Court of Queen's Bench of Alberta

Citation: Alberta Union of Provincial Employees v. Caritas Health Group, 2006 ABQB 550

Date: 20060721
Docket: 0603 02781
Registry: Edmonton

In the Matter of the *Labour Relations Code*, R.S.A. 2000, c. L-1;

And in the Matter of the Collective Agreement between Caritas Health Group (Edmonton General Continuing Care Centre) and Alberta Union of Provincial Employees;

And in the Matter of AUPE Grievance of Lorna Wright;

And in the Matter of an Award by an Arbitration Board consisting of Andrew C.L. Sims, Q.C., Chair; Susan McGillivray, Employer Nominee; and Jodi Hubler, Union Nominee, dated January 31, 2006

Between:

Alberta Union of Provincial Employees

Applicant

- and -

Caritas Health Group (Edmonton General Continuing Care Centre)

Respondent

Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby

Decision:

[1] Written and oral evidence of complaints made by patients who died prior to a hearing before an arbitration board as to incidents which occurred while they were resident on a palliative care ward of a hospital were properly admitted into evidence, although hearsay, by that board. It upheld the dismissal of an employee who was dismissed as a result of upsetting those

patients by making them the subject of mild sexual humour when she was attending to them. The board made no error in arriving at the conclusion that the subsequent deaths made the receipt of this hearsay evidence necessary and, further, that it was reliable.

[2] The reliability requirement was met by an assessment of all the evidence including the conclusion that the two men would have had no opportunity to meet to fabricate similar complaints in a similar time frame nor any motivation to do so. Further, the employee's denials of the conduct and statements were found to be incredible due to inconsistencies between parts of her evidence and that of virtually every other witness including witnesses she called on her own behalf.

[3] The board properly considered the employee's failure to accept and understand the impugned conduct was improper in declining to reinstate her into her employment. The employer was properly concerned that it could be repeated if she were to be reinstated.

Facts:

[4] The Applicant applies for judicial review of the majority decision of a labour arbitration board ("the Board") which concluded that the Respondent had just cause for terminating the employment of Lorna Wright as a nursing assistant and, alternatively, from its failure to substitute an alternate form of discipline for termination on finding that she had engaged in conduct warranting discipline.

[5] Ms. Wright's employment was terminated on August 28, 2003 after an investigation into complaints about her conduct received from two patients whom she cared for in the palliative care unit of the General Hospital in Edmonton, Alberta. Both related to inappropriate comments of a sexual nature she was said to have made to each of the patients.

[6] The Applicant alleges that Ms. Wright was denied a fair hearing because the Board admitted and relied upon hearsay evidence of the two patients in preference to her *viva voce* denials of the conduct in question. Both men had passed away by the time of the hearings before the Board.

[7] The Board gave extensive written reasons for its decision which included the admission into evidence of the written records of statements made by each of the two patients to hospital staff investigating the incidents although these records were not verbatim, as well as *viva voce* evidence from those to whom the complaints were originally made. It found that the hearsay statements met the legal requirements for admission, i.e. necessity and reliability. First, the patients' deaths provided the necessity for admission. Second, after an extensive review of the *viva voce* evidence heard, including that from Ms. Wright, it concluded that the hearsay was reliable. In so doing it made adverse credibility findings against Ms. Wright who had denied making the comments at all.

[8] The Applicant challenges the finding of necessity because in each case a third person may have been present in the immediate vicinity when the alleged statements were said to have been made, yet that person was not called to testify before the Board. It challenges the finding of reliability because of the evidence of periods of delirium experienced by one of the complainants and because of differences in two written versions of the complaint made by one of the patients. As such it argued that the hearsay should not have been admitted in evidence, failing which the only evidence before the Board was that of Ms. Wright who should, therefore, have been believed.

[9] Alternatively the Applicant argued that the Board breached the rules of natural justice by considering Ms. Wright's denial and lack of remorse as factors in its decision not to substitute an alternate form of discipline for that of termination.

Issues:

1. What is the standard of review for decisions involving alleged breaches of procedural fairness?

2. Was Ms. Wright denied a fair hearing because there was a breach of the principles of natural justice and procedural fairness by:

   a. the Board's admission and reliance of hearsay evidence given by the deceased patients, including the Board's failure to conduct a ***Khan*** analysis of each individual oral and written statement made by each of the two complainants; and,

   b. the reliance on Ms. Wright's denials and lack of remorse when declining to substitute a lesser penalty for that of termination of her contract of employment?

Analysis:

1. What is the standard of review for decisions involving alleged breaches of procedural fairness?

[10] The first challenged decision arises from the application of the rule which permits the admission of hearsay evidence where it is necessary to do so and the evidence is shown to be reliable. The rule was admittedly correctly identified and described by the Board. The issue arises from its subsequent conclusion that the requirement for necessity was met notwithstanding the failure to call the evidence of two potential "eyewitnesses", each of whom might have been able to give direct evidence as to one of the two incidents.

[11] The nature of the second alleged error arises from the fact that the Board considered Ms. Wright's failure to admit the misconduct in its decision not to reinstate her into her employment.

[12] The Applicant argues that the standard of correctness must be applied to these decisions whereas the Respondent maintains the correct standard is that of reasonableness. Under the latter standard even if the Board erred in concluding that it was necessary to admit the hearsay evidence or erred in considering Ms. Wright's failure to admit responsibilities when addressing reinstatement, judicial review should not follow if the decision was nonetheless reasonable.

[13] The parties agree that the standard of review for alleged breach of procedural fairness is not to be determined through applying the familiar pragmatic and functional approach but rather that scope of the duty of fairness owed Ms. Wright "is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected"; see ***Baker v. Canada (Minister of Citizenship & Immigration)*** [1999] S.C.J. No. 39 at para. 22 in which Madame Justice L'Heureux-Dubé set out the factors to be considered in this determination as follows:

(a) the nature of the decision and the process followed in making it;
(b) the nature of the statutory scheme;
(c) the importance of the decision to the individual affected;
(d) the legitimate expectations of the person challenging the decision; and
(e) the choices of procedure made by the tribunal itself.

[14] To consider, then, each of these factors in turn:

(a) the nature of the decision and the process followed in making it

[15] The first of the two decisions is akin to a mixed question of fact and law, i.e. the failure to apply the fact that there may have been witnesses to the alleged misconduct who could have been called to testify with the result that the Board mistakenly concluded it was necessary to rely on the hearsay statements. The second question is akin to a question of law, i.e. whether it is ever appropriate to consider a wrongdoer's failure to admit the conduct when determining penalty.

[16] Further, the alleged errors were on issues central to the ultimate conclusions reached by the Board. If the hearsay evidence had not been admitted, there would have been no evidence upon which to discipline Ms. Wright.

[17] In addition, the law indicates that the closer the tribunal's decision-making process resembles the judicial decision-making process, the more the tribunal will be held to an expansive duty of procedural fairness; that is, a tribunal will be required to provide protections similar to those provided by a court if the decision it is asked to make and the tribunal's process, function and nature resemble judicial decision-making; see ***Baker***, para. 23.

[18] The Board's decision-making process here contained many of the hallmarks of an informal judicial hearing. The process was adversarial. Both parties called witnesses and submitted evidence as they would have done before a court. The Board was required to and did apply legal principles in arriving at its decision, a decision which is final and binding subject to a right to seek judicial review.

[19] As such, the nature of the two decisions and the process followed in making them suggests that any error made by the Board should afford a remedy.

(b) the nature of the statutory scheme

[20] Statute creates an important difference between the procedural requirements imposed by a labour relations board and a court, differences which the Respondent argues favor a deferential standard of review. The *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 143(2)(b) provides that the Board:

> is not bound by the law of evidence applicable to judicial proceedings

[21] In the result the Board was entitled to receive and consider hearsay evidence where appropriate even where the legal prerequisites for the admission of that evidence in a court of law had not been established; see Jones & de Villars, *Principles of Administrative Law* 4th ed. (2004) Carswell: Scarborough at p. 294.

[22] The scope of this right has been circumscribed by case law so that a labour arbitration board should accept hearsay evidence only where relevant and reliable; see ***Thomson v. Alberta (Transportation and Safety Board)*** (2003) 19 Alta. L.R. (4th) 236.

[23] This argument is something of a red herring as the Board did not purport to rely upon s. 143(2)(b) of the Code in admitting the hearsay statements but rather did so after conducting a careful analysis as against the requirements for admission established by the Supreme Court of Canada in ***Khan***. In this fashion the Board functioned as a court would have done in a similar situation. As such, while ***Khan*** and subsequent authorities applying it form part of the common law rather than statute, any error in applying the law which has created this exception to the hearsay rule is akin to making an error of law in the application of a statute.

[24] There are authorities which suggest that *viva voce* evidence should always be preferred over contrary hearsay evidence, that a critical finding of fact cannot be based on hearsay, and that just cause can never be established based solely on hearsay evidence ; see ***Better Beef Ltd. and U.F.C.W., Loc. 175*** **(Loker) (Re)** (2003) 119 L.A.C. (4th) 361 at 367; ***Girvin and Consumers' Gas Co. (*Re*)*** (1973) 40 D.L.R. (3d) 509. However, these authorities do not discuss a workplace situation involving vulnerable victims who may be exposed to harm which cannot be addressed and prevented if hearsay evidence is excluded, or situations where death has caused the disappearance of anything but hearsay evidence.

(c) the importance of the decision to the individual affected

[25] There is no question that this decision was of great importance to Ms. Wright. When an individual's employment is at stake, a particularly high standard of justice is required and the

process leading to the decision must adhere to a high standard of procedural fairness; see ***Baker***, at para. 25; ***Kane v. University of British Columbia*** (1980) 110 D.L.R. (3d) 311 at 322 (S.C.C.)

(d) the legitimate expectations of the person challenging the decision

[26] The Applicant does not rely on any specific representations made by this Board as to its procedure or regular practices; see ***Baker***, para. 26**.**

(*e) the choices of procedure made by the tribunal itself*

[27] No issue arises from any choice of procedure by the Board. The Applicant noted, however, that the usual deference one might accord a decision of a labour relations board does not prevent judicial review on a standard of correctness for errors of law nor where a duty of procedural fairness has been breached.

[28] This analysis leads to the conclusion that the proper standard to be applied to each of the Board decisions is one of correctness. The Board functioned as a court would have done; the questions at issue were central to the decision; any error made was an error of law or of mixed fact and law; the decisions made were of great importance to the Applicant and there is no presumption of deference in these circumstances. If I am wrong in that conclusion and the correct standard is one of reasonableness, it would be difficult to conclude that the Board's decision was reasonable if it erred in either of the two decisions in question given their nature and the process followed.

***2. Was Ms. Wright denied a fair hearing because there was a breach of the principles of natural justice and procedural fairness by*:**

a. the Board's admission and reliance of hearsay evidence given by the deceased patients, including the Board's failure to conduct a Khan analysis of each individual oral and written statement made by each of the deceased patients

[29] The Board found that George Mullen (a pseudonym adopted by the Board) stayed on this palliative care ward from August 8, 2003 until his death on September 20, 2003 at the age of 68 years. He suffered from pancreatic cancer for which there was no cure and very little treatment. Mr. Mullen's daughter visited him regularly during this time. One day while she was there Ms. Wright walked into the room and she saw a look come across her father's face that she had not seen before. In response to an inquiry from her as to what was wrong he replied, "I don't like that woman, she scares me - I don't want her anywhere near me - something bad has happened". He then quickly changed the subject.

[30] A few days later when her daughter was again visiting him with her brother he described Ms. Wright touching his penis while she was bathing him and saying, "I bet your Mr. Business has had a lot of experiences in his life". The daughter had never heard him refer to his private parts by that name. She had never heard her father react in that way before as he said the same

thing over and over. She was concerned that it might be due to the medication he was on but ultimately concluded that the event had genuinely happened and was not a figment of his imagination.

[31] After this revelation the family members had a chat about what they were going to do. She says he did not want the same thing to happen to someone else; someone who was not emotionally up to it. They were all quite upset by the experience. Her father decided to report the matter and told her later that he had done so to the nurse on duty and the unit manager.

[32] The duty nurse testified as to a conversation with Mr. Mullen on August 22 in which she concluded he was very clear. He said he was hesitant to speak but he needed to tell her about an incident. He said he was hesitant because someone might be fired which was not his objective and he was concerned about how he might be treated in the future. He didn’t want to get anyone into trouble. He was concerned that if he revealed this matter other nurses might give him less care.

[33] He then went on to tell her that while Ms. Wright was washing him in the bathroom she flipped her hand at his penis making it swing and asked him, “How’s Mr. Business today?”. He later told the unit nurse when she pursued the matter with him that Ms. Wright had never done such a thing before but that she treated him in a flirtatious manner and made remarks that made him feel uncomfortable. The unit nurse made notes of these conversations later that same day.

[34] The unit manager visited Mr. Mullen on August 25 (a delay occasioned by Mr. Mullen having to go to the Cross Cancer Centre for radiotherapy) and took a recorded non-verbatim statement which Mr. Mullen later signed. In this statement he described the incident in the bathroom with Ms. Wright. He indicated that there was another caregiver in the room when the incident occurred, identifying who she was by description.

[35] Mr. Mullen had suffered a state of delirium prior to these events. One of his physician’s testified before the Board that in her opinion the kind of statements he was alleged to have made would not be a product of his medical condition, that hallucinations, if experienced, were usually less complex.

[36] Mr. Forrester (a pseudonym provided by the Board), the second complainant, had never experienced confusion; he suffered from lung cancer. The unit manager questioned him on August 25, 2003 after being alerted by a nurse that Mr. Forrester had said something a little strange and out of character to her. In response to an inquiry as to whether Ms. Wright had treated him inappropriately he stated that she had come into his room and said, “Ok-get naked” and “I bet you have been with a lot of women - I thought it would be worn out”.

[37] The unit manager made arrangements to make a non-verbatim record of this incident which he did on August 28, 2003. Mr. Forrester signed this record. He stated that he felt his care was being compromised because of his having discussed the incident and that staff members were whispering about him. In the signed statement Mr. Forrester identified another person, Ali,

who was present when the incident occurred. He stated that he felt guilty for telling about the incident and that he wouldn't want Ms. Wright to lose her job, that she probably needed it.

[38] Ms. Wright testified before the Board. She had worked in the healthcare industry for 30 years, first as a nursing assistant in England and then in Edmonton, culminating in 8 years of service at the Edmonton General. She had taken two years of a registered nurse's training. She denied that any of these comments or actions took place. She denied outright ever making comments to patients of a sexual nature, even by innuendo.

[39] The Board admitted the hearsay evidence of the information provided by Mr. Mullen and Mr. Forrester after finding it was both necessary and reliable. It made adverse credibility findings against Ms. Wright. Neither these credibility findings nor the weight which the Board attributed to these hearsay statements is in issue in this application for judicial review. The issue relates to the admission of these statements only.

[40] The Board observed that the current principles governing the introduction of hearsay statements in exceptional circumstances were described by the Supreme Court of Canada in ***R. v. Khan*** [1990] 2 S.C.R. 531 where McLachlin, J. (as she then was) stated at 546-7:

> The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.
>
> The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.
>
> In determining the admissibility of the evidence, the judge must have regard to the need to safeguard the interests of the accused. In most cases a right of cross-examination, such as that alluded to in *Ares v. Venner*, would not be available. If the child's direct evidence in chief is not admissible, it follows that his or her cross-examination would not be admissible either. Where trauma to the child is at issue, there would be little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination...in most cases the concerns

> of the accused as to credibility will remain to be addressed by submissions as to the weight to be accorded to the evidence, and submissions as to the quality of any corroborating evidence.

necessity:

[41] The death of a potential witness has been accepted as meeting the criterion of "necessity"; see ***R. v. Smith*** [1992] 2 S.C.R. 915 at para. 36.

[42] The Board accepted that the necessity component of this test was met by the fact that the two patients were then dead and that there were no other persons whose evidence might be capable of providing the proof in question by direct evidence.

[43] The Applicant challenges this conclusion. It argues that there was another person present in the vicinity when each of the incidents complained of occurred but that the Respondent called neither of them as a witness during the hearings before the Board. In the notes taken by the unit staff Mr. Mullen is described as having identified "a dark-haired girl with a French accent - normal size" with a lighter skin color who was in the bathroom, over by the door "at moveable table" when his incident occurred. Mr. Forrester's signed statement indicates, "Ali was there. She sang the song (Ali) I guess she heard me say devil woman and mentioned there was a song."

[44] The Applicant argues that the reception of the hearsay evidence was not justified by necessity because there was, or could have been, someone else who could have provided direct evidence regarding the facts in issue. If these two women had been questioned they might have recalled the incidents and could have described what had occurred.

[45] The Respondent replies that there is nothing to show that it failed to identify and interview these women. The fact that neither appears to have been called is as equally consistent with the conclusion that when interviewed they had nothing of assistance to say as with the conclusion that the Respondent failed to consider calling them to testify. It argues that this conclusion should be implied from the finding at para. 16 of the decision:

> The Employer argues that the necessity component of the test in this case is met by the fact the two patients involved are now dead. We accept that proposition subject only to our noting that there are also no other persons whose evidence might be capable of providing the proof in question by direct evidence.

[46] No transcript was taken of the proceedings before the Board. There is nothing else in the Record which addresses this issue. While the Respondent's counsel at the judicial review application had also appeared during the proceedings before the Board, that was not the situation for counsel for Ms. Wright who had been represented by the Applicant's in-house counsel at those earlier proceedings.

[47] The Respondent carried the burden of proof before the Board which included the obligation to establish necessity. As each of the two written hearsay statements clearly identified a possible “eyewitness”, the Respondent would have had to establish those persons could not assist the Board by testifying to the incidents before that burden would have been discharged. The written summaries of the hearsay statements were central to this issue. It is highly unlikely that this issue would be missed before the Board only to be raised for the first time on judicial review. I find that the Board’s conclusion that there were no other persons whose evidence might be capable of proof of the question shows that the issue was raised before it.

[48] Unless this is a case where an adverse inference should be drawn against the Respondent because these potential witnesses did not testify the Board made no error in concluding that the admission of the hearsay statements was necessary. I conclude that no such adverse inference should be drawn because, in the absence of a record of the proceedings before the Board, it is not certain why these employees did not testify or, if they did, that they were not questioned on this issue. There is nothing to show that these women, if present, overheard the statements in question, i.e. that they would be able to provide material evidence had they been called. Further, the Respondent was not shown to have sole control over these witnesses. These requirements for a finding of adverse inference are identified in *The Law of Evidence in Canada* , J. Sopinka, S.N. Lederman and A.W. Bryant which states at p. 297:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party’s case, or at least would not support it.

[49] The *Labour Relations Code* gave the Board the power to compel a witness to attend a hearing and give oral evidence. The Applicant could have requested the Board to compel their attendance at the hearing if they were not willing to attend voluntarily. The Respondent employer did not, therefore, have total exclusive control over these witnesses.

[50] Accordingly, the Board was correct in concluding that necessity had been established in relation to the admission of the hearsay statements.

reliability:

[51] The second component of the requirement for the admissibility of hearsay evidence is that the evidence be reliable. In ***Smith*** at p. 604 the Supreme Court of Canada made clear that a hearsay statement is only “reliable” if it was made “under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken”. An investigation of reliability must therefore address the declarant’s capacity to observe, recollect and communicate

as well as his perception, memory and credibility; see ***R. v. Meaney*** (1996) 111 C.C.C. (3d) 55 at 79-80 (Nfld. C.A.); leave to appeal denied [1996] S.C.C.A. No. 591.

[52] The Applicant argued that the Board was mistaken when it concluded that the hearsay statements were reliable for the following reasons:

a. The reported evidence of Mr. Forrester was unreliable because that evidence showed he disliked her because she was not responsive to his requests including on one occasion where she took over one hour to comply with his request to replenish his mobile oxygen bottle. Other evidence showed that she was involved in an emergency with another patient through that period and that Mr. Forrester had access to a wall-mounted source of oxygen at all times. Ms. Wright also testified that Mr. Forrester had used a racial epithet, calling her a nigger when he spoke to her in anger on one occasion. The Board specifically rejected that evidence as incredible after observing that the RN on duty to whom she testified that she mentioned the comment, Delores Selinger had no memory of it, and that it was unlikely that Ms. Wright would have overlooked it during the extensive interviews conducted with her by management, only to raise it for the first time in her evidence before the Board.

b. Mr. Mullen had been recorded as being drowsy and confused as late as August 20. His physician then reduced the dosage of a medication he was receiving which she expected would result in these side effects disappearing within 24 to 48 hours. However, one of the other nursing assistants who testified, Ms. Duong, stated that he was equipped with a bed alarm on August 22, 2003 because he was confused and in danger of falling.

[53] The Board noted in its decision on page 28 that it had concerns with regard to the date on which the event with Mr. Mullen was said to have occurred. It was raised with the authorities on August 22 but he had already discussed it with his family by that time and could not pinpoint the date when it had occurred. It accepted that there was good evidence that he was cogent on the 22nd but that he had gone through a period of confusion and toxicity before that, raising the possibility that the event occurred or in his mind was thought to occur while his thinking was impaired.

[54] The Board nonetheless observed that Dr. Taube opined even if Mr. Mullen were suffering from the side effects of medication it was unlikely that he would have hallucinated a situation with the type of detail contained in his complaint. Most importantly, in concluding that he was telling the truth, the Board noted that there was no evidence to suggest that he and Mr. Forrester had coordinated their efforts in any way, and that there was no reason to be concerned about the credibility of Mr. Forrester's evidence. It stated:

> We agree with the Employer that the chance of two gentlemen bringing forward similar complaints about an employee's conduct, each unrelated to the other, is itself improbable.

[55] The Applicant argues that the Respondent's failure to call the "dark-haired girl with a French accent" to testify may indicate that such a person does not exist and that therefore she was a figment of Mr. Mullen's imagination, another sign of cognitive impairment. This conclusion is speculative to say the least.

[56] The Board's analysis of reliability of the evidence of Mr. Mullen and Mr. Forrester also included:

a. a rejection of Ms. Wright's evidence on important points; it noted that her evidence was contradicted by virtually every other witness who testified including witnesses she called on her own behalf in relation to her character; somewhat surprisingly the other witnesses painted her to be a much more approachable and compassionate person than she portrayed herself to be;

b. consideration of the written records of the evidence made shortly after the complaints were received, albeit not verbatim records;

c. that both men were in the last days of their lives and were dependent upon their caregivers; they were each reluctant to complain for fear of their complaints affecting their care;

d. that both men's emotional state while approaching death would have disinclined them to raise any concerns unless they were serious;

e. that the written statements were taken by hospital staff who were not shown to have had a motive for either fabricating or omitting anything;

f. that Mr. Mullen first complained to a family member and it was only after a family discussion that he decided to report it to the authorities; he expressed reluctance to complain;

g. that the two men did not know one another and so there was no occasion for them to have fabricated a joint tale; the Applicant argued this was an error because the men, as patients in the same ward, would have shared the same common area in that ward and thus could have had the opportunity to discuss these matters together but there is no evidence that they were ever out of their rooms in the common area at the same time;

h. consideration of evidence that Ms. Wright had engaged in similar conduct in relation to another patient, Mr. Jackson, a situation which was not the subject of complaint or discipline; and,

i. the evidence of the unit nurse to whom Mr. Mullen made his complaint that Ms. Wright had a reputation for including sexual innuendo in her conversation with staff, families and patients on a regular basis which made people uncomfortable although she had never

> spoken to Ms. Wright about this conduct; Ms. Duong, another palliative care nursing attendant, testified that she had never heard Ms. Wright refer to things in a sexually inappropriate way in 8 years of working with her but Ms. Inez Viera told two of the staff investigating these matters that "Ms. Wright could be quite funny at times and at one time [gave] Mr. Jackson's penis a name", although Ms. Viera did not recall making this statement when testifying before the Board; the Board accepted the evidence that Ms. Wright was observed to often engage in the type of conduct and comment which formed the subject of these complaints.

[57] The Board heard the direct evidence of all witnesses other than the two deceased complainants. It was in the best possible position to consider and assess the credibility of those witnesses.

[58] As such the Applicant has not established that Ms. Wright did not receive a fair hearing in relation to the issue of just cause for discipline. There has been therefore no reason established to grant judicial review on this issue.

[59] This conclusion is not affected by the Board's failure to conduct a ***Khan*** analysis of each individual oral and written statement made by each of the two complainants. Rather the Board considered all of the statements and concluded that despite certain inconsistencies they were sufficiently reliable. The Applicant argued that the Board erred in arriving at this conclusion, in failing to conclude that the evidence of what was said was unreliable because there were differences between what appeared in the duty nurse's notes of Mr. Mullen's complaint and the unit manager's record, the latter ultimately being signed by Mr. Mullen. In one version he was said to have stated that the event occurred when he was being washed in bed and there was another person present while in another he said he was being washed in the bathroom by Ms. Wright alone.

[60] The Board in its decision expressly noted that these inconsistencies existed but nonetheless concluded that the gist of them was sufficiently reliable to meet the test of admissibility. It then went on to find that Ms. Wright was not a credible witness, weighing these statements as sufficiently reliable to found the termination.

[61] The differences between the versions of these statements did not arise in relation to the offensive statements and conduct themselves but rather the circumstances surrounding the event. They may have arisen as no verbatim statement was taken on either occasion. What the Board considered were summaries of the complaint recorded by different persons.

[62] In any event the Board heard the *viva voce* evidence which was available. It assessed the reliability of the hearsay statements against that evidence. It was in a better position to assess credibility and reliability than is this court on an application for judicial review. In any event this was not a criminal prosecution in which differences between statements taken on oath may raise a reasonable doubt.

b. the reliance on Ms. Wright's denials and lack of remorse when declining to substitute a lesser penalty for that of termination of her contract of employment

[63] Upon finding that the Respondent had just cause to discipline Ms. Wright the Board had a broad discretion to substitute a penalty; see *Labour Relations Code* s. 142(2). The Applicant takes issue with the results of the exercise of that discretion arguing that the Board should have reinstated Ms. Wright after perhaps a period of suspension, rather than confirming her termination but adding the payment of four months salary.

[64] The Board noted that Ms. Wright had a very satisfactory record of employment but for the situations that lead to her discipline, concluding that she did a difficult job well. It expressly observed that it might have been inclined to substitute a suspension for termination, with a relocation to a less sensitive work area "had we found Ms. Wright's evidence more persuasive and had she given an indication of recognizing the inappropriateness of such humour in circumstances like these"; see para. 117 of the Board's decision.

[65] The Applicant argues that the Board breached the principles of natural justice by considering the fact that Ms. Wright denied the incidents in question in determining whether it should exercise its discretion to modify the discipline imposed by the employer. A denial of guilt and lack of remorse cannot be considered as aggravating factors with respect to a criminal sentencing, by way of analogy, although a plea of guilty and an apology can act in mitigation of sentence. A similar philosophy of penalty is applied in professional discipline situations; see ***College of Physicians and Surgeons of Ontario v. Gillen*** (1990) 1 O.R. (3d) 710, aff'd (1993) 13 O.R. (3d) 385 (C.A.). Arbitration authority also exists to the effect that it is inappropriate to consider an employee's untruthfulness in testifying when considering penalty; see ***Cannet Freight Cartage Ltd. and Teamsters Union, Local 419*** (1993) 35 L.A.C. (4th) 314.

[66] However, in ***Medicine Hat (City) v. Canadian Union of Public Employees, Local 46*** [2001] A.G.A.A. No. 73 at paras. 81-84 the arbitrator also substituted an award of four months pay rather than reinstate upon finding there had been a lack of candor or truthfulness resulting in a lack of trust in the employment relationship; see also ***Tolko Industries Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-207*** [2003] A.G.A.A. No.97 at para. 43 and ***Conagra Ltd.-Lamb-Weston Division v. United Steelworkers of America, Local Union 6034*** [2004] A.G.A.A. No. 62 at paras. 109-110.

[67] The Board's conclusions in full reveal its decision not to reinstate was imposed not because Ms. Wright denied the conduct in question in her testimony but because her conduct and evidence throughout lead to a breakdown in the employment relationship. It was her lack of recognition of the inappropriateness of the alleged behavior in the circumstances in which she worked which lead to a concern that it might be repeated and thus increase the risk of harm to a vulnerable population, dying men in palliative care.

[68] I agree. The Board stated at p. 26 of its Reasons:

> It is unfortunate that the evidence of Ms. Wright's personality tended to focus, unduly in our view, on whether she was a good or bad person; on whether this devout Christian woman could possibly have done such things. This polarization does insufficient justice to Ms. Wright or to the nature of the allegations about her conduct. Ms. Wright is not alleged to have been evil or malicious with patients, or to have any sexual agenda of her own in respect of her patients. Rather, the nub of the charges against her are that she was insensitive in dealing with patients in that she injected a mildly risqué form of humour into situations where it was inappropriate to do so.
>
> Despite a tendency on Ms. Wright's part to present herself in evidence in a somewhat dour and reserved way, we conclude from the evidence of virtually every other witness that she was generally fun to be around and could be humourous with the people she dealt with. In most circumstances that is a very positive trait, and we are sure that Ms. Wright's good humour and direct manner were what endeared her to members of staff, patients and their families. But not everybody has the same sense of humour and not every situation is appropriate for its use. It is well known that those who have to deal with death and tragedy in their work often develop coping mechanisms using humour to help deal with the emotions they are exposed to as part of their job. Not every conversation between police officers, surgeons, emergency room personnel or paramedics would benefit from the light of day. The problem is not with the humour itself but with its exposure to the persons whose circumstances became the subject of that humour.
>
> What we found most difficult to accept in Ms. Wright's own testimony is any reflection of the character others described. Her evidence was not that she said things but without malicious intent, or that people exaggerated or misunderstood her humour. Rather she adopted a stance of almost total denial which lacked the ring of truth when contrasted with the other evidence of her general demeanour.

[69] I accept that arbitrators, when reinstating grievors, must consider the employment relationship into which the employee is to return. The attitude of the employee including her willingness and ability to change to address the problems which lead to her being the subject of discipline is a proper consideration when addressing penalty. The Board did no more than undertake this obligation in making the comments it did in para. 117 of its Reasons. It made no reviewable error in so doing. It made no error at all.

Conclusion:

[70] This application for judicial review is dismissed.

Costs:

[71] Costs may be spoken to if necessary.

Heard on the 21st day of June 2006.
Dated at the City of Edmonton, Alberta this 21st day of July 2006.

M.B. Bielby
J.C.Q.B.A.

Appearances:

David Williams and Vanessa Cosco
for the Applicant

Frederick A. Day, Q.C.
for the Respondent