out the justification defence of having reasonably accommodated the claimant, but whether the claimant has satisfied the threshold onus of demonstrating that there is *prima facie* discrimination, namely, that she has been disadvantaged by the employer's conduct based on stereotypical or arbitrary assumptions about persons with disabilities, thereby shifting the onus to the employer to justify the conduct.

[98] The group of operators placed in the AMP, of necessity, must include individuals who have chronic, recurring and perhaps other types of disabilities. Such operators are not included in the program based upon some stereotypical or arbitrary assumptions about persons with disabilities. They are placed there because they have surpassed the number of days of absence that exceeds the average of their fellow operators, and the process is thus begun to determine how to assess and address their absences.

[99] The conclusion of the Tribunal member that the mere application of the petitioner's AMP to this select group is systemically discriminatory is one of mixed fact and law. I find that that conclusion was reached on an analysis that is contrary to the reasoning of Abella J. in ***Montreal General Hospital***, and I am thus unable to accept that it is correct.

iii) Were the Members of the Group Identified by the Tribunal Member Subjected to Adverse Treatment due to the AMP?

[100] This issue is one of mixed fact and law, and pursuant to ***Bolster*** attracts a review standard of correctness.

[101] A review of the Tribunal member's decision as to *prima facie* discrimination based upon a failure within the AMP to consider reasonable accommodation at an early stage, and the subjection of employees to the stress of being placed on the AMP and advanced through it in a situation where that might not be appropriate cannot end with a rejection of the Tribunal member's finding in that regard. The conclusion of *prima facie* discrimination may still not be incorrect if the AMP is discriminatory in other ways.

[102] Another discriminatory aspect of the AMP identified by the Tribunal member is described at para. 637 of her decision:

> The evidence before me established that, in applying the AMP, [the petitioner] treats individuals with chronic or recurring disabilities as "attendance problems" and forces them into the AMP 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 AMP 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*, which indicate that there must be accommodation within the standard, not just a standard set with the possibility of accommodation at the end stages.

[103] The petitioner argued that the Tribunal member's view in para. 637 misconstrues the objectives of protecting disabled persons in the employment context, as described by Madam Justice L'Heureux-Dubé in ***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 [***Quebec v. Montreal***] at para. 36:

> The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job.

[104] This reasoning was elaborated upon by Madam Justice Deschamps in ***Hydro-Québéc v. Syndicat des employé-e-s de techniques professionelles et***

de bureau d'Hydro-Québec section locale 2000 (SCFP-FTQ), 2008 SCC 43

[***Hydro-Quebec***] at paras. 14-19:

> As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration….
>
> …
>
> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided…. However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.
>
> Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. I adopt the words of Thibault J.A. in the judgment quoted by the Court of Appeal, *Québec (Procureur général) v. Syndicat des professionnelles et professionnels du gouvernement du Québec (SPGQ)*, [2005] R.J.Q. 944, 2005 QCCA 311: [TRANSLATION] "[in such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or

> her inability to fulfill the fundamental obligations arising from the employment relationship" (para. 76).
>
> The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

[105] Without some monitoring of employee absences, and some program for assessing the cause of the absences and what can be done to accommodate those causes, an employer is left with only arbitrary approaches to employee absences, approaches that the courts have condemned.

[106] The petitioner’s operators are not placed into the AMP after their first absence from work. They are only placed in the AMP after their absences exceed the average of their fellow operators.

[107] I find that the reasoning utilized by the Tribunal member at para. 637 of her decision is contrary to the reasoning approved of by the Supreme Court of Canada in ***Keays***, ***Quebec v. Montreal***, and ***Hydro-Quebec***, and conclude that her conclusion based upon that reasoning is incorrect. Does this mean that her decision reached by that reasoning should be quashed? That will depend upon the following further analysis.

iv) Other Findings of Adverse Treatment

[108] As the Tribunal member’s conclusions were reached by what I have concluded was an incorrect application of the law as stated by the Supreme Court of Canada, I conclude that, pursuant to ***Bolster***, the issue must be seen as one of

mixed fact and law, and that the standard of correctness should be applied to my review of those conclusions.

[109] The discriminatory features identified by the Tribunal member, other than those I have already addressed, were that the AMP caused stress and anxiety by monitoring employee attendance and advising employees via warning letters that their failure to improve attendance might result in termination.

[110] I accept the submission of the petitioner that there is nothing systemically discriminatory about monitoring employee attendance, or providing warning letters to those whose rate of absenteeism is considered by the petitioner to be excessive. This does not result in differential treatment based upon disability. It is the obligation of the petitioner to warn its employees of its attendance concerns and the potential consequences of specific absenteeism.

[111] Indeed, the soundness of such a practice was favourably commented upon by another panel of the Tribunal in ***Senyk v. WFG Agency Network (No. 2)***, 2008 BCHRT 376, (*sub nom.* ***Senyk v. WFG Agency Network (B.C.) Inc.***) 69 C.C.E.L. (3d) 221 [***Senyk***], albeit subsequently to the decision under review. At paras. 398-399 that panel commented:

> There are sound reasons for requiring employers to give such a warning and provide employees with an opportunity to provide relevant medical evidence before terminating their employment. First, the warning and opportunity may open a dialogue between the employer, the employee and their medical advisors, through which the employee may be able to return to work, with or without modifications. Second, it ensures that the employer, in making termination decisions, which may have a profound effect on the employee, will do so with the best available information, which should lead to better decisions.

> Third, even in a case where the employee is unable to return to work within a reasonable period of time, and the employer is ultimately justified in terminating their employment, the warning and opportunity to provide medical information gives the employee a valuable opportunity to be heard in respect of this crucial decision. Doing so helps to ensure that disabled employees are treated with dignity. Further, the warning may provide the employee whose employment is ultimately terminated with some opportunity to prepare themselves, which may tend to avoid or reduce the sort of negative consequences which Ms. Senyk suffered in receiving the April 7, 2006 e-mail without warning.

[112] I consider the reasoning on this issue in ***Senyk*** to be correct. I regard the Tribunal member's reasoning on the stress and anxiety through the monitoring of employee attendance and the warning letters advising employees that their failure to improve attendance might result in termination in the same manner as I regard her reasoning in para. 637 of her decision. I reach the same conclusion as I did with respect to that paragraph: it is contrary to the reasoning of the Supreme Court of Canada in ***Keays***, ***Quebec v. Montreal***, and ***Hydro-Quebec***, and therefore is also incorrect.

c) The Application of the AMP

[113] The Tribunal member found five issues that she concluded were proof of *prima facie* discrimination:

i) Information/Confidentiality issues;

ii) a narrow view of accommodation that inappropriately delayed accommodation;

iii) the inappropriate use of average absenteeism rates;

iv) the focus and timing of the petitioner's accommodation efforts; and

v) The use of partial day absences during return to work efforts.

i) Information/Confidentiality Issues

[114] The Tribunal member found that the AMP did not allow for relevant health information within the knowledge of the Occupational Health Group to be made available to the Attendance Management Group.

[115] Such information is subject to the privacy rights of the operator in question. Section 6 of the ***Personal Information Protection Act***, S.B.C. 2003, c. 63, provides that:

(1) An organization must not
  (a) collect personal information about an individual,
  (b) use personal information about an individual, or
  (c) disclose personal information about an individual.
(2) Subsection (1) does not apply if

> (a) the individual gives consent to the collection, use or disclosure,
> (b) this Act authorizes the collection, use or disclosure without the consent of the individual, or
> (c) this Act deems the collection, use or disclosure to be consented to by the individual.

[116] While the information known to the Occupational Health Group was not provided by it to the Attendance Management Group, for the former to have provided the information to the latter without the operator's consent would have been contrary to the ***Personal Information Protection Act*** and the Collective Agreement. Moreover, the Collective Agreement does not prevent, and indeed allows the respondent to encourage its members to voluntarily provide such information to the petitioner, where it is in their interests to do so.

[117] The Tribunal member found that an operator would not necessarily know that he or she was being considered at a quarterly meeting, and thus be placed into the AMP without having the opportunity to make his or her health information available. In that the petitioner was ordered by Mr. Dorsey to give appropriate notice of the AMP to its employees, and that the Tribunal member found that it did so in January 2001, this concern appears more hypothetical than real. Those whose absenteeism exceeded the number of days beyond which they would be placed in the AMP must be taken to know if they had reached that number of days.

[118] In summary, I find that the Tribunal member's conclusion of systemic discrimination due to the impact of the Confidentiality Policy agreed to between the petitioner and the respondent is a conclusion of mixed fact and law, which I conclude was incorrect.

ii) Accommodation and Delayed Accommodation

[119] At para. 613 of her decision, the Tribunal member found that:

> Second, in applying the AMP, [the petitioner] takes a narrow view of the points at which accommodation should be considered. Specifically, while [the petitioner] has a fairly comprehensive structure in place for the accommodation of employees who are returning to work from an illness or injury (including GRTWs 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.

[120] The Tribunal member must be taken from this paragraph in her decision to have concluded that the petitioner's AMP included a structure, which she described as fairly comprehensive, for the accommodation of workers who required it. Her criticism of this aspect of the AMP is that the petitioner gives little consideration to its employees who are fit to return to work, albeit with some accommodation needed.

[121] With respect, the Tribunal member's reasoning on this issue is inconsistent. If the AMP is, as she describes, a "fairly comprehensive structure … for the accommodation of employees", and the perceived problem is the accommodation needed when the employees return to work, the problem is not with the AMP itself, but with the efforts within it, once the employee can return to some form of work.

[122] The Tribunal member does not explain how an employer like the petitioner could properly determine how, if at all, an employee could be accommodated on his or her return to work, until that return is possible. The Tribunal member did recognize at paras. 585-586 of her decision that some of the petitioner's operators have been accommodated on their return to work.

[123] As discussed above, the Tribunal member concluded that a medical opinion that an operator was fit to return to work did not mean that the operator was no longer affected by his or her disability or did not need accommodation in his or her return to work. I am unable to see how this problem could be said to be due to the petitioner's AMP. If an operator's doctor declares him or her fit to return to work, in order to avoid the concern identified by the Tribunal member, the doctor can be asked if the operator can return to full or part-time duties, and if he or she requires some form of accommodation in order to do so.

[124] According to ***Central Okanagan School District No. 23 v. Renaud***, [1992] 2 S.C.R. 970 at 994, the employee seeking accommodation bears a "duty to facilitate the search for such an accommodation", in part by "bringing to the attention of the employer the facts relating to discrimination". In this case, that duty includes bringing to the employer's attention medical information that supports their need to be accommodated.

[125] The general findings of the Tribunal member with respect to the accommodation of the petitioner's operators by the AMP itself are findings of fact. I find, adopting the test articulated in ***Southam*** and reaffirmed in ***Dunsmuir***, that they are unreasonable as they are not supported by any reasons that can stand up to a somewhat probing examination.

[126] That said, I am not prepared to overturn the Tribunal member's findings of specific failures to accommodate the individual operators referred to in her decision. She concluded in the case of Virginia Young, for example, that the responsible

supervisor declined to listen to an operator's explanation for her absence. Whether I would have reached the same conclusion with respect to the operators dealt with by the Tribunal Member in her decision, if I had the benefit of reviewing the evidence heard by the Tribunal member, is irrelevant: see ***Speckling v. British Columbia (Workers' Compensation Board)***, 2005 BCCA 80, 46 B.C.L.R. (4th) 77 at para. 37.

[127] I am unable to say that there was no evidence to support the findings of the Tribunal member concerning those operators or that, in light of all the evidence described by the Tribunal member in her decision, the findings with respect to those workers are otherwise unreasonable.

iii) Use of Average Absenteeism Rates at Level 3 of the AMP

[128] At para. 614 of her decision, the Tribunal member found:

> Third, while [the petitioner] did put forward instances where discretion was used not to advance employees in the AMP, the evidence indicated that, where an employee was advanced to Level 3 of the AMP, 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 petitioner] takes into account the circumstances of each individual case. This occurs even in instances where [the petitioner] has information that indicates that an employee's disability may lead to elevated absence levels.

[129] The use of average absenteeism rates at Level 3 of the AMP was the subject of some criticism of the AMP by Mr. Dorsey, and the Tribunal member reiterated the same or at least similar concerns. I accepted that there must be benchmarks to trigger the AMP and to assess absenteeism rates as aberrant or otherwise, and I found that the Tribunal member's conclusion regarding the use of average

absenteeism rates to trigger the AMP is incorrect. However, the question of what the benchmarks should be once an employee is placed in the AMP is a matter of the exercise of the Tribunal member's discretion.

[130] A standard of patent unreasonableness is required before the decision of the Tribunal member can be disturbed on this issue, and that standard has not been met by the petitioner in this case. I therefore decline to disturb the Tribunal member's decision on the use of average absenteeism rates, once an employee is placed in the AMP.

iv) The Focus and Timing of the Petitioner's Accommodation Efforts

[131] At para. 615 of her decision the Tribunal member found:

> Fourth, when [the petitioner] 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 AMP. For example, there is no evidence before me that [the petitioner] has ever considered modifying the AMP standards as a possible accommodation, prior to placing an employee at Level 3 of the AMP (and very few thereafter).
>
> [Emphasis in original.]

[132] The petitioner argued that this finding demonstrated a misunderstanding by the Tribunal member with respect to the nature of absenteeism and the realities faced by employers in dealing with absenteeism.

[133] As with her general findings concerning accommodation and delayed accommodation, the finding that the consideration of accommodation in para. 615 of her decision occurs predominantly in the later stages of the AMP implies that it is not

the AMP itself that creates this late consideration, but the implementation of the AMP by the petitioner that brings about this result. This issue is again, a finding of fact, but I conclude that the Tribunal member's findings on this issue are inconsistent with the implied flexibility in the AMP. Again applying the test from ***Southam***, I find that they are unreasonable as they are not supported by any reasons that can stand up to a somewhat probing examination.

[134] That finding on my part does not, however, apply to the final sentence in para. 615 of the Tribunal member's decision. That sentence deals with the evidence that the Tribunal member states was before her. I am unable to say that there was no evidence to support the findings in that sentence or that, in light of all the evidence described by the Tribunal member in her decision, the findings with respect to modification of the AMP prior to placing an operator at Level 3, are otherwise unreasonable.

v) The Use of Partial Day Absences during Return to Work Efforts

[135] At para. 616 of her decision, the Tribunal member found:

> Fifth, I have found [the petitioner's] treatment of partial day absences resulting from an employee being placed on a GRTW placement to be discriminatory. In my view, this practice is illustrative of an underlying problem, discussed in this decision, of the AMP being poorly integrated with [the petitioner's] accommodation policies.

[136] The petitioner argued that the finding of the Tribunal member at para. 610 of her decision does not support a finding of *prima facie* discrimination. She states there that:

> I accept that counting partial days of absence while on GRTW may not have a significant impact on the attendance of most employees. It does have the potential to do so, however, as illustrated by the circumstances of Mr. Minch….

[137] The petitioner argued that as it would not be discriminatory to compensate someone on a graduated return to work only for the hours in which work was performed, it cannot be discriminatory to take into account the time an employee is not at work when reviewing their attendance record.

[138] As with the Tribunal member's findings with respect to the use of average absenteeism rates, once an employee is placed in the AMP, what might be acceptable as a matter of labour law might not be acceptable from a human rights standpoint.

[139] A standard of patent unreasonableness is required before the decision of the Tribunal member can be disturbed on this issue as well. The Tribunal member gave, at para. 610, one example which in her view supported her findings in para. 616 of her decision. She also explained how that example led to her conclusion on this issue. I am unable to conclude that the required standard for rejecting the conclusion of the Tribunal member on this issue has been met by the petitioner, and I decline to disturb that portion of her decision.

d) *Bona Fide* Occupational Requirement

[140] In ***Meiorin***, the Court identified a three-part test for determining whether an employer has established, on a balance of probabilities, that a *prima facie* discriminatory standard is a *bona fide* occupational requirement. First, the employer

must show that it adopted the standard for a purpose rationally connected to the performance of the job. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose. Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose. Third, the employer must demonstrate that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, the employer must show that it is impossible for it to accommodate individual employees sharing the characteristics of the claimant without experiencing undue hardship.

[141] In ***Montreal General Hospital***, Abella J. stated at paras. 51-52 that:

> To justify [*prima facie* discrimination], an employer must show that the conduct was reasonably necessary to accomplish a legitimate workplace purpose. Part of proving reasonable necessity, as McLachlin J. explained in *Meiorin*, at para. 54, is demonstrating that "it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer". This is where we examine whether the employer has reasonably accommodated an individual whose group identity has resulted in an arbitrary workplace disadvantage.
>
> *Meiorin* defines the applicable evidentiary burden on an employer for justifying discriminatory conduct, that is, for demonstrating that such conduct is brought "within an exception to the general prohibition of discrimination": para. 67. It is an onerous burden, and properly so. It reinforces the primacy of human rights principles in a workplace and tells employers that they can only justify such conduct towards a particular employee if the employee cannot reasonably be accommodated. If they can justify the conduct, there is no discrimination. It is part of the justification defence, not a stand-alone legal duty: if the conduct or standard is not discriminatory, on its face or in effect, no such burden of justification falls on the employer.

[142] As indicated above, the Tribunal member applied the criteria identified in ***Meiorin*** to determine whether or not the petitioner's AMP was a *bona fide* occupational requirement. She found that the first two ***Meiorin*** criteria were met, and, obviously, the petitioner takes no issue with those findings.

[143] It is the Tribunal member's finding that there was no evidence before her as to the specific cost of accommodation of employees with chronic or recurring disabilities before her, and that the petitioner had thus failed to establish that it was not possible to further accommodate such employees short of hardship that the petitioner challenged.

[144] The petitioner argued that the Tribunal member applied too stringent a test in reaching her conclusion and erred in her application of the ***Meiorin*** and ***Grismer*** cases in her statement at para. 632 that "[t]he real issue before the Tribunal in determining whether the AMP is a BFOR is whether [the petitioner] has demonstrated that it is impossible to further accommodate individual employees within the AMP without experiencing undue hardship" [emphasis added by the petitioner].

[145] In ***Hydro-Quebec***, released after the Tribunal member's decision in this case, Deschamps J., for the Court, discussed how undue hardship in this context is to be determined, and stated at paras. 14-16 that:

> … the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are

> otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration….
>
> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[146] The Tribunal member's formulation of the legal test to be applied is, under ***Bolster***, a matter that falls to be reviewed on a standard of correctness. Given its incompatibility with the reasoning in ***Hydro-Quebec***, the Tribunal member's conclusion that the issue before her was whether the petitioner had demonstrated impossibility is incorrect.

[147] The petitioner also argued that the Tribunal member's application of the principles determined by the ***Meiorin*** and ***Grismer*** cases was incorrect, and referred specifically to paras. 637 and 646 of her reasons in this regard. At those paragraphs, the Tribunal member found:

> The evidence before me established that, in applying the AMP, [the petitioner] treats individuals with chronic or recurring disabilities as "attendance problems" and forces them into the AMP 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 AMP 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*, which indicate that there must be accommodation within the standard, not just a standard set with the possibility of accommodation at the end stages.

and

> In *Meiorin*, the Court held that a standard (in this case a policy) which unnecessarily fails to reflect the differences among individuals (in this case, fails to consider the actual characteristics of the disabilities suffered by individuals) runs afoul of the prohibitions contained in the various human rights statutes and must be replaced: para. 68.

[148] At paras. 31 and 32 in ***Grismer***, the court addressed the three-part test for a *bona fide* occupational requirement from ***Meiorin***. With respect to the third element, the court held that:

> … two common indicia of unreasonableness mentioned in these proceedings may be noted. First, a standard that excludes members of a particular group on impressionistic assumptions is generally suspect. That is not the case here: the Member found that the Superintendent's prohibition was based on current knowledge and was not impressionistic. Second, evidence that a particular group is being treated more harshly than others without apparent justification may indicate that the standard applied to that group is not reasonably necessary.
>
> … In order to prove that its standard is “reasonably necessary”, the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost. In this case, there are at least two ways in which the Superintendent could show that a standard that permits no accommodation is reasonably necessary. First, he could show that no one with the particular disability could ever meet the desired objective of reasonable highway safety. For example, using current technology, someone who is totally blind cannot safely operate a motor vehicle on the highway. Since accommodation of such a person is impossible, it need not be further considered. Alternatively, if the Superintendent could not show that accommodation is totally inconsistent with his goal, he could show that accommodation is unreasonable because testing for exceptional individuals who can drive safely despite their disability is impossible short of undue hardship.

[149] The Tribunal member's analysis of the ***Meiorin*** and ***Grismer*** cases and their application to the petitioner's AMP is an issue of mixed fact and law, and thus must be reviewed on a correctness standard.

[150] As I have already found, the respondent accepts that some form of AMP is appropriate. In addition, in ***Honda Canada Inc. v. Keays***, 2008 SCC 39 [***Keays***], Bastarache J., for seven of the nine members of the Court, said at para. 71:

> … I accept that the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.

[151] ***Keayes*** was released after the Tribunal member's decision in this matter, so she did not have the benefit of that decision.

[152] I accept the petitioner's submission that unlike the impugned standards in the ***Meiorin*** and ***Grismer*** cases, which operated to exclude members of a protected group from employment, in the former case, and from receiving a driver's licence in the latter case, the petitioner's AMP simply triggers a process, and is not comparable to the exclusions in those cases.

[153] I have already found that the Tribunal member's finding that the threshold selected for inclusion in the petitioner's AMP was discriminatory is incorrect. It follows, then, that I am unable to accept that the inclusion of those who meet the threshold for entry into the petitioner's AMP offends the third element of the ***Meiorin*** test, and I conclude that the Tribunal member's finding in that regard is incorrect.

e) The Remedies Granted by the Tribunal Member

[154] The petitioner argued that the imposition of mediation and the prospect of the Tribunal member involving herself in rewriting the petitioner's AMP are remedies that are beyond her jurisdiction.

[155] The respondent submitted that because the amended petition does not identify this issue as a ground of appeal, it should not be considered. Strictly speaking, the issue is not raised in the amended petition, unless it could be said to be subsumed by the sixth ground "[s]uch other grounds as may appear".

[156] While I consider that the respondent deserved more particular notice than the sixth ground affords with respect to this issue, I am unable to accept that, if the Tribunal member made an order in excess of her jurisdiction, I should not deal with that issue.

[157] In her discussion of remedies, the Tribunal member is openly concerned with imposing a systemic remedy to resolve the systemic discrimination that she has found. In imposing "Tribunal-assisted mediation", I consider that the Tribunal member was attempting to permit the parties to come to a mutually-agreeable solution and to avoid striking down the AMP, leaving the petitioner without any policy to manage attendance, or imposing a new AMP written by her.

[158] I also conclude that the Tribunal member, in the second challenged order, was not involving herself in rewriting the petitioner's AMP but rather was attempting to seize herself of the matter should further submissions or orders be necessary.

[159] The Tribunal member therefore appears to have been attempting to craft a remedy that would not create more problems than it resolved. Though this may be a laudable goal, for the reasons below, I conclude that the two challenged remedies are beyond her jurisdiction.

[160] Whether a tribunal has jurisdiction to order a particular remedy is to be reviewed on a correctness standard: ***Royal Oak Mines Inc. v. Canada (Labour Relations Board)***, [1996] 1 S.C.R. 369 at para. 59. Further, an administrative decision maker, including a tribunal, only has the powers included in its constating statute: ***Roncarelli v. Duplessis***, [1959] S.C.R. 121. Therefore, to determine whether the Tribunal member had the jurisdiction to make the challenged orders, I must first look at the relevant sections of the ***Code***.

[161] Section 37(2) of the ***Code*** sets out the Tribunal's remedial jurisdiction. Section 37(2)(a) establishes the only mandatory remedy: the member or panel "must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention". Subsections (b)-(d) then provide discretionary remedies. Subsection (b) gives the Tribunal discretion to make declaratory orders. The Tribunal may remedy systemic discrimination under s. 37(2)(c)(i) and (ii) by ordering a contravening party to:

> (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice; [and]
>
> (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code….

[162] Finally, subsection (d) gives the Tribunal discretion to compensate a complainant with money or by providing him or her with the opportunity which was denied.

[163] In ***British Columbia (Minister of Health Planning) v. British Columbia (Human Rights Tribunal)***, 2003 BCSC 1112, 17 B.C.L.R. (4th) 193 [***Minister of Health Planning***], Williamson J. reviewed a decision of the Tribunal which had held that it was discriminatory to disallow same sex partners from being registered on birth registration forms as parents. In addition to the finding that the refusal was discriminatory, the Tribunal had ordered the Director of Vital Statistics to amend its registration form, purportedly pursuant to its jurisdiction under s. 37(2)(c)(i).

[164] Williamson J. set aside the portion of the order requiring the amendment of the form as an order that was beyond the jurisdiction of the Tribunal. He held at para. 26 that the order to amend the form did not amount to a step to ameliorate the effect of the discrimination, and did nothing for those who had been subject to the discrimination. Williamson J. reasoned at para. 27 that it should have been left to the Director, acting within his or her authority, to choose between the myriad of steps available to correct the discrimination identified.

[165] The Tribunal member in this case, in directing herself to a systemic remedy, appears to have made the challenged orders pursuant to s. 37(2)(c)(i) or (ii).

[166] I consider that remaining seized of the matter constitutes neither “steps … to ameliorate the effects of the discriminatory practice” nor “an employment equity program or other special program”, and that that order cannot be made pursuant to

either s. 37(2)(c)(i) or (ii). I also consider that the mediation order is not "an employment equity or other special program", and cannot be made pursuant to s. 37(2)(c)(ii).

[167] Finally, I consider that, with the mediation order, the Tribunal member purported to choose between the remedial options available to the respondent to correct the discrimination, contrary to the reasoning in Williamson J.'s decision in ***Minister of Health Planning***.

[168] Consequently, I conclude, on a standard of correctness, that the Tribunal member exceeded her jurisdiction in ordering the parties to attend "Tribunal-assisted mediation" and in attempting to seize herself of the matter.

[169] It is unnecessary for me to quash those orders, as I have overturned aspects of the Tribunal member's decision that render the remedy portion moot. Had I not reached a dispositive decision on those matters, I would quash these orders as well.

CONCLUSION

[170] I am not prepared to disturb the Tribunal member's conclusion that the group she identified for the purposes of dealing with the complaint that she reviewed was correct.

[171] I am also not prepared to disturb the Tribunal member's conclusions with respect to accommodation and delayed accommodation respecting specific identified operators or her conclusion that applying average absenteeism rates to

employees already placed in the petitioner's AMP at Level 3 or before is discriminatory.

[172] I am further not prepared to disturb the Tribunal member's conclusion that the treatment of part-day absences within the AMP was incorrect.

[173] I will and do, however, quash the Tribunal member's finding that the application of the petitioner's AMP to the group she identified was in and of itself discriminatory, as well as her finding that early placement of operators in the AMP is discriminatory.

[174] I also quash the Tribunal member's finding that the AMP is discriminatory because it creates stress on those who are placed within it, and who receive letters from the petitioner once in the AMP.

[175] I find that the Tribunal member erred in concluding that the petitioner's AMP is problematic due to issues of confidentiality, and I quash her conclusion that the petitioner's AMP fails to accommodate its operators or delays in so doing, with the exception of her findings respecting specific identified operators.

[176] I further find that the Tribunal member erred in finding that the petitioner's AMP is not a *bona fide* operational requirement.

[177] Finally, I find that the Tribunal member exceeded her jurisdiction in ordering "Tribunal-assisted mediation" and in attempting to remain seized of the matter. These orders are moot due to my other conclusions, but if I had not reached those conclusions I would quash them.

[178] I would have remitted the matter to the Tribunal for reconsideration based upon these reasons for judgment, had I not reached particular conclusions. These conclusions include my findings that the application of the AMP to the group chosen by the Tribunal member, the early placement of employees in the AMP, and the letters issued pursuant to the AMP were not discriminatory. These findings on discrimination are not dispositive of the petition, but would have limited the scope of the matter to be sent back to the Tribunal. These conclusions also include my finding that the AMP is a *bona fide* occupational requirement, which is dispositive of the entire petition, leaving nothing for the Tribunal to reconsider. To remit the matter is thus inappropriate.

[179] In the result, I allow the petition, insofar as it relates to the petitioner's overall AMP, but uphold those portions of it that relate to specific identified operators.

COSTS

[180] While the petitioners have enjoyed success, it is not complete. I will not therefore, dispose of the matter of costs as between the petitioner and the respondent without further submissions from those parties. If those parties wish to make further submissions on the matter of costs only, the petitioner will have two weeks to do so, and the respondent two weeks thereafter to reply. The petitioner will then have one week after that to reply to the respondent's submissions.

[181] Insofar as costs against the Tribunal are concerned, while counsel for the Tribunal did transgress the bounds for submissions described in ***Paccar***, that excessive aspect of her submissions did not appreciably add to the burden on the

petitioner, nor protract the proceedings in a significant way. I therefore decline to award costs against the Tribunal pursuant to the principles set out in ***Lang v. British Columbia (Superintendent of Motor Vehicles)***, 2005 BCCA 244, 43 B.C.L.R. (4th) 65 at paras. 46-54.

"Hinkson J."