IN THE MATTER OF AN ARBITRATION

BETWEEN:

Saskatchewan Government and General Employees' Union
and Bartley Nikota (Grievor)

- and -

Saskatchewan Institute of Applied Science and Technology
(SIAST)

AWARD

BEFORE:

MERRILEE RASMUSSEN, Q.C., Arbitrator

Heard in Saskatoon, Saskatchewan on:
December 6 and 7, 2010, January 17, 18, and 28, and March 28, 2011

Larry Buchinski, for the Union
David Stack and Steven Seiferling, for the Employer

Decision dated at Regina, Saskatchewan, July 19, 2011

INTRODUCTION

[1] This arbitration hearing arises from a series of events that resulted in the Grievor being reverted from a full-time permanent position to his former part-time position. It was agreed that I was properly appointed as Arbitrator and had jurisdiction to hear the two grievances filed in relation to these events, subject to the Employer's objection on the grounds of timeliness in relation to the second grievance that was filed. The parties requested that I rule on the timeliness objection before proceeding further and that I make a determination about whether or not the first grievance that was filed is appropriately characterized as "disciplinary" and whether the Employer or the Union should proceed first and carry the burden of proof.

[2] I heard evidence with respect to these preliminary issues in Saskatoon on December 6, 2010, and I provided these interim decisions to the parties on December 7, 2010. I dismissed the second grievance as being out of time and determined that the Union would proceed first and bear the burden of proof with respect to grievance 1.

[3] The hearing was originally scheduled to proceed on December 8, 2010, but on that date one of the Union's witnesses was ill and could not attend. It was agreed that the hearing would resume at a later date. It was eventually held over several days starting on January 17, 2011 and finally concluding on March 28, 2011. A binder of documents was filed by each of the Employer and the Union.

FACTS

[4] The Grievor was employed at SIAST as a systems administrator in the CAD-CAM program at Kelsey Campus. He first began work at SIAST in October 2001, and passed probation in that position at the band 8 level in about April 2005. This was a part-time position, consisting of 10 hours per week. He received an "outstanding" performance evaluation dated April 15, 2005, from his supervisor in the part-time position.[1] On November 17, 2008, a job posting for a full-time position for a Systems Manager/Analyst in the Computer Systems Technology (CST) Program was posted.[2] The posting called for certain required qualifications, skills, abilities and experience. The Grievor was the only internal candidate for the position and he was "screened in" as an eligible candidate and interviewed. The screening process was conducted by the program head, Conrad Kruger, and a human resources consultant, Crystal Lavallee, with a Union observer, Beverley Edwards-Jackson, present. According to both the witnesses for the Union and for the Employer, applicants are only screened in to advance to the interview stage where they meet the "required" components of the job posting.

[5] The Grievor was then interviewed by Mr. Kruger and Ms Lavallee, with Ms Edwards-Jackson again present as an observer and Glen Cassidy, the person holding the second position of Systems Manager/Analyst in the CST Program, also present as an observer. During the interview, the Grievor said that he did not know "Active Directory" and he was weak in the area of "Enterprise Skills". These are software programs used by the Systems Manager/Analyst in the position. When

[1]SGEU Document Binder at Tab 5.

[2]SGEU Document Binder at Tab 8.

the interview was complete, there was some discussion about whether or not the Grievor had passed. Mr. Kruger had concerns, but said that he commented that at least there was a probationary period to rely on. Ms Lavallee recalls that Mr. Kruger made reference to probation. Ms Edwards-Jackson did not recall the comment.

[6] It was decided that the Grievor would be offered the position in the CST program and a letter of offer was sent to him, which is dated December 5, 2008[3]. The letter states that he will commence work in the full-time position on January 5, 2009 and also that, "The probationary period for this position is twelve months". As well, the letter indicates that his pay level would be at step 1 in band 8, the same pay band as the part-time position from which he was coming. The letter is signed by Ms Lavallee and copied to Mr. Kruger and to the Dean. The CST program consisted of about 20 employees, with Mr. Kruger as the in-scope Program Head.

[7] Mr. Kruger assigned Glen Cassidy, the other Systems Manager/Analyst in the CST program, to assist the Grievor in learning the duties of the full-time position. Both Mr. Kruger and Mr. Cassidy felt that a month should be a sufficient time for the Grievor to become proficient in the position. However, after three months, around the beginning of April 2009, the Grievor was still struggling in the position and Mr. Cassidy was frustrated with the Greivor's failure to improve his performance and with his own lack of time to do his work and continue to support the Grievor. At this point in time, Mr. Kruger advised the Grievor that he could take the CNET295 Directory

[3]SGEU Document Binder at Tab 10.

Services class at SIAST to acquire some of the technical expertise he apparently lacked.[4] He was permitted to take these classes during work hours. However, he only attended the classes for the first week, which was the week that Mr. Cassidy was away attending a training session, but after that he stopped going and did not mention that fact to anyone, including the Program Head. The Grievor said that he was under the understanding that his attendance at classes was dependent on his ability to get his work done in his position. Thus, he said, when he fell behind in those duties he felt that he had to quit going to the classes. I note, however, that during that first week (April 27 to May 1, 2009) he took time to get his truck windshield replaced and to make a platelet donation.[5]

[8] There were two probationary reviews conducted during the probationary period. The first of these was scheduled for June 2009 and, about a month before that, Mr. Kruger met informally with the Grievor because of his concerns with the Grievor's performance and to identify for the Grievor his areas of weakness so that he could work on them prior to the formal performance review. The areas of weakness in the Grievor's performance were 1) lack of technical knowledge; 2) attendance and availability; and 3) attitude.[6] Because of his concerns about the Grievor's performance, Mr. Kruger also sought input from other members of the CST program about their interactions with the Grievor. He did this by circulating an email and he received several replies by email, most of them indicating the same sorts of issues that Mr. Kruger had identified himself.[7]

---

[4]Employer Document Binder at p. 15.

[5]Employer Document Binder at pp. 23 and 24.

[6]See Employer Document Binder at p.45.

[7]See Employer Document Binder at pp. 29 to 41.

[9] In June 2009, an interim probationary performance review was conducted in relation to the Grievor's work performance for the period from January 5 to June 15, 2009[8]. Under "Quality of Work" he was rated below standard ; "Quantity of Work" was rated as low; under "Use of Working Time" it was noted that his planning and organization was only fair and he was sometimes poorly organized; under "Dependability/Judgement" he was rated as only dependable on simple matters; under "Interpersonal Skills" he was rated as sometimes abrupt with staff and students. His overall rating was "Sometimes meets minimum requirements - needs improvement". The comments section indicates that the Grievor would improve his skills by reading training manuals, setting up a server to practice on, and investigate the availability of relevant short-term training courses. As well, he agreed that he would develop a more helping attitude and improve his attendance and availability. The performance review is signed by the Grievor indicating that it was discussed with him. This performance review was not shared with the Union.

[10] However, the Grievor's performance did not improve. He did not build a server or review manuals. He took a Linux class, which was not relevant to his areas of technical weakness but a class in which he was personally interested. His availability and attendance did not change. On October 5, 2009, the Grievor was notified that his performance in the Systems Manager/Analyst position was unacceptable and, in accordance with article 6.3.1 of the Collective Agreement he

[8]SGEU Documents Binder at Tab 4.

could revert back to his previous part-time position[9]. A grievance was filed in relation to this action on October 27, 2009[10]. This was grievance 1. During the grievance process in relation to grievance 1, Union officials realized that the Systems Manager/Analyst position was in the same pay band as the part-time CAD-CAM position that the Grievor had moved from. Within a matter of a few days after learning this, a second grievance was filed, on January 25, 2010, in relation to the fact that the Grievor has been placed on probation when he moved into the Systems Manager/Analyst position[11]. As mentioned earlier, this second grievance was dismissed in my Interim Decision on the basis that it was out of time.

ISSUES

[11] Grievance 1 alleges "wrongful dismissal due to an inappropriate assessment of the grievor's probationary review" and asks for his reinstatement into the Systems Manager/Analyst position with an extension of the probation period and appropriate support to assist him to successfully complete the probation. The Union has identified a list of 10 questions, which in my view can be reduced to the following issues:

1) Was there a breach of the Grievor's right to union representation that negatives his failure of his probation? (Union's questions 19(a), (i) and (j))

---

[9]SGEU Document Binder at Tab 3.

[10]SGEU Document Binder at Tab 14.

[11]SGEU Document Binder at Tab 16.

2) Was the Grievor appropriately supported during his probation and was his performance fairly assessed on the basis of appropriate standards properly communicated to him? (Union's questions 19(b) to (g))

3) Should the Employer have questioned the Grievor about possible medical or health issues? (Union question 19(h))

[12] The Employer has identified the issues in a different manner, which in my view are included in the issues as I have stated them (Employer issues III A and B are included in issue 2 above and III C is addressed in issue 3).

POSITIONS OF THE PARTIES

[13] The Union argues that the Grievor was not provided with a proper and formal coaching plan during the one-year probationary period in the full-time position. In addition, the Union was never notified by the Employer that the Grievor was having problems with performance in the full-time position until the day on which the Grievor was reverted to the part-time position. The Union is of the view that the Employer did not act in good faith and in a manner that gave the Grievor a fair opportunity to demonstrate his suitability for the full-time position.

[14] The Employer argues that a failure of a probation is not discipline and the standard to be applied on a probationary assessment is whether the probationer has failed to meet the standards set by the Employer and is therefore considered by the Employer to be not satisfactory. The grievance

can only be established where the Grievor shows that the Employer acted in bad faith or in an arbitrary or discriminatory manner in assessing the Grievor, and no such evidence was provided. In relation to the issue of the Grievor's health, the Employer argues that any evidence in this regard arose after the grievance was filed and that the Employer could not accommodate that of which both it and the Grievor were unaware.

DECISION

Union Representation

[15] In relation to this aspect of the grievance, the following provisions of the Collective Agreement are relevant:

> 3.4.1 Employees shall have the right to the assistance of a union representative(s) during discussions related to grievances or negotiations with respect to the collective agreement. Such representative(s) shall have access to the premises to assist in the settlement of the grievance.
>
> 23.7 The supervisor shall inform an employee of any meeting involving disciplinary action. The employee has the right to union representation.

[16] The Union argues that I should interpret the phrase "disciplinary action" as used in article 23.7 broadly to include any employer action that negatively affects the employee's employment. The Union submits that the performance assessment in June 2009, because it was bad, and presumably the decision to revert the Grievor to his part-time position in October 2009 were in this sense "disciplinary" and the Grievor therefore had a right to union representation. In support of this argument the Union has referred me to several cases.

[17] In *Alberta Union of Provincial Employees v. Lethbridge Community College*[12] the Supreme Court of Canada had to consider whether a provision of Alberta legislation allowing the arbitrator to substitute a penalty in cases where "an employee has been discharged or otherwise disciplined for cause" applied to a situation of non-culpable discharge. In concluding that it did, the Court confirmed its adoption of Driedger's "modern approach" to statutory interpretation, which emphasizes contextual understanding of words as used in legislation. The modern approach recognizes that interpretation of a written text is informed by many factors and that words "in themselves" have no inherent meaning but take their meaning from their context. Professor Sullivan[13] has elaborated upon Driedger's modern approach as follows:

> There is only one rule in modern interpretation, namely, the courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that cen be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.[14]

[18] The jurisprudence adopts a similar approach to the interpretation of contracts. In *Toronto Transit Commission v. Amalgamated Transit Union. Local 113*,[15] Arbitrator Brunner discussed

---

[12] 2004 SCC 28.

[13] *Driedger on the Construction of Statutes*, 3rd ed by Ruth Sullivan. (Toronto and Vancouver: Butterworths, 1994).

[14] *Ibid*, at p. 131.

[15] Unpublished, as provided by the Union, dated August 12, 2009.

generally the principles of contract construction in relation to a policy grievance concerning an issue of accrual of collective agreement benefits to persons receiving workers' compensation. He summarized the applicable principles as follows:

> The agreement is to be interpreted:
>
> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the cardinal presumption that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiations of the contract, but without reference to the subjective intention of the parties; and (to the extent that there is any ambiguity in the contract)
>
> (d) in a fashion that accords with the sound labour relations principles and good labour management sense, and that avoids a labour relations absurdity.[16]

In my view, this is another way of articulating Driedger's modern rule: the interpretation must be plausible, in that it reflects a meaning the words used can actually bear, efficacious, in that it achieves its purpose, and it must be reasonable and just. Taking this approach, arbitrators have addressed the issue of how to interpret union representation clauses and the question of what actions by the employer can be characterized as disciplinary. The Union referred me to several of these decisions.

---

[16] *Ibid*, at p. 16.

[19] In *Crane Canada Inc.*[17] the grievor had been demoted back to a labourer position as a result of poor performance. Although it was not at issue in the case, the arbitrator discussed the question of whether "discipline" means only punishment for culpable conduct and did not include punishment for non-culpable conduct and concluded that it included both.

[20] In *Riverdale Hospital v. Canadian Union of Public Employees, Local 79 (Delos Reyes Grievance)*[18] the grievor was suspended with pay as a result of an incident of patient abuse. Immediately after the incident occurred, she was called into her supervisor's office with no union representative present and directed to go home in the middle of her shift. Three days later she was fired. The arbitrator found that her suspension with pay was "disciplinary" and she did not have union representation as required by article 9.02 of the collective agreement, which stated:

> 9.02 At the time that formal discipline is imposed, or at any stage of the complaint stage, an employee shall have the right upon request to the presence of his/her steward. In the case of suspension or discharge, the Hospital shall notify the employee of this right in advance.[19]

The approach taken in *Riverdale* was to analyze what happened on the basis of the effect of the events and not on the labels attached to them. Thus, when the grievor's immediate supervisor sent the grievor home as a result of an incident of patient abuse, even though the employer argued the supervisor had no authority to impose discipline, it was a disciplinary response to which the right

---

[17](1990), 14 L.A.C. (4th) 253.

[18][2000] O.L.A.A No. 879.

[19]*Ibid*, at para. 4.

of representation applied. This makes sense because otherwise, an employer would be able to subvert the whole purpose of the union representation clause by having discipline imposed by supervisors "without authority". However, it must be emphasized that the arbitrator in coming to this conclusion was interpreting the phrase in article 9.02, "at the time that formal discipline is imposed".

[21] In *Medis Health and Pharmaceutical Services v. Teamsters, Chemical and Allied Workers, Local 424 (Satar Grievance)*,[20] the arbitrator had to decide whether meetings with the grievor were "investigatory" or "disciplinary". In this case, the collective agreement contained a union representation provision similar to that in *Riverdale*: union representation was required for an employee "when being disciplined". The arbitrator considered the meaning of this phrase in the context of the purpose of union representation clauses generally, and came to the following conclusion:

> After looking at all the cases, and the collective agreements involved, recognizing that each case is different, the common thread, whether or not a line is drawn between the investigation process and the discipline process is the protection of the employee where that employee's rights may be materially affected to the employee's detriment by the actions fo the company. The cases referred to by the Company did not erode this principle. Whether there is a distinction made between investigatory and disciplinary meetings or meetings or interviews which may affect the employee's record, the employer, unless it is protected by the clear wording of the collective agreement even when limiting its role at a certain stage as an observer, puts itself, and its findings at risk, should it not have union representation when the rights of the employee are to be materially effected [sic].[21]

---

[20](2001), 100 L.A.C. (4th) 178.

[21]*Ibid*, at para. 44.

In *Medis*, the "investigatory meetings" were held for the express purpose of obtaining admissions of guilt of theft from the employer, as a result of which those employees were fired. This crossed the line from investigation to discipline and union representation was therefore required.

[22] In this case, the facts in this regard are not in dispute. The Union was involved in the interview process by which the Grievor was promoted into the full-time position in December 2008, but the Union was not notified of any subsequent meetings or discussions with the Grievor of his performance or of the decision to revert him back to the part-time position. In particular, the union was not notified of the June 2009 meeting between the Grievor to discuss his performance in the full-time position, nor in the October 2009 meeting when the Grievor was advised that he was being reverted to his part-time position. The issue in this case does not turn on the distinction between culpable and non-culpable conduct, as in *Crane*, or whether a paid suspension is disciplinary, as in *Riverdale*, or on whether an investigatory process crossed the line and became disciplinary, as in *Medis*. Here, the issue is whether a failure on probation and subsequent reversion to the employee's prior position is "disciplinary".

[23] The Employer argues that probation and discipline are two distinct processes with distinct purposes and referred me to the Supreme Court of Canada's decision in *Jacmain v. Canada (Attorney General)* for the proposition that probation is not discipline. In that decision, Grandpré, J., writing for the majority, quoted with approval the words of Heald, J. in the decision in the Federal Court of Appeal:

> The whole intent of section 28 [providing for a period of probation] is to give the employer an opportunity to assess an employee's suitability for a position. If, at any time during that period, the employer concludes that the employee is not suitable, then the employer can reject him without the employee having the adjudication avenue of redress. To hold that a probationary employee acquires vested rights to adjudication during his period of probation is to completely ignore the plain meaning of the words used in section 28 of the *Public Service Employment Act* and section 91 of the *Public Staff Relations Act*.[22]

[24] In this case, article 6.3.1 of the Collective Agreement explicitly provides for a period of probation on promotion, which period is tied to the period described in article 6.1.1. The Grievor was provided with a letter of offer for the full-time position indicating that the period of probation in the new position was 12 months. Mr. Kruger provided a performance assessment that was described as an interim probationary review. There is no doubt that the Grievor was on probation and the provisions of the Collective Agreement regarding probation apply. Obviously, the reasons why an employer would revert a probationary employee to their pre-promotion position could be either culpable or non-culpable, but just because those reasons might support disciplinary action outside the context of probation, the probation process is not thereby transformed into a disciplinary one. I note also that even in the case of probation on initial employment, article 6.1.4. does not require union representation when a probationary employee is terminated, although the employee has a right to grieve the termination. Article 23.7, providing a right to union representation in the discipline process, does not apply, nor does article 3.4.1, which relates to union assistance in the case of a grievance or negotiations.

---

[22] *Ibid*, at p. 16

Performance Assessment on Probation

[25] As mentioned, article 6 of the Collective Agreement governs probation. Article 6.3 deals with probation of an employee who is promoted and it states as follows:

> 6.3.1 A permanent employee who has been promoted shall serve a probationary period as stipulated in article 6. A permanent employee who does not successfully complete the probationary period shall revert to the position held prior to the promotion or by mutual agreement the employee may revert to a similar position at the same step in the salary range, subject to any increments that would have been earned had the promotion not taken place.

[26] The "probationary period stipulated in article 6" is a reference to the length of time that the probation will be for. Article 6.1, which describes probation on initial employment, stipulates a probationary period of six months in pay band 1 to 3 and 12 months in pay band 4 to 10. As the Systems Manager/Analyst position was in pay band 8, the applicable probation period is 12 months, which is the length of the probation period referred to in the Employer's offer of employment to the Grievor.

[27] Article 6.2.1 deals with assessment while on probation following initial employment. It states as follows:

> 6.2.1 Since probation is the final step in the selection process, the following procedure will be followed as a minimum in the evaluation process.
>
> (a) Performance requirements established by the employer will be communicated to the employee, in writing, at the outset and discussed during the employee's probationary period. Performance requirements will be established based on the classification specifications and the job descriptions and will include the responsibilities, qualifications, skills, abilities and experience

appropriate to the job.

(b) The immediate supervisor shall evaluate performance by direct observation on at least two (2) different occasions.

(c) Two (2) written performance assessments will be completed for each employee during the probationary period. Performance assessments will be conducted at two (2) and five (5) months in the case of a six (6) month probationary period (130 working days) and five (5) and eleven (11) months in the case of a twelve (12) month probationary period (260 working days).

(d) Performance assessments will be discussed with the employee and shall be signed by the employee to indicate awareness of the assessment.

Employees will be advised whether they have successfully completed the probationary period. A current job description is required when the final probationary review is complete.

In all cases, the employee will be given a copy of any performance assessment.

[28] The Union argues that the Employer failed to provide a written communication of performance requirements to the Grievor from the "outset" of his employment in the full-time position, as required by article 6.2.1(a). In my opinion, article 6.2.1 does not apply to a probation on promotion, since probation on promotion is specifically addressed under article 6.3, which explicitly incorporates by reference only the period of probation and not the specific assessment process contained in article 6.2. Nevertheless, even though not precisely articulated in the Collective Agreement, an employee is certainly required to know what standard of performance is expected of him in order that he can achieve it. While it would certainly be clearer to provide specific requirements in writing at the outset of the probationary period, in my view a failure to do so is not necessarily determinative. The question is appropriately stated more broadly: Was the

Grievor made aware of the standard of performance expected of him in a manner and at a time that made it possible for him to improve his performance within the probationary period so that he could complete it successfully? For the following reasons, my answer to that question is "yes".

[29] The Grievor was generally aware of the requirements of the full-time position because of the job posting for it to which he had responded.[23] He was sufficiently aware that he lacked the required knowledge and expertise in relation to Active Directory and Enterprise Tools, because he brought this up in his interview for the position. The Employer assigned Mr. Cassidy to assist the Grievor when he started in the full-time position. After three months, Mr. Cassidy gave up in frustration. At this point in time, Mr. Kruger suggested to the Grievor that he could take the CNET class through SIAST to improve his knowledge and skills. The Grievor attended the class for a week and then stopped going, without telling anyone. He says that his job duties were too onerous to permit him to attend the class and he didn't realize that Mr. Kruger had intended that the class should take precedence over his job duties. The Union argues that the class was not suggested to the Grievor until three months into his probation and there was no back-fill provided for him in terms of his job duties, and that therefore the Employer did not adequately address the Grievor's needs in the full-time position or provide him with necessary support.

[30] I note that one of the required qualifications, skills, abilities and experience, as listed in the job posting for the full-time position, was "ability to work independently and/or co-operatively in

[23] SGEU Document Binder at Tab 8.

groups and with a high level of initiative and motivation".[24] The Grievor knew that he lacked the knowledge and skills of Active Directory and Enterprise Tools, as the Union pointed out at paragraphs 20 and 21 of its written submissions on the Grievor's behalf, and yet he took no initiative of his own to acquire them. When an employee is on probation in any position, he needs to take the initiative to demonstrate his ability to do the job. When he knows he lacks a specific area of expertise, there is a greater onus on him to show that initiative and motivation. In addition, an investment by the Grievor in obtaining this knowledge would have made it easier for him to have addressed the daily demands of the job. The Union portrays this as a lack of understanding between the Grievor and Mr. Kruger, but when Mr. Kruger sent the email to the Grievor suggesting he take this course, there was no mention of any such conditions on his attendance at it. As already noted, the Grievor found three hours in the first week of the course to attend to non-urgent personal matters, and one would have expected that he would have first attended to the duties of his job, including attending classes. It is difficult to understand why the Grievor stood by and did nothing in a proactive manner to improve the likelihood that he would successfully complete the probationary period. The Union says he expected to be provided an opportunity to receive some formal training but, when offered the ability to attend classes while on the job, he failed to attend.

[31] Prior to the interim probationary review, Mr. Kruger met with the Grievor to help him to understand where his performance deficiencies lay. He advised him at that time that he needed to improve in three areas: knowledge and expertise, attendance and availability, and attitude and interpersonal relationships with staff and students. The Grievor therefore had about a month's

[24] *Ibid*, at point 8.

specific notice of how to improve his performance to obtain a satisfactory rating. He again did nothing. At the June 26, 2009 formal interim probationary review he was rated as not meeting minimum expectations, and Mr. Kruger discussed with him the very specific steps he could take to improve that rating. Again, he did nothing. An employee whose performance is assessed as not meeting minimum requirements must understand that a failure to improve performance will lead inevitably to a failed probation. It is simply incorrect to state that the Grievor was given no opportunities to improve, and the Employer's decision to revert him after he failed the interim performance assessment and did nothing to improve his performance thereafter should not have come as a surprise to anyone.

[32] In all of the circumstances of this case, I am satisfied that throughout the probationary period the performance standards to be met were clearly drawn to the Grievor's attention in sufficient time for him to be able to improve his performance if he had chosen to do so. In addition, I am satisfied that the employer provided appropriate support by assigning Mr. Cassidy to assist the Grievor in on-the-job training for a period of three months, allowing him to take SIAST classes during working hours, permitting him to set up a practice server and read training manuals during working hours, and allowing him to seek out other educational opportunities for consideration.

[33] Although the Union referred me to cases that discuss the just cause standard in situations of non-culpable performance, neither of them dealt with probationary employees.[25] A failure of

[25] *Weyerhaeuser Co. v. Industrial Wood and Allied Woodworkers Union of Canada, Local 1-3567* (2004), 130 L.A.C. (4th) 419 addressed the issue of a non-disciplinary demotion while *Edith Cavell Private Hospital and Hospital Employees' Union, Local 180 (Datwin Grievance)*,

probation is not the same as a discharge, and the burden of proof is different, as is who bears it. According to Brown and Beatty:

> It is inherent in the status of probationer that a person can be terminated if he or she cannot satisfy the employer of suitability for the job. Given its purpose, employers can let probationary employees go for reasons that would not constitute just cause for the dismissal of a seniority-rated employee.[26]

[34] In a discharge case, the burden of proof to show just cause for termination rests on the employer as soon as the fact of discharge is established. In a failure of probation case, the burden of proof is on the union to show that the employer acted in a manner that can be described as arbitrary, discriminatory or in bad faith.[27] The concept of bad faith has been described as follows:

> At its core, "bad faith" implies malice or ill will. A decision made in bad faith is grounded not on a rational connection between the circumstances and the outcome, but on antipathy toward the individual for non-rational reasons. . . . Because of the absence of a rational connection between the outcome and the circumstances, a decision made in bad faith cannot be reasonable. The absence of a rational basis for the decision implies that factors other than those relevant were considered. In that sense, a decision in bad faith is also arbitrary.[28]

[35] The only submission by the Union of bad faith on the part of the Employer relates to the solicitation and use of information from instructors in the CST program by the Program Head, Mr.

[1982] B.C.C.A.A.A. No. 290 dealt with non-culpable discharge and demotion.

[26] *Canadian Labour Arbitration*, looseleaf edition, para. 5020 at p. 7-196.8.

[27] See *Re Municipality of Toronto and Canadian Union of Public Employees, Local 79* (1984), 18 L.A.C. (3d) 52; *Canadian Union of Public Employees, Local 1032 v. Newell (County) No. 4 (Dyck Grievance)*, [2000] A.G.A.A. No. 86.

[28] *Re Alcan Wire & Cable and U.S.W.A.* (1992), 26 L.A.C.A (4th) 93.

Kruger. On May 7, 2009 Mr. Kruger sent the following email to all the instructors (18 in number):

> Bart's mid-point probationary review is coming up shortly, and I'd like to get some feedback on your perception of how he's doing (positive/negative/no comment). If you're not comfortable putting your thoughts/experience in an email, please come and talk to me directly. I would still be taking notes so that I can accurately reflect your information in the review.
>
> I'd like to collect the information over the next week (since I'm gone for most of it), and start collating it when I get back.[29]

[36] This email was sent as a result of a suggestion Mr. Kruger received from one of the instructors, Brenda Suru, who had seen this approach used in another department at SIAST. As an alternative, Ms Suru suggested that Mr. Kruger meet with a number of the instructors who had concerns about the level of service the Grievor was providing or not providing to them.[30]

[37] The Union contends that there was a group of instructors that was out "to get" the Grievor in that they had taken a dislike to him and were trying to get him removed from the full-time position. Support for this conclusion is cited as the fact that two of the instructors who provided negative feedback referred to concerns that Mr. Cassidy would quit if the Grievor passed his probation and the comment of a third that if he passed they would be "in trouble". I do not accept the contention that there was an effort to get rid of the Grievor based on the fact that some instructors didn't like him. I was impressed with the credibility of the testimony of all of the instructor witnesses who gave evidence. Several of them explicitly stated that their criticisms

---

[29]Employer's Document Binder, p. 29.

[30]See Employer's Document Binder at p. 27.

pertained to the Grievor's job performance and not to him as a person. The problem they had was that they were frustrated in getting their work done because of the Grievor's inability to provide them with the technical support they required. They did not set out to get rid of him because they didn't like him.

[38] In order to properly evaluate the quality of the technical performance of anyone in the Grievor's position, the Program Head would of necessity have to talk to the persons who relied on him for the performance of his work. Those affected by the Grievor's work comprised the group of instructors. Whether or not feedback from the instructors was initially solicited by an email, or the idea to use an email to request it came from one of the group, it was reasonable to ask those affected by the Grievor's performance on the job for their experiences in dealing with him in order to provide an accurate and comprehensive assessment of it. In fact, there were specific events or incidents to support every one of the assessments made in the June 2009 performance review. The Grievor did not dispute those assessments, nor did he take issue with the agreed- upon actions that were recorded in it for him to improve his performance. He just didn't do the things he acknowledged needed to be done for his performance to be adequate in the position.

[39] Mr. Kruger requested feedback from the instructors a second time on September 17, 2009 to prepare for the final probationary review. His request was again sent by email. He forwarded his May 7, 2009 email to the same group with an introductory comment:

> As requested previously, could you send me your thoughts/comments/concerns/kudos for Bart's FINAL probationary review. Same rules apply as below.

Soon is best . . . [31]

Six instructors responded; most of them provided negative feedback.[32]

[40] My comments to this point have concentrated on the Grievor's technical knowledge and skills. To summarize, there is no doubt that the Grievor was deficient in this regard. He said so himself. His defence was that he self-declared in the interview for the full-time position that he didn't have the required technical expertise and that he was waiting for the Employer to figure out how he could gain it. What the Employer did do was to pair him up with an experienced person to help him adjust to the new position and allow him to take courses on work time, as well as to build and work with a practice server and to study the training manuals – but he did none of these things. The Grievor argues that this is the Employer's fault because either the Employer was not clear in communicating its required standard or did not provide him with the support he needed to be successful. I reject that argument. The Employer did what it could to help the Grievor to acquire the technical expertise he needed, but he made little if any effort to do so. In my view, the lack of technical expertise alone would be a sufficient reason for reverting the Grievor to his part-time position, but there were also issues concerning his attendance and availability as well as his attitude and relationships with staff and students.

[41] With respect to the issue of attendance and availability, the evidence was uncontroverted that

---

[31]See Employer's Document Binder at p. 70.

[32]See Employer's Document Binder at pp. 70 to 82.

the Grievor was often away from the workplace on personal business, with little or no warning to his colleagues or his supervisor, and appeared to come and go as he pleased with little regard for the impact his actions had on others. This problem surfaced very early in the Grievor's probation. He began work on January 5, 2009 and on Friday, January 16, the Program Head, Mr. Kruger, sent an email to him and Mr. Cassidy because there was no one available to provide technical support over lunch on that day. In that email, Mr. Kruger asked the two of them to be aware of the hours each of them would be on duty and to let him know that information as well, to make sure that if one of them had to leave the building that the other knew about it, to avoid situations where both of them were absent, and to inform him when they were off-campus.[33] The Grievor took responsibility for the lack of coverage on January 16, indicating that Mr. Cassidy left for lunch before he did.[34]

[42] On Monday, January 19, Mr. Kruger emailed the Grievor at 9:29 am saying he needed to know where the Grievor was because he was just in the Grievor's office and he was not there. Mr. Kruger also said in this email, "This is starting to cause some problems".[35] At 10:33 am the Grievor responded "my father in law needed some assistance this morning". He also said, "I intend to be here from 9 to 5pm".[36] But on January 23, the Grievor sent an email around to everyone at 11:18

---

[33]Employer Document Binder at p. 4.

[34]Employer Document Binder at p. 3.

[35]*Ibid*.

[36]*Ibid*.

am saying, “Out for lunch for a bit, but in the building. I can be reached on cell if need be”.[37] On Monday January 26 at 5:47 pm he sent an email to Mr. Kruger saying he would not be in the next day from 10:00 to 11:30 due to a physiotherapy appointment.[38] On January 30 at 10:24 am , in responding from an inquiry from Mr. Kruger as to when an inventory that was required would be completed, he advised that he had to go home at noon and fix his water heater, so “if that goes as planned” he would finish up in the afternoon.[39] On February 3 he notified Mr. Kruger at 9:32 am that he had a physio appointment at 11:00.[40] While of course an employee may take time for medical appointments, the difficulty the Grievor caused was in the short notice that he provided when he knew that it was important that either he or Mr. Cassidy be available to provide support to the program. One is left with the impression that the Grievor ordered his personal affairs without any regard for the impact that might have in the workplace. A striking example of this attitude is reflected in his April 29 email to Mr. Kruger, during the week that Mr. Cassidy was in Regina on training and the Grievor was supposed to be auditing CNET classes: “Out for 45 min to take my truck to get windshield repaired”.[41] And on April 30 he sent an email at 9:11 am saying he had scheduled a platelet donation from 10:45 to about 12:45.[42] Again, Mr. Cassidy was still away, the Grievor was aware that someone needed to be in the office at all times, and he arranged to be away

---

[37]Employer Document Binder at p. 6.

[38]Employer Document Binder at p. 7.

[39]Employer Document Binder at p. 8.

[40]Employer Document Binder at p. 9.

[41]Employer Document Binder at p. 23.

[42]Employer Document Binder at p. 24.

for two hours for an appointment that could have been scheduled in a different week, when Mr. Cassidy was back. On May 20, he sent an email at 8:33 am to say he would be late coming in as, "I am getting my new ride inspected at SGI before I can plate it".[43] Several of the instructors referred to his taking long lunches, coming in late, and often not being around when they needed support. Mr. Kruger noted a number of times that the Grievor arrived long after 9:00 am in the morning, his own stated commencement time of work.

[43] In his notes of his meeting with the Grievor on May 25, 2009, to prepare him for the formal interim probationary performance assessment, Mr. Kruger raised these issues with the Grievor. Mr. Kruger's notes of that meeting indicate that they discussed his working after hours rather than from 9:00 to 5:00, and scheduling appointments at inappropriate times.[44] On August 31, Mr. Kruger sent the Grievor an email asking him why he didn't show up until 9:50 am that morning. Again, Mr. Kruger talked with the Grievor and reiterated that he needed to know if and when the Grievor was not at work. Mr. Kruger kept closer track thereafter and noted that the Grievor was late on September 11, 14, 18 and 22 and on September 22 he left at noon to go home to feed his animals.[45]

[44] Finally, with respect to the issue of attitude and interpersonal skills, as displayed in the manner in which he dealt with his attendance at work, the Grievor did not appear to take into account the needs of the workplace in scheduling and attending to personal matters that were not

---

[43]Employer Document Binder at p. 44.

[44]Employer Document Binder at p. 45.

[45]Employer Document Binder at p. 83.

urgent. In addition, when things did not go right, which happened a number of time because of his lack of technical expertise, he became defensive and adversarial. In one incident, he lashed out at students who brought water into the computer labs, even though there was a policy permitting them to do so. One instructor commented that most people who had to deal with the Grievor were frustrated in doing so.

[45] In conclusion, the Employer's reasons for reverting the Grievor to his part-time position were based on a fair assessment of factors that have a rational connection to the requirements of the full-time job that the Grievor had to perform. I see no evidence of any ulterior motivation on the Employer's part or any conspiracy that could support the Union's allegation of bad faith. The Union has not met its burden of proving on a balance of probabilities, or at all, that the Employer's decision was arbitrary, discriminatory or in bad faith. There remains, however, the question of whether or not the Grievor's medical condition warranted some duty of accommodation.

Medical

[46] After the Grievor was reverted to the part-time position he learned that he had a condition known as sleep apnea. He did not consult a physician until September 2009 and the diagnosis was not made until February 17, 2010, when he saw a specialist. The Union submits that where an employer is aware or ought to be aware of an employee's disability, the employer has an obligation to make inquiries as part of the employer's duty to accommodate. The Employer argues on the basis of the decision of the Supreme Court of Canada in *Cie minière Québec Cartier v. Quebec*

(Grievances arbitrator)[46] that evidence of events that have occurred after the fact out of which the grievance arises cannot be used as justification. While this is correct, it does not address the real issue in relation to the medical question, which is: was the Employer aware, or should it have been aware, of a medical condition that may have affected the Grievor's performance? Accepting for the moment that it is possible for an employer to have constructive knowledge of a medical condition that the employee himself is not aware of, the mere fact that the Grievor subsequently discovered that he had a medical condition does not automatically engage a duty to accommodate. The Grievor has not provided any evidence on which it would be possible for the Employer to have imputed knowledge. More significantly, the Grievor's lack of the required technical knowledge and expertise was not caused by his medical condition.

Conclusion

[47] For all of the reasons articulated above, it is my conclusion that the Grievor was not entitled to Union representation at the June 2009 performance review meeting or the October 5, 2009 meeting when he was reverted to the part-time position, or otherwise throughout the period of probation. The Grievor was provided every reasonable support by the Employer to assist him to meet the requirements of the position, and fairly assessed his performance on the basis of factors that were rationally connected to the requirements of the job. The Employer had no knowledge of the Grievor's medical condition, and there was no reason for the Employer to suspect that a medical condition might be causing the Grievor's performance problems, and in particular there is no possible connection between the Grievor's later diagnosed sleep apnea and his lack of technical

[46][1995] 2 S.C.R. 1095.

expertise for the position.

ORDER

[48] The grievance is therefore dismissed.

Dated at Regina, Saskatchewan, this 19th day of July, 2011.

Merrilee Rasmussen Q.C.
Arbitrator