## *1. Procedural considerations*

a. *Overview* - "cornerstone of industrial justice" - prevents strikes and lockouts by providing a mechanism for "the peaceful adjustment of difficulties between wage-receivers and their employers." {Winkler} - means for resolving disputes without stoppage of work (quid pro quo). *s. 82(1), s. 84(1);* imported by *s. 84(3)* if not included in CBA.

b. *Principled approach* - arbitrators must have regard to "real substance" of matters in dispute, relative merits of parties' positions; not bound by a strict legal interpretation of the issue. *s. 82(2)*

c. *Duties of all persons involved in labour relations* - set out in *s. 2* of the *Code*, promotes economically viable business, cooperative participation, stability in industrial relations, public interest, mediation.

*d. Grievance procedure*

i. *Overview* - if informal/ADR fails, matter proceeds to grievance. Grievance is the union's articulation of the nature of the employer's alleged breach of the collective bargaining agreement.

ii. *Representation* - if there is no union representation during the grievance process, discipline may be considered void *ab initio*.

iii. *Context* - not approached as discrete events, but take into account larger context, current pressures and trends in the relationship between union and employee. Given conflicting interests and pressures, many ways through which union can breach DFR.

1. For instance, relationships between parties (employee-supervisor, steward-manager, union-employer), history of disputes, citations for safety infractions (etc.), backlog of grievances, track record. Context may pressure any number of agents to act in a certain way.

iv. *Types of grievance* - most are individual/rights grievances (eg. individual worker grieves dismissal), but CBA may also allow for group grievances (similar individual grievances) and policy/union grievances (matters of general interest, no individual member yet affected).

1. For instance, consider an "attendance management" system, imposed by employer and opposed by union in form of collective grievance.

v. *Carriage* - union has exclusive carriage of all grievances, and is able to file (or not file) grievances on behalf of employees. However, this is subject to the duty of fair representation, *s. 12.*

1. For instance, union sometimes members hire own legal counsel, but employer will not engage, referring to exclusivity of relationship with CBU. Could grieve DFR directly to the Board (though 99% of these fail).

*e. Time limits* - failure to comply with CBA time limits on grievance might mean that the arbitrator has no jurisdiction to hear dispute; depends on interpretation, although the Board may dismiss application where there has been an unreasonable delay causing prejudice, under *s. 89(e),(f)*

*i.* For instance, while "shall" is mandatory language, this does not render time limits mandatory in the absence of express language to that end; may yet be discretionary.

*ii.* For instance, failure to meet time limits for reply does not mean that the grievance succeeds, but rather that the initiating party may proceed to the next step.

*iii. Process re time limits under* ***s. 89(e)***

*1.* How forcefully the parties have expressed the binding effect of the time limits in the agreement? {Pacific Forest}

*2.* Did the breach of the time limit take place in the early or later stages of the grievance procedure? {Pacific Forest}

*3.* The length of the delay? {Pacific Forest}

*4.* Whether there is a reasonable explanation for the delay? {Pacific Forest}

*5.* The seriousness of the grievance? {Pacific Forest}

*6.* Prejudice to the other party? {Pacific Forest}

*7.* Any other factors? {Pacific Forest}

*f. Arbitral jurisdiction*

*i. Overview* - has developed considerably over time, from a narrow conception limited to application of the collective agreement, to a view which allows for administration of *Charter* remedies, etc. Generally governed by *s. 89* (remedial) and *s. 92* (procedural) grants of power.

*ii. Does the dispute arise from a valid component of a CBA?*

1. *Arbitrable matters*

a. *Approach pre-Egan* - arbitrators can deal with issues arising within the contents of the agreement and no more. Everything else falls under management rights.

i. For instance, employer offers free lunch to employees every day in the 1960s; union grieves when employer ceases this practice. Arbitrator holds that, as lunches not in CBA, there was no sustainable or arbitrable grievance between the parties.

b. *Approach post-Egan, 1975* - matters touching on the workplace, for instance by violating minimum standards set out in *ESA* or other legislation, are arbitrable, regardless of whether they are referred to in CBA. {Egan}

*2. Unwritten addenda*

*a. Overview* - as the CBA is the source of arbitral jurisdiction, and CBA must be written, unwritten addenda are not generally within jurisdiction. {National Refrigeration}

*i.* For instance, oral assent to provide employees with newly created provincial holiday was not enforceable; not in the CBA, had not been signed off by parties. {National Refrigeration}

*ii.* For instance, while past practice may be useful in interpreting the CBA, it cannot be used to create a term of the CBA where document itself is completely silent {Hertz}

*3. Written addenda*

*a. Overview* - CBA does not have to be solely one document, but rather consists of any documents which parties *intended* to become part of CBA; {Canada Bread} joint signatures not required if intention present. {United Grain}

*i.* For instance, where document is included in the CBA booklet, or is specifically referred to in the CBA, or refers to the CBA in a manner which modifies / amplifies, etc. {Canada Bread}

*ii.* For instance, qualifications document setting out requirements for teaching specialties incorporated into CBA: set out in writing and referenced in the CBA document, though not signed by union. {BCCTF}

*b. Contrast with employer policy* - written addenda are bilateral agreements, unlike employer policies, which are unilateral and are not "enforceable" by arbitrators. {Long Manufacturing}

*i.* For instance, counterexample, may form the basis of estoppel, eg. that if one party has detrimentally relied on employer policy, this may form a shield against operation of the CBA. {Long Manufacturing}

*4. Temporal effectiveness of addenda*

*a. Position in BC* - per industry norms, addenda are not effective once the underlying CBA has expired, unless they are mutual covenants which have already been acted on. {Eurocan} The exceptions include: {Munroe}

*i. Express intent* - parties stated in the ancillary agreement itself that it would continue to bind them until other arrangements had been negotiated. {Munroe}

*ii. Importance and reliance* - addendum of "fundamental importance", benefit of which had already been enjoyed by the party giving notice to terminate it. {Munroe}

*b. Position elsewhere* - addenda roll over into renewals *unless action taken* to terminate, or other express language causes lapse. {Bowater}

*i.* For instance, where a written addenda does not contain a specific sunset clause, and no party acted to terminate it, the addenda remains effective in renewal of CBA. {G.H. Noble}

*iii. Does the arbitrator have jurisdiction to hear the dispute?*

*1. Overview* - either explicitly or by necessary implication, from the CBA, which must be in writing. {Toronto (City)} See also: s. 84(2), which stipulates procedure for dispute resolution.

*2. Nexus requirement (establishes jurisdiction to hear dispute)*

*a. Overview* - regardless of subject matter of dispute, must be sufficient nexus to CBA such that dispute falls within jurisdiction of arbitrator. {Giesbrecht}

*i.* For instance, general provisions concerning health and safety were sufficient to establish jurisdiction over

failure to prevent workplace harassment; specific clause unnecessary. {Giesbrecht}

*ii.* For instance, defamation action by employer against employee for comments made about org. or management will often only arise from CBA if the employee was disciplined. {Bhaduria}

*b. Effect of arbitral jurisdiction* - once an arbitrator is properly seized of jurisdiction over the particular "factual matrix", all elements of the dispute should be addressed; includes consideration of statute and application of remedies (see below). {Weber}

*3. Exclusivity of jurisdiction (ousts jurisdiction of Courts)*

*a. Overview* - statute identifies arbitration as sole forum for resolving CBA disputes; matters arising expressly or inferentially from CBA are *solely* within arbitral jurisdiction. {Weber}

*i.* For instance, not all disputes between employee and employer are precluded; only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts. {Weber}

*b. Jurisdictional test* - emphasizing substance or form, attempts to determine the "essential nature of the dispute" (eg. whether it arises from CBA) with regard to both (1) nature of dispute and (2) the ambit of the collective agreement. {Weber}

*i.* For instance, even where there is no dispute resolution process for the given issue (eg. it is negatived by CBA, or no oral hearing allowed for specific subject matter): if essentially CBA, arbitral jurisdiction wins out. {Vernon}

*ii.* For instance, if claim *could* have been arbitrated, then it is beyond Court jurisdiction, regardless of the named parties / defendants, casting of the actions, etc. {Jadwani}

*iii.* For instance, in seeking severance pay under CBA, Courts have no jurisdiction to adjudicate dispute, because claim would not exist whatsoever but for CBA, even where CBA precludes arbitration of this *type* of claim. {Allen}

*iv.* For instance, even where access to independent adjudication (eg. arbitration) of a claim is ruled out by statute, the matter is nevertheless beyond the jurisdiction of the courts. {Vaughan}

*v.* For instance, where employee whistleblower brings court action for harassment, despite that there is no harassment clause in the CBA, the matter is nevertheless beyond jurisdiction of the courts. {Ferreira}

*vi.* For instance, counterexample, disputes arising out of a contract which was concluded *before* the parties began bargaining collectively are within the jurisdiction of the courts. {Goudie}

*vii.* For instance, counterexample, claim for malicious prosecution/mental distress is actionable, because the invocation of criminal proceedings took matter beyond labour relations sphere. {Piko}

*c. Special considerations in jurisdiction*

*i. Other tribunals and statutory bodies*

1. *Overview* - where there is a specialized mechanism (eg. human rights tribunal) set out in legislation, employee may have recourse to that body, notwithstanding *Weber*.

2. *Concurrent jurisdiction* - there is no concurrent jurisdiction for *common law* rights, but there can be for *statutory* rights. {Saskatchewan}

a. For instance, employees have recourse to human rights tribunals as well as labour arbitrators for disputes; may opt for whatever process is preferred. {Saskatchewan}

b. *Test for primacy* - where there is concurrent jurisdiction, must determine which body has primacy; this requires consideration of "essential nature" of dispute, two part test: {Morin}

i. *Exclusivity* - determine whether legislation grants exclusive jurisdiction to either arbitrator or specialized tribunal; *not* determinative. {Morin}

- For instance, while statute may grant exclusivity to special body, arbitrators never have exclusivity over HR, because quasi-constitutional nature of these statutes means that arbitral jurisdiction cannot oust; may have *primacy*, however. {Halifax}

ii. *Essence of claim* - determine whether the essence of the claim is one which deals with workplace dispute, or subject matter of legislation. {Morin}

- For instance, where the violation arises from breach of human rights legislation, it is likely that primacy lies with human rights tribunal. {Morin}

- For instance, where the essence of a claim is race discrimination, falls under HRT jurisdiction notwithstanding that conduct occurred in workplace. {Halifax}

3. *Duplicative proceedings* - due to concurrence of jurisdiction, may be duplicate claims brought concerning same facts, open to employer/union to argue *res judicata*, estoppel, etc. {Richards}

4. *Exclusive jurisdiction* – specialized tribunals may oust arbitral or court jurisdiction; where specialized tribunal set out by statute for d&d of police officers, CBA arbitrators no longer have jurisdiction. {Regina}

*ii. Class actions*

1. *Overview* – though dispute might involve several BUs, necessitating multiple arbitration proceedings, this nonetheless does not oust arbitral jurisdiction where "essentially" a CBA dispute. {Bisaillon}

a. For instance, where nine unions dispute changes to pension plan taken unilaterally by employer, and no one CBA able to handle all disputes, nevertheless jurisdiction is arbitral. {Bisaillon}

*iii.Defamation actions*

1. *Overview* – clarification required to determine which body has jurisdiction where defamation is alleged; *arbitral* if all made out: {Haight-Smith}

a. *Related to organization or employment relationship* – comments concern the employee's character, history, or capacity as an employee;

i. For instance, where comments made by vice principal to police officer concerning teacher's erratic behaviour at workplace, this is likely made out. {Stuart}

b. *Communication part of role* - comments were made by someone whose job it was to communicate a workplace problem;

i. For instance, it is not the position of the vice principal to "communicate workplace problems," particularly not to police officers; not made out. {Stuart}

c. *Receiver of communication* - comments were made to persons who would be expected to be informed of workplace problems.

i. For instance, one would not expect police officers to be informed of workplace problems at a school; not made out. {Stuart}

*iv. Does the arbitrator have jurisdiction to apply statute?*

1. *Overview* - arbitrator has jurisdiction over obligations under HR/ESA statutes, which are "incorporated" into collective agreements: see s. 89(g). {Parry Sound}

2. *Nexus requirement (establishes jurisdiction to apply statute)*

a. *Overview* - statute must have some connection to the collective agreement; it must affect the interpretation, application, or operation of the CBA in order to be arbitrable. {Denison}

b. *Not extinguished - Mitchnik* argues that SCC rejected *nexus* requirement; this misstates *Parry Sound* - see para 19: *no violation of CBA, no arbitrable dispute*. However, *HRC* is implicit in CBA between parties, and ergo violations arbitrable on this basis. {Parry Sound}

i. For instance, even in the absence of express language, arbitrator may determine grievance concerning the *Occupational Health and Safety Act*. {Canada Safeway}

ii. For instance, impugned conduct may not contradict an *express* component of the CBA; however, as HR statutes are incorporated, contravention of HR statute by emplyr. makes matter arbitrable. {Parry Sound}

c. *Limitations* - statutes must relate to employment relationship, health, safety, or human rights, eg. a "significant part of the employment relationship." {BCTF} Must be *compatible with collective bargaining regime*. {Isidore Garon}

i. For instance, class size limits provided by the BC *School Act* enforceable through grievance/arbitration procedure because this was an "important exercise of the management rights clause." {BCTF}

ii. For instance, ON *Education Act* not enforceable *in toto* at arbitration; however, provisions which deal with CBA and labour relations are enforceable through grievance/arbitration. {TCDSB}

3. *Means through which statute relevant to labour disputes* {Denison}

a. *Incorporation* - collective agreement may expressly or impliedly incorporate the provisions of a statute: s. 89(g) of the *Code*. {Denison} Mandatory per the SCC. {Parry Sound}

i. For instance, does not require explicit grant of authority; *Parry Sound* confers jurisdiction on all arbitrators to consider statutes which govern employer relationship. {Ottawa}

ii. For instance, the inclusion of a "whole agreement clause" or any other clause limiting the applicability of

statutory authority to CBA / employment relationship has no force. {Ottawa]

*iii.* For instance, see nexus limitations above; only statutes which are "compatible" with collective bargaining regime is incorporated implicitly. {Isidore Garon}

*b. Interpretation* - statute may provide an aid to the interpretation of a collective agreement. {Denison}

*c. Conflict* - statute may render unlawful a provision of a collective agreement, or may speak to the very issues addressed by a collective agreement, but provide superior benefits. {Denison}

*4. BC Human Rights Code (example)*

*a. Overview* - example of statute relevant to labour relations; prohibits discrimination in hiring or condition of employment based on enumerated grounds: *s. 13(1), HRC*

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

*b. Exceptions*

*i. Seniority - bona fide* schemes based on seniority are excepted from application of *s. 13(1)* through *s. 13(3)(a).*

*ii. Insurance/pension plans* - marital status, physical or mental disability, sex or age in context of of a *bona fide* retirement, superannuation or pension plan. *s. 13(3)(b)*

*iii.BFORs -s. 13(1)* does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement. *s. 13(4)*

*v. Does the arbitrator have jurisdiction to order a remedy?*

*1. Overview* - notwithstanding whether there is express statutory or CBA authority granted to provide for a specific remedy, not limited to declaratory relief, etc. Arbitrators may provide any relief necessary to redress CBA violations; *s. 89* {Polymer} Binding on parties. *s. 95*

*a.* For instance, despite that CBA does not provide for damages, and no evidence that such awards were "intended" by parties to CBA, arbitrators may nevertheless award damages where necessary. {Polymer}

*2. Statutory remedies - Code* provides for the following remedies:

*a. General* - whatever remedy is required to provide final and conclusive settlement of a dispute; *s. 89*

*b. Damages* - order setting the monetary value of an injury or loss suffered; directing a person to pay a person all or part of the amount of that monetary value. *s. 89(a)*

*c. Rescind /replace discipline/order reinstatement* - order rescinding discipline, *s. 89(c)*, substitute other measures if just/equitable, *s. 89(d)*, reinstate dismissed employee. *s. 89(b)*

*d. Dismiss dispute* – dismiss or reject an application or grievance or refuse to settle a difference, if there has been unreasonable delay leading to prejudice to other party. *s. 89(f)* (see also: grievance -> timing, above)

*e. Encourage settlement* – encourage settlement of the dispute and, with the agreement of the parties, the arbitration board may use mediation, conciliation or other procedures. *s. 89(h)*

3. *Broad remedies available* - obligation to provide a final and binding settlement of all matters in dispute requires arbitrator to apply necessary remedies; *s. 89* - sufficiently broad to include *Charter* (see *Charter*, below). {Mount Sinai}

*a.* For instance, in fashioning remedy, arbitrator must determine whether breach of CBA also has tort or *Charter* implications, and act accordingly (eg. order damages or other remedial action). {Weber}

*b.* For instance, arbitrator could consider claim to order remedy which would lead to removal of supervisor from workplace, in addition to damages. {Tenaquip}

*c.* For instance, arbitrator could, absent other suitable remedies, order the discharge of a managerial employee, among other things. {Pinazza}

d. For instance, if arbitrators have the power to make production orders, it logically follows that they have the power to enforce; includes the dismissal of the claim. {Budget} (see evidentiary issues -> production, below).

4. *Limitation* – this does not operate where there is express limitation to the tribunal's adjudicative powers; eg. if legislation limits available remedies, no jurisdiction; recourse for the excluded remedy may be had elsewhere (eg. in the Courts). {Conway}

*vi. Does the arbitrator have jurisdiction to apply the Charter?*

1. *Overview* - *Charter* applies to govn't action, where govn't *de facto* or *de jure* controls an org., or where org. implementing govn't program. {Eldridge} Also, *Charter* is "relevant background" for developing common law between private parties; thus applicable to CBAs. {Dolphin Delivery}

*a.* For instance, corporation set up by the Ontario government for the purpose of implementing and administering its energy policy was an agency of the government. {Society of Energy Professionals}

2. *Source of jurisdiction* - statutory obligation to provide a final, binding settlement of all matters in dispute requires an arbitrator to apply *Charter* to collective bargaining disputes. {Mount Sinai}

*a.* For instance, prelim judges not courts, because *Criminal Code* gives such magistrates "no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy." {Weber}

3. *Charter rights relevant to labour*

*a. Freedom of association under s. 2(d)*

*i. Overview* – freedom of individuals to "come together" to pursue common purposes; includes procedural right to bargain collectively. {Trilogy}

*1.* For instance, employees have right to form/join union, pursue collective interests, though this does not guarantee *means* for securing purposes (eg. does *not* protect right to mid-term strike). {Trilogy}

*ii. Meaningful association* - government must take steps to ensure that association is meaningful; if statute interferes with s. 2(d), then it is unlawful. {Dunmore}

1. For instance, where agricultural workers incapable of exercising freedom to organize without aid from protective regime, exclusion from this regime violates s. 2(d). {Dunmore}

*iii.Extent of protections* - *Charter* protects against "substantial interference" with collective bargaining, where (1) the matter is important to collective bargaining processes and (2) issue impacts on the collective right to good faith. {Health Sciences}

1. For instance, court effectively overturned Trilogy decisions which excluded protection of collective bargaining from s. 2(d). {Health Sciences}

2. For instance, protects meaningful participation, to make representations to employer, to have these considered in good faith; only where this is impossible is s. 2(d) violated. {Fraser}

3. For instance, must extend also to the right to strike, which is an essential element to engage in protective bargaining. {Saskatchewan Federation}

*b. Freedom of expression under s. 2(b)*

*i. Overview* - broadly interpreted by courts, any activity which attempts to convey meaning; covers most human activity.

*ii. Employer* - limited consideration, however should be noted that compelling an employer to make certain statements in form of reference letter, compelling silence beyond those statements breaches s. 2(b), though not unreasonably so in that case. {Slaight}

*iii.Employee* - broadly protected; ability to speak is an essential component of labour relations, particularly for vulnerable workers. {KMart}

1. For instance, picketing may only be restrained where it involves the commission of a tort or crime; eg. trespass or nuisance. {Pepsi}

2. *Picketing* - peaceful picketing conveys meaning, is therefore expressive and so protected under s. 2(b). {Dolphin}

3. *Secondary picketing* - secondary picketing not illegal *per se*; therefore secondary picketing allowable, even absent alliance b/w secondary site and employer. {Pepsi}

   a. For instance, counterexample, BC legislation outlaws most secondary picketing; therefore, likely that these portions of the *Code* are unconstitutional. {Harris&Co}

4. *Recording of picket line* - union able to videotape casino picket line in mall, because used to inform of strike, enhance striker morale, etc. therefore, protected. {United Food}

5. *Striking* - refusal to cross picket line is protected, conveys meaning (eg. support for strike). While legislation which defines crossing line as strike unlawfully infringes s. 2(b), likely justified under s. 1 re: prevention of labour disruption. {Grain Workers}

   a. For instance, protest against legislatively imposed CBA on teachers found to convey meaning,

thus restriction violative of s. 2(b); in that case, justifiable to protect labour stability. {BCTF}

*4. Demonstrable justification under s. 1 {Oakes}*

*a. Overview* - government actions which breach *Charter* rights may nevertheless be justifiable if the *Oakes* satisfied re: section 1. If non-governmental action, remedy under s. 24.

*b. Applicability of Charter to arbitral decisions* - decisions of administrative bodies are *not* government actions, so *Oakes* is inapplicable. Instead, on review, Court must balance severity of breach against statutory objectives for reasonableness. {Dore}

*c. Application*

*i. Pressing and substantial* - concern to which the government action relates must be a "pressing and substantial" concern; violation of rights for trifles is not justifiable.

1. For instance, the protection of family farms, vulnerable agricultural industry in Alberta is a pressing and substantial objective. {Dunmore}

*ii. Rational connection* - is the action taken by the government rationally connected to the pressing and substantial concern?

1. For instance, legislation which excludes agricultural workers from statutory regime which protects the right to organize is rationally connected to objective of protecting family farms. {Dunmore}

*iii. Minimal impairment* - does the action taken by the government minimally impair rights in pursuing the concern?

1. For instance, legislation which excludes agricultural workers from statutory regime which protects the right to organize is not minimally impairing: every sector, no distinction. {Dunmore}

2. For instance, legislation which defines refusal to cross picket line as a strike is minimally impairing, because it allows for other means of support (eg. can join picket line after work). {Grain Workers}

3. For instance, restricting ability of teachers to discuss class size, which is fundamental to employment relationship, at parent-teacher conferences not minimally impairing. {BCTF}

4. For instance, total ban on teachers sending pamphlets to parents through students not minimally impairing, b/c employer could just take measures to correct inaccurate items. {BCTF}

5. For instance, banning black armband which conveys political message is minimally impairing, where this is only in the context of exposing students to political discussion. {BCTF}

*iv. Proportionality* - is there proportionality between the effect of the measures and the objective sought (balance of harm)?

*5. Charter-specific remedies*

*a. Overview* - arbitrators are considered as "court of competent jurisdiction" such that *Charter* remedies may be granted under s. 24. Includes damages, evidence exclusion, etc. {Martin}

*i.* For instance, may rule that legislation of no force or effect, award damages for breach of *Charter* rights,

exclude evidence obtained pursuant to breach, etc. {Ward}

*b. Statutory compliance / no force or effect (s. 52(1), Constitution Act)*

*i. Overview* - arbitrators empowered to consider *Charter* compliance of legislative provisions; if violative, bound to treat such provisions as having no force/effect. {Douglas}

*c. Exclusion of evidence*

*i. Overview* - following *Weber*, arbitrators are able to order *Charter* remedies, including under s. 24(2) which allows for the exclusion of evidence obtained via breach. {Weber}

*ii. Independent determination* - findings of courts re: admissibility of evidence not binding on arbitrators, must make independent ruling due to differing SOP, onus, policy. {Fotheringham}

*1.* For instance, key consideration in *Grant* analysis under s. 24(2) is whether admission would bring admin. justice into disrepute; this is different for arbitration vs. criminal court. {Koprowski}

*iii. Flexible application* - discretion to exclude evidence "should be exercised with restraint" since, unlike crim. law, grievor's liberty is not at stake. {Toronto Transit}

*g. Evidentiary issues*

*i. Employer's right to call grievor as witness*

1. *Overview* - the employer does not have an *unfettered* right to call the grievor, even where it presents its case first; matter must be determined in light of:

   a. Right of to fair hearing; {UPS}

   b. Notice given to grievor; {UPS}

   c. Extent of the grievor's knowledge of opposing case; and, {UPS}

   d. Employer's purpose in making the request (eg. to assist in proving its case, or solely to discredit the witness?) {UPS}

*ii. Evidence from informal / ADR discussions*

1. *Overview* - prior to grievance, may have discussions re informal resolution. This will involve discussion of particulars; however, any such evidence is off the record / without prejudice, therefore inadmissible at arbitration - promotes compromise between parties.

*iii. Production and compelling attendance*

*1. Overview* - arbitrators can order production of documents through use of subpoena *duces tecum*; may include compulsion to testify; whether this is operative prior to hearing depends on wording of enabling statute. {Halifax} Affirmative in BC, *s. 92(1)(c):* can order pre-hearing.

*a.* For instance, in BC, s. 93(1) provides for power of arbitrator to compel attendance, produce documents, provide testimony; limited only to powers of "civil court of record." May still order pre-hearing disclosure from *parties*, but not pre-hearing production from *third* parties. {Blasina}

*b.* For instance, no individual, including cabinet ministers, stand outside the ambit of the summonsing power of arbitrators, where there is reason to believe that this person has relevant evidence. {Moreau}

2. *Scope of production/summons* - three approaches to determining the scope of production, each of which weighs fairness of proceedings against need to avoid fishing expeditions:

   a. *Liberal approach* - all documents in possession of party which have a "semblance of relevance" ought to be disclosed or identified (if privileged). {Belleville} Does nothing to avoid fishing expeditions.

   b. *Restricted approach* - documents must be relevant, particularized, and must have a clear nexus with issues in dispute. {Harding} Problematic, can't know what is relevant before knowing that evidence exists.

   c. *Intermediate approach* - documents must be arguably/*prima facie* relevant, allowing for an element of discovery, with arbitrators erring on side of disclosure; all documents subject to probative/prejudicial analysis. {Harding}

      *i.* For instance, must be some reasonable and specific basis on which to conclude that the requested document may be material to the proceeding. {Bell Canada}

      *ii.* For instance, capable of being established by counsel's definition of issues / theory of the case: there is no need for laying of an evidentiary foundation to allow for production / summons. {Bendel}

3. *Remedy for noncompliance* - may dismiss grievance on basis of abuse of process where production orders are not followed. {National Standard} May order arrest of absent witness. {Acme}

   *a.* For instance, if arbitrators have the power to make production orders, it logically follows that they have the power to enforce them, even in the absence of an express statutory provision to that effect. {Budget}

   *b.* For instance, counterexample, board went too far by allowing a grievance solely on the basis that the employer had failed to produce material documents, where docs destroyed by third party. {Ontario}

*iv.Medical examination of employee*

1. *Overview* - employers have a limited right to insist on having employee examined medically for the purposes of arbitration. {Oakville} Stems from similar power of civil courts. {UBC}

   *a.* For instance, this power is implicit in the power to ensure a fair and just hearing: in the power to control procedure, effectively. {Kodak}

2. *Requirements* - where physical or mental condition of a person is put at issue by union; perhaps due to conflicting and indeterminate nature of medical reports submitted by one party. {UBC} All other options must have been exhausted, however. {Grover}

   *a.* For instance, will not be ordered unless union has put health of grievor at issue, due to the highly intrusive

nature of forced medical exams. {Whitaker} or where request is made for some collateral reason, unrelated to the need to ensure procedural fairness. {Ontario}

*b.* For instance, ordering exam for the sole purpose of testing the employer's theory of the case, would go beyond the "fair hearing" principle, {Harris} or for purpose of determining "fitness" for proceeding. {Blass}

3. *Means of examination* - have to be carried out in minimally invasive means; this will occasionally mean that the union/grievor will have input into selection of examiner; depends on whether "playing field" needs to be levelled. {Telus}

   *a.* For instance, where the grievor has *not* been previously examined by any party, there is no need to level playing field, therefore independent examiner appropriate. {UBC}

4. *Statutory provisions* - certain statutes grant authority for medical examination of employees, have been upheld as constitutional; see BC *School Act*. {Vancouver}

*v. Particulars*

1. *Overview* - there is no formal process for discovery/disclosure in arbitration; grievance procedure meant to fill this role. Where this falls short, arbitrators can order particularization of position by parties to ensure fairness and efficiency. {Devonian}

2. *Limitations* - party is not obligated to provide a statement of the evidence by which it intends to prove its case. {Consumers} Not "disclosure" as in criminal proceedings, must and requests for disclosure are dealt with on item-by-item basis. {Brasserie}

*vi.Best evidence rule*

1. *Overview* - party must produce the best or strongest evidence available; original rather than photocopy, etc. Evidence falling short is admissible, but may be given lesser weight. {Varma}

*vii.Hearsay*

1. *Overview* - arbitrators have discretion to admit evidence, whether or not admissible in court; but, invariably give hearsay evidence little weight or exclude it altogether. {Northern Electric}

   *a.* For instance, while employer may not want to call dissatisfied customer as witness in grievance, nevertheless would be unfair to admit hearsay for truth of contents. {Brewster}

2. *Medical reports*

   a. *Overview* - to spare parties cost of calling witnesses re: medical evidence, admissible as reports through *Evidence Act*. Adverse parties retain right to cross-examine. Cost borne by party seeking to adduce evidence in this manner. {Miracle Food}

3. *Business records*

   a. *Overview* - like medical records, admissible as reports. Further, arbitrators have discretion to admit business documents absent compliance with notice requirements {Libby}

   b. *Weight* - frailties which arise from circumstances in which record was created diminish the

weight to be accorded to the document, but they do not affect its admissibility.

c. *Opinion* - where record contains elements of opinion evidence, not admissible through this procedure, and rather must be adduced *vica voce*. {OCCAS}

*viii.Findings of concurrent proceedings*

1. *Criminal proceedings* – finding of guilt in a criminal trial must be taken as conclusive proof of the accused's culpability for the purpose of all other proceedings. {Toronto}

   a. For instance, would constitute abuse of process to permit re-litigation of criminal findings of fact; however, no requirement to await outcome of criminal proceedings to discharge, if just cause present. {Edmonton}

2. See also: independent determination of arbitrator required re: admissibility of evidence, see *Charter* remedies, above.

*ix.Reply evidence*

1. *Overview* – party bearing the legal onus may present reply evidence; prohibited from "splitting case" however; reply denied if evidence should have been brought out in first instance. Must address new matters which arose or inconsistencies revealed, not new subject matter. {Telus}

   a. For instance, union evidence focused on CBA, opted not to call evidence on past practice. Employer focused only on past practice in their case. Union was aware of employer's strategy from outset, but chose not to address; therefore, evidence not admissible as reply. {Taylor}

   b. For instance, where evidence arises from something newly raised in the grievor's defence, this is properly admitted as reply evidence; however, where tendered to contradict a fact which was known from the outset to be in dispute, should have been tendered in-chief. {Mikus}

2. *Surrebuttal* – intermediate ground allows for admission of reply evidence subject to a further reply by the other party; however, will not be granted where there is notice/disclosure. {Taylor}

*x. Cross-examination, Browne v. Dunne*

1. *Overview* - where party calls evidence to contradict a witness on a particular point, the contradiction must first be put to the witness during cross-examination. {Nissan}

2. *Application* - not strictly applied in arbitration {Nissan} though certain arbitrators take the opposite view, because it goes to fairness, and is not a mere technicality. {Laidlaw}

   a. For instance, contradictory evidence sought to be admitted which was not identified or put to the witness in cross ruled inadmissible by strict operation of the rule. {Delta Catalytic}

   b. For instance, where the contradiction is manifest from the outset, the witness is in frail health, and the witness was not a party to the proceeding, strict application of the rule is not required. {Grand River}

3. *Credibility* - applies to impeachment of credibility through *calling contradictory evidence*; can still impugn credibility in argument regardless of whether contradiction put to witness. {Hurd}

*xi.Credibility*

1. *Overview* - cautioned against impressionistic approach; rather, should be holistic, looking at internal consistency, external consistency, and probability re: common sense. {Faryna}

    a. For instance, cannot gauge evidence credibility solely on whether the personal demeanour of the particular witness carried conviction of the truth. {Faryna}

*xii. Failure to call witness*

1. *Overview* - failure of a party to call a witness who may have material evidence to give, including the grievor, can lead to an adverse inference being drawn against that party.

2. *Limitation* - applicable where party was in a reasonable position to call the witness; evidence must have been material, witness available, no other reason for failure. {McFetridge}

*xiii. Testifying by teleconference*

1. *Overview* - reception of testimony by teleconference lies within arb. power over proceedings; despite that this deprives full opportunity to view witness while testifying. {CBC}

    a. For instance, apt where key witness for the employer resided overseas, and could not be served with a subpoena {CBC} or where travel time/cost onerous. {McDonald}

    b. For instance, counterexample, ordered to attend in person where no indication that witness unable or unwilling to attend in person, and case turns largely on credibility. {Toronto}

    c. For instance, counterexample, ordered to attend in person where no medical evidence that the grievor was disabled by illness to the point of not being able to leave her home. {Grunerud}

2. *Considerations*: {Toronto}

    a. *Vica voce presumption* - general principle that evidence and argument should be presented in open court;

    b. *Importance* - importance of the evidence to the determination of the issues in the case (more important, stronger presumption for *vica voce*);

    c. *Effect* - of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of the witnesses;

    d. *Demeanour* - importance in the circumstances of the case of observing the demeanour of a witness;

    e. *Purpose* - whether a party, witness or solicitor for a party is unable to attend because of infirmity, illness or any other reason;

    f. *Balance of convenience* - between the party wishing the telephone or videoconference and the party or parties opposing;

    g. *Miscellaneous* - any other relevant matter.

*xiv. Motion for non-suit*

1. *Overview* - after party bearing onus has presented its case, opposing party may bring non-suit motion, eg. that even if evidence taken at its highest, no case has been made out. {Swan} Bring at own peril: unlikely union will bring grievance to arbitration if *no* case.

2. *Position in BC* - at court level, distinguish between *no evidence* and *insufficient evidence* motions; in case of the latter, party bringing motion must elect not to call evidence (not so in former). However, arbitrators have relaxed this rule; no need to make an election. {Surfwood}

*xv. Charter*

1. *Overview* - see *Charter* remedies, above.

*h. Other procedural considerations*

*i. Overview* - subject to general power, under *s. 92(1)*, of the board to set own procedure, determine pre-hearing matters and issue pre-hearing orders. *s. 92(1)(c)*

*ii. Adjournment of proceedings*

1. *Overview* - arbitrator has the discretion to grant an adjournment at any stage of the arbitration hearing; must consider whether there is a valid reason for doing so, weighing justice and fairness. {Kalin} Best idea: parties consent to reasonable adjournments (for better relations).

2. *Limitation* - arbitrators must be alive to the fact that labour relations delayed are labour relations defeated and denied; expedited nature of proceedings essential. {Journal Publishing}

   *a.* For instance, where employee also charged criminally for same facts, employer entitled to prompt resolution of grievance, independent of criminal proceedings. {Donovan}

3. *Adjournment to await concurrent proceedings* - where there are concurrent proceedings involving same facts, may delay to await outcome of that proceeding. {Journal Publishing}

   *a.* For instance, as criminal finding of guilt is conclusive proof of culpability for other proceedings, worthwhile to adjourn arbitration for same facts until criminal trial concluded. {Toronto}

   *b. Considerations for adjournment for concurrent tribunal:* {Therrien}

      *i. Breadth of jurisdiction* - which forum has broader jurisdiction to resolve all the issues at play;

         1. For instance, if matter falls under specialized purview of other tribunal, strong case for deferral until conclusion exists, due to *res judicata*. {Lavery}

         2. For instance, counterexample, there is no automatic deference/primacy for the statutory tribunal; {Bendel} (see special considerations in jurisdiction, above).

      *ii. Progress* - which forum is further ahead in its proceedings;

      *iii. Consistency* - the likelihood of inconsistent decisions and duplicative efforts;

*iv. Overlap* – the degree of overlap in the issues;

*v. Centrality of specialized subject matter* – the existence of human rights issues and the particular importance that attaches to their efficient resolution;

*vi. Prejudice* – the degree of prejudice to the parties;

*vii. Impact* – the impact on fact-gathering and the determination of legal issues.

c. *Considerations for adjournment for concurrent criminal trial*: {Ellis}

*i. Expedition* – labour relations goal of achieving an expeditious result;

1. For instance, where no date had been set for the criminal trial, no date imminent, need for expeditious result militated against adjourning for outcome of trial. {Maple Villa}

*ii. Efficiency* – need to ensure efficient use of resources;

*iii. Liability to employer* – accruing liability on the employer;

1. For instance, this effect may be minimized where union undertakes not to seek compensation for period beyond the originally scheduled arbitration date. {Ellis}

*iv. Losses to grieveor* – accruing losses or financial hardship to the grievor;

*v. Consistency* – potential for inconsistent decisions;

1. For instance, if matter falls under specialized purview of other tribunal, strong case for deferral until conclusion exists, due to *res judicata*. {Lavery}

*vi. Prejudice* – need to avoid prejudice in the criminal trial and in the arbitration hearing;

*vii. Impact* – the impact of a finding of guilt or an acquittal on the issues to be decided at arbitration;

*viii. Miscellaneous* – any other potentially relevant or exceptional circumstances.

1. For instance, employer does not need to await outcome of criminal trial to impose discharge, if just cause available: see d&d -> off-duty conduct. {Edmonton}

*iii. Public access to proceedings*

1. *Overview* - while court proceedings presumptively open to public, this does not apply to arbitration, which is "essentially private" in nature; therefore, discretionary {Toronto Star}

a. For instance, no favouring either the inclusion or the exclusion of the public; in each case, it is simply an issue for the arbitrator to decide by weighing interests. {Ottawa Public Library}

2. *Includes "personal advisors"* - parties could insist that grievor not have *own* lawyer present, where this constitutes an impediment or delay to the proceedings. {Toronto Community Housing}

3. *Considerations for whether to exclude public:* {Schemmer}

    a. *Nature* - of the dispute;

    b. *Context* - of the dispute;

    c. *Implications* - upon an order to exclude witnesses; esp. on labour relations.

    d. *Impact* - on the proceedings if observers and/or the media are present;

    e. *Nature* - of the employer's enterprise, i.e. whether it is a public or a private institution;

    f. *Sensitivities* - raised by the issues;

    g. *Confidentiality* - of witness and private information;

    h. *Interest* - whether there is any legitimate public interest in the issues;

    i. *Publicity* - extent to which the matter is readily a matter of public knowledge or the subject of media coverage.

*iv.Disqualification of counsel*

1. *Overview* - arbs. have broad power to determine procedure in re: ensuring a fair hearing, and thus an effective resolution of the dispute: includes authority to disqualify counsel. {Moore} Undertake with caution; close relations in community may make this a bad strategy.

*v. Recording of proceedings*

1. *Overview* - have right to take notes of proceeding for own use; however, tape recording falls within broad control over proceedings re: fairness. {Eastern Provincial}

    a. For instance, allowable within discretion if for own use, has no official status, merely another form of note-taking {Clarke Institute} but not if this would intimidate witnesses through formality. {Crawford}

*vi.Exclusion of witnesses*

1. *Overview* - discretionary, will be ordered to ensure that testimony not tainted or influenced by prior testimony of others. {Norfab}

2. *Exclusion of grievor* - allowable b/c grievor is not a party, though in a special position due to close interest in outcome; therefore, should be minimally invasive. {Maclean}

    a. For instance, grievor excluded during testimony of two principal witnesses, but otherwise allowed to observe proceedings. {Maclean}

*vii.Interpreters*

1. *Overview* - there is a right to present evidence in own language; simultaneous translation a

fundamental part of the right to a fair hearing. {Supply & Services}

2. *Costs* - party who needs the translation or interpretation services which must bear the cost, though natural justice may *occasionally* require shared allocation. {M.G. Picher}

    a. For instance, party which produces a witness to testify in a language other than that in which the hearing is conducted bears the responsibility of arranging/paying for translation. {Bendel}

    b. For instance, costs of interpreters for deaf witnesses is an arbitral expense, to be borne by both of the parties; however, for non-deaf witnesses, further interpretation to be borne by union. {Dorsey}

*viii. Consolidation of grievances*

1. *Overview* - consolidation of grievances is a procedural matter which therefore falls under arbitral jurisdiction. {Maple Leaf}

2. *Requirements* - where consolidation sensible, both parties under an obligation to facilitate, even if arbitrator who had not otherwise been selected to hear all of the grievances. {TDSB}

    a. For instance, counterexample, this has not been followed in arbitration matters where the arbitrator was appointed ministerially rather than consensually. {Roach|

*ix. Withdrawal of grievance*

1. *Overview* - no right to withdraw without prejudice, arbitrators have the power to deny any such request, particularly where other party objects. {Rossner}

2. *Labour relations* - relationship is the overarching consideration, question is whether it would make sense to relieve the withdrawing party of the consequences of its decision. {Levinson}

    a. For instance, where grievor misled the parties, claimed to be unavailable for the hearing, not appropriate to allow without-prejudice withdrawal; grievance dismissed, to prevent abuse of process. {Rose}

*x. Appointment of arbitrator*

1. *Overview* - most CBAs hold that arbitrator to be appointed upon agreement by parties; if parties fail to do so, director may appoint an arbitrator or arbitral board to adjudicate. *s. 86*

*xi. Settlement officers*

1. *Overview* - if dispute persists following grievance, within 45 days but matter not yet referred to arbitrator, either party may request appointment of settlement officer (mediator) to assist parties to reach settlement. If no settlement reached within 5 days, matter proceeds to arb. *s. 87*

*xii. Intervention by Labour Relations Board and special officers*

1. *Overview* - if a matter is delayed in settlement or is a source of unrest, Board may inquire into the matter and recommend settlement, order matter to arbitration (if arbitrable) or request appointment of a *special officer* (if not arbitrable). *s. 88*

2. *Special officers* - investigate disputes, hold hearings, arbitrate differences, *s. 106*. Issue binding

orders, *s. 107;* orders effective for only 30 days when departing from CBA. *s. 108*; similar to arbitrators in view of powers. *s. 109*

*xiii.Referrals to Labour Relations Board*

1. *Overview* – at any stage, arbitrator may refer to Board for a binding opinion and decision questions of labour relations policy or interpretation of Code. *s. 98*

*xiv.Costs of arbitration*

1. *Overview* - unless CBA says otherwise, each party bears its own costs, including equal shares of costs of arbitrators. *s. 90*

*xv.Delay by arbitration board*

1. *Overview* - if decision not rendered in reasonable time, minister may issue order to ensure decision rendered without further delay. *s. 91*

*xvi.Appeals of arbitral decisions*

1. *Overview* – appeal may be brought to either the LRB *s. 99* (no fair hearing, or inconsistent with labour relations principles)*;* or to the Court of Appeal *s. 100* if the matter is an issue of law not included in LRB jurisdiction.

2. *Superior Courts* – despite privative clause, either in *s. 101* or in CBA holding that arbitration decisions are final, they are reviewable and subject to *certiorari*, etc. by superior courts. {Raven}

*xvii.Enforcement*

1. *Overview* – decisions may be filed with the superior court of the province, and may thereafter be enforceable as an order of that court. *s. 102(2)*

*xviii.Expedited arbitration*

1. *Overview* - if grievance procedure exhausted, either party may bring dispute to director for expedited arbitration within 45 days and not already referred to arbitration; director appoints arbitrator, and sets hearing date within 28 days. *s. 104* May also involve settlement officer.

2. *Timing* - the arbitrator must issue a written decision within 21 days of hearing, *s. 104(6)*, but an oral decision must be made within one day if the parties request. *s. 104(7)*

3. *Jurisdiction* - cannot be contracted out of in CBA, *s. 104(9),* and arbitrator has the same jurisdiction as any other arbitrator. *s. 104(8)*

*xix.Consensual mediation-arbitration*

1. *Overview* - parties may refer differences to a mediator-arbitrator by consent, for informal and expeditious resolution. Proceedings begin within 28 days. Will attempt to solve through mediation, and failing that, will arbitrate an outcome, provide decision within 21 days. *s. 105*

***2. Discipline and discharge***

a. *Overview* - most collective agreements require employer to prove *just cause* (or reasonable cause) for any disciplinary measure taken against an employee; required by *s. 84(1);* imported by *s. 84(3)* if not in CBA. If CBA provision otherwise unsuitable, Minister may modify to conform. *s. 85(1)*

b. *Specific penalty provided for in CBA* - in British Columbia, even where the CBA provides for a specific penalty in a given circumstance, arbitrator may impose lesser penalty. Provisions which prescribe a specific penalty are construed strictly, as held by SCC after *Port Arthur*. {Brinks}

c. *Modern process under CBAs*

*i.* <u>*Privacy and collection of electronic evidence by employer*</u>

1. *Overview* - employer actions concerning the collection of evidence may be subject to both statutory and common law limitations. Generally, reasonable suspicion of misconduct is required to monitor an employee; employer must also engage in least intrusive means.

2. *Applicable legal standards to information collection*

*a. All employees*

i. *Harris recommendations* - should have a policy in place, which notifies of monitoring and of discipline process for misuse; must also engage specialists to engage in preservation of electronic evidence.

ii. *BC Privacy Act* – creates statutory tort of invasion of privacy; protects that which is "reasonable in the circumstances." Thus, with an express policy of monitoring employee use, expectation of privacy is low.

iii. *Criminal Code* - s. 184, wilful interception of private communications are prohibited except for where an individual has consented, including through implication.

iv. *Common law* - employee has reduced expectation of privacy concerning data stored on employers' equipment; thus, employer may usually monitor, and the expectation of privacy reduced if there is a policy notifying of monitoring.

1. For instance, expectation of privacy increased when equipment used for both personal and business use at home, therefore may be reasonable expectation. {Pacific Northwest}

*b. Private sector, provincially-regulated employees*

i. *Overview - Personal Information Protection Act* ("PIPA") prohibits collection or disclosure of employee personal information absent consent. This is subject to exceptions, which require the use of the least intrusive means available:

1. *Consent present* – collection and disclosure allowable where employee consents to

this; or,

2. *Necessity* - consent not necessary where information is necessary to establish, maintain, or terminate employment relationship; or,

3. *Consent would compromise* - consent not necessary where obtaining consent would compromise the availability or accuracy of the information, and the collection of the information is reasonable for the purposes of investigation.

*c. Public sector, provincially-regulated employees*

i. *Overview - Freedom of Information and Protection of Privacy Act* ("FIPPA") allows for collection of personal information where necessary for and directly related to organizational operations. Individuals must be notified, unless exceptions apply.

1. For instance, *FIPPA* violated where employer monitored employee internet use during work hours; collected personal correspondence and banking records; collection deemed unnecessary to manage employment relationship, did not notify. {*UBC No. F07-18*}

*ii. <u>Order of proceeding, burden and standard of proof</u>*

*1. Burden of proof: presumptively on employer*

a. *Overview* - employer bears the burden of proving just cause for discipline, *unless* the employer disputes (1) employment status of the grievor, (2) applicability of the CBA, or (2) whether discipline has occurred, in which case the union bears the burden.

i. For instance, additionally, consider exclusion clauses in the CBA for bargaining unit; employer bears burden (even if not d&d) where basis for exclusion lies within knowledge of employer. {Serco}

b. *Exceptions*

i. *Facts not in dispute*

1. *Overview* - if only legal and not factual matters are in dispute, then it is inapt to speak of a burden of proof resting on *either* party. {Hope}

ii. *Illness or disability*

1. *Overview* - if union asserts that misconduct was caused by an illness/disability, and that this should be viewed as a mitigating factor or one which requires the employer to take accommodative steps, *union bears the burden*; must show that the illness or disability was a causal factor in the misconduct. {Safeway}

iii.*Probationary employees*

1. *CBA silent* - where CBA is silent on the standard re: termination of probationary employees, burden lies with the union to prove *mala fides,* arbitrary or discriminatory reasons. {National Gallery of Canada}

2. *CBA not silent* - where CBA specifies discharge of probationary employee can be set aside only if the decision was arbitrary or discriminatory or in bad faith, the onus of proof falls on the union. {Essex}

iv. *Circumstances other than discipline and discharge*

1. *Overview* - legal onus rests on grievor; never shifts, even if *prima facie* case made out. Evidentiary onus may shift repeatedly as hearing progresses. {Etherington}

*2. Order of proceeding: party bearing burden generally presents first*

a. *Overview* – the party which bears the burden of proof will present its case first, and will have the opportunity to enter reply evidence. {CBC}

i. For instance, if there is no dispute concerning employment status, CBA applicability, or whether discipline has occurred, employer will present its case first. {Brown}

ii. For instance, if there is a dispute as to the above, the union will present its case first *with respect to* that issue, but the employer will still present first concerning the substantive issues. {Brown}

*3. Standard of proof: balance of probabilities*

a. *Overview* – universally accepted that the standard of proof is a balance of probabilities; note that notwithstanding the decision in *McDougall*, in BC there remain two standards for arbitration: one for professionals/moral turpitude, and one for lower level employees. {Cohen}

b. *Relation with moral turpitude*

i. *Contemporaneous* - employer may defeat a grievance against discipline despite the failure of criminal prosecution for same impugned acts, due to more restricted standard in criminal law. Only one standard applies in arbitration: balance of probabilities. {McDougall}

ii. *Historical* - where misconduct includes allegations of criminal, illegal, or morally reprehensible behaviour / reputation harming behaviour, *clear, cogent, and convincing* evidence required. {BCTel} Held that this was only a single standard - still BOP, but now "greater probabilities required." Applicable in BC. {Indusmin}

c. *Prima facie SOP on threshold issues* - where the employer disputes threshold issues, eg. grievor, employment status, CBA applicability, or whether discipline has occurred, burden of proof is on the union to make out a *prima facie* case. {Brown}

*iii.* *<u>Standard for assessing discipline: "just cause"</u>*

1. *Overview* - "just cause" is the presumptive standard for assessing whether discipline is consistent with the CBA and the *Labour Relations Code.*

2. *Jurisprudentially defined* - "just cause" not usually defined in CBA, thus precise definition must

be determined by arbitrators. {Quebec} See "process," below.

3. *Applicable even where CBA silent* - while Laskin held (*A.C. Horn Co.*) that arbitrators should not import "just cause" into CBAs silent on the issue, it is common for arbitrators to do just that (though not for probationary employees). {Mississauga}

    a. For instance, to do otherwise would render other common CBA provisions, such as seniority/probationary periods meaningless. {Mississauga}

    b. For instance, to do otherwise would be inconsistent with statutory arbitral power to assess penalty on just cause standard. {National Arts Centre}

4. *Statutory requirements re: just cause for dismissal, s. 84(1)*

    a. *British Columbia* - every CBA in British Columbia must contain a just and reasonable cause provision re: *employee dismissal* (ie. not necessarily for other penalties). {s. 84(1)}

    b. *Federal - Canada Labour Code* also requires just cause for dismissal of unorganized Fed employees with 12 months of continuous employment, ss. 240-246. Thus, due same protection as organized workers. {Roberts}

*5. Exceptions*

    *a. Probationary employees*

        i. *Overview* - where CBA is silent on the standard re: termination of probationary employees, challenge must be grounded in *mala fides,* arbitrary or discriminatory reasons. {Gallery} Not covered by importation of just cause in *s. 84(1)*

        ii. *Notice and remedy* - probationary employees must be informed of issues, and allowed for a period of time to rectify. To do otherwise will result in a grievance of termination, particularly where there is a lack of documentation on the record. {O'Brien}

    *b. Casual or temporary employees*

        i. *Overview* - some collective agreements also recognize separate categories of "casual" or "temporary" employees; application of just cause will depend on specific language used. {Ornge}

            1. For instance, clause permitting termination of casual employees with two weeks' notice, or pay in lieu indicated intention that they not be entitled to just cause protection. {Ornge}

            2. For instance, clause allowing for grievances where employer has acted "unjustly, improperly, or unreasonably" permitted challenges to termination of casual employees on those limited grounds. {Ornge}

    *c. Employees suffering from illness or disorder or alleging discrimination*

        i. *Overview* - where condition is present, certain portions of misconduct may be attributable to condition, subject to a human rights analysis, and others attributable to

the culpability of the grievor, subject to a just cause analysis. {Fraser Lake}

ii. *Human rights analysis* - the human rights portion of the inquiry will focus on whether the union can make out a *prima facie* case for discrimination; establishing causality b/w condition and *misconduct* insufficient, union must show link b/w condition and *discipline*: {Gooding}

1. *Differential treatment* - does employer's treatment of grievor draw a formal distinction between grievor or others based on personal characteristics, or fail to take into account that person's already disadvantaged position? {*Withler}*

2. *Enumerated ground* – is the basis for the differential treatment complained of rooted in an enumerated or analogous ground? {*Withler}*

3. *Substantive discrimination* - does the treatment impose a burden upon or withhold a benefit from the griever in a manner which reflects stereotypical application of characteristics? {*Withler}*

    a. For instance, may challenge justness of dismissal by alleging racial discrimination; labour disputes can have HR implications, so long as employer able to investigate and respond to allegations. {York}

iii. *Applicable only in direct discrimination* - does not apply to adverse-effect discrimination, eg. where the employer has applied discipline in accordance w/ zero-tolerance policy. {Gooding}

1. For instance, where alcoholic BC Liquor employee discharged for theft of liquor, not enough to show that misconduct arose from condition; as non-disabled employee would have received same discipline for that misconduct. {Gooding}

2. For instance, counter-example, cannabis-addicted griever reinstated where it was found that addiction played a role in misconduct, despite zero-tolerance policy. {Rio Tinto}

*iv.* *<u>Process for determining whether discipline imposed with "just cause"</u>*

1. *Overview* – behaviour which is inconsistent with the legitimate business interests of the employer, and not merely conduct which the employer happens to dislike. Must not be for discriminatory reasons.

2. *Application*

*a. Misconduct – does the impugned conduct constitute behaviour against employer's interests?*

i. *Overview* - is there evidence that grievor has done *something* which would constitute activity against employer's interests, eg. misconduct? If negative, inquiry ends. {Wm. Scott}

1. For instance, where evidence establishes that grievor had failed to implement bus safety program, damaged property, and was dishonest concerning these factors, misconduct is made out. {Arrow Lakes}

2. For instance, holistic approach encouraged; where grievor accused of acting against employer's financial interest, must consider the fact that the grievor banks overtime and takes time off when not needed, thus minimizing costs. {Arrow Lakes}

*b. Proportionality – was the penalty imposed for the impugned conduct proportionate?*

i. *Overview* - was the penalty imposed proportionate in all the circumstances of the case? If negative, proceed to imposition of lesser discipline. {Wm. Scott} Depending on the nature of the penalty and misconduct, different criteria may apply:

*ii. <u>William Scott factors:</u>*

*1. Seriousness*

a. *Overview* - how serious is the immediate offence which precipitated the discharge? Central question is whether misconduct is sufficient to irreparably breach the employment relationship - this is a high bar. {Arrow Lakes}

i. Does misconduct irreparably breach the employment relationship?

- For instance, in breach of trust: place of employment not a church (standard of perfection inapt), but nor is it a prison (where everyone must constantly be watched). {Philips Cable}

- For instance, where grievor damaged property, failed to implement maintenance program, was dishonest concerning performance of duties, etc., may not be sufficient to breach relationship. {Arrow Lakes}

- For instance, where conduct involves dishonesty, greater likelihood that the employment relationship is harmed, as trust and honesty are integral; particularly with supervisory employees. {Arrow Lakes}

- For instance, where dishonesty can be characterized as belligerent obstinacy and willful stupidity than conniving deceit or fraud, it is less culpable. {Arrow Lakes}

- For instance, where misconduct involves engaging in damaging activities while at work, theft of time may be an additional aggravating factor, even where not basis of discipline. {*Hawco*}

b. Does misconduct involve issues of safety?

- For instance, where issues involve safety, particular of vulnerable persons (eg. minor schoolbus passengers), the offence is more serious. {Arrow Lakes}

c. How did the employer respond to the misconduct? (see also: prog. discipline)

- For instance, where employer responds swiftly to deficiencies, this indicates that the offence is serious; where employer does not react swiftly, this indicates that the seriousness is lesser. {Arrow Lakes}

*2. Premeditation*

a. *Overview* - was the grievor's conduct premeditated or repetitive, as opposed to a momentary aberration, or was it provoked by someone else?

i. For instance, momentary aberration due to strong emotional impulses or provocation less punishable than premeditated act. {Stelco}

ii. For instance, unintentional or accidental conduct less culpable; if grievor misunderstood intention of order. {Stelco}

iii. For instance, was the grievor genuinely confused or mistaken as to his or her right to do the act complained of? Less culpable if so. {CBC}

iv. For instance, was a workplace assault the result of provocation, a momentary flare up, or a premeditated attack? {SRI}

*3. Record*

a. *Overview* - does the grievor have a record of long service with relatively little discipline? (see also: doctrine of culminating incident, below)

i. For instance, grievor's sixteen years of service; clean disciplinary record, excepting letter of expectation regarding pre-trip checklist documentation establishes significant mitigating factor. {Arrow Lakes}

ii. For instance, whether or not the offence was an isolated incident in the employment history of the grievor, who otherwise has long record of good service. {Stelco}

iii. For instance, record which is clear indicates good rehabilitative prospects, which weighs heavily against discharge. {CBC}

*4. Corrective/progressive discipline*

a. *Overview* - employer expected to use measures short of dismissal aimed at correcting future misconduct; inherent in the power to discharge. Only once exhausted is discharge appropriate or just. {London}

i. For instance, usually expect verbal warning (corrective) -> letter of warning (corrective) -> letter of reprimand (punitive) -> suspension (short) -> suspension (lengthy) -> dismissal.

b. *Essence of progressive discipline* - (1) timely communication to the employee, (2) expectations made known, and (3) a warning or admonition that failure to improve will lead to future and/or more severe discipline. {Fort Rouge}

i. For instance, zero-tolerance on time theft was deemed inconsistent with need for progressive discipline, four employees reinstated. {Grand and Toy}

ii. For instance, where grievor damaged property, failed to implement maintenance program, was dishonest concerning performance of duties, etc., discharge not warranted absent progressive discipline{Arrow Lakes}

c. *Type of misconduct* – the importance of progressive discipline varies w/ misconduct; where poor work performance is the basis for dismissal, becomes more important. {North York}

d. *Justification of departure from progressive approach* – if the employer wishes to

deviate from progressive discipline, it must establish that the grievor is not an apt candidate. {Arrow Lakes}

i. For instance, significant dishonesty and other misconduct was not sufficient to warrant departure from progressive approach; high bar. {Arrow Lakes}

ii. For instance, the fact that investigation of misconduct is ongoing is not sufficient to warrant deviation from progressive discipline; where investigation inhibits progressive discipline, deviation is unjustified. {Arrow Lakes}

e. *Historical approach* – prior to the 1970s, held that progressive discipline did not apply to most serious misconduct, however have resiled from this position over time; must always focus on rehabilitative potential. {Galco}

5. *Consistency*

a. *Overview* - does the penalty given the grievor appear to be consistent with the employer's prior practice, or does it single out the grievor for arbitrary and harsh treatment?

i. For instance, of employees sharing porn via work email, four terminated; three suspended for 10 days, three for 5 days, three for three days; one given letter of warning, one off work pending investigation; not inconsistent. {*Hawco*}

ii. For instance, evidence that company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of condonation; less culpable. {Stelco}

iii. For instance, more culpable where employer has a clear and consistently applied policy against fighting or assault in workplace. {SRI}

6. *See also: other factors, below.*

*iii.* *Other relevant factors:*

1. *Hardship*

a. *Overview* – whether the penalty imposed has created a special economic hardship for the grievor in the light of his or her particular circumstances; {Stelco}

i. For instance, job with this is employer very important to the grievor, particularly based on advanced age and limited prospects; {Arrow Lakes}

2. *Substance abuse / disability etc.*

a. *Overview* – was the grievor unable to appreciate the wrongfulness of his or her conduct due to drunkenness or emotional problems? {CBC} (see substance abuse / illness / disability, below)

3. *Personal motive*

a. *Overview* – did grievor have a sympathetic personal motive for being dishonest,

such as family need, as opposed to hardened criminality? {CBC}

*4. Has the employee exhibited remorse?*

a. *Overview* - remorse is an important factor, but is not necessarily determinative in consideration of an effective penalty. Question is whether this poses a bar to the resurrection of the employment relationship. {Arrow Lakes}

i. For instance, grievor has not admitted the precise level of his wrongdoing, but this does not necessarily pose a bar to the resurrection of the employment relationship. {Arrow Lakes}

ii. For instance, grievor's failure to show due remorse and to provide an unconditional apology did not, in the circumstances, disentitle him from reinstatement. {SRI}

iii. For instance, failure to openly acknowledge misconduct and apologize is a significant aggravating factor that inclines against lesser discipline. {Cariboo}

b. *Not aggravating* - while early admission of wrongdoing is a mitigating factor, indicative of honesty, remorse, etc., failure to admit is only exceptionally considered an aggravating factor. {Farmers Co-op}

*5. Rehabilitation*

a. *Overview* – what are the grievor's rehabilitative prospects? {CBC} Is there a strong likelihood of recurrence? Can the grievor be reintegrated into workforce? See also, record and prog. discipline. {SRI}

i. For instance, if the grievor makes a frank acknowledgment of misconduct, prospects for rehabilitation better. {CBC}

ii. For instance, where grievor committed workplace assault, reintegration and rehabilitation far more likely where apology made to victim. {SRI}

*6. Deterrence*

a. *Overview* – is discharge of the grievor necessary to deter other employees? {SRI}

*7. Has the employee exhibited dishonesty at arbitration or in investigation?*

a. *Overview* – dishonesty by grievor during investigation or at arbitration (eg. following the misconduct) will often lead to upholding of dismissal penalty. {Shell}

i. For instance, where grievor dismissed for theft, dishonesty during investigation meant that the grievor was a poor candidate for reinstatement despite 17 years good service. {Shell}

ii. For instance, failure to tell truth at arbitration hearing in discharge for sexual harassment meant that any opportunity for rebuilding employment relationship over. {Peace Regional}

*8. Has the employee failed to explain the misconduct?*

a. *Overview* - two approaches through which employee silence become relevant to

just cause consideration, with the opportunity approach more credible. The duty approach has been rejected by some arbitrators in BC. {Tober}

b. *Duty approach* – refusal of an employee to provide an explanation for apparent misconduct may itself furnish a ground for discipline. {Toronto East}

   i. For instance, where an employee missed several days of work, in custody due to a probation violation, and did not disclose this reason to employer, discharge is warranted. {National Homes}

c. *Opportunity approach* – other arbitrators hold that silence is not wrong itself, but rather through failure to rebut presumption of wrongdoing supported by other evidence. {Tober} Exhibits itself in three ways:

   i. *Remorse* - silence indicates lack of remorse, such that reinstatement would be inappropriate. {Coquitlam}

   ii. *Discipline* – employer is more likely to reach conclusion that discipline is warranted absent explanation. {Coquitlam}

   iii. *Prejudice* - grievor may be prejudiced in attempts to later defend conduct at arbitration through loss of credibility. {Coquitlam}

   iv. For instance, arbitrator is entitled to draw an adverse inference from employee silence. {Tober}

*9. Is there established industry practice re: discipline for this type of misconduct?*

a. *Overview* - industries have established standards for discipline concerning particular misconduct; however, these must be consistent with progressive discipline (see below).

   i. For instance, if one steals in the food industry, this is grounds for immediate discharge; even if what is taken is trivial. {New Dominion}

   ii. For instance, "corporal punishment" (eg. grabbing a student by the shirt) could be grounds for dismissal for an educator - tantamount to assault. {Cohen}

10. *Does the employee suffer from illness, disorder, or substance dependency?*

a. *Overview* - misconduct may be considered a result of substance dependency or other disorder such that treatment will render employee suitable for reinstatement. {Canada Post}

b. *Requirements* - the union must show that the following criteria are satisfied to make out a claim of illness or disorder: {Canada Post}

   i. *Contemporaneity* – the grievor was experiencing an illness or condition at the time of the misconduct;

   ii. *Causal linkage* – a causal linkage or nexus between the illness or condition

and the aberrant conduct has been established; often turns on medical evidence.

iii. For instance, where psychiatric opinion can persuade arbitrator that misconduct, such as threatening supervisor, linked to condition, such as depressive disorder. {Wescast}

iv. For instance, learning disorder and attention deficit disorder do not affect grievor's ability to differentiate right and wrong, ergo not causal re: breach of trust. {Sifto}

*v. Displacement of responsibility* – must render the conduct less culpable; even if it is found that misconduct would not have occurred but for the illness or condition, may nevertheless conclude that grievor was responsible for misconduct, thus justifying penalty;

*vi.Rehabilitation* – must be satisfied that grievor has been rehabilitated, and that risk of recurrence is minimal;

*vii.*For instance, reinstatement may be made contingent on medical certification of fitness to return to work. {Wescast}

*viii.Undue hardship on employer* – may amount to undue hardship to require the employer to reinstate the grievor; thus, rehabilitation and recurrence risk of primary importance.

c. *Individual accommodation* – employer *must* consider sanctions less severe than automatic dismissal if an employee tests positive and, where appropriate, enable the employee to seek treatment and rehabilitation. {Entrop}

*i.* For instance, automatic discharge for single positive test violates the right of employees to individual accommodation, treatment; ergo, disproportionate. {Entrop}

d. *Appropriateness of testing* - urinalysis capable of showing *presence* of drugs/ alcohol, *not* impairment; breathalyzer capable of showing impairment, however. Consequence must follow from what testing capable of proving. {Entrop}

*iv.*<u>*Did the misconduct involve a breach of trust? {CBC} (see also: falsification, below)*</u>

1. *Proven allegations* - determine whether conduct amounting to a breach of trust/ dishonesty has been proven w/ *clear and cogent* evidence. If so: {McKinley}

2. *Relationship* - determine whether the nature and seriousness of the dishonesty can be reconciled with future employment relationship. {McKinley} Effectively, Wm. Scott and other factors considered at this stage (see above).

*v.* <u>*Did the misconduct involve off-duty conduct? {Milhaven}*</u>

1. *Overview* - for the employer to discipline for off-duty conduct, must prove that conduct is work-related: has detrimental impact on its business. {Milhaven}

- For instance, where school custodian has relationship with 15-yo student, no nexus if student attended different school, no meetings on school property, and relationship developed

outside of school. {Cape Breton}

2. *Public sector employees* – public employees are under duty to employer 24/7; more stringent than private sector standard: community standards apply. {Shewan}

    a. For instance, teacher's husband takes nude picture of wife, sends to magazine identifying job/ location; held to strict standards b/c dealing with children. Suspension apt. {Shewan}

    b. For instance, teacher involved w/ anti-semitic pamphleting off-duty fired; has trust and influence over students, had actual effect on students. {Ross}

    c. For instance, can reasonably infer that off-duty homophobic conduct of teacher-counsellor will create negative environment at school. No need to prove. {Kempling}

3. *Untenability* - whether a reasonable and fair-minded person, knowing the facts, would conclude that grievor's continued employment untenable. {Cape Breton}

    - For instance, consensual, committed relationship between school custodian and 15-yo which developed outside of school does not warrant discharge. Suspended for three months for dishonesty during investigation, however. {Cape Breton}

4. *Considerations* – employer can prove this by establishing *one or more* of the following {Milhaven} involving substantial/legitimate business interests: {Singh}

    a. *Harm* – conduct of the grievor harms the company's reputation or product. Judged on standard of reasonable person: conjecture allowed. {Money's}

        - For instance, even if actual reputational harm not established, sufficient if *reasonable person* would respond detrimentally to re: reputation. {Money's}

        - For instance, where there is assault b/w coworkers at what is essentially a staff party, others at restaurant aware that conduct linked to employer. {Singh}

        - For instance, reputation *alone* is not sufficient to justify taking action against an employee. {Health Services}

        - For instance, continued employment of historic sex offender as custodian would cause school board to be viewed negatively by parents. {Sea to Sky}

    b. *Duties* – renders the employee unable to perform his duties satisfactorily;

    c. *Other employees* – behavior leads to refusal, reluctance, or inability of the other employees to work with him;

        - For instance, where there is assault b/w coworkers at what is essentially a staff party, clear that relationship between employees harmed by conduct. {Singh}

    d. *Management* – imposes difficulty re: company carrying outs its function of efficiently managing its works and efficiently directing its working forces.

        - For instance, where there is assault b/w coworkers at what is essentially a staff party, the social function is not entirely separate from work, conduct disciplinable. {Singh}

    e. *Criminal convictions* – where guilty of a serious breach of *Criminal Code*, thus

rendering conduct injurious to general reputation of the company and its employees;

- For instance, counterexample, employer does not need to await outcome of criminal trial to impose discharge, if just cause otherwise available. {Edmonton}

- *Considerations* - to determine whether conviction affects business interests of employer, must consider:

    - *Risk of reoffending* - consider risk that employee will reoffend, including holistic factors such as minimization, coercion, self-awareness/coping, relationships, etc. {Sea to Sky}

    - *Business*- the nature of the business;

        - For instance, where conduct related to the nature of the business, such as theft of valium by ambulance attendant, employer has right to distance itself. {Health Services}

        - For instance, where ISP attempts to promote self as safe and secure provider of internet services, conviction for sexual luring of child sufficient to warrant discharge. {Aliant}

        - For instance, where employer is school board, provides education in safe environment to students, therefore employees held to high standard of conduct; uncertainty resolved in favour of students; cannot have employees who cannot interact. {Sea to Sky}

    - *Crime* - the character of the criminal activity;

        - For instance, where ISP attempts to promote self as safe and secure provider of internet services, conviction for sexual luring of child sufficient to warrant discharge. {Aliant}

        - For instance, marijuana possession charges not sufficient to warrant discharge for support worker for mentally disabled. {Kenora}

        - For instance, conviction for sex assault charges sufficient to warrant discharge of a correctional officer. {Khan}

        - For instance, conviction for historical sex assault, despite that incidents were 20 years in past, five years before working for school board, clean discipline, remorse/admission. {Sea to Sky}

    - *Duties* - the job duties of the employee.

        - For instance, where conduct related to the job duties of employee, such as theft of valium by ambulance attendant, employer has right to distance itself. {Health Services}

        - For instance, where employee not able to be assigned to alternative duties unrelated to business purpose harmed by conviction, discharge warranted. {Aliant}

- For instance, where alternate duties would not address loss of trust, position does not exist, and there would have to be another staff member in building to allay parental concerns, alternate position inapt. {Sea to Sky}

f. *Criminal charges* – where trial is pending, may be grounds to suspend employee until the outcome of the criminal trial. {Khan} Often dealt with in CBA, eg. s. 15(4) *School Act* allows for suspension, for instance.

- *Adjournment* – may adjourn arbitration pending outcome; see procedure -> adjournments -> criminal trial.

- *Charges alone insufficient for discharge* - unproved charges or those pending appeal cannot justify discharge alone - even where work related. {Philips Cables}

- *Just cause required to justify suspension* - absent CBA provision, employer must prove that presence of accused in workplace would present "substantial and immediate" hardship to its business, that could not otherwise be alleviated. {Philips Cables}

    - For instance, reasonable to suspend employee without pay where charged with murder of school principle. {Nechako Lakes}

- *Reasonable inference* - arbitrator can draw these from nature of charges, circumstances, organization of workforce, inferences which support suspension or otherwise. {Nechako Lakes}

    - For instance, reasonable to find that retention of employee charged with murder of another employee would have harmful impact. {Nechako Lakes}

    - For instance, where appeal of sex assault conviction pending, could suspend grievor while awaiting disposition of appeal or conduct just cause investigation. {Khan}

- *With or without pay* - if CBA provision silent, suspension may be with or without pay, depending on what is reasonably justified.

- *Alternative duties* - even where employee under restrictive bail conditions, employer must attempt to see if there are other apt vacancies for employee to fill before suspension allowable. {Lauzon}

- *Employer participation in investigation* - where employer assisted investigation, should not be suspension: rather immed. discharge due to possession of evidence amounting to just cause. {Philips Cables}

- *Duty to investigate* - employer obligated to undertake best efforts investigation to determine risks of cont. employment. {Jockey Club}

    - For instance, where charges laid, absent assessment of risk of conviction, suspension cannot be imposed on grievor {Concordia}

- *Duty to comply with investigation* - employee obligated to comply with

employer investigation into criminal charges, subject to discipline. Employer has right to know about criminal charges. {MacAskill}

- For instance, two-day suspension warranted for refusal to answer questions re: criminal charges for off-duty conduct. {MacAskill}

- *Consequence of acquittal*

  - *Relitigation* - employer cannot punish for off-duty conduct if acquitted; abuse of process to relitigate in this circumstance, despite differing BOP. {Toronto(City)}

  - *Back pay* - employer may be liable for back-pay if it played a substantial role in the investigation or the laying of charges against the employee. {Humber}

    - For instance, counterexample, no compensation due where employee not suspended, but barred from workplace by court order; employer not involved in investigation or in court order. {Engineered Suspensions}

*vi.<u>Did the misconduct involve sexual harassment?</u>*

1. *Overview* - unwelcome conduct of a sexual nature (1) detrimental to work environment or (2) leading to adverse job-related consequences for victims. {Janzen} Jurisdiction regardless of HRT protection. {CNR}

2. *Forms of harassment* - coerced intercourse, unsolicited contact, persistent propositions, gender-based insults/taunting which may reasonably be perceived to create a negative psychological and emotional work environment. {Bell}

   - For instance, difficult to define, must be cautious not to prohibit normal social contact, allow for free discussion; however, may exist in isolation from overt action. {Young}

   - For instance, harassment where homophobic insults hurled at schoolchild, regardless of whether the child actually homosexual. {Jubran}

   a. *Repetition* - arbitrators often require proof of a pattern or repetition of the conduct in question; single incident doesn't poison environment. {Western Star}

      - For instance, where pattern of gender-based insults and other harassment over long period of time, even absent *quid pro quo;* amounts to "constant barrage" {Young}

      - For instance, counterexample, manager ordered to apologize for a single comment that was held to violate the prohibition against discrimination {Prestressed}

      - For instance, counterexample, in corrections workplace where "sexual" horseplay common, single incident of males carrying female guard into men's locker room, beginning to undress despite her protests sufficient to make out sexual harassment. {AUPE}

   b. *Outside of workplace* - determination of whether activity occurring after hours / outside of workplace question of fact; see also, off-duty conduct. {Simpson}

c. *Appropriate penalties* - sexual harassment does not automatically justify discharge, and like any other disciplinary offence, must be assessed with due regard to mitigating factors. {CNR}

- For instance, if the harassment falls at the middle or lower end of the spectrum, discharge only warranted if employee warned that recurrence could lead to dismissal. {Brazeau}

- For instance, in more serious cases, a single incident is enough to warrant discharge, particularly where the grievor does not have long service. {Siemens}

- For instance, demotion to lesser supervisory position apt in circumstances where transgression shows inability to perform former position. {Young}

*vii.* *Did the misconduct involve consensual sex in the workplace?*

1. *Overview* - not *necessarily* harassment, but may nevertheless attract discipline where this causes harm to employer's interests, work environment. {Indusmin}

*viii.* *Did the misconduct involve falsification of records? (see also: breach of trust, above)*

*1.* *Overview* - employer must prove with *clear, convincing, cogent evidence* that falsification occurred and was deliberate; {Mitchkin} {McKinley}

- For instance, where grievor was merely careless and negligent, rather than deliberately dishonest in filling out time card, discharge likely excessive. {Tatalum}

*a. Falsification of application for employment {Gould}*

i. *Overview* - extremely serious, because entire employment relationship begins on a note of dishonesty.

ii. *Duty to disclose* - while there is a duty to be honest on application, there is no duty, to disclose a previous discharge for cause. {Seguin}

- For instance, grievor suggested in application that he had not been discharged; this is active misrepresentation, therefore discipline warranted. {Seguin}

iii. *Nature of falsification* - the nature and character of the falsification and the matter or offence concealed (eg. related to nature of work?)

iv. *Extent of falsification* - the number of matters concealed;

v. *Materiality of falsification* - the materiality of that falsification or matter or offence concealed to the work performed;

vi. *Effect of falsification* - whether the revelation of the matter or evidence concealed would have resulted in the employer not hiring the individual;

vii. *Timing of concealed matter* - the date when the falsified or concealed matter occurred in relation to the signing of the employment application;

viii. *Timing of discovery* – the time that has elapsed between the signing of the false application form and the date of discovery;

ix. *Timing of response* – whether the employer acted promptly upon learning of the falsification of the employment record;

x. *Warning on application* – any warning contained on the employment application;

xi. *Seniority* - the seniority of the grievor;

xii. *Discharge* – whether the grievor was in fact discharged for the falsification;

xiii. *Special considerations* – such as a sensitive employment position.

*b. Falsification of attendance or production records*

i. *Evidence* - employer must prove with clear, convincing, cogent evidence that falsification occurred and was deliberate; {Mitchkin}

- For instance, where grievor was merely careless and negligent, rather than deliberately dishonest in filling out time card, discharge likely excessive. {Tatalum}

ii. *Benefit* - consideration of whether the grievor obtained a direct monetary benefit from the falsification of records (aggravating). {Accucaps}

iii. *Severity* - will be treated as fraud or theft, particularly where dealing with time cards; therefore, deserving of severe penalties. {Accucaps}

- For instance, employees with 33 & 39 years of seniority not reinstated b/c falsification and deceit at hearing destroyed employment relationship. {Canada Safeway}

iv. *Admission* - early admission and subsequent honesty at hearing important in determining whether emplmnt. relationship recoverable. {Canada Bread}

- For instance, where grievor has failed to admit offence, despite opportunities to do so, discharge is rarely modified at arbitration. {Canada Safeway}

*c. Falsification of medical certificates*

i. *Severity* - difficulty in detection of such falsification, fact that it strikes at the heart of employment relationship, harsh penalty warranted. {Mitchkin}

- For instance, where grievor had history of unrelated dishonesty, engaged in abuse over long period of time, continued during investigation/hearing, lack of acknowledgment of wrongs discharge warranted. {District 62}

- For instance, particularly where employee is in a position of trust with respect to either money or unsupervised work performance. {District 62}

- For instance, failure to act honestly, employ such elaborate artifice as forged medical certificates does serious damage to the employment relationship: justifies discharge in some circumstances. {District 62}

ii. *Holistic* - discharge not invariably apt, penalty should be assessed on an individualized basis, taking into account all the circumstance. {TDS Auto}

*d. Sick leave abuse*

i. *Severity* - serious form of fraudulent misconduct, similar to theft in its impact on the employment relationship. {Mitchkin}

- For instance, where grievor had history of unrelated dishonesty, engaged in abuse over long period of time, continued during investigation/hearing, lack of acknowledgment of wrongs discharge warranted. {District 62}

- For instance, particularly where employee is in a position of trust with respect to either money or unsupervised work performance. {District 62}

- For instance, failure to act honestly, employ such elaborate artifice as forged medical certificates does serious damage to the employment relationship. {District 62}

ii. *Deterrence* - easy to commit but difficult to detect, there is a special need to deter employees by enforcing rigorous standards of discipline. {Mitchkin}

- For instance, absent compelling mitigating factors, deterrence interest will ordinarily justify discharge. {Gilbert}

iii. *Onus* - where *prima facie* case made out (fabrication and failure to attend work), union must adduce clear and convincing evidence that absence was legitimate. {Ineos Nova}

- For instance, not sufficient to prove that employee has disability; question is whether false/misleading information provided to support benefits claim. {Winpak}

iv. *Wilfulness* - as with other forms of falsification, must show that it was deliberate, not merely careless to support discharge. {Mitchkin}

- For instance, where employee did not intend to obtain benefits to which not entitled, but was nevertheless dishonest, two-month suspension apt. {Groulx}

v. *Pattern* - circumstantial evidence demonstrating "pattern absenteeism" may establish sick leave abuse, even absent direct evidence. {Sigaty}

- For instance, absent contrary evidence, strong pattern of sick leave in addition to days off/holiday time supports inference of sick leave abuse. {Sigaty}

*ix. <u>Did the misconduct involve misuse of employer technology?</u>*

*1. Did the misconduct involve social networking?*

a. *Overview* - may be useful to employers by allowing for new means to interact with customers, interaction between employees, recruitment of candidates.

- For instance, where employee of FN airline makes racist remarks on FB, despite that conduct was "off-duty," while discharge may not be sufficient, the "potential for significant detrimental effect" sufficient to rule out reinstatement. {*Wasaya*}

- For instance, where employer's representatives did not see Facebook postings in which employees disparaged one another, could not sustain discipline; motion for non-suit granted. {*Alberta Distillers*}

- For instance, where employee insubordinate and disparaging on Facebook, including postings that he intended to quit due to "lousy pay," this is sufficient to sustain discipline. {*RBI Canada*}

- For instance, where employees sought to submit Facebook postings as evidence of an invalid vote during organizing drive, held that such postings were not capable of establishing that the vote was invalid. {*Chatelier*}

- For instance, where discharged employee posts on Facebook that "it was all in my favour," this does not violate non-disclosure clause in settlement with employer. {*Christian Labour*}

b. *Dangers concerning candidate recruitment* - when using social networking to collect information on candidates, must ensure that information is accurate, that it is relevant to the physical person, and that it does not run afoul of *HRC* re: discrimination.

c. *Dangers concerning general use* - could lead to posting of confidential information, disparaging information, as well as loss of productivity in employees. Poses evidentiary difficulties concerning determination of who made postings.

*2. Did the misconduct involve a personal blog?*

a. *Overview* - generally publicly accessible, can be dangerous to employer's interests where used to post disparaging remarks about employer, customers, etc.

- For instance, personal blog contains racism, offensive comments - identified employer by name; undermined employer's reputation, but did not criticize employer or business; no prior record, candid apology; thus reinstated. {*EV Logistics*}

- For instance, personal blog contains information about persons under employee's care at old-age home, criticized employers, co-workers; conduct unbefitting, discharge upheld. {*Chatham-Kent*}

- For instance, personal blog contains disparaging remarks about coworkers by using readily discernible pseudonyms; conduct unbefitting, relationship damaged. Thus, discharge warranted. {*Ponak*}

i. *Inquiry*

- *Off-duty or relevant conduct* – is the information disparaging to the employer or the employer's organizational interests?

- For instance, where employer specifically named, and therefore linked to

off-duty conduct which is abhorrent/reprehensible, harm could be presumed if publicly available. {*EV Logistics*}

- *Public availability* – is the information publicly available? Goes to harm - private conduct far less likely to damage employer's organizational interests{*EV Logistics*}

- *Damage* – does conduct undermine the employment relationship beyond repair? {*Ponak*}

*3. Did the misconduct involve pornography, inappropriate images or materials?*

a. *Overview* - employees may access and store pornographic or other inapt materials on work computers; will often run contrary to employer interests.

- For instance, employees using employer's computers to access/store/distribute pornography terminated, despite long service, lack of previous discipline; employer had a resource-use policy, and employees had independent (eg. trust-reliant) roles. {*Grierson*}

- For instance, teacher suspended for three days for having nude photos on work computer; initially claimed only access, later admitted to storage. {*Munton*}

- For instance, where material is attributable to the employer because it is sent from a work email address, serious potential for harm. {*Hawco*}

i. *Inquiry*

- *Material* - offensive character of the material itself; {*Hawco*}

  - For instance, re: pornography, the more explicit, the more offensive, and thus the more serious the misconduct. {*Hawco*}

- *Repetition* – individual's perseverance and time spent viewing the sites; {*Hawco*}

  - For instance, daily involvement over years establishes pattern of misconduct, more serious than isolated incidents. {*Hawco*}

- *On or off-duty* – use of the material within the workplace and whether it has been saved, downloaded or shared with co-workers; {*Hawco*}

  - For instance, off-duty conduct involving offensive material will not usually affect employer's organizational interests. {*Hawco*}

  - For instance, sending inapt content emails with an employer's domain name attached is reckless, wanton disregard for potential damage to reputation of employer. {*Hawco*}

- *Workplace* – nature of the workplace and the trust relationships associated therewith; whether they must continuously strive for public confidence, respect. {*Hawco*}

- For instance, school board associated with care and education of children - inconsistent with employees sharing pornography. {*Hawco*}

- For instance, reputation is responsibility of each employe, must be diligently carried out and enforced. {*Hawco*}

- *Culture* – culture existent in workplace, whether impugned activities can be seen to have poisoned or otherwise made the person's possible reintegration into the work environment highly problematic; {*Hawco*}

    - For instance, less likely to have poisoned culture where such conduct was "condoned" by employer; failure of management to indicate that pinup calendars inapt, for instance. {*Hawco*}

    - For instance, pornography runs contrary to legal duty of employer re: workplace harassment, mere exposure at work may constitute such harassment. {Hawco}

- *Policies* – known employer policies respecting internet use and whether any express or specific emphasis has been provided in the past respecting the seriousness of the transgression. {*Hawco*}

    - For instance, lack of knowledge of policy does not assist; common sense indicates that resources not for personal use, transmission of sexual material unacceptable. {*Hawco*}

*4. Did the misconduct involve personal use of employer resources?*

a. *Overview* – personal use may reduce productivity, amount to theft of time in addition. Does not matter whether the activity is ultimately beneficial to employer. {*Grierson*}

    - For instance, using employer's telephone/internet for immigration business involving exotic dancers leads to discharge; breaches fundamental component of relationship. {*Ontario Power*}

    - For instance, spending time managing pipe band and hockey team is misuse, regardless of whether employer benefits. {*Grierson*}

*5. Did the misconduct involve accessing a coworker's computer?*

a. *Overview* – such use will often run afoul of employer business interests; for instance, where harmful impersonation results.

    - For instance, sending emails from another teacher's account, where these emails are damaging, and accessing private accounts of other teachers is conduct worthy of discharge. {*Deol*}

*c. Can the employer avail itself of the doctrine of culminating incident?*

i. *Overview* – allows employer to take *overall* record of employee into account in assessing the appropriate penalty. Thus, may justify penalty greater than that which would be

warranted for impugned act if viewed in isolation. {Livingston}

ii. *Final act must constitute misconduct* – final culminating act must be one which itself merits discipline; if culminating act not misconduct, doctrine is inapplicable. {Sauder} Cannot rely on prior record to make this out. {Safeway}

1. For instance, while prior record usable to discredit employee credibility concerning culminating incident, cannot satisfy final act req. *per se*. {Safeway}

*iii. Employer's scheme not determinative re: doctrine* - that an employee has reached the end of the employer's progressive discipline scheme not dispositive.{Hershey}

1. For instance, employee discharged for sleeping on the job reinstated despite having exhausted employer's progressive scheme; mitigated as culminating incident had been inadvertent, grievor had 15 years of service. {Hershey}

iv. *Prior record* – serious offences may not give rise to a culminating incident if prior record is reasonably good; minor offences may give rise to a culminating record if the record is poor. Nature of and discipline for prior offences, corrective behaviour relevant. {SKF}

1. For instance, where record shows "significant and sustained improvement over the previous six months," incident not culminating. {BAII}

2. For instance, where record over six months includes two warnings, one-day and two-day suspensions, incident not culminating. {Courtesy}

3. For instance, where record shows that grievor prior misconduct has been corrected, eg. by responding when paged by employer, incident not culminating. {Emergency}

4. For instance, where record over two years includes one warning, three-day and five-day suspensions, incident culminating. {Annapolis}

v. *Failure to reference prior record in dismissal* - failure by employer to refer to prior record in dismissal letter does not preclude doctrine of culminating incident. {Agropur}

vi. *Irreparable harm* – where discipline imposed is discharge, the key question is whether the employment relationship has been irreparably harmed. If not, then a lesser penalty is warranted. {Cambridge Memorial}

*vii. Composition of the prior record*

1. *Overview* – all prior incidents of *formal* discipline can be considered part of an employee's record, provided they are *not subject to a sunset clause* in the collective agreement; regardless of whether grieved or ungrieved. {Mental Health}

a. For instance, due to risk of prejudice, disciplinary measures which remain unresolved at the time of hearing are inadmissible as part of record. {Mental Health}

*2. Admissible form of prior record*

a. *Overview* - statement of general character of incidents, dates on which discipline was imposed, and specific penalties. Other details not admissible.

{Sunnybrook}

- For instance, counter-example arose in case where *detailed letters* concerning ungrieved disciplinary record admissible; held that the lack of grievance at the time was tantamount to admission/acceptance. {Cambridge}

i. *Rationale for limitations* – union would be allowed to call evidence in response, undermining principle that employees may not explain factual background of disciplinary actions which were not grieved; grossly untimely. {Greyhound}

ii. *Results of grievance proceedings concerning prior incidents* - some arbitrators hold that only description of misconduct, penalty, and the fact that the penalty was confirmed or modified through arbitration admissible.{Canada Post} Others, that arbitrator's reasons are also admissible, if not prejudicial or barred by sunset clause. {Toronto}

*b. Sunset clauses*

i. *Overview* – where explicitly set out in CBA, employee disciplinary records may be expunged after a specific period of time has passed. Often subject to conditions, eg. not participating in further misconduct, or only applying to minor infractions.

ii. *Effect on prior record* - any reference to prior discipline falling within the operation of the sunset clause is inadmissible for culminating incident or at arbitration. {Spartech}

iii. *Rebutting claim of good record* - incidents subject to sunset clause nevertheless admissible for the limited purpose of rebutting claim by the union that the employee has a good or clear record. Clause waived by making claim. {Mariott}

- For instance, allows for admission of recorded discipline, and also other items, eg. letters of counselling or expectation. {Lethbridge}

*c. Related versus unrelated misconduct*

i. *Overview* - all prior acts of misconduct, whether related or otherwise, which resulted in some form of discipline can be taken into account in assessing the penalty for a culminating incident. {Calgary}

ii. *Weight assigned to unrelated misconduct* – weight accorded to prior incidents increases where record supports finding that grievor has not learned from discipline, therefore rehabilitation unlikely. {Northwestel}

*d. Incidents predating organization*

i. *Overview* - employers can rely on disciplinary episodes preceding the first collective agreement between the parties (subject to sunset clause).

{Metropol}

ii. *Process* - employer must prove each part of that record because normal grievance arbitration rights were not then available to the employee. {Metropol}

*e. Prior non-disciplined conduct*

i. *Overview* - some arbitrators hold that such incidents should not be considered in cumulative incident analysis, because employee cannot correct shortcomings. {SKF} Others, that where poor work performance is at issue, hold that some misconduct may only become disciplinary in light of subsequent misconduct, and is therefore properly admissible. {Air Canada}

ii. *Criteria for admission*

- *Freshness* - incidents must be less than circa one-year old. {Greyhound}

- *Rational connection* - incidents are connected in some rational way to the immediate incident. {Citadel}

- *Recency* - employee not prejudiced by lack of memory or inability to locate witnesses. {Citadel}

- *Concerns raised* - though discipline not pursued, employee was made aware of concerns through informal processes. {Citadel}

- *CBA silence* - the collective agreement does not expressly or impliedly bar use of such evidence (eg. through sunset clause). {Citadel}

- *Alternative grounds for admission* - where the union has raised the grievor's good record as a mitigating factor concerning penalty for misconduct, the employer may raise non-disciplinary conduct to rebut this. {Newfoundland}

    - For instance, clear record claim allows admission of recorded discipline, and other items, eg. letters of counselling or expectation, notwithstanding sunset clause. {Lethbridge}

*d. What alternative measures should be imposed in lieu of the original penalty levied by the employer? {Wm. Scott}*

i. *Overview* - arbitrators can substitute lesser penalty, notwithstanding that cause for *some* form of discipline has been shown; when SCC ruled against this in *Port Arthur*, all jurisdictions legislatively restored power; SCC now defers to arbitral expertise. {s. 89(d)}

1. For instance, where other penalties, such as long suspension and permanent demotion should indicate seriousness of action to grievor, this is apt. {Arrow Lakes}

*ii. Demotion*

1. *Overview* - arbitrators are empowered to demote for just cause, finite duration, where transgression shows incompetence to perform the job from which demotion occurred. {Young}

*iii.Reduction in penalty generally*

1. *Management deference unnecessary* - "broad" approach to determining whether it is just and reasonable to substitute lesser penalty; no deference to management needed. {Phillips Cables}

2. *Other considerations* - nature of offence, effect on employer operations/reputation, value of deterrence vs. correction, circumstances of the grievor. {Phillips Cables}

*iv.Compensation in lieu of reinstatement*

1. *Overview* - where misconduct merits discipline short of discharge, reinstatement is the usual remedy; however, arbitrator has jurisdiction to exceptionally deny this, award compensation instead. {Carbonic}

2. *Requirements*

   a. *Employment relationship* - the employment relationship must be deemed by the arbitrator to be "no longer viable," as per the SCC. {Lethbridge}

   b. *Progressive discipline* - absent resort to progressive discipline, unlikely that an employer will be able to establish a fundamental breakdown in employer relationship. {Assiniboine}

   c. *Quantum* - at common law, should include compensation for termination or severance, based on the grievor's length of service, as well as ESA and CBA entitlements, loss of benefits and seniority. {BC Ferries}

   d. *Mitigation* - compensation is a fixed sum, and therefore the principle of mitigation of damages does not apply. {BC Ferries}

*d. Historical approach to discipline*

i. *Overview* - prior to collective bargaining, discipline/discharge governed by common law contract of employment.

1. *Penalties* - for serious misconduct, there was just cause for dismissal, or for less serious misconduct, employer could sue for breach of contract. Other penalties not allowable.

2. *Notice* - absent an express term prescribing the period of employment, either party could terminate employment with reasonable notice.

***3. Medical information and employee privacy***

*a. Drug and alcohol testing or disclosure*

i. *Overview* - employer may have policy of *mandatory* testing; however, this must be reasonable, weighing privacy interest against legitimate business interests of employers.

ii. *Random testing prohibited* – even safety-sensitive employers (eg. railroads) cannot encroach on privacy, dignity of employees by subjecting them to random or speculative drug testing. {CPR}

1. For instance, cannot merely undertake mandatory random drug and alcohol testing of employees, even where *broad* (non-specific) CBA provisions would allow. {Provincial American}

2. For instance, counterexample, absent *specific* authorization in the CBA for random testing, this would be allowable only where there is a proven drug/alcohol problem which cannot otherwise be combatted. {Provincial American}

iii. *Pre-employment testing or disclosure* - random drug testing/disclosure also prohibited in pre-employment situations, except for where this constitutes a BFOR. {Entrop}

1. For instance, where employees must work in the US and therefore testing required by regulations, employer entitled to require safety-sensitive employees to undergo random tests. {Milazzo}

2. For instance, counterexample, lingering effects of marijuana pose unacceptable risk in safety-sensitive workplaces; denial of employment not unreasonable. No *prima facie* disc., so no BFOR required. {Kellog Brown}

iv. *Reasonableness* - must be reasonable grounds to believe that an employee may be impaired by drugs or alcohol while on duty for testing to be justified. {CPR} More latitude w/ safety-sensitive industries. {Mitchnik}

1. For instance, may be able to justify random testing in circumstances where reasonable grounds indicate a drug/alcohol problem in the workplace which cannot otherwise be combatted. {Provincial American}

2. For instance, employer entitled to compel employees in safety-sensitive positions to undergo drug and alcohol testing where there existed reasonable grounds for suspecting impairment. {CNR}

3. For instance, employer's interest in risk avoidance justified testing as a precondition to promotion or transfer of an employee to a safety-sensitive position. {CNR}

4. For instance, counterexample, employees in safety-sensitive workplace subject to random alcohol testing by minimally invasive means; paper mill is dangerous workplace. Drug testing excluded without history, however, because such testing did not indicate *present impairment*. {Irving}

v. *Safety-sensitive position* - where impairment puts at risk the safety of the employee, or other employees or persons generally, property, etc. Includes nature of work, workplace, etc. {Irving}

1. For instance, note that "inherently safety sensitive" applies to industry, while "safety sensitive position" refers to specific jobs within industry; if industry dangerous, do not need to establish reasonable grounds, but nevertheless must determine which specific positions to which this is applicable. {Weyerhauser}

vi. *Compliance* - employee may be subject to discipline for refusing to comply w/ a directive that he/she undergo testing where reasonable grounds exist. {CPR}

vii. *Proportionateness* - see discipline and discharge -> employee suffering from illness etc.

*b. Employer requests for medical information*

i. *Overview* - employers entitled to request medical info from their employees, when such info is reasonably necessary for employer to manage its business; can extend to obligation. {Harris}

ii. *Source* - derives from CBA, where such rights are express, or absent provision, may nevertheless be included in management rights. {Harris}

iii. *Information which may be requested* - as indicated by arbitral jurisprudence: {Harris}

1. The nature of an employee's illness;

2. Prognosis;

3. Expected return to work date;

4. Confirmation of fitness to return to work;

5. Limitations or necessary accommodations upon return to work.

iv. *Applicable circumstances* - employers have a right to request medical info in the following circumstances, but should keep right to privacy in mind nevertheless: {Harris}

1. *Leave requests* - including requests for paid sick leave or benefits; this may be limited through the CBA; such provisions may not limit if reasonable to doubt legitimacy of leave;

2. *Return to work* – following an extended absence due to injury or illness; employees bear onus to establish fitness, and employers obligated to ensure that employees are fit.

    a. *Medical certificate* - usually sufficient to establish fitness to return; additional infomay be requested based on length of absence, frequency/pattern, or any other doubts re: fitness.

3. *Accommodation requests* – obligation on employee to disclose disability etc. upon making such a request, incl. compliance with treatment, additional medical info necessary.

4. *Fitness* – where there is legitimate reason to doubt an employee's fitness to work, info may be requested; medical confirmation required; onus on employer to show unfit.

5. *Arbitration* - where employee raises his or her medical condition at arbitration; see evidentiary issues -> medical examination of employee, above.

v. *Additional* - see *Coast Mountain, Northern Lights College, BC Crown Counsel* cases, as well as *Morris*, etc. re: third party occupational health providers (miscellaneous, below).

***4. Seniority, posting and filling***

*a. Seniority*

i. *Overview* - plays a critical role in determining employees' rights with respect to promotion, transfer, layoff, recall and entitlement to benefits ranging from vacation to pensions. {Tung-Sol}

1. For instance, seniority under collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay. {Tung-Sol}

ii. *Presumption against loss* - CBA construed strictly against authorizing the loss or undermining of seniority, or the rights and privileges which would otherwise attach to seniority. {Tung-Sol}

1. For instance, seniority should only be affected by very clear language in the CBA concerned and that arbitrators should construe the collective agreement with the utmost strictness. {Tung-Sol}

iii. *Elements of seniority* - conferred by the CBA; if no express relation between decision and seniority in CBA, management rights prevail regardless of seniority: {Nguyen}

1. *Calculation* - to whom, from when and in what amounts seniority accrues;

2. *Purposes* - the elaboration of the workplace decisions for which seniority is taken into account;

3. *Weight* - the degree of influence that seniority is to have in making the particular decision.

iv. *Statutory modification* – seniority can be modified by statute; eg *s. 21* of the *School Act* holds that one can accrue seniority while not in BU (eg. can become a principal, accrue seniority in management role); blurs distinction between BU and non-BU employees. *HRC* also relevant (see jurisdiction -> statute -> HRC, above)

*v. Measurement of seniority*

*1. Overview* - open to the parties to stipulate the terms of its commencement, acquisition and termination, subject to statutory restrictions (eg. no discrimination). {Hemond}

*2. List* - every employer obliged to provide employees with seniority list for determination of accuracy by the union.

*3. Unqualified reference* - absent qualification, reference to seniority, continuous service, or length of continuous service simply means continuous employment: time since the date of hire.

*a.* For instance, absent language in the CBA stating that seniority only accrues when persons are at work (eg. not on strike), presumption is that seniority accrues while on strike. {Tung-Sol} Accords with *s. 62*: benefits are accrued while on strike.

*b.* For instance, absences from the workplace for reasons other than discharge do not usually interfere with seniority or entitlement to benefits based on seniority.

*c.* For instance, seniority may be affected by leave or part time work; however, this will only arise where there are specific CBA provisions to that effect. {Mitchkin}

*b. Layoff and recall*

*i. Overview* - increasingly important due to shrinking workforce; seniority not only relevant to filling of vacancies, but also in layoff and recall decisions.

*ii. Recall*

1. *Overview* – generally for a defined period of time; severed once this expires. Employee can elect for severance or await recall. If on recall, seniority retained.

*iii. Severance*

1. *Overview* – if severed, seniority lost / employment cut off. Occurs where employee opts upon layoff, when recall period expires, or when employee on recall list turns down two or more opportunities for recall.

*c. Vacancies and transfers*

*i. Transfers* - seniority often governs transfers; if job opens, seniority for bidding will tiebreak when qualifications are otherwise equal. If > seniority and > qualified, guaranteed position.

*ii. Tension* - employers focus on qualifications and unions on seniority; CBA, counsel, arbitrators, courts attempt to balance these things.

*iii. Existence of vacancy* - must first determine whether there is a vacancy which triggers posting requirements under the CBA; absent contrary provision, employer can discontinue a job. Usually up to employer discretion, but CBA provisions are the starting point.

*iv. Discontinuation of position* - subject to reasonable discretion of employer, absent CBA provision to the contrary. {Horton}

1. *Requirement* – company must first initially determine if they require a person to do that job; eg. whether work should continue to be performed, or redistributed to other employees, etc. {Dupont}

2. *Adequate work* – means a vacant position for which there is adequate work in the opinion of the company to justify the filling of that position; company must take *reasonable view* of objective facts to this end. {Horton}

3. *Part-time* – if bargaining unit includes both full-time and part-time employees, employer may fill departing full-time vacancy with multiple part-time postings; subject to CBA positions. {North Wellington}

*d. Job postings / qualifications*

*i. Reasonableness* – job posting provisions of CBA generally prescribe the procedure which employer must follow in filling vacancies that arise in workplace; must also be fair and reasonable. {Sudbury} Held to *reasonable relevance standard.* {Cape Breton} Broad scope of reasonableness for employer.

1. For instance, not reasonable or fair where person with significant role in interview/selection process has bias/ partiality, as established by union. {Pellerin}

2. For instance, reliance on criteria other than those included in the posting constitute an unfair and unreasonable selection procedure,{Elgin} except for where these are "common sense" inclusions. {Terasen}

3. For instance, unreasonable to require environmental services course for entry-level laundry worker; not related to

position. {Glen Haven}

*ii. Qualifications vs. seniority* - CBA also governs the criteria used for filling vacancies; relationship between seniority one hand and qualifications on the other. Where educational/qualifications stipulated are valid, seniority does not come into play until qualifications met. {Regina}

1. *Sufficient ability clause* - means that seniority is the important determinant in who gets the job; most senior of candidates who meet minimum threshold of qualifications will get hired.

*iii. Contents* - will have opening/closing days; general requirement to post internally first, before going external. Occasionally will have "suitability" qualifier, to keep out miserable/toxic people. Reviewed by union.

*iv. Reliance on unposted qualifications* - any reliance on unposted qualifications, skills, characteristics is unfair and unreasonable; applicants must have proper notice of criteria. {Elgin} However, do not have to spell out common-sense part of the job. {Terasen}

1. For instance, counterexample, not very normal, obvious or reasonably expected requirement of a job need be spelt out. {St Vincent's}

2. For instance, counterexample, employer entitled to consider applicants' attendance in making decision re: leadership position, though not explicit in posting, due to CBA provisions re: efficiency as well as ability. {Terasen}

*v. Shortlisting* - full criteria set out in CBA do not need to be followed during initial screening process; may create short list, so long as full criteria considered later in process; must nevertheless be reasonable, transparent, however. {Telus}

*vi. Amendment of posting* - employers are free to amend qualifications for a position; must be reasonably associated with job, in good faith, and no specific bar in CBA. {Sun-Rype} Increase less likely to be acceptable for entry-level, low-skill positions. {Victoria}

1. For instance, union challenged decision to change "one-year clinical experience" to "one-year post-anaesthesia and surgical nursing" - reasonably related to prevention of mistakes in care, therefore upheld. {Victoria}

*vii. Cancellation of posting* - once a vacancy has been posted, the employer is not permitted to cancel the competition in the absence of a sound and practical business reason for doing so. Even more stringent where competition completed, offers made and accepted. {Perez}

1. For instance, credible allegations of widespread cheating insufficient to justify cancellation of postings; should have postponed and investigated instead. {Perez}

*viii. Arbitral review of posting* - while management may fix the qualifications/weighing, employer cannot (1) manipulate these to subvert legitimate claims for advancement; (2) may not set qualifications which are not reasonably related to work. {Reynolds}

1. For instance, union may occasionally see multiple grievances from posting; will generally champion more senior person; however, other person nonetheless due representation, either separately or *de facto* through standing at arbitration for other candidate.

2. For instance, employer cannot artificially "puff up" minimum qualifications for labour position so that employees who, on an objective standard, have knowledge/ability to perform job are discouraged/disqualified. {Delta}

3. For instance, improper to require as necessary the ability to be promoted out of the job in question, or define qualifications by reference to higher rated job; *unless it is apprenticeship* for another position. {Union Carbide}

*ix. Consequence of noncompliance* - successful grievance to this end results in ruling that position must be reposted in a compliant manner; experience of wrongfully-appointed employee discarded in subsequent competition for position.

*e. Filling of vacancies*

*i. Employer assessment of skill* - not be interfered with unless dishonest, discriminatory, biased, ill-will, or unreasonable. Correctness standard on review, absent CBA provisions to the contrary, which must also be considered by arbitrator for compliance. {Union Carbide}

*ii. Deference* - arbitrators often defer to the employer's opinion on the basis that management is better situated to assess an employee's capability or aptitude for the job. {Maple Ridge}

*iii. Considerations* - except where CBA leaves the employer's discretion completely unfettered, arbitrators have not restricted their inquiry to an analysis of the *bona fides* of the employer's motives. {Burnaby}

*iv. Equivalency*

1. *Overview* – what counts is existence in an applicant, at time of an application, of ability actually and adequately, to perform duties, not the *source* of that capacity. If employee can show capacity re: job, regardless of whether academic/experiential qualifications met, entitled to job.{Burnaby}

   a. For instance, where CBA defines qualifications (for purposes of layoffs) as having teaching certificate, university teaching major, or one year of equivalent experience, or general equivalency (reasonable expectation of ability to perform); applies to entire CBA {Burnaby}

2. *Operative unless negatived* – where provisions do not *specifically* preclude equivalency through clear language exhibiting intention, then it is open to employee to show equivalency. {Burnaby}

*v. Consequence of noncompliance* - successful grievance to this end results in overturning the results of the job competition. {Great Atlantic}

***5. Miscellaneous***

*- Origins and development of arbitration*

*a. Overview* - began as means for speedy, cost-effective, fair, and efficient means of resolving disputes between employers and unions; now, as a "victim of own success" has succumbed to "legalism."

*b. French origins* - first introduced by Napoleon the First in the nineteenth century. Tribunals established, dealt with tens of thousands of disputes annually, resolving 79%.

*c. UK origins* - introduced in various industries, tripartite with official umpire; while non-binding, parties respected decisions; began trend towards using particular, permanent arbitral board.

*d. US origins* - rose to popularity in the interwar/WW2 period in industrial sectors, with designation of

permanent industry arbitrators adjudicating disputes over CBAs.

*e. Canadian origins* - Privy Council order 1003 in 1944, labour shortage in WW2 meant that conditions favourable, and organization movement galvanized by failed Kirkland Lake strike. Ontario legislation led way in 1943, responding to unprecedented labour unrest. Dispute resolution procedure (via Courts) given as *quid pro quo* for prohibition on mid-term actions.

*f. Golden age in Ontario* - Court system inapt for labour disputes, so Ontario turns to arbitral model, offering speedy, low-cost, informal, and expert dispute resolution model; both permanent and *ad hoc* methods used by various industries according with their needs.

*g. Expedited arbitration adopted* - as with Court system, arbitration system ultimately developed backlog due to success, leading to enactment of "expedited" proceedings (eg. single arbitrator rather than tripartite panel).

*h. Current issues in arbitration* – now permeated by delay, due to backlog of cases and need to secure preferred arbitrators, hampered by rising costs, and growing formality of the process. {Winkler]

*i. Importance of functional arbitration system* - dysfunction destabilizes work environment, demoralizes, sidetracks productivity; arbitration vital to well-functioning workplace. {Winkler]

*ii. Governed by three factors* - these relate to proportionality - eg. cost of pursuit proportional to value of claim; goal of system must be to protect proportionality.

1. *Expanded jurisdiction* - as the jurisdiction of labour arbitrators expanded, so did the complexity and volume of grievance arbitrations. {Winkler}

    a. For instance, counterexample, this also means that there is a much-needed "one stop shop" for all labour-related disputes. {Winkler}

2. *Academic discourse* - shift from pragmatic lower-court judges to young, academic arbitrators led to tendency for academic discourse to creep into arbitral decisions. {Winkler}

3. *Cultural shift* - adoption of cumbersome attributes of the civil litigation process, leading to legalization which causes arbitration to resemble negative elements of litigation. {Winkler}

    a. For instance, evidentiary and other technical preliminary motions can considerably lengthen the time needed to adjudicate grievance; decisions are complex, take considerable time to render. {Winkler}

*iii. Potential responses* - eliminate steps, voluntarily embracing mechanisms which expedite process, and pursuing "expedited" arbitration where possible, eg. for simpler, less important disputes: {Winkler}

1. *Compression* - steps in grievance procedure (prior to arb.) can be eliminated/compressed. Deadlines can be imposed for scheduling hearings, selecting arbitrators, and issuing awards.

2. *Choice of arbitrator* - parties must consciously balance their interest in getting a particular arbitrator with their interest in getting their dispute resolved sooner.

3. *Venue* - parties could agree to alternate between using employer and union premises, or use videoconferencing, saving the costs and delays associated with accommodation and travel.

4. *Preparation* -, issue definition should occur during the grievance procedure and should precede the hearing. Grievance procedure should be the discovery process.

5. *Proportionality* - must be resolved in a manner that reflects the complexity, monetary value, and importance of the dispute. Onus is on parties and (to limited extent) arbitrator.

6. *Evidence* - evidence should be limited and focused on what is essential; admitted facts, written briefs should be used, cross-examination used effectively.

7. *Reasons* - not every grievance requires an exhaustive, publication-quality analysis but, rather, reasons that are "sufficient." Delay in reasons causes more hardship than decision itself.

8. *Finality* - arbitration should not be seen as an interim step *en route* to judicial review. Rather, already the backstop for grievance, so should be seen as binding.

9. *Relationship* - unlike litigation, where courts do not often need to consider future relationship between parties, this is essential to arbitration.

- *Arrow Lakes Board of Education v. CUPE 2450 (Arrow Lakes),* Sullivan 2012

- Facts - bus driver / supervisor discharged by employer for dishonesty, failure to implement maintenance program satisfactorily, damaging vehicle, crashing bus.

- Issue - discharge satisfactory under the "just cause" standard?

- Rule - no; reinstated with permanent demotion.

    - Application of three part inquiry as per Wm. Scott;

    - First question, whether the conduct gave rise to just cause for the imposition of a disciplinary sanction?

        - Grievor made repeated assertion, until giving evidence on the witness stand, proceeding, that he had performed the required pre-trip inspection on November 30;

        - Dishonesty greatly exacerbates grievor's wrongdoings; evidence supports a conclusion that of continued misconduct in regards to answers to investigative questions.

        - Only admitted wrongdoing for damage of truck with shovel upon being confronted with eyewitness testimony by the employer; uttered only once caught.

        - Drove bus too fast around a corner despite cautionary signs advising speed reduction, therefore responsible for accident which damaged school bus.

        - Failed to properly address problems relating to the pre-trip inspection forms, personally remise in ensuring accuracy and proper lawful completion of documentation.

- Grievor sought to mislead the Employer during its investigation by informing it that Mr. Fox had not raised a concern with the vehicle that became "suddenly low" on oil.

- Evidence is not sufficiently clear upon which to determine that the grievor committed misconduct in relation to the Employer's allegations regarding the Vernon trip.

    - For instance, employer did not take into account the fact that grievor banks over time, takes time off when not needed, thus minimizing the cost of his overtime.

- Second question, whether having regard to all of the surrounding circumstances, was the discipline imposed excessive?

    - The employment relationship has not been irreparably breached, and therefore the discharge was an excessive disciplinary response.

    - Employee possessed about sixteen years of service; clean disciplinary record, excepting letter of expectation regarding pre-trip checklist documentation.

    - Implicit in the concept of just cause is the principle of progressive discipline; unjust to terminate one's employment without first having imposed lesser sanctions with a view to correcting an employee's behaviour.

        - There is no basis to conclude the grievor is not an appropriate candidate for progressive discipline.

        - Investigation by employer was not focused on obtaining new information, but rather getting the grievor to admit to his wrongdoings; precluded progressive discipline.

    - Employer's inaction in responding to deficiencies it knew of in a timely manner diminishes its argument regarding the seriousness of the grievor's misconduct as a safety matter.

    - Dishonesty is a significant factor that weighs against restoration of the employment relationship; not necessarily determinative; weighed against record and lack of progressive discipline.

        - Trust and honesty are inherently an integral part of the employment relationship between the Employer and all of its employees, particularly supervisory employees who also have a role in modeling behaviour.

        - Dishonesty is better described as belligerent obstinacy and willful stupidity than conniving deceit or fraud; less culpable, therefore.

    - Grievor has not admitted the precise level of his wrongdoing, but this does not necessarily pose a bar to the resurrection of the employment relationship.

- Job with this is employer very important to the grievor, particularly based on his age and prospects;

- Third question, if the discipline imposed was excessive, what should be substituted as just and equitable?

- The evidence strongly supports a conclusion that the grievor be permanently demoted from the Transportation Foreman position.

- Returning to the workplace with a permanent demotion, after a period of long time-served suspension should impress upon the grievor the seriousness of his actions.

– *Vancouver Board of Education v. United Brotherhood of Carpenters (Hawco),* Ready 1995

- Facts

- Carpenter empl. by school board, 12.5 years of service, 40-years old, clean record; required to use employer computer for work. Used his employee email account daily over two-year period to participate in distribution and access of explicit pornographic materials while at work. Had two meetings with employer (9 December 2009, 13 January 2010); thereafter terminated.

- Issue

- Was the termination just and reasonable?

- Rule

- Used employer email address in his distribution of material which had every potential of harming the School District's reputation; contrary to employer's purpose re: care and education of children.

- General public does not endorse or accept the viewing of adult pornography; should be self-evident to any employee that it is unacceptable to use an employer's email facilities for porn.

- Pornography runs contrary to legal duty of an employer to prevent workplace harassment; mere exposure to offensive material is workplace harassment.

- Corrections employers must "continuously strive for public confidence and respect," distribution of porn could create a hostile and sexually-charged work environment; detrimental to organizational interests.

- Concerning school board, must maintain respect and confidence of parents and public; grave responsibility shared by each employe, must be diligently carried out and enforced.

- Factors to be considered, inexhaustive:

- Offensive character of the material itself;

- Individual's perseverance and time spent viewing the sites;

- Use of the material within the workplace and whether it has been saved, downloaded or shared with co-workers;

- Nature of the workplace and the trust relationships associated therewith;

- Culture existent in the workplace and whether the impugned activities can be seen to have poisoned or otherwise made the person's possible reintegration into the work environment highly problematic; and

- Known employer policies respecting internet use and whether any express or specific emphasis has been provided in the past respecting the seriousness of the transgression.

- Lack of knowledge of policy does not assist; common sense should have indicated that employer resources not for personal use, transmission of sexual material unacceptable.

- Principles outlined in the jurisprudence clearly place responsibility on employees to exercise common sense and use good judgment.

- Rather than report the situation when he saw other employees viewing inappropriate material, asked to be included in the distribution.

- Difficult to square this evidence with condonation of conduct because of the swift response of HR manager to receipt of phone call reporting conduct.

- Sending inapt content emails with an employer's name attached is reckless, wanton disregard for the potential damage to the reputation of the Employer.

- Of the employees in the email group four were terminated; three received ten day suspensions; three received five day suspensions; three received three day suspensions; one was given a letter of warning and one remains off work pending further investigation.

- Cannot conclude that the absence of a suspension of any other employee beyond ten days is indicative of a lack of proportionality in the imposition of disciplinary penalties.

- Theft of time based on the number of work hours the grievor wasted in the pursuit of his inappropriate actions would clearly be an aggravating factor.

– *Parry Sound (District) v. OPSEU 324, SCC 2003*

- Facts

- Probationary employee takes maternity leave, returns to work and is discharged. CBA specifically excludes probationary employees from grieving discharge. Employee nevertheless grieves, asserting that arbitrator has jurisdiction through incorporation of *HRC,* which is incorporated into CBA under provision similar to BC's s. 89(g).

- Issue

    - Does a grievance arbitrator have the power to enforce the substantive rights and obligations of human rights and other employment-related statutes?

- Rule - the substantive rights and obligations of the Human Rights Code are incorporated into each collective agreement.

    - Absent violation of CBA, arbitrator has no jurisdiction over dispute; there is no basis on which to conclude that such a dispute is arbitrable.

    - In *McLeod*, Court held that union and employer are restricted from making an agreement contrary to law; Courts will not enforce illegal agreements.

    - Broad management rights are nevertheless circumscribed by statutory rights granted to employees; HR/ESA establish a floor beneath which employer and union cannot contract.

    - Limits freedom of contract between private parties; however, apt, since CBAs serve private and public functions (eg. the peaceful resolution of labour disputes).

    - Cannot establish that the intention of the parties was to establish that discrimination may be used to discharge probationary employees; regardless, this would be void.

    - Conflict between the collective agreement and an employment-related statute is not a condition precedent of the power to bring that statute into practical operation.

    - Alleged contravention of an express provision of CBA not necessary for arbitration re: substantive rights and obligations of employment-related statutes: implicit sufficient.

    - Serves policy, because enhances purposes of *Labour Relations* re: adjudication of disputes in workplace, bolsters HR protection as a result through expedited, accessible proceedings.

    - While countervailing consideration holds that HR tribunals are more expert re: human rights, this is outweighed by benefits of arbitration process.

- Dissent (Major)

    - Until legislature passes legislation incorporating the substance of its statutes into collective agreements, assumed that unions, employers define which disputes are covered by CBA.

    - Absent legislative action, courts should not on their own initiative interfere with the terms of a collective agreement.

    - Grievor is not without remedy: may use mechanisms set out by the legislature to vindicate human rights, and may bring claim before the Human Rights Commission.

– *Weber v. Ontario Hydro, SCC 1994*

- Facts - Hydro employee on sick leave, employer hires investigators who conduct illegal search in

collecting evidence re: malingering.

- Issue - Can the courts adjudicate *Charter* violations, where these arise in the context of employment relationship? Is an arbitral panel a "court of competent jurisdiction" within the meaning intended under s. 24(1), therefore allowing arbitrators to impose remedies for *Charter* violations?

- Rule - Courts cannot adjudicate disputes which arise from the workplace relationship, and arbitrators are "courts of competent jurisdiction" within the context of s. 24(1), can issue remedies.

    - Causes of action in tort and under *Charter*, within the context of employment relationship (eg. sick leave investigation) are arbitrable, ergo not within jurisdiction of courts.

    - Mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction; arbitrable actions are exclusive jurisdiction of arbitrators.

    - Issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one arising *under* the collective agreement.

    - All proceedings arising from the difference between the parties, however those proceedings may be framed, are under exclusive jurisdiction of arbitrators.

    - Purpose of arbitration is expeditious and cost-effective resolution of labour disputes, minimizes labour disruption and onerousness to parties, undermined by concurrent jurisdiction with courts.

    - Three models of jurisdiction:

        - *Concurrent* - jurisdiction over labour disputes shared by courts and tribunals; undermines policy concerns served by arbitration model, rejected.

        - *Overlapping* - would allow for court actions where these exceed traditional subjects of labour law (eg. trespass, nuisance); focuses on *form* of pleadings, rather than *substance*, so subject to same flaws as concurrency, rejected.

        - *Exclusive* - if the essential character of the dispute arises from the collective agreement, the matter is one for arbitration, not the courts, accepted.

    - That the parties are employer and employee not determinative of essential character, nor is the location of the conduct giving rise to the dispute.

    - Question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

    - Not all disputes between employee and employer are precluded; only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts.

    - In the law of the land to disputes (common law, statute, *Charter*), arbitrators may grant such remedies as the Legislature or Parliament has empowered them to grant.

- Labour arbitrator can consider the Charter, find laws inoperative for conflict with it, and go on to grant remedies in the exercise of his powers under the Labour Code:

- If an arbitrator can find a law violative of the Charter, it would seem he or she can determine whether conduct in the administration of the CBA violative, and remedy.

- Tribunal will be a court of competent jurisdiction if legislation gives it power over the parties, the issue in litigation and power to grant the remedy which is sought.

- Prelim judges not courts, because *Criminal Code* gives such magistrates "no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy."

- Dissent (Iacobucci)

- Arbitrators are bound to apply the law, and as a result, the *Charter;* therefore, must make decisions in conformity with the *Charter*.

- However, this does not mean that arbitrators have the power, under s. 24(1) of the *Charter*, to remedy the *Charter* violations they find: not courts of competent jurisdiction.

- Use of the word "court" was deliberate; it was meant to correspond to an adjudicating body with specific characteristics that enable it to grant Charter remedies.

- Prelim judge is not a "court" (cannot weigh evidence, or render verdict); ergo, tribunal, which is not even presided by a judge in a traditional courtroom, is not either.

- Arbitrators must not apply an invalid law, but an arbitration decision cannot have the effect of actually striking down the law; only a court can make such a declaration.

- *Board of School Trustees of School District No 62 v CUPE Local 459 (Sea to Sky), 2002*

- Facts - grievor forges two doctor's notes, employer discovers; employee claims that he *was* sick, but did not realize that he would be able to get note. Dishonest during investigation, and had previously admitted to lying about unrelated incident in workplace.

- Issue - is discharge warranted?

- Rule - Yes.

- Acts of dishonesty like theft are considered amongst the most serious of employment offences as they go to the heart of the employment relationship.

- Particularly the case where as here, the employee is in a position of trust with respect to either money or unsupervised work performance.

- Over lengthy period of time, grievor engaged in numerous dishonest acts, ergo NOT a simple lapse of judgment or a momentary aberration; not excused by external factors.

- Failure to act honestly and to employ such elaborate artifice as forged medical certificates

does serious damage to the employment relationship.

- In giving answers, trying to protect best interests, avoid jeopardizing his job. This is NOT someone who was shocked nor was it someone who is willing to acknowledge his conduct but unsure what to do.

- Cases involving dishonesty operate such that years of service do not always favour employee; do not provide license to be dishonest; may create increased expectation of honesty.

- Problem getting along with others; inability to realistically assess and accept responsibility for conflicts. Similar to inability to take responsibility for wrongs.

- Managers testified he could no longer be trusted/serious doubts about whether grievor appreciates the gravity of what he has done, accepts responsibility for his actions.

- *Board of Education of School District No. 48 (Sea to Sky) and CUPE Local 779*, 2012

- Facts - employee charged with sex assault of two minor children; pled guilty. Low-moderate risk of recidivism; incidents were 20 years in past, five years before working for school board, clean discipline, remorse/admission. Grievor requests graveyard shift as custodian: no contact w/ kids.

- Issue - discharge justified?

- Rule - just cause for discipline and ultimately for discharge.

- *Consideration of following factors regarding risk of reoffending:*

- Use of coercion, psychological or physical, during crime;

- Minimization of sexual offending;

- Attitudes that condone sexual offending; who used to have these and it's not clear that they've changed;

- Problems with self-awareness;

- Problems with stress or coping;

- Violent or suicidal ideation;

- Problems with intimate relationships;

- Problems with non-intimate relationships;

- Problems with employment;

- Problems with planning;

- Problems with treatment.

- Employer provides education in safe environment to students; requires teachers as well as other support staff to effect this purpose; thus, all held to high standard of conduct.

- Must be a nexus between the criminal offence and the performance of the employee's duties - that connection underlies all of the Milhaven considerations.

- Nexus present, as employee was in position of trust and responsibility vis-à-vis the students and a high standard of care could be expected of him in those circumstances.

- Continued employment would be seen negatively by the public and more particularly, the parents of children in the school district.

- Employer does not have to prove injury to its reputation and employees', but rather it is the job of the tribunal to exercise its own judgment regarding reputational harm.

- Any uncertainty must be resolved in favour of the students. Compassion for the grievor and years of good service cannot result in lessening of responsibility to protect children.

- Graveyard shift would not address loss of trust re: standard of care, position does not exist, and there would have to be another staff member in building to allay parental concerns.

- Not excessive despite low-moderate risk of recidivism; incidents were 20 years in past, five years before working for school board, clean discipline, remorse/admission.

- School system is ALL about the students and children, ergo makes no sense to have an employee in the system who cannot engage in any interactions with them.

- *CUPE Local 63 v Toronto Board of Education (Young)*

- Facts - sex harassment claim against supervisor; grieved discipline imposed by employer, which was demotion to supervisory position at another school, prohibition from bidding for promotion for one year, sex harassment training, no working at school with complainant.

- Issue - imposed discipline justified?

- Rule - Yes; treatment constituted sexual-harassment, even though not all comments were gender-based.

- Insulted and taunted the grievor, including gender-based insults and taunting, made sexually-oriented remarks about her and her appearance.

- Supervisory role involved significant leadership duties; in charge of employees, operations, coaching, administration of policies; one of which the grievor violated.

- Grievor did not attend any formal training concerning its Sexual Harassment Policy, arbitrator found knew or should have known that conduct is violative.

- Sexual harassment difficult to define, must be cautious not to prohibit normal social contact,

allow for free discussion; however, may exist in isolation from overt action.

- Conduct must not be merely "casual" comments, but must amount to a constant barrage or pattern of insults to be deserving of relief.

- Harassment is a course of vexatious comment or conduct that is known, or ought reasonably to be known to be unwelcome; either for *quid pro quo* or where causing distress.

- Arbitrators are empowered to demote for just cause, finite duration, where transgression shows incompetence to perform the job from which demotion occurred.

- *Coast Mountain Bus Co v National Automobile, Aerospace, Transportation, and General Workers of Canada, BCSC 2009*

- HRT concluded that the employer's attendance management program discriminated against employees with disabilities, and, in particular, employees who suffered from one or more chronic or recurring disabilities ☒ at least part of the difficulty with the employer's attendance management program was its strict adherence to its confidentiality policy, considering the employer was bound by the collective agreement to protect the confidentiality of employee medical info

- To ensure the confidentiality of employee medical info, the employer relied upon two separate departments to administer the attendance management program.

- The attendance management department identified individuals with higher than average rates of absenteeism

- The Occupational Health Group identified which individuals had health problems that impacted their attendance.

- Ultimately, supervisors determined which employees were placed in the attendance management program.

- HRT decision

    - Found that in some instances, the OHG did not provide sufficient medical info to allow supervisors to make proper decisions regarding employees' absenteeism, so some employees with choice chronic or recurring disabilities were placed in the attendance management program w/o proper regard for their individual circumstances and w/o appropriate accommodation

- BCSC decision

    - The tribunal erred in concluding that the employer's attendance management program was problematic due to issues of confidentiality

    - While the info known to the OHG was not provided by it to the attendance management group, for the former to have provided the latter w/o the employee's consent would have been contrary to the PIPA and the Collective Agreement. Moreover, the collective agreement does not prevent, and indeed allows the respondent to encourage its members to

voluntarily provide such info to the petitioner where it is in their interests to do so.

- Decision reminds us that it is important to establish appropriate lines of communication between occupational health professionals and managers

- Both objectives of protecting confidentiality and making sound decisions can usually be accomplished by ensuring appropriate consents are in place permitting occupational health professionals to provide relevant info to managers

- Managers should clearly communicate expectations or performance concerns to employees, so employees who understand their employer's expectations are in a better position to determine when they require accommodation to meet those expectations, and to cooperate in providing necessary medical info in support of an accommodation request

– *Board of Education of Surrey School District No 36 and Surrey Teacher's Association (2010)*

- A teacher who had been on long term disability leave for seven years notified the Board of Education that she was now fit to participate in a very gradual return to work: the grievor's disabilities included a neurological condition and severe chemical sensitivities

- The grievor provided the BOE w/ a short note from her family doctor which stated that "Elaine has been disabled from her teaching job for many years, but has made significant gains in her abilities over the last years. She is interested in, and medically fit to consider, a very gradual reintroduction to the workplace-something along the lines of half a day per week on a trial basis in a scent free environment and wheel chair accessible room to accommodate her physical disabilities"

- The BOE requested specific info from a specialist listing, the type of scents and products to which the grievor could not be exposed, in order to consider whether it could create a safe work environment for the grievor

- In response to the BOE's request, the Union stated that the greivor required a "scent free environment" and provided an excerpt from the BC Lung Associations website on a Policy for Developing a Scent-Free Workplace. The Union took the position that the BOE had sufficient info to create an accommodated position for the grievor

- In Evidence, specialist explained that exposure to everyday items such as sunscreen or hair products could trigger an anaphylactic reaction in the grievor; despite his attempts to maintain a scent-free office, the grievor suffered serious allergic reactions when she visited for appointments

- Specialist explained that it would be impossible to produce a complete list of everyday products that the grievor's students and colleagues would have to avoid in order to create a safe scent-free environment. In summary, contrary to the opinion of Dr. Cordoni, it was Dr. Chang's opinion that it was impossible for the grievor to work outside her home

- Arbitrator held BOE acted reasonably by insisting on further medical info; "an employer is entitled to ensure that there is sufficient and adequate objective medical evidence to support an individual's safe return to work and accommodation. Without the specific medical evidence as to the physical limitations or the exact nature of the disability an employer has no way of determining whether or not it is safe to accommodate or return that person to work.

- Clear and unequivocal medical evidence was necessary in order for the employer to safely return Ms. Willis to work; in this instance, the medical notes provided by the doctor to support her request to return to work were incomplete on the nature and extent of her disability as well as the environmental and chemical triggers that set off her allergies;

- BOE satisfied its duty to accommodate her - the safety of the grievor and the magnitude of the employer's risk in returning her to work are serious factors that compel a conclusion that the employer has satisfied its duty to accommodate her; there can be no reasonable level of assuredness that the employer can provide a safe environment for her to return to work, given her particular allergic conditions and anaphylactic reactions

- Article: Employ has an obligation to make sure the employee can safely return to work - sufficient and adequate objective medical evidence should be sought out, and employers should understand the nature and the extent of the employee's medical conditions.

*- Northern Lights College v BCGEU, 2009*

- Article: employers have the right to insist upon sufficient medical evidence to justify an employee's request for a gradual return to work following sick leave.

- The grievor alleged that the employer discriminated against her b/c of her disability and unilaterally ended her return to work program; the employer replied that it had reasonable grounds to doubt the grievor's fitness to continue in the return to work program and as such the employer was justified in requiring the grievor to undergo an independent medical exam before continuing with the gradual return to work program

- Grievor suffered from several medical conditions including lupus, depression and anxiety which led to her commencing sick leave; her family doctor recommended a gradual return to work whereby the grievor would work three days a week for a trial period of three months and the employer agreed to this return to work program

- After 3 months, the greivor's condition had not improved - she was continuing to experience serious anxiety at work and the employer began to doubt her fitness to continue in the return to work program. As a result they asked the grievor for medical info confirming her fitness to continue in the return to work program.

- Doctor provided a medical certificate recommending that the grievor continue working 3 days/ week. Shortly after providing the certificate, the grievor took another leave of absence due to anxiety.

- The grievor's absence caused the employer to conclude that it required asn independent medical exam to determine whether the grievor was truly fit to continue in the gradual return to work program. The grievor refused to cooperate with the firm the employer selected and the employer ended the return to work program, after which the grievor received long term disability benefits

- Arbitrator: the employer had a legitimate reason to doubt the grievor's fitness to continue in the return to work program - was justified in requiring an independent medical exam

- Accommodation is a multi-party effort and the grievor was required to cooperate by providing sufficient medical info [illegible] employers are entitled to medical info where there are legitimate reasons for an employer to doubt an employee's fitness for work

- Article: decision reaffirms an employer's right to seek medical info in cases where there is reason to doubt an employee's fitness to work. Given employers' positive duty to ensure a safe work place, it is important to ask employees for sufficient medical info when there are reasonable grounds to suspect the employee has a disability that renders them unfit to work.

    - Employers should ensure that there are truly legitimate grounds for requesting medical info and they should ensure that their reasons for doubting an employee's fitness to work are based on actual occurences in the workplace rather than any stereotypical views of the employee's disability

- *BC v BC Crown Counsel Association, 2010*

- The grievor took a short term sick leave under the employer's STIIP. The grievor provided a brief note from their doctor explaining that they experienced stress, anxiety, and abdominal pain and that he recommended that he needed to take a stress leave. The doctor concurrently provided another medical report to support the grievor's application for new employment and indicated that the grievor was in good physical and mental health

- The grievor was absent from work for a period of three months, at which point he returned to his regular duties

- Approx. one month after returning to work, the employer met with the grievor to discuss some performance issues. Following the meeting, the employer provided the grievor with a letter of expectation and further monitored their performance

- Later, the employer raised new performance concerns with the grievor, prompting an email from the grievor stating "I am unable to work due to illness or injury."

- The doctor provided a brief medical certificate explaining that the grievor suffered from anxiety and was unable to perform normal work related duties - advised that the grievor could return to work "depending on progress."

- The employer paid the grievor sick leave benefits for a two week period, at which point it requested additional medical info - employer raised its concern that the grievor's sick leave appeared to relate to issues in the workplace rather than a medical condition

- In response, the doctor advised that the grievor's symptoms included panic attacks, anxiety, insomnia and racing thoughts; he expressed depressed moods with anxiety; his treatment program included counseling and weekly checkups; and he was unable to perform normal or modified work duties.

- The employer determined it did not have sufficient medical info to support the grievor's continued absence and discontinued the sick leave benefits; took the position that the grievor should submit to an independent medical exam - grievor refused and grieved the discontinuation of benefits

- Employer sought an order requiring the grievor to attend an IME. The parties' STIIP provided that the employer could require employees to provide a statement from a licensed medical practioner or consulting physician where:

    - There was a pattern of consistent or fraudulent absences.

    - The employee was absent from work for 6 consecutive days; or

    - More than 30 days elapsed since the last medical certificate was submitted and the employee received benefits during that period.

- The employer had a clear right to request a medical certificate and the question was whether they had the right to request additional medical info - no provisions in the STIIP permitting the employer to insist upon an independent medical exam.

- As a general arbitral rule, IMEs are rare and exceptional - arbitrators reluctant to order them given the private nature of medical info

- At CL, arbitrators may compel an employee to undergo a medical examination if it will advance the interests of natural justice

- Where employees have chosen to put their own medical condition at issue in medical proceedings, employers may be entitled to an order for an independent medical examination to help advance their legal position.

- Arbitrator: the basic objective of the arbitral principle that attempts to balance privacy rights of employees, with legitimate business interests of the employer, is to "direct employers to use the least intrusive means capable of securing whatever information they require - a subject of this principle is that the employer is generally only entitled to what is reasonably necessary in the circumstances.
- the arbitral principle of employing the least intrusive means would apply to an arbitral order for an IME, especially in the case of a psychiatric evaluation

    - Order requiring the grievor to attend an IME was justified given the apparent inconsistencies in the doctor's medical evidence, the fact that the doc attributed the grievor's medical condition to the work environment and the lack of prognosis in the medical evidence justified the order.

    - The employer was entitled to additional info that would help it determine whether the grievor's absence was related to workplace issues rather than a legitimate medical condition and whether the length of the grievor's absence was justified.

    - The grievor and the employer should agree to an appropriate physician - neither side in this case had retained a psychiatrist who had examined the grievor to the detriment of the other side, thus it was appropriate for a psychiatrist to be appointed by the mutual agreement of the parties.

– *Morris v BC Railway [2003] BCHRT*

- Employee suffered from depression. The employer terminated the employee's employment shortly after he returned to work following a sick leave and maintained that its decision was the result of restructuring - employee alleged HRC discrimination

    a. the occupational health department had medical info indicating the employee was fit to return to work after a medical leave of absence + a psychiatrist's report explaining the possibility of a relapse upon the employee's return to work, and the effect that his symptoms had on his work performance

    b. in keeping with its policies, the department kept the psychiatrist's report confidential - consequently, the employee's managers were told only that the employee was cleared to return to work and did not receive the info from the psychiatric report

    c. HRT found that the employee's managers were motivated to terminate his employment b/c they were dissatisfied with his work performance - the employee's performance was adversely affected by his depression and the managers did not have sufficient info to understand the effects that the employee's depression had upon his work performance

    d. HRT criticized the employer's rigid corporate policy regarding confidentiality of employee medical info, commenting that managers ought to have known that although the employee was cleared to return to work, he continued to be affected by his depression. Termination constituted discrimination on the basis of mental disability

- *Occupational health Professionals and Third Party Administrators: What All Employers Should Know*

    e. Whenever these 3rd parties are involved, employers must ensure that there is sufficient and appropriate info sharing between the managers who make decisions about an employee's employment and those who are privy to the medical info that should inform such decision

    f. Occupational health professionals and 3rd party administrators usually have an obligation to keep employee medical info confidential **HOWEVER *Morris*** suggests that it is risky for managers to make decisions about employees' employment w/o considering the relevant medical info

    g. Managers cannot avoid liability for human rights violations by insulating themselves from relevant medical info - therefore they must work together with occupational health professionals and third party administrators to ensure that sufficient medical info is shared with management.

    h. Whenever it is necessary to share medical info, employees should provide their written consent

    i. Occupational health professionals and 3rd party administrators should only disclose info that is necessary for managers to manage the employment relationship

    j. Organizations may unwittingly infringe upon their employee's privacy rights if they collect confidential medical info from 3rd party administrators w/o notifying the employee

k. ***TransAlta Corporation and Kelly, Luttmer & Associates Ltd*** - an employer collected personal employee info in contravention of PIPA. The employer collected an employee's medical info from a 3rd party administrator w/o providing the employee with reasonable notice.

l. **The Use of Third Party Administrators in the Unionized Context**

i. Few things to keep in mind when considering whether to utilize a 3rd party administrator for employees under a collective agreement

1. Larger employers with short term disability, where the employer is the insurer, may look to achieve efficiencies in using a 3rd party administrator to determine eligibility for sick leave benefits

2. Another reason employers may look to third party administrators is to take advantage of their medical expertise in dealing with claims for benefits.

ii. There are comments in a number of cases that appear to suggest that it is not a violation of a collective agreement for an employer to use a 3rd party to assist in the administration of a sick leave plan/ assisting with determining eligibility for benefits **HOWEVER** the extent to which a 3rd party may be used will likely depend on the particular terms of the collective agreement **I.E** terms relating to what medical info can be obtained from employees and who that info could go to could limit use of a third party

iii. Where medical info does not go to the employer and the ultimate decision as to benefit must be made by the employer, it is likely not enough for an employer to take the position that the third party made the decision, thereby absolving the employer of liability - the employer would likely have to choose between obtaining the necessary info from the 3rd party to make its own determination, and present its own case at arbitration if to issue gets to that point, or simply accepting any consequences that arise from the 3rd party's decision on eligibility

- *Tung-Sol of Canada Ltd and UE Local 512, 1964*

- Facts - union certified as bargaining agent, CBA concluded. Seniority list published, but deducted period when employees were on strike during negotiations. CBA did not account for loss of seniority stemming from strike.

- Issue - does seniority accrue while on strike?

- Rule - Yes, absent specific CBA language to the contrary.

- Seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay.

- Seniority should only be affected by very clear language in the CBA concerned and that arbitrators should construe the collective agreement with the utmost strictness.

- Parties have clearly agreed in art 4(2) that the seniority of a regular employee shall date from his last hiring date, with no qualifications and no exceptions; clear, unambiguous.

- *The Board of Education of School District 41 (Burnaby) and BC Teachers' Federation/Burnaby School District Teachers' Association,* 2011

    - Facts - grievor informed not qualified to teach in Burnaby; advised that she was hired in error after employer reviewed transcripts; could work as general TOC, but could not teach specialties such as math or art, as she did not have the requisite 18 post-secondary credits to do so.

        - CBA defines qualifications, requiring teaching certificate, and either teaching major/ equivalent, one year experience, reasonable expectations re: duties.

        - CBA sets requirements for fillings, including "best learning situation," filled by competition (not by seniority); teachers who meet qualifications have first claim; temporary contract teachers offered further contracts on the basis of seniority if they meet qualifications.

    - Issue - do the requirements of the employer to teach specialties run afoul of reasonableness?

    - Rule - employer has prerogative to determine skills and qualifications required in any job. Absent specific clause in CBA, management can determine this, *subject to flaws proven by union*. However, where employee can prove equivalency, entitled to the job.

        - Apt to evaluate the equivalency of different qualifications to determine whether an employee meets the substantive requirements of the job

        - If employee demonstrates personal qualifications, abilities sufficient to do all work competently, w/o requisite academics/experience, employee will be entitled to the job.

        - Except where CBA leaves the employer's discretion completely unfettered, arbitrators have not restricted their inquiry to an analysis of the bona fides of the employer's motives

        - Merits of qualification decision, subject to a standard of reasonableness; tested for honesty, completeness and correctness under a test of reason - whether irrelevant to job.

        - Balances right of the employer to set the qualifications for a position vs the place, if any, in this exercise for the consideration of equivalent qualifications.

        - *Equivalency* - what counts is existence in an applicant, at time of an application, of ability actually and adequately, to perform the job's duties, and not the *source* of that capacity.

        - Where provisions do not *specifically* preclude equivalency through clear language exhibiting intention, then it is open to employee to show equivalent qualification.

- To do / consider

    - Questions

        - HRC vs. arbitral jurisdiction on discipline (40 mark question on this, procedure, just cause);

        - Off-duty conduct, discipline (30 mark question on this);

    - Materials just covered (30 mark question, seniority, qualifications, posting/filling);

- Other stuff

    - Employee medical information -> no specific question on employee privacy re: records; only dealt with in very collateral manner.;

    - Picketing (old outline) - not covered;

    - ESA - not covered;

    - *Charter* - not covered, except for with respect to jurisdictional/theoretical, purposes of arbitration/LRC/etc.

    - Falsification of records - not covered;

- Needs:

    - Just cause re: disability (would illness generally amount to just cause?)

    - HRC sections re: employment

    - Grievance process (old outline)