On judicial review from a decision of an adjudicator delivered September 9, 2015.

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Docket: CI 15-01-98140
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:		**COUNSEL:**
NORTHERN REGIONAL HEALTH AUTHORITY,	)	For the Applicant: Robert A. Watchman
Applicant,	)	
- and -	)	For the Respondents: Isha Khan
MANITOBA HUMAN RIGHTS COMMISSION, and LINDA HORROCKS,	)	
Respondents.	)	Judgment delivered: May 6, 2016

EDMOND J.

I. INTRODUCTION

[1] The applicant seeks judicial review of a decision of an adjudicator appointed pursuant to ***The Human Rights Code***, C.C.S.M. c. H175 ("***Code***"), that was communicated to the parties on September 9, 2015 ("adjudicator's decision").

[2] The adjudicator's decision was in respect of a complaint of discrimination filed by the respondent Linda Horrocks ("complainant") with the respondent Manitoba Human Rights Commission ("Commission") in File No. 12 EN 207 on November 14, 2012 ("complaint"). The complainant alleged that her employer, Northern Regional Health Authority ("applicant"), contravened section 14 of the ***Code***, discriminated against her in connection with her employment as a health care aide on the basis of a disability, namely, alcohol addiction, and failed to reasonably accommodate her special needs associated with her disability.

[3] The complainant also alleged that "the discrimination was not based upon bona fide and reasonable requirements or qualifications for the employment or occupation contrary to Section 14" of the ***Code***.

[4] On August 28, 2014, the adjudicator designated herself as a Board of Adjudication to hear and decide the complaint pursuant to subsections 32(1) and (2) of the ***Code***.

[5] The adjudicator made the following findings:

(1) She had jurisdiction to hear and decide the complaint under the ***Code***.

(2) The complainant had a disability within the meaning of the ***Code*** relating to alcohol addiction; she had special needs

associated with that disability that required accommodation in the workplace; and, she was treated adversely by the applicant and her disability was a factor in that adverse treatment.

(3) The applicant failed to meet its onus to establish that its actions were justified because:

(a) it made reasonable efforts to accommodate the complainant to the point of undue hardship; and/or

(b) the conditions it imposed were *bona fide* occupational requirements.

[6] In its application brief, the applicant raised the following points in issue:

(1) What is the applicable standard of judicial review?

(2) Did the adjudicator err in law when she accepted jurisdiction to hear and decide the complaint when the essential character of the dispute was within the exclusive jurisdiction of a labour arbitrator in accordance with the terms of a collective agreement governing the parties and the applicable provisions of ***The Labour Relations Act***, C.C.S.M. c. L10 ("***Act***")?

(3) Alternatively, did the adjudicator err in law in failing to determine that labour arbitration was the more appropriate forum for hearing and determining the subject matter of the complaint?

(4) If the adjudicator had jurisdiction to hear and decide the complaint, did she commit errors of law and was the adjudicator's decision reasonable?

[7] The Commission disagrees with the applicant's statement of the issues and submits that section 50(1) of the ***Code*** restricts the court's review of the adjudicator's decision to assessing whether or not:

(a) there was an error of jurisdiction with respect to the adjudication; or

(b) there was a breach of the principle of natural justice or the principle of fairness in the course of the adjudication; or

(c) there was an error of law on the face of the record of the proceedings.

[8] The Commission, therefore, submits that the court must determine the following issues:

(1) What is the appropriate standard of review?

(2) Did the adjudicator err in determining that she had jurisdiction to consider the complaint?

(3) Was the adjudicator's decision reasonable?

II. THE FACTS

[9] In or about June 2009, the complainant commenced employment with the applicant as a health care aide, working at a personal care home in Flin Flon, Manitoba.

[10] The complainant was a member of the Canadian Union of Public Employees, Local 8600 ("Union"). As such, there is no dispute that her employment was governed by a collective agreement entered into between the Union and the applicant ("collective agreement").

[11] On January 6, 2011, a representative of the applicant met with the complainant and a representative of the Union in order to discuss concerns about the complainant's rate of absenteeism. The applicant asked the complainant if her absences were related to alcohol abuse. The complainant denied alcohol use, indicating she was on probation and was to abstain from alcohol as a condition of her probation. She said she had been charged with driving under the influence and was under a court order not to consume alcohol from May 2010 to May 2011.

[12] On May 26, 2011, a representative of the applicant met again with the complainant to discuss her attendance. The complainant had been

absent from work on nine occasions, between January 6, 2011, and May 26, 2011. At that meeting, the complainant advised the applicant that as a result of the probation, she was required to attend regularly scheduled meetings at the Addictions Foundation of Manitoba ("AFM").

[13] Commencing in May 2011, the complainant began receiving ongoing counseling from AFM as a result of enrolling in a program called "Reducing the Risk". Her AFM counselor, Lori Stevens, testified at the hearing before the adjudicator. Ms. Stevens had recommended that the complainant sign an agreement to abstain from alcohol for a three-month period in order to help the complainant deal with her personal issues and learn to make healthier choices. The complainant asked to defer signing the agreement for one week because she was intending to drink at an upcoming fundraising event. Signing the abstinence agreement was put off until June 6, 2011.

[14] On June 3, 2011, the complainant was determined by the applicant's regional manager to be under the influence of alcohol while she was on duty at work, and was immediately sent home and suspended from her job without pay pending further investigation.

[15] On June 7, 2011, the complainant was questioned about the incident of June 3, 2011, and she disclosed to the applicant that she was struggling with alcohol addiction issues.

[16] On June 21, 2011, the complainant was asked to sign an agreement between the applicant, the Union and the complainant as a condition of continuing employment. The terms of the agreement included that the complainant would attend at addictions counseling sessions through AFM, Alcoholics Anonymous group meetings, as well as mental health counseling sessions, would submit to random alcohol and/or drug testing, and would abstain from consuming alcohol entirely, at and outside of work.

[17] The complainant was particularly concerned about the breadth of the abstinence term, and after seeking advice from the Union she refused to sign the agreement.

[18] As a result, the applicant terminated the complainant's employment, and the Union filed a grievance on behalf of the complainant under the collective agreement.

[19] The grievance was referred to arbitration and an arbitrator was appointed.

[20] In April 2012, prior to the arbitration proceeding, the complainant, the Union and the applicant signed a memorandum of agreement ("MOA") to resolve the grievance and allow the complainant to return to work in accordance with the terms of the MOA. One provision in the

MOA required the complainant to abstain from consuming alcohol. The grievance was withdrawn and the arbitration was cancelled.

[21] The MOA contained the following terms:

> 10. Should Ms. Horrocks, at any time within two (2) years of the date of her return to work pursuant to this Agreement, breach any of the conditions as noted in paragraph 3, 4, 5, 6, 7, 8, and 9 above, such breach shall be considered by the Employer to constitute just cause for the termination of Ms. Horrocks' employment, subject to the right of the Union and Ms. Horrocks to challenge any decision of the Employer through the grievance and arbitration procedure set forth in the Collective Agreement. After the two (2) year period mentioned above, the consequences of a breach may involve a decision by the Employer other than termination, subject to the grievance and arbitration procedure.
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> 11. Ms. Horrocks confirms that she understands the terms of this Agreement and she considers them to be satisfactory and complete and that all obligations of the Employer and the Union to her (including the Duty to Accommodate) have been met and that she signs this Agreement freely and voluntarily.

[22] On April 30, 2012, prior to the complainant returning to work, the applicant arranged a meeting with the complainant and the Union. At that meeting, the applicant advised it had received two separate reports stating that the complainant was seen visibly intoxicated outside of work on one occasion and had been perceived to be intoxicated during a telephone call on another occasion.

[23] Both incidents were alleged to have occurred subsequent to the complainant's execution of the MOA. The complainant denied that she had been drinking. The complainant was given several opportunities to

reconsider the position she was taking at the meeting and given time alone with her Union representative; however, she maintained her position that she had not been drinking.

[24] As a result, in a letter dated May 1, 2012, the applicant terminated the complainant's employment effective April 30, 2012, for cause. The Union did not file a grievance on her behalf. No evidence was filed as to why the complainant or the Union did not file a grievance. There is no evidence that the Union refused to file a grievance.

[25] The collective agreement contained a comprehensive grievance procedure in article 10 and an arbitration procedure in article 11. A grievance may be filed by an employee or by the Union on behalf of an employee.

[26] The grievance procedure in article 1007 provides that "[a]n employee claiming to have been discharged or suspended without just cause may submit the grievance directly to the Executive Director of Human Resources or designate." There was no evidence that the complainant, who was discharged, initiated the grievance procedure set forth in the collective agreement or pursuant to the terms of the MOA.

[27] The arbitration procedure in article 1107 provides that "[t]he decision of the Board of Arbitration or the Sole Arbitrator shall be final and binding and enforceable on all Parties, and may not be changed."

[28] Article 6 of the collective agreement provides that every employee is entitled to a respectful workplace which is free from discrimination and harassment. The parties agreed that there shall be no discrimination, as set forth in article 602, including no discrimination based on "physical or mental disability".

[29] On November 14, 2012, the complaint of discrimination was filed by the complainant with the Commission. After a hearing, the adjudicator's decision was released.

III. STANDARD OF REVIEW

[30] The parties agree the standard of reasonableness applies where a reviewing court's decision involves a specialized administrative tribunal interpreting or applying its own statute, in this case the ***Code***. See:

- ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54

- ***Korsch v. Manitoba (Human Rights Commission)***, 2011 MBQB 222, [2011] M.J. No. 304 (QL) at paras. 41 and 47, aff'd 2012 MBCA 108, [2012] M.J. No. 378 (QL)

- ***Manitoba (Human Rights Commission) v. Jewish Community Campus of Winnipeg Inc.***, 2015 MBQB 47, [2015] M.J. No. 87 (QL) at paras. 14 to 20

- ***Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval***, 2016 SCC 8, [2016] S.C.J. No. 8 (QL)

- ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61, [2011] 3 S.C.R. 654

- ***Commissioner of Competition v. CCS Corp.***, 2015 SCC 3, 380 D.L.R. (4th) 381 at para. 35

- ***Smith v. Alliance Pipeline Ltd.***, 2011 SCC 7, [2011] 1 S.C.R. 160 at paras. 26 and 28

[31] The applicant submits that the standard of correctness still applies to certain specific types of administrative decisions. The applicant relies upon the following finding in the ***Dunsmuir*** decision:

> [61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: ***Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners***, [2000] 1 S.C.R. 360, 2000 SCC 14; ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)***, [2004] 2 S.C.R. 185, 2004 SCC 39.

[32] In ***Loewen v. MTS***, 2015 MBCA 13, 380 D.L.R. (4th) 654, it has been clearly pointed out by our Manitoba Court of Appeal as follows:

> [41] Post-***Dunsmuir***, decisions of the Supreme Court of Canada have continued to shrink the category of a question of general law to which the correctness standard would apply. See Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012), 38 Queen's L.J. 59-98 at para. 35 (QL); and David Phillip Jones, "Recent Developments in Administrative Law" (Paper delivered at the Canadian Bar Association 2013 National Administrative Law,

> Labour and Employment Law Conference, 29-30 November 2013) at 1. Lewans indicates that the Supreme Court of Canada's decisions over the past year "provide a clear signal that the Court intends to rein in the conceptual categories associated with correctness review" (at para. 26). This trend accords with the general emphasis on deference to the original decision-maker and the focus on more efficacy and proportionality in the justice system.
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> . . . . .
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> [47] In summary, the recent Supreme Court of Canada jurisprudence clearly favours a reasonableness standard of review with respect to most decisions of administrative decision-makers, including those of labour arbitrators and commercial arbitrators. It cautions a reviewing court to be careful in identifying the nature of the question in issue and to be wary about applying a correctness standard where the question involves the decision-maker interpreting its home legislation or where the question involves inextricably intertwined legal and factual issues within the decision-maker's mandate and expertise.

[33] The Commission submits that this is not a case in which there are two competing specialized tribunals at play, namely, a labour arbitrator appointed pursuant to the provisions of the collective agreement and the ***Act*** and a human rights adjudicator appointed pursuant to the ***Code***. The Commission submits that there was no evidence before the adjudicator that a labour arbitrator was in a position to hear the dispute and compete with the adjudicator to determine whether or not the complainant had been discriminated against on the basis of her addiction under section 14 of the ***Code***, as alleged in her complaint.

[34] The applicant submits that the complainant, or the Union on her behalf, was required to follow the grievance procedure in the collective agreement and a labour arbitrator or board had exclusive jurisdiction to

hear the dispute. The applicant submits that the Supreme Court of Canada's decisions since ***Dunsmuir*** have confirmed that the standard of correctness governs when "the drawing of jurisdictional lines between two or more competing specialized tribunals" is at issue. The applicant relies upon ***Smith*** at para. 26, and ***Canada (Canadian Human Rights Commission) v. Canada (Attorney General)***, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 18.

[35] Having reviewed the numerous decisions that were referred to the court on the issue of the appropriate standard of review, I am satisfied that the standard of correctness applies to the issue of drawing the jurisdictional lines between labour arbitration and human rights adjudication. The balance of the adjudicator's decision is subject to review pursuant to a standard of reasonableness.

IV. JURISDICTION

[36] The Supreme Court of Canada has stated in a number of decisions that where there are two administrative bodies (or even a court and an administrative tribunal) that could claim jurisdiction in respect of a dispute, the question of jurisdiction must be resolved by examining the essential character of the dispute at issue, taken in its full factual context, and the two legislative schemes to determine which of the administrative bodies was intended by the applicable legislative authority to resolve the dispute. See ***Weber v. Ontario Hydro***, [1995] 2 S.C.R.

929; ***Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners***, 2000 SCC 14, [2000] 1 S.C.R. 360; ***Quebec (Attorney General) v. Quebec (Human Rights Tribunal)***, 2004 SCC 40, [2004] 2 S.C.R. 223 ("***Charette***"); ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)***, 2004 SCC 39, [2004] 2 S.C.R. 185 ("***Morin***"); ***Bisaillon v. Concordia University***, 2006 SCC 19, [2006] 1 S.C.R. 666.

[37] In ***Weber***, the Supreme Court of Canada reviewed section 45(1) of the Ontario *Labour Relations Act*, which is similar to section 78(1) of the Manitoba ***Act***, and analyzed the concurrent model, the model of overlapping jurisdiction, and the exclusive jurisdiction model, and concluded that the exclusive jurisdiction model gives full credit to the language of section 45(1) of the Ontario *Labour Relations Act*. The court examined the "essential character" of the dispute in its factual context.

[38] The Supreme Court of Canada in ***Weber*** summarized the law in this way:

> [67] I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to *Charter* remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory

> tribunal. Against this background, I turn to the facts in the case at bar.

[39] Cases heard since ***Weber***, including cases where the disputed issue includes human rights principles, have found that the applicable Human Rights Commission or Tribunal may or may not be the adjudication body that has authority to decide those issues or apply human rights principles.

[40] In ***Morin***, the teachers' unions entered into a modification of a collective agreement with the Province of Quebec, which adversely affected primarily younger and less experienced teachers. The younger teachers complained to the Quebec Human Rights Commission that the agreement discriminated against them, violating the equality guarantee of the Quebec *Charter of Human Rights and Freedoms*. The matter proceeded before the Human Rights Tribunal. The respondents filed a motion challenging the Tribunal to decline jurisdiction on the ground that the labour arbitrator possessed exclusive jurisdiction over the dispute. The Tribunal rejected the motion, but the Quebec Court of Appeal reversed the Tribunal's decision.

[41] The majority of the Supreme Court of Canada applied ***Weber*** but made it clear that ***Weber*** does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. The dispute, viewed not formalistically but in its essential

nature, "engages matters which pertain more to alleged discrimination in the formation and validity of the agreement, than to its 'interpretation or application', which is the source of the arbitrator's jurisdiction under the *Labour Code*, s. 1(*f*)." See ***Morin***, para. 25.

[42] After analyzing the two statutes, the majority of the Supreme Court of Canada concluded that the Human Rights Tribunal was entitled to exercise its jurisdiction over the claim under the governing legislation. The reasons given included the following:

(1) The nature of the question did not lend itself to characterization as a grievance under the collective agreement, since the claim was that the agreement was itself discriminatory. See ***Morin***, para. 27.

(2) The unions were opposed in interest to the complainants. If the unions chose not to file a grievance before the arbitrator, the teachers would be left with no legal recourse. See ***Morin***, para. 28.

(3) Even if the unions had filed a grievance on behalf of the complainants, the arbitrator would not have had jurisdiction over all of the parties to the dispute. See ***Morin***, para. 29.

(4) Because the complainants' general challenge to the validity of a provision in the collective agreement affected hundreds

> of teachers, the Human Rights Tribunal was a "'better fit' for this dispute than the appointment of a single arbitrator to deal with a single grievance within the statutory framework of the *Labour Code*." See ***Morin***, para. 30.

[43] In ***Charette***, the Supreme Court of Canada dealt with the jurisdiction of the Human Rights Tribunal to hear a complaint alleging discrimination on the basis of sex and pregnancy. The complainant was entitled to participate in a government program that provided social assistance benefits to low income families with children where at least one adult was receiving income from employment in the labour force. When she left work on maternity leave, she was told that she would not receive the benefits because the employment insurance benefits she would receive while on maternity leave were not income from employment. The *Act respecting the Commission des affaires sociales* and the *Act respecting income security* ("*Income Security Act*") contained a comprehensive administrative scheme, and the Commission des affaires sociales ("CAS") had the jurisdiction to apply and interpret the scheme. Bastarache and Arbour JJ. found that the essential character of the dispute, in its factual context, arose either expressly or inferentially from the statutory scheme, and that the essential character of the dispute was a decision on an issue that was within the exclusive jurisdiction of the CAS.

[44] Binnie and Fish JJ., concurring in the result, commented on McLachlin C.J.'s dissenting reasons as follows:

> [41] While it is true, as the Chief Justice points out at para. 18, that the dispute can also be viewed as a human rights claim about the validity of an aspect of the legislative scheme, I do not think that Ms. Charette can sidestep the will of the Quebec legislature by failing to ask the Minister for reconsideration or failing to exercise her right of administrative appeal. The Chief Justice accepts that Ms. Charette was "entitled" (para. 3) to appeal the Minister's decision to deny her benefits, i.e., that the CAS would have had the jurisdiction to hear the appeal, including the ***Charter*** challenge. If the CAS had jurisdiction in the circumstances of this case, it seems to me clear that such jurisdiction was intended to be exclusive. The Chief Justice outlines, at para. 16, a number of policy considerations favouring the Human Rights Tribunal as the adjudicative body for the resolution of this dispute. With respect, that was a policy choice for the legislature to make and, having made it, it is for the courts to respect that choice.
>
> [42] The legal factors that favoured the jurisdiction of the Quebec Human Rights Tribunal in ***Morin***, outlined by the Chief Justice at para. 27 of her reasons in that case, do not apply here. Firstly we held in ***Morin*** that "the nature of the question does not lend itself to characterization as a grievance under the collective agreement" (para. 27 (emphasis in original)). There is no doubt here that Ms. Charette's claim is under the *Income Security Act* and the CAS is competent to deal with it. Secondly, Ms. Charette, unlike the situation in ***Morin***, would not be represented by unions that were "on the face of it, opposed in interest to the complainants" (para. 28). Third, the CAS, unlike the labour arbitrator in ***Morin***, has jurisdiction over all of the relevant parties to Ms. Charette's complaint about discontinuance of her income supplement. Fourth, while the dispute here potentially affects many individuals other than Ms. Charette, as was the case in ***Morin*** and is a characteristic of ***Charter*** claims generally, this factor will always favour the Commission or a Human Rights Tribunal in turf wars with other branches of the provincial government. It is a factor which the Quebec legislature inevitably took into account when it gave exclusive jurisdiction over income security benefits to the CAS including the power to adjudicate ***Charter*** arguments (subject to judicial review by the ordinary courts).
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> [Emphasis in original.]

[45] In ***Canada (House of Commons) v. Vaid***, 2005 SCC 30, [2005] 1 S.C.R. 667, the Supreme Court of Canada dealt with a grievance filed under the *Parliamentary Employment and Staff Relations Act* ("*PESRA*") by a chauffeur to the Speaker of the House of Commons. Following the grievance the chauffeur was reinstated in his position, but when he returned to work he was not allowed to resume his duties. He was subsequently informed by the Speaker's office that, because of a reorganization, his former position was not available. The chauffeur filed a complaint with the Canadian Human Rights Commission and the matter was referred to a tribunal. The Speaker and the House of Commons challenged the human rights tribunal's jurisdiction, and the tribunal dismissed the challenge. On an application for judicial review, both the Federal Court, Trial Division, and the Federal Court of Appeal upheld the tribunal's decision. The Supreme Court of Canada unanimously allowed the appeal and found that the *PESRA* was intended to have exclusive jurisdiction to resolve a dispute. In applying the ***Weber*** test as noted above, the Supreme Court of Canada stated:

> [93] The fact that the respondent Vaid claims violations of his human rights does not automatically steer the case to the Canadian Human Rights Commission because "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute" (***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929, at para. 49; ***St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219***, [1986] 1 S.C.R. 704, at p. 721).

[46] After reviewing the allegations made by the respondent Vaid, the Supreme Court of Canada concluded, at para. 94, "There is nothing here, in my respectful opinion, to lift these complaints out of their specific employment context." And further, the Supreme Court of Canada stated:

> [98] In this case, we are not dealing with an allegation of systemic discrimination. We are dealing with a single employee who says he was wrongfully dismissed against a background of alleged discrimination and harassment. A different dispute may involve different considerations that may lead to a complaint properly falling under the jurisdiction of the Canadian Human Rights Commission. But that is not this case.

[47] The Supreme Court of Canada has also clearly decided that a board of arbitration appointed pursuant to a collective agreement and the Ontario *Labour Relations Act* has the jurisdiction to apply the substantive rights and obligations of human rights legislation. The Supreme Court of Canada held that the board of arbitration was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. See ***Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324***, 2003 SCC 42, [2003] 2 S.C.R. 157. See also ***Tranchemontagne v. Ontario (Director, Disability Support Program)***, 2006 SCC 14, [2006] 1 S.C.R. 513.

[48] Here, the adjudicator's decision made reference to the ***Weber*** and ***Parry Sound*** decisions, and in applying the test set forth in ***Weber*** the adjudicator stated:

> [110] In this case, having regard to the evidence as a whole, I find the essential character of this dispute arises from an alleged violation of the Complainant's human rights and not out of the "interpretation, application, administration or violation of the collective agreement".

Further, the adjudicator stated:

> [243] … In my view this proceeding is not about whether the Memorandum of Agreement is a valid contract. Nor is it about whether the Complainant breached the agreement in fact. Rather, it is about whether the Respondent violated the Complainant's rights under clause 14 of the *Code*.

[49] In my view, the approach adopted by the adjudicator was to focus on the legal characterization of the issue, which was whether there was a violation of the complainant's human rights. That is precisely what the Supreme Court of Canada has stated should not be done. The tribunal is to examine the essential character of the dispute in the factual context. In my view, the essential character of the dispute in issue is whether there was just cause to terminate employment of a unionized employee with an alleged addiction problem. A secondary issue is whether an alleged breach of the MOA negotiated between the applicant, the Union, and the complainant constitutes just cause for termination of employment. My review of the Supreme Court of Canada's decisions

noted above is that the tribunal should not examine the essential character of the dispute in a formalistic or legalistic manner.

[50] In my opinion, the approach adopted by the adjudicator was incorrect and focused on the legal characterization of the dispute as opposed to determining the essential character of the dispute in its factual context.

[51] The next question that must be examined is the legislative intent. Subsections 78(1) and (2) of the ***Act*** state, in part:

> **Provision for final settlement**
> **78(1)** Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation.
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> **Deemed arbitration provisions**
> **78(2)** Where a collective agreement does not contain a provision as required under subsection (1), it shall be deemed to contain the following provisions, which shall be numbered or lettered as may be required in the collective agreement:
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> > (a) Where a violation of this agreement is alleged, or a difference arises between the parties to this agreement relating to the dismissal or discipline of an employee, or to the meaning, interpretation, application or operation of this agreement (including a difference as to whether or not a matter is arbitrable), either party, without stoppage of work and after exhausting any grievance procedure established by this agreement, may notify the other party in writing of its desire to submit the alleged violation or difference to arbitration; and thereafter the parties shall, subject to clause (b), agree on an arbitrator to hear and determine the matter and issue a decision, which decision is final and binding on the parties and any person affected thereby.

[52] The powers of an arbitrator or an arbitration board are set forth in section 120(1) of the ***Act***. Section 121(2) deals with the remedial authority and uses mandatory language as follows: "The arbitrator or arbitration board shall provide a final and conclusive settlement of the matter submitted to arbitration ...."

[53] Further, section 128(1) of the ***Act*** provides that every decision of an arbitrator or arbitration board is "final and binding on the parties".

[54] Section 58 of the ***Code*** states:

> **Paramountcy of Code**
> 58 Unless expressly provided otherwise herein or in another Act of the Legislature, the substantive rights and obligations in this Code are paramount over the substantive rights and obligations in every other Act of the Legislature, whether enacted before or after this Code.

[55] Although the adjudicator did not conduct an analysis of the legislative provisions outlined above, she made the following finding:

> [106] I find that this complaint does fall within the jurisdiction of an adjudicator designated under the *Code* and as such I have the jurisdiction to determine whether the *Code* has been contravened in the manner alleged in the Complaint.

[56] In essence, the Commission submits that this is not a case in which a labour arbitrator has exclusive jurisdiction to determine the issues. Instead, the Commission submits that this is a case in which the adjudicator did not err in considering the factual context of the dispute and did not err by failing to consider the legislative intent of the scheme

provided by the ***Code***. Further, the Commission submits that the adjudicator considered the effect of the parties' entering into the MOA and the fact that "notwithstanding the automatic termination provisions contained in Last Chance Agreements, there is always a statutory obligation to examine the employer's duty to accommodate to the point of undue hardship." See paragraph 115 of the adjudicator's decision.

[57] The legislative provisions in the ***Act*** and the ***Code*** support a finding that the legislative intent for any dispute involving the termination of a unionized employee, including any human rights violation associated with the termination, is within the exclusive jurisdiction of labour arbitration.

[58] Section 58 of the ***Code*** makes it clear that "the substantive rights and obligations in this Code are paramount over the substantive rights and obligations in every other Act of the Legislature". In my opinion that does not mean the adjudicative procedures under the ***Code*** were intended to be exclusive. Quite the contrary. It simply means that the courts and all other administrative tribunals must enforce the substantive rights and obligations in the ***Code***. This is consistent with the Supreme Court of Canada decisions noted above. See ***Parry Sound*** and ***Tranchemontagne***.

[59] The collective agreement and the ***Act*** include a provision for the final settlement of all disputes. See collective agreement, articles 10 and 11.

[60] Interpreting last chance agreements negotiated between an employer, a union, and a union member is done in the context of labour arbitration, and a last chance agreement like the MOA in this case forms part of a collective agreement process. See ***Cornwall (City) v. Canadian Union of Public Employees, Local 234 (Séguin Grievance)***, [2006] O.L.A.A. No. 560 (QL) at para. 7.

[61] The fact that a claim of wrongful dismissal includes allegations of human rights violations does not necessarily take the complaints out of the process governed by the collective agreement. See ***Vaid***.

[62] In my view, the ***Morin*** decision is distinguishable from the facts of this case. As noted above, a group of teachers complained to the Quebec Human Rights Commission that a modification of a collective agreement with the Province of Quebec adversely affected them, discriminated against them, and violated the equality guarantee. The nature of the question did not lend itself to characterization as a grievance under the collective agreement. The claim was that the agreement negotiated between the teachers' unions and the Province of Quebec was discriminatory. In this case, the nature of the question does lend itself to characterization as a grievance under the collective agreement. In

Morin, the unions were opposed in interest to the complainants. In this case, no evidence was led that the Union was opposed in interest to the complainant. It appears clear that the Union did not file a grievance, but nothing prevented the complainant or the Union from filing a grievance, subject to the applicant raising the fact that the grievance was filed out of time. On that point, applicant's counsel confirmed on the record that if this matter was referred back to the grievance procedure and arbitration procedure, the applicant would not raise a defence that the grievance was filed out of time or respond that the grievance could not be heard based on delay.

[63] In ***Morin***, even if the unions had filed a grievance on behalf of the complainants, the arbitrator would not have had jurisdiction over all of the parties to the dispute. In this case, if a grievance had been filed, the arbitrator would clearly have had jurisdiction over the parties to the dispute.

[64] In ***Morin***, the Supreme Court of Canada also held that the Human Rights Tribunal was a "better fit" for the dispute. I am not satisfied, on the facts of this case, that an adjudicator appointed pursuant to the ***Code*** is a better fit for determination of the dispute. The issues raised in this case are matters that are routinely decided by labour arbitrators, involving determinations as to whether there was just cause to dismiss the complainant, whether the complainant breached the terms of the

MOA, whether the complainant established a *prima facie* case of discrimination on the basis of disability, and if a case of *prima facie* discrimination was made out, whether the applicant established that it made reasonable efforts to accommodate the complainant to the point of undue hardship and/or the conditions it imposed were *bona fide* occupational requirements. See ***Seaspan ULC v. International Longshore & Warehouse Union, Local 400 (G.H. Grievance)***, 2014 CanLII 83893 (BC LA), [2014] B.C.C.A.A.A. No. 108 (QL); ***Fraser Lake Sawmills Ltd. (Re)***, [2002] B.C.L.R.B.D. No. 390 (QL).

[65] In summary, the following are my findings:

(1) The essential character of the dispute in issue is whether there was just cause to terminate the employment of the complainant.

(2) A secondary but also important issue is whether an alleged breach of a last chance agreement, in this case the MOA, negotiated between the applicant, the Union, and the complainant, constitutes just cause for termination of employment.

(3) The approach adopted by the adjudicator was incorrect and focused on the legal characterization of the dispute as

opposed to determining the essential character of the dispute in its factual context.

(4) Issues which involve interpretation, application, administration, or violation of the collective agreement, and the MOA entered into pursuant to the collective agreement, were intended to be resolved pursuant to the arbitration procedure set out in the collective agreement and the ***Act***.

(5) The labour arbitrator is required to apply the substantive rights and obligations of the ***Code***.

(6) To the extent that the dispute raises issues that would fall under the jurisdiction of a labour arbitrator and a human rights adjudicator, I am satisfied, in the factual context of the dispute, that labour arbitration is a "better fit" for determining the dispute.

(7) Accordingly, the adjudicator's decision is set aside and the dispute shall be determined in accordance with the grievance procedure and arbitration procedure in the collective agreement.

(8) The grievance should be initiated in accordance with the grievance procedure, and in light of the statement made on the record by the applicant, no position may be advanced by

> the applicant that the complainant has failed to comply with the time requirements set forth in the grievance procedure and arbitration procedure of the collective agreement.

[66] In light of my findings, it is unnecessary for me to decide whether the adjudicator committed errors of law and whether the adjudicator's decision was reasonable.

[67] In my view, it is not appropriate for the court to decide issues that will have to be determined by a labour arbitrator. In the context of a labour arbitration, the labour arbitrator must consider whether the complainant met the onus of proving *prima facie* discrimination, and if so, whether the applicant reasonably accommodated the complainant in this case.

[68] Those issues are often hotly contested as was the case in the recent decision in ***Stewart v. Elk Valley Coal Corp.***, 2015 ABCA 225, [2015] A.J. No. 728 (QL), leave to appeal to S.C.C. granted, [2015] S.C.C.A. No. 389 (QL).

V. CONCLUSION

[69] The application is allowed and the adjudicator's decision is set aside. The complainant is entitled to file a grievance pursuant to the grievance procedure set forth in the collective agreement. If the grievance is not resolved, the matter should proceed to arbitration

pursuant to the arbitration procedure set forth in the collective agreement.

[70] If the applicant is seeking costs and the parties cannot agree on costs, they may be spoken to.

_____J.