IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20
Date: June 4, 2020
Docket Number: 201901H0041

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1620 — APPELLANT

AND:

LOWER CHURCHILL TRANSMISSION CONSTRUCTION EMPLOYERS' ASSOCIATION INC. AND VALARD CONSTRUCTION LP — RESPONDENTS

Coram: Welsh, Hoegg and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador General Division 201801G4330 (2019 NLSC 48)

Appeal Heard: December 18, 2019
Judgment Rendered: June 4, 2020

Reasons for Judgment by: Welsh J.A.
Concurring Reasons by: Butler J.A.
Dissenting Reasons by: Hoegg J.A.

Counsel for the Appellant: Daria A. Strachan
Counsel for the Respondents: Darren C. Stratton and Brittany Keating

Welsh J.A.:

[1] The International Brotherhood of Electrical Workers filed a grievance on behalf of one of its members who was refused employment when he failed to pass a drug test. The grievor, a general labourer, had disclosed that he used medically authorized cannabis to manage chronic pain. The focus of this appeal is the employer's duty to accommodate the grievor's disability.

BACKGROUND

[2] The proceedings began with a hearing in which a labour arbitrator concluded that, while the grievor had been discriminated against, the employer was not able to accommodate the grievor without undue hardship. Accordingly, the grievance was denied. An application for judicial review of the arbitrator's decision, brought by the Union, was dismissed. The Union appeals that decision.

[3] The applications judge summarized the nature of the work and the parties involved (2019 NLSC 48):

> [7] The workplace that provides the setting for this dispute is one for the construction of towers and related infrastructure for the delivery of electricity from Muskrat Falls in Labrador to, and then within, the island of Newfoundland. This construction project was declared a special project under the *Labour Relations Act*, R.S.N.L. 1990, c. L-1. The Special Project Order designates the [International Brotherhood of Electrical Workers] and the [Lower Churchill Transmission Construction Employers' Association] as the sole and exclusive bargaining agents for, respectively, the workers and contractors engaged in Project construction.

Valard Construction, the employer which denied the grievor employment, is one of the contractors working on the Project. The grievor, a general labourer, is a member of the International Brotherhood of Electrical Workers (the "Union").

[4] The arbitrator accepted that the employment at issue involved safety-sensitive positions. The applications judge summarized:

> [31] The Nalcor Drug and Alcohol Standard defined a "Safety Sensitive Position" as "any position in which the individual has a key and direct role in an operation

> where performance limitations due to substance use or incapacity due to the adverse effects of drugs or alcohol, could result in a direct and significant risk of injury as a result of an Incident or Near Miss … . All Workers working on Site are considered to be in Safety Sensitive Positions" [emphasis added].
>
> [32] Without reference to the Nalcor Policy, the Arbitrator determined that both positions in issue were safety-sensitive positions. His decision in that regard was based on evidence that the positions were ones requiring physical dexterity and mental focus, a deficit in which, due to the nature of the work, equipment and worksite, created hazards for the [grievor] and other workers. The evidence before the Arbitrator, including *viva voce* from the employer's safety officer and photographs of the site, supported this conclusion, as did the Nalcor Standard, although the Standard was not referred to by the Arbitrator in respect of this issue.
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> (Emphasis added in original.)

[5] It was also accepted that there was no alternate medical intervention available to the grievor to address his disability for purposes of employment with the employer.

[6] In denying the grievance filed by the Union, the arbitrator concluded:

> [198] The Employer did not place the [grievor] in employment at the Project because of the [grievor's] authorized use of medical cannabis as directed by his physician. This use created a risk of the [grievor's] impairment on the jobsite. The Employer was unable to readily measure impairment from cannabis, based on currently available technology and resources. Consequently, the inability to measure and manage that risk of harm constitutes undue hardship for the Employer.

[7] The applications judge summarized the issues for consideration on judicial review:

> [3] The Union and Employer agreed that the [grievor] suffered from pain due to osteoarthritis and Crohn's Disease and that the effects of the pain constituted a disability, a prohibited ground of discrimination under the meaning of the *Human Rights Act, 2010*, SNL 2010, c. H-13.1 (the "Act") at section 9. The main question before the Arbitrator was whether the Employer had met its acknowledged duty to accommodate the [grievor's] disability without undue hardship.
>
> [4] The Union has applied for judicial review of the Arbitrator's decision, relying on several errors in the Arbitration Award that, it says, rendered the Award unreasonable. First, the Union says that the Arbitrator erred in determining that the risk of impairment from cannabis use continued for a longer period of time after ingestion than expected by the [grievor's] treating physician. Second, the Union argues that the Arbitrator effectively reversed the onus of proof in respect of

> accommodation and undue hardship by determining that employing the [grievor] with a risk of impairment, rather than demonstrated impairment, constituted undue hardship. Third, the Union argues that the Employer's actions, and the Arbitrator's decision, perpetuated the stigma and stereotypes associated with cannabis users.
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> (Emphasis added.)

[8] The judge dismissed the application for judicial review on the basis that the arbitrator's decision was within the range of reasonable outcomes.

ISSUES

[9] On appeal, the issues to be considered are: (1) the appropriate standard of review and its application to the arbitrator's decision; and (2) whether the applications judge erred in determining that the arbitrator's decision regarding the employer's duty to accommodate the grievor was reasonable.

ANALYSIS

[10] The applications judge summarized the positions of the parties:

> [24] The Respondent Employer conceded before the Arbitrator that the [grievor] suffered from a disability within the meaning of the *Act*. The disability resulted from pain caused by Crohn's disease and osteoarthritis. The [employer] also conceded before the Arbitrator and in this Court that the [grievor] was denied employment solely because of his use of cannabis to treat the pain that caused his disability, and therefore, the denial of employment amounted to a *prima facie* case of discrimination on a ground prohibited by the *Human Rights Act*, section 9. The [employer] asserted that the denial of employment was due to a good faith occupational qualification, i.e., the ability to work unimpaired, within the meaning of the *Act*, section 14(2) and therefore discrimination in denial of employment was allowed. The [employer] also conceded that it had a duty to accommodate the [grievor's] disability. The [employer] took the position before the Arbitrator that it could not accommodate the [grievor] as it would constitute undue hardship for it to employ the [grievor] when the risk of impairment on the job could not be alleviated by a reliable measure of impairment. The [Union] maintained that the [employer] failed in its duty to accommodate the [grievor's] disability.

Standard of Review

[11] Shortly after this appeal was heard, the Supreme Court of Canada released decisions revising the analytical approach to be applied in cases of judicial review of an administrative decision. Counsel were given the opportunity to make supplementary submissions to assist the Court in applying the revised standard.

Presumption of a Standard of Review of Reasonableness

[12] In determining the appropriate standard of review, the revised framework, which was first discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, is summarized in *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67:

> [27] In *Vavilov*, this Court set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in two types of situations. The first is where the legislature has statutorily prescribed a standard of review or where it has provided for an appeal from the administrative decision to a court. The second is where the question on review falls into one of the categories of questions that the rule of law requires be reviewed on a standard of correctness. …

[13] With respect to the latter, in *Vavilov*, the majority identified three categories of questions:

> [53] In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir* [2008 SCC 9, [2008] 1 S.C.R. 190], at para. 58.

[14] Neither the legislative exception nor any of these situations, that would result in departing from the presumption of reasonableness, applies to the appeal now before this Court. The only consideration raised in this case is the Union's submission regarding questions of law of central importance to the legal system. The Union submits that whether the employer discriminated against the grievor and whether the employer accommodated the grievor to the point of undue hardship are questions of law of central importance to the legal system as a whole, and that, therefore, those issues are subject to the correctness standard of review. I do not accept that submission. The first of these, whether the grievor was discriminated against based on a disability has been conceded by the employer throughout the proceedings.

[15] Regarding the second, whether the employer has satisfied the duty to accommodate the grievor in the circumstances of this case clearly does not fall

within the meaning of a law of central importance to the legal system as a whole as discussed by the majority in *Vavilov*:

> [59] … the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, at para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government … .

Examples cited in *Vavilov*, at paragraphs 59 and 60, include: a question that will affect a variety of statutes; limits on or the uniform protection of solicitor-client privilege; the barring of an administrative proceeding by the doctrines of *res judicata* or abuse of process; the scope of parliamentary privilege.

[16] In this case, the question is one of mixed fact and law in determining whether the employer in the particular circumstances has satisfied the duty to accommodate the grievor. While the decision may have precedential value in future similar situations, it cannot be said that the question is one of central importance to the legal system as a whole. It follows that the presumption of a standard of review of reasonableness, not having been rebutted, applies.

Assessing Reasonableness

[17] In assessing the reasonableness of a decision, the relevant considerations are summarized in *Canada Post*:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses* [2011 SCC 62, [2011] 3 S.C.R. 708]).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility –

> and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on … are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). …
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> (Emphasis added.)

[18] Considerations that may inform the analysis include: relevant statutory or common law; principles of statutory interpretation; the evidence; submissions by the parties; past practices and decisions; and impact of the decision on the affected individual.

Duty to Accommodate to the Point of Undue Hardship – the Law

[19] A three-pronged test is engaged when assessing whether the arbitrator erred in concluding that the employer had established a *bona fide* occupational requirement justifying the discrimination that resulted in a refusal to hire the grievor. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), McLachlin J., for the Court, explained:

> [54] … An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
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> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[20] Regarding the first step:

> [58] The employer must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective

> requirements of the job. … Where the general purpose of the standard is to ensure the safe and efficient performance of the job – essential elements of all occupations – it will likely not be necessary to spend much time at this stage. …

[21] The second step, flowing from the first, requires an honest and good faith belief that the adopted standard was necessary.

[22] With respect to the third step, factors that may be considered in assessing the duty to accommodate to the point of undue hardship, McLachlin J. wrote:

> [63] … Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. … In all cases, as Cory J. noted in *Chambly* [[1994] 2 S.C.R. 525], at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

[23] And further:

> [65] Some of the important questions that may be asked in the course of the analysis include:
>
> > (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
> >
> > (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
> >
> > (c) Is it necessary to have <u>all</u> employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
> >
> > (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
> >
> > (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
> >
> > (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud* [[1992] 2 S.C.R. 970], at pp. 992-96, the task of determining how to accommodate

> individual differences may also place burdens on the employee and, if there is a collective agreement, a union.
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> (Underlining in the original.)

[24] In the more recent decision in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 S.C.R. 35, Abella J., for the majority, cautioned:

> [25] The duty to accommodate is not unlimited; its scope in any particular case is defined by the symmetrical concepts of "reasonable accommodation" and "undue hardship". In *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, this Court observed that "[u]ndue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate" (para. 122), explaining:
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> > The jurisprudence of this Court reveals that undue hardship can be established where a standard or barrier is "reasonably necessary" insofar as there is a "sufficient risk" that a legitimate objective like safety would be threatened enough to warrant the maintenance of the … standard …; where "such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer" have been taken …; where no reasonable alternatives are available …; where only "reasonable limits" are imposed on the exercise of a right …; where an employer or service provider shows "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" … . The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain. [Citations omitted; para. 130.]
>
> [26] As Deschamps J. explained in *Hydro-Quebec* [2008 SCC 43, [2008] 2 S.C.R. 561],
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> > [w]hat is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances. …
> >
> > … 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. [paras. 12 and 16]

> [27] In short, the duty to accommodate requires accommodation to the point that the employer is able to demonstrate "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" ….

[25] The Union relies on the decision in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), in submitting that the employer was required, but failed, to undertake an individual assessment of the grievor. McLachlin J., for the Court, explained:

> [21] The [*Meiorin*] test permits the employer or service provider to choose its purpose or goal, as long as that choice is made in good faith, or "legitimately". Having chosen and defined the purpose or goal – be it safety, efficiency, or any other valid object – the focus shifts to the means by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored to the ends. For example, if an employer's goal is workplace safety, then the employer is entitled to insist on hiring standards reasonably required to provide that workplace safety. However, the employer is not entitled to set standards that are either higher than necessary for workplace safety or irrelevant to the work required, and which arbitrarily exclude some classes of workers. On the other hand, if the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that the standard excludes some classes of people does not amount to discrimination. …
>
> [22] … Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. …
>
> (Emphasis added.)

[26] In *Meiorin*, there was a failure to accommodate because the employer "failed to adduce evidence linking the standard (a certain aerobic capacity) to the purpose (safety and efficiency in fire fighting)" (*Grismer*, at paragraph 22).

[27] In *Grismer*, Mr. Grismer had an eye condition that affected his peripheral vision. On the basis of his condition, he was refused a driver's licence. The Court concluded that, unless the government could establish that a "blanket rejection" of every individual with that condition was necessary for safety reasons, the government was "under an obligation to accommodate the claimant by allowing the person an opportunity to show that he or she does not present an undue threat to safety" (at paragraph 43).

Application of the Law

[28] As discussed above, the applications judge did not err in concluding that a standard of review of reasonableness applies to a review of the arbitrator's decision. In assessing whether the arbitrator's decision met that standard, the judge used the *Dunsmuir* analytical approach which was the law at the time. Insofar as the manner of assessing reasonableness has been adjusted by *Vavilov*, those principles will be applied for purposes of this appeal.

[29] The arbitrator provided extensive reasons for his decision, including a comprehensive review of the evidence. He then reached the following conclusions:

> [176] In the end, I have drawn the following conclusion from the [Canada Health] Guidance, the specialized witnesses and their evidence:
>
> > 1. The regular use of medically-authorized cannabis products can cause impairment of a worker in a workplace environment. The length of cognitive impairment can exceed simply the passage of 4 hours after ingestion. Impairment can sometimes exist for up to 24 hours after use.
> >
> > 2. Persons consuming medical cannabis in the evening may sincerely believe that they are not impaired in their subsequent daily functioning; they can, however experience residual impairment beyond the shortest suggested time limits. The lack of awareness or real insight into one's functional impairment can be a consequence of cannabis use. In that context, a person may not experience 'euphoria' (as mentioned in the Health Canada Guidance), yet still not function, respond or react normally while impaired by cannabis use.
> >
> > 3. A general practicing physician is not in a position to adequately determine, simply grounded on visual inspection of the patient in a clinic and a basic understanding of [the] patient's work, the daily safety issues in a hazardous workplace. Specialized training in understanding workplace hazards is necessary to fully understand the interaction between cannabis impairment and appropriate work restrictions in a given fact situation.
> >
> > 4. There currently are no readily available testing resources within the Province of Newfoundland and Labrador to allow an employer to adequately and accurately measure impairment arising from cannabis use on a daily or other regular basis.

[30] In the result, the arbitrator concluded that the grievor's use of medically authorized cannabis created a risk of impairment on the jobsite, and further, that "more research and knowledge than is currently possible [is necessary] in order

to ensure an employer's ability to determine impairment in a construction environment" (arbitrator's decision, at paragraph 192). Consequently, the arbitrator determined that the employer's "inability to measure and manage that risk of harm constitutes undue hardship for the Employer" (arbitrator's decision, at paragraph 198).

[31] In assessing the reasonableness of that determination, the relevant legal principles provide the starting place. The arbitrator stated the appropriate three-pronged test set out in *Meiorin*. The question, then, is whether the manner in which he applied that test resulted in a decision that meets the standard of reasonableness. As set out above, given the concessions by the employer, the sole issue to be addressed on the appeal relates to the employer's duty to accommodate the grievor's disability. Pursuant to the third of the *Meiorin* steps, the onus is on the employer to establish that to accommodate the grievor, who was using medically authorized cannabis, would result in undue hardship.

[32] The thrust of the employer's submissions and evidence was that there is no scientific or medical standard from which it may be determined whether the grievor was impaired, and if so, the extent of impairment after the passage of time as a result of his consuming cannabis by means of vaporization the evening before a shift. An example where the law sets a particular, measurable standard for assessing impairment is the case of impaired driving where a standard has been adopted such that a driver with a certain blood-alcohol content is presumed to be impaired. The arbitrator accepted that the scientific and medical evidence is not at a level of sophistication to enable a similar defined standard to establish impairment where the use of medically authorized cannabis is at issue.

[33] There was conflicting evidence as to the length of time necessary to eliminate impairment after using the grievor's authorized level of cannabis. The arbitrator was not required to accept the evidence of particular guidelines or of one expert over that of another. Having reviewed all the evidence, he was satisfied that no reliable scientific or medical test or resource was available for determining impairment in the circumstances. On that point, the arbitrator's extensive reasons, including consideration of the evidence, provide an answer that is justified, transparent and intelligible (*Canada Post*, at paragraph 32, paragraph 17, above). The arbitrator's decision regarding that issue meets the standard of reasonableness. However, that is not the end of the matter.

[34] In the absence of a scientific or medical test or standard, in order to discharge the onus of establishing that to accommodate the grievor would amount to undue hardship, it was necessary for the employer to demonstrate that

to assess the grievor for impairment by some other means on a daily or periodic basis would result in undue hardship. That is, the absence of a test or standard does not lead inexorably to the conclusion that there is no means by which to determine whether an employee, by reason of ingesting cannabis, would be incapable of performing a specific job, including a safety-sensitive job. The onus was on the employer to establish on a balance of probabilities that some means of individual testing of the grievor to assess his ability to perform the job was not an alternative.

[35] Considerations discussed in *Meiorin*, when applied in the context of this case, lead to the conclusion that there is a danger in treating impairment by the use of medically authorized cannabis on the basis of the class of individuals who access that treatment. Rather, given the individual nature of the possible accommodation, the analysis requires an assessment regarding what alternatives were investigated by the employer that may have allowed for individual testing of the grievor. Was a scientific or medical standard the only option? If so, why? If alternate options were identified, why were they not implemented? For example, was a functional assessment of the grievor before his shift considered? If rejected, why? What discussions were had with the Union to identify and assess alternate options for determining whether the grievor was capable of safely performing the job despite his use of cannabis in the evening? The employer failed to address these questions or provide evidence as necessary to discharge the onus of demonstrating that accommodation of the grievor on an individual basis would result in undue hardship.

[36] The conclusion follows that the arbitrator's decision was unreasonable insofar as he failed to address the employer's onus to establish that to accommodate the grievor by means of individual assessment of his ability to perform the job safely, regardless of the absence of a scientific or medical standard, would result in undue hardship.

[37] Given the nature of the error, it is not appropriate simply to set aside the arbitrator's decision and order an assessment of damages as requested by the Union. Rather, until the additional component of the analysis has been completed, it is not possible to determine whether the grievor should or would have been hired. In the result, the matter must be remitted for a determination of whether there is another means of individual assessment of the grievor's ability to perform the job safely which would provide an option for accommodation without undue hardship. I refer as well to the helpful discussion at paragraphs 78 to 89 by my colleague Butler J.A. regarding the underlying rationale.

SUMMARY AND DISPOSITION

[38] In summary, the arbitrator's decision is subject to review on a standard of reasonableness. The applications judge erred in concluding that the arbitrator's decision was reasonable because the arbitrator completed only part of the analysis. The additional issue, necessary to discharge the employer's onus to establish that accommodating the grievor would result in undue hardship, is whether there was an alternate option involving individual assessment for determining whether the grievor could safely perform the job.

[39] Accordingly, I would allow the appeal. I would remit the matter for reconsideration as set out above. Given the nature of the issue to be determined, there would be no reason to disqualify the same arbitrator from hearing the matter. I would order the parties to bear their own costs in this Court and in the court appealed from given their shared responsibility for the incomplete arbitration.

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B. G. Welsh J.A.

Butler J.A. (Concurring Reasons):

INTRODUCTION

[40] I concur with my colleague Welsh J.A. on the appropriate standard of review, its application to the decision of the arbitrator (which was upheld by the applications judge) and on the manner of disposition of the appeal.

[41] Sections 14(1) and (2) of the *Human Rights Act*, *2010*, SNL 2010, c. H-13.1 were in issue in this case. The relevant portions read as follows:

> 14. (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment on the basis of a prohibited ground of discrimination…
>
> (2) Subsection (1) does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

[42] At paragraph 19, my colleague Welsh J.A. has described the three pronged test for the section 14(2) good faith occupational qualification (more commonly referred to as a legitimate *bona fide* occupational requirement or BFOR) as set out in *Meiorin*.

[43] In my view the first step is to identify the standard which the employer adopted and seeks to justify as reasonably necessary to accomplish the desired goal, which in this case was site safety.

NALCOR'S DRUG AND ALCOHOL POLICY

[44] As a condition of employment or continued employment on site, employees were required to accept the terms of Nalcor's Drug and Alcohol Standard (the "Policy"). Despite multiple revisions, the Policy consistently required drug testing in specified circumstances and established consequences for failure of the drug test. The grievor had been accepted for employment on November 9, 2016; the April 2016 revision of the Policy specified the tolerance for prescribed marijuana as 50 ng/ml (nanograms per mililitre of urine).

[45] Article 7.2 provided as follows:

> 7.2 USE OF PRESCRIPTION AND NON-PRESCRIPTION DRUGS
>
> All workers are expected to use prescription and non-prescription drugs in a safe and responsible manner. Accordingly LCMC permits the possession or use of prescription and non-prescription drugs that are approved and regulated by Health Canada under the following conditions:
>
> . . .
>
> d) A Worker taking any prescription or non-prescription drug which may adversely affect their ability to work safely, must notify their supervisor or manager of such prescription and non-prescription drug use before travelling to Site and if on Site before starting to work on Site. The supervisor or manager who is provided with such information is required to advise the DCR and/or the DLCMCR. The DCR and/or the DLCMCR may require the worker to provide a medical certificate from their health care practitioner identifying the effects of the drug on the Worker's ability to safely perform their duties. The medical certificate must identify any work restrictions, anticipated duration of restrictions, and any other information that would reasonably be required to determine the worker's fitness to perform modified duties in any Safety Sensitive Position. …

[46] The arbitrator found the Policy to be irrelevant on the basis that it could not "enable the Employer to avoid or change its obligations to an employee who

has a disability and is using medically-authorized cannabis for treatment of that disability" (at paragraph 127). Without relying on the Policy, the arbitrator nevertheless found the jobs, for which the grievor qualified, to be safety-sensitive positions and he accepted that this designation determined "to which employees the testing policy will apply" (at paragraph 130). The applications judge limited the Policy's relevance to confirmation that the jobs which the grievor had been denied were safety-sensitive positions (applications judge's decision, at paragraph 30).

[47] I believe the Policy had far greater relevance to the issues to be determined in this case.

[48] First, the risk of side effects from prescription drug use was identified in the Policy as the basis for discriminating against employees taking these drugs. As a result, the employer conceded that the Policy violated section 14(1) of the *Code*. The focus of the arbitration became section 14(2) of the *Code* and ultimately, the issue to be determined was whether accommodation, short of undue hardship, was established.

[49] Secondly, the employer asserted that the BFOR was safe performance of duties. Such a position confuses the standard with the purpose. Relying upon the Policy, I would conclude that the standard (or BFOR) was the specified tolerance (50 ng/ml) and the purpose was site safety. It was conceded that the grievor failed his drug test but no test results were disclosed; nevertheless, it was this failure which was relied upon to deny his employment. In other words, he could not meet the BFOR which the employer sought to justify.

[50] Relative to the first two prongs of *Meiorin*, good faith was acknowledged and a general connection was made between the purpose for which the Policy was introduced (site safety) and the objective requirements of all positions on site. However, the evidence as a whole established that there was no reliable means of measuring impairment from this prescribed drug. On this basis I would conclude that it follows that the tolerance established in the Policy in effect at the time was an arbitrary standard. As *Grismer* informs "failure to accommodate may be established by evidence of arbitrariness in setting the standard" (at paragraph 22).

[51] Thirdly, the April 2016 revision to the Policy had deleted any reference to the term "impairment" and substituted this with "inability to work safely because of drugs or alcohol." This change reflects the broad enquiry mandated by the principle of accommodation as I will address later herein.

[52] Fourthly, as *Grismer* establishes, the legitimate purpose of safety must be defined with more precision by asking what kind of safety and what degree of risk would be tolerated? "The possibilities range from absolute safety … to a total lack of concern for safety" (at paragraph 25). In assessing where on this spectrum the bar was set in this instance, the Policy (which was motivated by the safety-sensitive nature of the workplace) again provided reliable evidence; it referenced screening tolerances, the potential need for a medical certificate and fitness for modified duties. This content confirms that absolute safety was impossible to achieve and that some risk would be tolerated. In fact, the arbitrator recognized at paragraph 139 of his decision that as a public policy issue "some risk … is acceptable within the accommodation process" and that "it is not required that all risk from that person's work must be eliminated completely".

[53] Consistent with the Court's conclusion of "reasonable" highway safety in *Grismer* (at paragraph 26), I would conclude that the purpose of the asserted BFOR was "reasonable" site safety.

[54] Fifthly, the Policy's reference to "modified duties" is also recognition of accommodation measures mandated by well-established workplace disability discrimination principles (*Grismer*, at paragraph 21).

[55] Finally, the Policy is relevant for the procedure to be followed. This was not a case of a worker who reported for duty, was suspected of being under the influence of alcohol or drugs and was asked to undergo a urine test. Instead, the grievor complied with the Policy's requirement that he report his use of the prescribed drug. If the employer was to rely on a blanket rejection of all persons who could not meet the (in my view, arbitrary) tolerance for this prescribed drug as candidates for employment, it had an obligation to establish through individualized assessment why the grievor could not be accommodated on site.

THE DUTY TO ACCOMMODATE

[56] While accommodation can take many forms, its purpose is always to "ensure that an employee who is able to work can do so" and that persons "who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship" (*Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561 at paragraph 14.

[57] Both the arbitrator and the applications judge were aware that "accommodation could … have been accomplished through" various means (applications judge's decision, at paragraph 37) but both were satisfied that since:

- no other jobs were available that were not safety-sensitive;
- no other medical or therapy modalities were available; and
- there was no reliable medical or scientific means to measure impairment from prescribed marijuana,

accommodation could not be accomplished short of undue hardship. I agree with Welsh J.A. that this falls short of the requirements of the duty to accommodate.

[58] Accommodation short of undue hardship is a very high threshold for an employer to meet. Not every hardship will be an "undue" hardship. That point "is reached when reasonable means of accommodation are exhausted and only unreasonable or impractical options for accommodation remain" (*Caron* at para. *25*, citing *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paragraph 122).

The Possibility of Impairment

[59] As the applications judge acknowledged at paragraph 28, this case was argued and "determined by the Arbitrator on consideration of the evidence of potential impairment or the risk of impairment", notwithstanding that the grievor was "never demonstrated to have been impaired in the safe performance of the positon he had occupied". Thus, in concluding as he did, the applications judge relied on the evidence that supported that:

- the use of marijuana can impair the ability of a worker to function safely in a safety-sensitive work place;
- the impairment can last up to 24 hours after use;
- the impairing effects may not be known to the user; and
- there was no available means or method for accurately testing impairment from cannabis use in the workplace (at paragraph 42).

[60] The applications judge characterized as reasonable the arbitrator's finding that "the duty to accommodate did not extend to a requirement that the Employer accept a risk resulting from the possibility of impairment" and "that the evidence of possible impairment … met [the employer's] onus to demonstrate undue hardship which displaced [the employer's] acknowledged duty to accommodate" (applications judge's decision, at paragraph 44).

[61] As stated in *Grismer*, risk "has a limited role in the analysis" of the third prong of the BFOR test stated in *Meiorin*. "Risk can still be considered under the guise of hardship, but not as an independent justification of discrimination" (at paragraph 30). In my view the approach taken here was contrary to well established workplace disability discrimination principles because the arbitrator and applications judge relied upon "potential risk" as an independent justification for discrimination.

[62] In other words, having already established in the Policy the general risk of side effects from prescription drug use and conditions to reflect that the standard was reasonable site safety, it was not sufficient for the employer to take the position that it could not employ someone because they posed a risk. The employer must go further and establish through an individualized analysis (not limited to medical or scientific testing) why allowing **this** grievor to perform **this** job on **this** site would not enable the employer to maintain reasonable site safety, short of undue hardship.

[63] *Grismer* instructs that there is "more than one way to establish that the necessary level of accommodation has not been provided" (at paragraph 22). One of these is evidence that some persons with the disability can perform the function safely and that the standard is discriminatory because it does not provide for individualized assessment.

[64] In this case, the Policy established the employer's right to request further information from the grievor to assist the employer in making a determination that the grievor could perform his duties or modified duties on site and still achieve the employer's legitimate goal of reasonable site safety. The grievor was compliant with the requests. Dr. Norman of the Cannabinoid Clinic expressed the view that the only restraint was that the grievor should not operate a motorized vehicle within 4 hours of ingestion.

[65] The focus of the arbitrator's decision became how to reliably measure possible impairment from the prescription drug use instead of the grievor's ability to perform the duties or modified duties while taking the prescribed drug.

I believe this shift in focus occurred because the drug was marijuana and because the arbitrator, finding the Policy to be of "no import", was unaware that it had been revised to eliminate the term "impairment" (paragraph 127).

[66] The applications judge correctly acknowledged that "impairment" is a relative term and "speaks to the impact of a condition or substance on a function or activity" (applications judge's decision, at paragraph 29).

[67] The reality for all disabled persons is that their ability is impaired in some manner. When an arbitrary standard is relied upon by an employer, workplace disability discrimination principles establish that individual assessment is a reasonable alternative to a discriminatory rule *(Saskatchewan (Human Rights Commission) v. Saskatoon*, [1989] 2 S.C.R. 1297 at 1313-1314). These principles do not require the disabled person to establish a reliable means of measuring their possible impairment or risk of impairment.

[68] It is also a reality for many disabled persons that the drugs they are prescribed carry recognized side effects. The Policy confirms that screening or testing tolerances applied to workers taking more common drugs such as Tylenol 1, 2 or 3 or Ativan. Requiring a grievor to establish a reliable means of measuring possible side effects from any of the enumerated medications effectively shifts the onus of proof for a BFOR from the employer to the grievor which is an error of law. The onus of establishing a valid BFOR remains upon the employer throughout (*Grismer*, at paragraph 32).

[69] The applications judge referenced section 26(2) of the *Occupational Health and Safety Regulations, 2012*, NLR 5/12, in support of the employer's requirement to consider the question of impairment. It states:

> 26(2) An employer, supervisor or worker shall not enter or remain on the premises of a workplace or at a job site while his or her ability to perform work responsibilities is impaired by intoxicating substances or another cause that endangers his or her health or safety or that of other workers.

[70] However, section 26(2) of the Regulations cited cannot override section 14(2) of the *Human Rights Act.* Section 5(1) of the *Act* states:

> 5. This Act shall take precedence over other Acts where they conflict with this Act whether those Acts were enacted before or after this Act comes into force.

Individualized Assessment

[71] The grievor had worked on this safety-sensitive site for fifteen months without incident; he maintained an impeccable safety record and was described by his supervisor as "a great worker, skilled and knowledgeable" and "always safe". For five of the fifteen months of his employment, the grievor was taking his prescribed drug and had brought this to the knowledge of his supervisor. It was only when a shortage of work with one contractor led the grievor to seek an alternative position on site that the employer refused to put the grievor to work.

[72] The employer argued that this work history was irrelevant because it was with another contractor. I would disagree. The Respondent Employers' Association is the sole and exclusive bargaining agent for all contractors on the project and a party to the collective agreement.

[73] The employer also argued that it may have been by pure luck that the grievor had no incident at work while taking the drug in question. I would characterize that as unfounded speculation.

[74] The grievor's ability to perform as a labourer under the responsibility of a site supervisor was established by his own employment history; assessment of his functioning was addressed by Dr. Norman of the Cannabinoid Medical Clinic. In my view, this evidence provided a form of individualized assessment, which, (because the arbitrator was wrongfully focused on risk instead of ability), was ignored.

Failure to Complete the Analysis

[75] At paragraph 23, Welsh J.A. has identified some of the important questions that *Meiorin* establishes may be asked in the course of the necessary analysis. Several of these remain unanswered in the arbitrator's analysis. As an alternative to medical or scientific testing, was there another approach to assessing the grievor's ability? Is it necessary to have all employees meet the one standard or could a standard reflective of the grievor's circumstances be established? Have the employer and Union fulfilled their roles and assisted in the search for possible accommodation?

[76] Canadian jurisprudence on workplace disability discrimination addresses the types of accommodation measures that should be considered when determining whether it was essential that all employees meet the same screening threshold. For example, in light of his employment history and his prescribing

physician's opinion on his functioning, could reasonable site safety be met if the grievor was:

- required to report any dosage increase;
- required to accept the need for independent medical assessment at random intervals;
- assigned to a different area, where the nature of the equipment, substances, other dangers or number of co-workers presented less risk; or
- required to accept closer supervision or a trial of probation to assess his functioning and insight into his functioning.

(See *Grismer*, at paragraphs 22 and 42 and *International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Employers' Association Inc.* (Uprichard) (2017), 281 L.A.C. (4th) 246 at paragraph 82.)

[77] Without considering whether the employer had either:

- investigated alternative approaches such as testing against a more individually sensitive standard;
- established the need to have all employees taking this prescription drug meet the tolerance stated in the Policy; and
- addressed and considered other ways to do the jobs that would be less discriminatory while still accomplishing the purpose of reasonable site safety

the arbitrator could not complete the required analysis (*Meiorin*, at paragraph 65).

EFFECT OF FAILURE TO COMPLETE THE ANALYSIS

[78] As my colleague Welsh J.A. has expressed at paragraph 17, in assessing the reasonableness of a decision, the relevant considerations are summarized in *Canada Post*. Citing *Vavilov* at paragraph 90, "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review."

[79] While it was the constraints imposed by the evidence that prevented the arbitrator from completing the analysis, until the analysis is complete, I agree with my colleague Welsh J.A. at paragraph 36 that it was unreasonable for the arbitrator to conclude that the employer had met the onus of demonstrating undue hardship.

[80] The appropriate result in such an instance is found in *Grismer* at paragraph 46 where, on appeal from judicial review, the Court restored the decision of the Member Designate of the British Columbia Human Rights Council (*British Columbia (Superintendent of Motor Vehicles*) *v. British Columbia (Council of Human Rights*) (1994), 25 C.H.R.R. D/296).

[81] Similar to the arbitrator in this case, the Member Designate did "not have sufficient information to determine how best to assess the complainant". Nor was he "certain that the possibility of reducing the risk of accident by imposing restrictions on Grismer's licence [had] been thoroughly considered by the respondent". The Member Designate therefore retained jurisdiction "to allow the parties an opportunity to agree to a process to assess the complainant's abilities and to consider the possibility of restrictions" (paragraphs 105-106).

[82] In my view, a similar result should follow in this case. The appeal should be allowed but as my colleague Welsh J.A. acknowledges, no determination can be made respecting the grievor's entitlement to a remedy until it is established that there was an alternate option involving individual assessment for determining whether he could safely perform the job.

[83] In light of the concerns expressed by my colleague Hoegg J.A. I feel compelled to make two additional comments.

[84] The effect of this decision is not that the employer is required to lower its safety standards; as recognized in *Grismer*, that would be contrary to the public interest.

[85] Instead, this case deals with no more than the right to be accommodated subject to undue hardship; it does not decide that the grievor had the right to be hired. The discrimination in this case lies not in the refusal to give the grievor the job for which he applied, "but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing" the employer's goal of reasonable site safety. This decision stands for the proposition that employers subject to the *Human Rights Act*, *2010* "must adopt

standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship" (*Grismer*, at paragraph 44).

COSTS

[86] Both parties to the arbitration must share some responsibility for the incomplete analysis.

[87] As the arbitrator's decision confirms, "there was no evidence called about other possible jobs or functions on the project which [the grievor] might have been able to do without safety being a major concern." Nor was there evidence of how the duties could be modified. The arbitrator concluded that the Union wanted the grievor "to be able to work in at least one of the positons for which he applied" and characterized this as an "all or nothing" approach (paragraph 179).

[88] For its part, the employer chose not to request that the grievor cooperate with a functional capacity assessment. Further, the arbitrator concluded at paragraph 145 that the:

> "conversations in early 2017 about the Grievor's individual medical condition/grievance rights and his medication quickly expanded into a discussion … about the larger topic of how employees might be able to work safely on the project while using medically-authorized cannabis products. The lines between (a) addressing directly the grievor's case and (b) addressing the larger workplace safety issue quickly blurred".

[89] In short, neither of the "parties who [were] obliged to assist in the search for possible accommodation fulfilled their roles" (*Meiorin*, at paragraph 65). In these circumstances, I agree with my colleague Welsh J.A. that each party should bear their own costs.

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G. D. Butler J.A.

Dissenting Reasons Hoegg J.A.:

INTRODUCTION

[90] I agree with my colleagues that the reviewing Judge was correct to apply reasonableness as the standard of review pertaining to the arbitrator's decision. However, I am unable to agree that the reviewing Judge erred by ruling that the arbitrator's decision was within the range of reasonable outcomes.

[91] In my view, the arbitrator's decision was reasonable. He decided that requiring the employer to take the risk of the grievor working while impaired constituted undue hardship. His decision was "based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrained [him]" (*Vavilov*, at paragraph 85).

BACKGROUND

[92] The grievor suffers from osteoarthritis and colitis. In order to manage the pain caused by his condition, he uses medically prescribed cannabis which he vapes every evening. The grievor was advised by the employer that he was successful in obtaining a position, on two different occasions, at the Muskrat Falls Project subject to passing a drug/alcohol medical exam.

[93] The Muskrat Falls Project worksite is a safety-sensitive, remote worksite. The arbitrator found that the two positions applied for by the grievor "were legitimately considered, in every way, as safety-sensitive", and this finding has not been challenged. No official report of the drug/alcohol exam result was in evidence, although two witnesses, including the IBEW site representative for the Project, testified that the grievor did not pass the drug exam. In any event, the grievor was not hired, and he filed a grievance based on the fact that he had been denied employment due to his cannabis use.

[94] The grievor disclosed that his prescribed cannabis use was 1.5 grams/day of cannabis with less than a 20% THC level, and that he ingests it by vaping every evening. This information was provided to expert witnesses who testified at the hearing, although by the time the grievance was heard, the THC level in the grievor's prescribed cannabis had increased to 22%.

[95] The grievance hearing was lengthy. There was much evidence respecting the grievor's work history, his pain condition, the steps he took to manage it, and the steps the employer took to evaluate the grievor's situation in order to determine whether the grievor could work on site unimpaired. The grievor's

evidence was that the effect of vaping each evening was such that it controlled his pain so as to enable him to work through the following day. It was also his view that the effects of his evening vaping did not leave him impaired the following day.

[96] There was also expert evidence respecting the effects of the grievor's prescribed cannabis use, how long the effects lasted, and their relationship to impairment. While the evidence varied respecting the degree of impairment the grievor could suffer on the day following his vaping, there was no disagreement that he could still suffer some impairment the day following his evening vaping. There was evidence that the employer would be unable to measure the extent of daily impairment due to the lack of available monitoring, and that while conventional blood and urine tests indicate the level of TCH in the body, they do not indicate impairment. This evidence was not controverted. In accepting the evidence that some impairment could remain the next day, the arbitrator noted the Health Canada Guideline which stated that effects from cannabis use could last for up to 24 hours, the concerns stated in the Federal Task Force report respecting the lack of ability to determine impairment with cannabis and the urgent need for research to reliably determine when individuals are impaired, as well as this province's Occupational Health and Safety legislation respecting impairment on worksites. There was no evidence of specially trained drug recognition experts who would be readily available to the employer.

[97] The grievor's expert opined that the grievor's family doctor was the best person to assess workplace risks associated with the grievor's cannabis use. However, the arbitrator was not satisfied that the grievor's physician was "sufficiently skill-setted to adequately assess the increased workplace risks associated with impairment of a worker employed as a labourer on a Project" because the doctor had limited understanding of the "hazard-filled workplace". That along with the proven inability of the employer to readily find a means to assess impairment at the worksite were his "major concerns about accepting her opinion that the grievor would not be impaired the morning after vaping" (paragraph 173).

[98] The parties agree that the grievor has a disability within the meaning of the *Human Rights Act 2010*. The parties also agree that the employer has a duty to accommodate the grievor's disability, provided that the accommodation does not cause the employer undue hardship. As well, it is understood that the *bona fide* occupational requirement (BFOR) for the grievor's prospective jobs was the ability to work unimpaired, or, as the arbitrator put it the ability "to perform work in a safe manner" (paragraph 143).

[99] In his decision, the arbitrator referenced *Meiorin* respecting the duty to accommodate. In *Meiorin,* the Supreme Court of Canada stated, at paragraph 54: "…to show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer".

[100] Undue hardship has been considered in Canadian labour law jurisprudence on several occasions. Recent authority from the Supreme Court of Canada is quoted by my colleague in paragraph 24 above. In essence, undue hardship can be established "where there is a sufficient risk that a legitimate objective like safety would be threatened", or where the employer establishes that "it could not have done anything else reasonable or practical to avoid the negative impact on the individual", or "where no reasonable alternatives are available" (*Caron,* at paragraph 25 citing *VIA Rail* at paragraph 130).

[101] In *Ontario (Human Rights Commission) v. Etobicoke*, [1982] 1 S.C.R. 202, the Supreme Court of Canada emphasized the importance of an employee's ability to perform his or her work in a safe manner. In addressing whether an otherwise discriminatory age standard was justified, the Court stated that it was necessary to consider:

> "… whether the evidence adduced justifies the conclusion that there is a sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large" (at 210)

[102] In this case, the employer demonstrated the risk that the grievor could be impaired on the job. Once risk was established, the question turned to how or whether the grievor could be accommodated on the worksite. The employer established, through the witnesses and with documentary evidence, that there is no way it could reasonably evaluate whether the grievor was impaired when he reported for work each morning. Accordingly, the arbitrator found that there was nothing reasonable or practical the employer could do to accommodate the grievor. Importantly in this regard, the Union did not suggest that there were other positions available at the Muskrat Falls Project which the grievor could accept, or that the grievor could be accommodated other than placing him in the worksite to see how he performed. The sole suggestion was for the employer to place the grievor on the worksite and take the associated risks of doing so. The arbitrator found that the Union was entirely focused on the grievor achieving a normal labourer's job at the Muskrat Falls Project, and that the Union knew,

especially because it represented all of the workers in all of the bargaining unit positions on the Project, that there were no other positions that were not safety-sensitive at the site:

> All of the evidence here surrounds the two labourer job postings – Utility Person and Assembler – sought by the Grievor. The Union clearly wanted him to be able to work in at least one of the positions for which he applied. As there was no evidence called about other possible jobs or functions on the Project into which he might have been able to go without safety being a major concern, I must conclude that there were no positions which he could have filled that would not also pose significant safety concerns. In some disabled worker cases, an employer has been able to place a disabled worker into a lower-hazard function while an injury healed… There is no evidence before me that similar accommodations might have been possible here. In other words, it was an 'all or nothing' fact situation – either the Grievor could work safely in the positions he applied for or there was no work available. Thus, undue hardship comes into consideration in the context of his ability to safely perform in labourer roles only.
>
> (Arbitrator's decision, at paragraph 179)

[103] The record amply supports the arbitrator's finding that the Union was singularly focused on the employer accommodating the employee by placing him on the worksite and the Union did not challenge the arbitrator's finding in this regard on appeal.

[104] At paragraph 181 of his award, the arbitrator concluded that the evidence supported a finding of undue hardship:

> The safety hazard that would be introduced into the workplace here by residual impairment arising from the grievor's daily evening use of cannabis products could not be ameliorated by remedial or monitoring processes. Consequently, undue hardship, in terms of unacceptable increased safety risk, would result to the employer if it put the grievor to work. As previously stated, if the employer cannot measure impairment, it cannot manage risk.

[105] The arbitrator concluded that the risk of permitting the grievor to work in a safety-sensitive position on a safety-sensitive work site constituted undue hardship. He reached this conclusion after meticulous consideration of the evidence which clearly established a risk that the grievor could be impaired when reporting for work the morning following vaping his prescribed cannabis the night before, and which evidence also clearly established that there was no method available to the employer to measure or evaluate whether or to what degree the grievor was impaired when he reported for work. To my mind, the arbitrator's conclusion that putting the grievor on the worksite, in the face of the

evidence that he could be impaired, constituted undue hardship was a reasonable one. I would add that if the effects of the grievor's vaping each evening extended to the following day to enable him to work pain free or with managed pain, it is reasonable to assume that other effects of vaping his prescribed cannabis could also last during the following day.

[106] The employer's lack of ability to measure impairment resulting from cannabis inhalation becomes a greater concern when one considers that the amount of cannabis the grievor vapes, the level of THC in it, and the time when he vapes it in relation to the time he is meant to be working the following day, are all factors that are entirely within the control of the grievor. If they vary on any given date, he could be more (or less) impaired the following day. In this regard, I note the grievor's prescribed cannabis increased from cannabis containing 20% THC to cannabis containing a higher percentage of THC during the period covered by the grievance. It seems unlikely to me that the grievor would vape the exact amount of cannabis with the exact amount of THC in it at exactly the same time every evening, despite his best efforts. This suggests that there may be a risk that his level of impairment could also vary from day to day. It also suggests that such variances could alter the expert opinions tendered at the hearing. By referencing the possibility of variances as noted above, I do not mean to challenge the grievor's credibility. Rather, I make the general observations that human behavior is not an exact science, and that the grievor's impairment, or degree of impairment, if any, rests entirely in the grievor's hands, and the employer has no way to measure it.

[107] I cannot accept my colleagues' view that the employer did not demonstrate that accommodation could not be made for the grievor, and that the arbitrator made his decision in the absence of the employer showing undue hardship.

[108] I also cannot accept that the grievor was not individually assessed. In my view, he was individually assessed. The grievor's full and particular circumstances – his condition, his prescriptions, the timing and method of his ingesting cannabis and so on – informed the medical evidence given at the hearing as well as the arbitrator's reasoning. I do not see any of the examples identified at paragraph 76 or the recommended follow-up identified at paragraph 77 as providing additional information to the accommodation analysis so as to make a difference to the outcome, especially as the grievor asked only to be able to work at one of the two positions for which he had applied. In this regard, it is important to recognize that what had to be accommodated in this case was the grievor's possible impairment which could jeopardize safety on the worksite,

which could not be measured. The grievor's possible impairment resulting from his ingesting cannabis does not lend itself to accommodation in the same way a visual or other physical impairment would.

[109] The practical effect of my colleagues' reasoning is that the employer should give the grievor the chance to work on the site to see if he can perform the job safely. This is a hit or miss proposition. As the employer pointed out in its factum, the fact that the grievor worked without incident in a safety-sensitive position for five months in a previous, different job when he was vaping cannabis with a lower THC level does not mean that his potential impairment did not pose a safety risk. Likewise, a Functional Capacity Evaluation would not assist. A Functional Capacity Evaluation is a tool for measuring physical ability and capacity. Such a snapshot measurement of physical ability and capacity does not measure the effects of impairment from cannabis.

[110] To cause the employer to take safety risks to see if the grievor can work without causing an accident is, to my mind, causing the employer to endure undue hardship. That hardship is the unacceptable workplace safety risk associated with having a possibly impaired employee on the safety-sensitive, remote worksite. The evidence, which the arbitrator was entitled to accept, was that the employer had no way to measure the risk of the grievor's impairment, that the two jobs he wanted were safety-sensitive, and that there was no other job on the site which was not safety-sensitive. Accordingly, the employer already demonstrated that it was neither reasonable nor practical to put the grievor on the worksite to "give it a try", and that doing so would constitute undue hardship. Accordingly, I cannot see how sending the matter back to the arbitrator could serve any useful purpose.

[111] The notion that the employer would be required to place the grievor on the worksite to see if he could safely work, after having been put on notice that the grievor could possibly be impaired, and with the employer having no way to reasonably measure if or to what degree the grievor could be impaired, is to my mind unacceptable, and could even give rise to negligence allegations.

[112] The bottom line is that if an employee's health condition is being treated with a drug which causes mental or physical impairment which cannot be evaluated, whether it be cannabis or another drug, that employee may simply not be able to work in a safety-sensitive position. The arbitrator's statement at paragraph 192 of his award pertains:

> "…[i]t is easy to have sympathy for the plight of the grievor, but he has chosen a therapy which, while effective in terms of his pain relief, requires more research and knowledge than is currently possible in order to ensure an employer's ability to determine impairment in a construction environment".

[113] This is an unfortunate situation for the grievor, who is fully entitled to choose the medication and treatment for his condition. However, his chosen medical treatment cannot be permitted to trump the safety of other workers, the project's success, or the grievor himself.

[114] I reiterate that the review standard for the arbitrator's decision, based on the record the parties put before him, was reasonableness. It is not for this Court to remit the matter to the arbitrator on advice to the parties to call more evidence. Again, the arbitrator's decision was "based on an internally coherent and rational chain of analysis that [was] justified *in relation to the facts and law that constrained him"* (*Vavilov,* at paragraph 85).

[115] I would uphold the reviewing Judge's decision for the reasons stated above, and dismiss the appeal. I would award costs on column three to the employer.

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L. R. Hoegg J.A.