ONTARIO LABOUR RELATIONS BOARD

2370-11-G Universal Workers Union, Labourers' International Union of North America, Local 183, Applicant v. **Dominion Forming Inc.,** High-View Forming Inc., High-View Structures Inc. and High-View Forming (1995) Inc., Responding Parties.

BEFORE: Ian Anderson, Vice-Chair.

APPEARANCES: James Robbins, Brendan McCutchen, Jaime Ortiz, John Salvador, Jack DaSilva and Luis Andrade for the applicant; Stephen Bernofsky, Richard Cushing, Greg Samoyloff, Marco Saverino, Pasquale Di Franco and Nick Spina for the responding parties.

DECISION OF THE BOARD: July 12, 2013

1. This is a referral of a grievance pursuant to section 133 of the *Labour Relations Act, 1995*.

2. This case arises out of a disputed workers' compensation claim. The applicant (the "Union") states that Luis Andrade (the "Grievor") experienced a compensable disabling accident on July 5, 2011 while working for the responding parties (the "Employer" or "Dominion") which caused him to leave work and prevented him from returning to active employment until November 4, 2011. The Union alleges Dominion interfered with the Grievor's workers' compensation claim by making false statements to the Workplace Safety and Insurance Board ("WSIB") which resulted in the denial of the claim. An appeal to the WSIB is pending with respect to that claim. The Union also alleges that Dominion unjustly terminated the Grievor's employment on or about August 24, 2011 when it issued a Record of Employment indicating that the Grievor had quit. It seeks a declaration that the Grievor was unjustly discharged and damages which it quantifies as the equivalent of the WSIB benefits to which the Grievor would be entitled.

3. Dominion does not accept that the Grievor experienced a compensable accident on July 5, 2011. It denies it interfered with his WSIB claim. Dominion states given the Grievor's absence from work and failure to respond to an offer of modified employment made on July 15, 2011 it correctly concluded that he had quit his employment. It was, therefore, entirely appropriate that it issued the ROE on August 24, 2011. It argues that the Board has no jurisdiction to award WSIB benefits.

The Jurisdictional Issue

4. It is useful to commence by defining the scope of the Board's jurisdiction to address the issues raised by the parties and hence the scope of the inquiry in which the Board is engaged.

5. The grievance raises the question of whether the Grievor quit or was terminated contrary to the collective agreement. This is clearly a matter within the jurisdiction of the Board and Dominion did not suggest otherwise.

6. It is also important to note that Dominion did not and has not alleged that it discharged the Grievor for cause. In particular, there is no allegation that it terminated the Grievor for making a fraudulent claim to the WSIB. Rather, Dominion's position is that the Grievor quit his employment.

7. The Union does not seek reinstatement for the Grievor. Further, the Union does not claim any loss of wages for the period July 6 to November 4, 2011. Rather, during this period the Union asserts that the Grievor was totally disabled or otherwise entitled to full benefits under the *Workplace Safety and Insurance Act* ("*WSIA*") and seeks an order to that effect.

8. At the outset of the hearing, I expressed the view that a claim for workers' compensation benefits must be pursued under the *WSIA*. During the course of the hearing, two decisions were issued directly on point and of which I advised the parties: *OPSEU v. Ontario et al.*, 2012 ONSC 2348 (Div. Ct.); and *ATU Local 113 v. Toronto Transit Commission, (Mirabal Grievance)*, 2012 OLAA No. 553 (Howe).

9. In *OPSEU v. Ontario*, the Divisional Court dismissed an application for judicial review of the Grievance Settlement Board ("GSB"). The GSB's decision was with respect to approximately 235 grievances which sought unspecified damages from alleged exposure to second hand smoke. Some of the grievors had sought compensation under either the *Workers' Compensation Act* ("*WCA*") or the *WSIA*. Some of the grievors had yet to exhibit specific health problems but were concerned about the long term health effects of exposure. The employer brought several preliminary objections to the grievances, one of which was that the GSB had no jurisdiction to consider fault-based claims pertaining to compensable accidents by virtue of section 16 of the WCA and section 26(1) of the WSIA. The GSB concluded (at para. 110):

> I find this Board cannot award a grievor damages "for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer" if the alleged accident or disease is or was compensable under the WCA or WSIA, whichever applies.

The union applied for judicial review.

10. The Court determined that the applicable standard of review was reasonableness, but also commented that in its view the decision of the GSB was correct. Accordingly, it is worth setting out the relevant parts of the Court's description of the GSB's decision in some detail. The Court stated:

> [9] Following an extensive review of case law, at para. 83, the Vice-Chair concluded that the Board had jurisdiction to award damages in respect of violations of the health and safety provisions of collective

agreements but that this power was subject to the limitations imposed by the *WCA* and the *WSIA*.

[10] Sections 16 and 17 of the *WCA* state:

> 16. The provisions of this Part are in lieu of all rights and rights of action, statutory or otherwise, to which a worker or the members of his or her family are or may be entitled against the employer of such worker, or any executive officer thereof, for or by reason of any accident happening to the worker or any occupational disease contracted by the worker on or after the 1st day of January, 1915, while in the employment of such employer, and no action lies in respect thereof. (Emphasis added [by the Court].)
>
> 17(1). Any party to an action may apply to the Appeals Tribunal for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, or whether the action is one in which the right to recover damages, contribution, or indemnity is limited by this Part, and such adjudication and determination is final and conclusive.

[11] The *WCA* was repealed in 1998 and replaced by the *WSIA*. Section 26 of the *WSIA* states:

> 26. (1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.
>
> (2) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer. (Emphasis added [by the Court].)

[12] The Vice-Chair rejected the Union's argument that the *WCA* and the *WSIA* restrictions only applied to tort and not to contract. He observed that the historical trade-off embodied in the two Acts was that the employer's contributions to the compensation fund protected it from liability for compensable workplace injuries. Whether pleaded in tort or in contract, the substance was the same.

11. Later in its decision, the Court observed:

> [30] In his decision, the Vice-Chair found that the "Board cannot award a grievor damages 'for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer' if the alleged accident or disease is or was compensable under the *WCA* or *WSIA*, whichever applies." The Vice-Chair did not find that the *WCA* or the *WSIA* foreclosed all grievances under the health and safety provision in the collective agreements. The Vice-Chair, at para. 111 of his decision, correctly observed that "the proper question is whether an injury or illness of the sort alleged by the grievor(s) would be or would have been compensable under the applicable statute if proven". His interpretation left alive a potential monetary remedy for a breach of the health and safety provision of the collective agreements such as for proven property loss or damage.

12. In *Toronto Transit Commission* the grievor had suffered a workplace injury on October 31, 2006 for which he had received benefits under the *WSIA*. The issue was whether additional remedial relief could be awarded under the collective agreement. Arbitrator Howe first concluded that the workplace injury was the product of several breaches of the provisions of the *Occupational Health and Safety Act* and that those provisions were implicit in the collective agreement and thus enforceable through the grievance procedure. Arbitrator Howe then considered the extent of the remedial relief which he could grant. Following a review of the jurisprudence, Arbitrator Howe adopted the reasoning and conclusions of the GSB and the Divisional Court in *OPSEU v. Ontario*. He then stated:

> Although section 26(2) of *WSIA* precludes awarding damages in respect of the grievor's injury, as indicated by Arbitrator Gray in paragraph 108 of that decision it does not preclude an arbitral award of declaratory or directory remedies if granting such remedies might serve a useful purpose.

13. I also agree with and adopt the reasoning of the GSB and the Divisional Court in *OPSEU v. Ontario*. (I note as well that the Court of Appeal has now dismissed an appeal from the decision of the Divisional Court and also held that the conclusion of the GSB was correct: see 2013 ONCA 406 (CanLII).) This Board cannot award a grievor damages "for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer" if the alleged accident or disease is or was compensable under the *WCA* or *WSIA*, whichever applies.

14. The Union argues, however, that it is not seeking damages for or by reason of the accident. Rather it is seeking damages for or by reason of the employer's interference with the grievor's claim for workers' compensation. It argues that this is a separate cause of action. It notes that in *OPSEU v. Ontario* the GSB held, and the Court concurred, that a violation of the health and safety provisions constituted a separate cause of action which gave rise to the potential for additional monetary damages. It relies upon *Hotel-Dieu Grace Hospital v. ONA*, (2004) 133 LAC 4th 1 (Watters); *Street v. Ontario Racing Commission* [2005] OJ No. 3908; *ICG Utilities*, (1989) 8 LAC 4th 289 (M.H. Freedman);

Hamilton Health Sciences, (2009) 188 LAC 4th 327; and *Barkley v. Sooter Studios*, 2001 BCSC 476.

15. In *Street v. Ontario Racing Commission* the defendant was found negligent for failing to ensure that workers' compensation coverage was in place. Given that the worker in question was not covered by workers' compensation, the effect of having such coverage on any cause of action by the worker was not considered. I do not find it of assistance.

16. Similarly, none of *ICG Utilities*, *Hamilton Health Sciences*, and *Barkley v. Sooter Studios* is of assistance. In each of these cases the claim was with respect to interference in a long term disability claim, not a workers' compensation claim. Accordingly, the effect of workers' compensation entitlement was not at issue.

17. The allegations in *Hotel-Dieu Grace Hospital v. ONA* in many ways resemble the allegations in this case. As in this case, the grievor alleged the employer had made false statements to the WSIB which resulted in disallowance of a claim for workers' compensation. The grievance, however, did not seek any form of monetary relief (see para. 6). The employer argued that question fell within the exclusive jurisdiction of the WSIB. Arbitrator Watters concluded that he did have jurisdiction to review whether the employer had knowingly made false or misleading statements to the WSIB in connection with the claim because: "Such a review is relevant to the issue of whether the Employer engaged in a course of conduct which amounted to harassment due to handicap contrary to article 3.04 of the collective agreement." I also note that in that case the grievor's claim for benefits had been approved by the WSIB at the time of the arbitration hearing.

18. In this case, the current status of the Grievor's claim for benefits to the WSIB is that it has been denied by initial level decision makers at the WSIB. Further, unlike *Hotel-Dieu Grace Hospital v. ONA*, the grievance seeks monetary damages. I have significant concerns that to the extent that the grievance advances an argument of interference with the Grievor's workers' compensation claim resulting in a decision denying that claim, it is an attempt to appeal that decision and obtain workers' compensation benefits. I note in this respect that the damages sought are the equivalent of workers' compensation benefits to which the Grievor would be entitled under the *WSIA*. Alternatively, the Union seeks declarations that there was a workplace accident giving rise to a compensable injury within the meaning of the *WSIA* and further a direction that the employer rescind its submissions to the WSIB to the contrary. As stated in *OPSEU v. Ontario* (both in the GSB and the Court decisions), a claim which is in substance a claim for entitlement to workers' compensation benefits falls within the exclusive jurisdiction of, in the first instance, the WSIB and, in the second instance, the WSIAT.

19. To the extent that the grievance does advance a claim for wrongful interference with entitlement to workers' compensation benefits, I have not been provided with legal authority to establish that such an independent cause of action exists. In this respect, I note that Dominion asserts that there is no basis in law for damages for interference by an employer with a worker's economic relationship with the WSIB. In any event, for all practical purposes it appears to me that a claim for damages arising from interference

with the workers' compensation claim presupposes that the Grievor is entitled to receive benefits from the WSIB or, at the very least, whether the Grievor is entitled to such benefits would appear likely to be a significant factor in the measure of any such damages. Once again, this is an issue within the exclusive jurisdiction of the WSIB and the WSIAT. Accordingly, I reserve on this issue pending being advised of the final disposition of the Grievor's appeal under the *WSIA*.

20. The Union seeks damages for mental distress based upon the reasoning of Arbitrator Shime in *Greater Toronto Airports Authority v. PSAC, Local 004*, (2010) 191 LAC 4th 277, application for judicial review allowed in part 2011 ONSC 487 (Div. Ct.). The Divisional Court held that there were two bases on which damages for mental distress can be claimed in contract. First, if it was established that one of the objects of the contract was to provide a particular psychological benefit, then damages for mental distress would be recoverable if they were within the reasonable contemplation of the parties when the contract was made (see para 58). Later, the court stated:

> [101] Generally, arbitrators have refused to award damages for mental distress. Those who have done so based their decision on the nature of the particular clause that had been breached and that led to the grievance. For example, the Public Service Grievance Board of Ontario awarded $20,000.00 in damages for mental distress where the grievor had been a victim of racial harassment, contrary to a contractual right to be free from racial discrimination. The Board held that such a term created an expectation of a psychological benefit, as it was meant to protect the dignity of an employee. Therefore, its breach would be expected to cause mental distress (*Ontario (Ministry of Community Safety and Correctional Services) and Charlton (Re)* (2007), 162 L.A.C. (4th) 71 (D. Carter) at p. 83). Notably, the Board observed (at p. 83):
>
> > Clearly not all terms and conditions of employment create the expectation of a "psychological benefit", and damages for mental distress are only available for breach of this type of contractual term.
>
> [102] Union counsel argued that the arbitrator here relied on particular terms of the collective agreement as creating a psychological benefit, such as the provisions relating to sick leave that were breached. However, the arbitrator's reasons are not rooted in that part of the agreement, for he speaks of a main purpose of the collective agreement to provide a psychological benefit of gainful employment (Award, p. 121).
>
> [103] We were referred to no case that has held that a principal object of a collective agreement is to secure psychological benefit and mental security, and there is no evidence cited to indicate why these parties would have contemplated this agreement to be a contract for psychological benefit. Indeed, in *Wallace*, *supra*, the Supreme Court had stated that an employment contract has not been regarded as a peace of mind contract.

21. So, in this case, the Union referred to no particular term of the collective agreement in its submissions seeking damages for mental distress. Further, there was no evidence that the parties to the collective agreement contemplated that it was a contract for psychological benefit. Accordingly, the claim for damages for mental distress cannot succeed on the first basis.

22. The second basis upon which the Divisional Court held damages for mental distress may be awarded is if the circumstances of the particular grievor are such that he or she is vulnerable to mental distress if the employer acts in bad faith in the manner of dismissal: see para. 106 -109. In this respect, it is worth noting that the grievor in the *GTAA* case was a particularly vulnerable person. She had, to the knowledge of her employer, suffered significant personal problems in her life, including mental, physical and sexual abuse by her former husband and had at one point taken a two month absence from work because of a "mental breakdown": see para 19. In this case, however, there was no evidence that the Grievor was particularly vulnerable to mental distress, let alone that the employer, which had employed him for less than a week before he left the workplace, had any knowledge of such issues. Further, there was little or no evidence that he experienced mental distress as a result of the dismissal. Accordingly, the claim for damages for mental distress also cannot succeed on the second basis.

23. Finally, the Union seeks damages for a breach of the *Human Rights Code* (the "*Code*").

24. There is, in this case, no issue of accommodation to be addressed: the Grievor claimed and claims to have been totally disabled up until the date of termination of his employment and beyond and in any event did not seek accommodation from the employer. There is, however, an issue of whether the Grievor's employment was terminated because of disability. If it was then there has been a breach of the *Code* and the claim for damages under the *Code* must be addressed.

25. The issues in this case, therefore, are whether the Grievor quit his employment or was discharged without cause and if he was discharged whether there was a breach of the *Code*.

Admissibility of Medical Reports and Documents from the WSIB File

26. During the course of the hearing Dominion objected to the admissibility of medical records in relation to the Grievor on the basis that they constituted hearsay statements. Similarly, Dominion objected to the admissibility of certain documents from the Grievor's WSIB file on the basis that they too were hearsay. Dominion conceded that the Union had advised it of its intention to rely upon and had provided both sets of documents to it well before the hearing. Dominion also stated that it did not challenge the authenticity of the documents. Dominion stated, however, that it was unable to read some of the records without the authors being produced for cross-examination.

27. The Union took the position that Dominion's objection was not being made in a timely way. The Union also noted that this was not a WSIB case; rather it is a grievance in which the issue is whether or not the Grievor had quit. The Union argued

that the medical documents were material to the issue before this Board in that they showed that the Grievor was seeking medical attention, reporting pain and giving a history of a work related accident.

28. The documents were received subject to the right of the parties to make argument about their admissibility. This issue was not pursued until final argument.

29. Dominion argues the fact that it objected to the admissibility of the documents at the time they were tendered as exhibits on the basis of their hearsay nature and stated it was unable to agree to the authenticity of the documents because it had not been given an opportunity to cross examine their authors constituted sufficient notice to the union of the need to produce their authors for cross-examination. Dominion concedes that at no point did it specifically request that the authors of the documents be produced for cross-examination. It argues, however, that natural justice required that the authors be called as witnesses and it be given an opportunity to cross-examine them. It cites: *Toronto District School Board*, 2007 CanLII 17454 (Albertyn); *Sammons & Channer Men's Clothing*, 1997 CanLII 15512 (Johnston); and *Abitibi Consolidated Inc.*, (2002) 103 LAC 4th 160 (Springate).

30. With respect to the WSIB records, the Union argues that they were admissible into evidence as "business records" pursuant to section 35 of the *Evidence Act*, citing *Toronto Community Housing Corp*., [2012] O.L.A.A. No. 622 (Snow).

31. With respect to the medical records, the Union argues they are admissible as medical "reports" pursuant to section 52 of the *Evidence Act*. Further, and in any event, the Union notes that section 48(12)(f) of the *Labour Relations Act, 1995* permits an arbitrator to accept evidence whether or not admissible in a court of law. The Union notes that arbitrators have adopted several approaches to this question, citing: *Toronto Transit Commission*, (1996) CLB 13533 (Backhouse); *Nitta Gelatin Canada Inc.*, 2009 CLB 26923 (Abramsky); *Toronto (Metropolitan)*, (1992) 25 LAC (4th) 73 (Springate); and *Miracle Food Mart of Canada*, (1996) 58 LAC (4th) 232 (Mitchnick). On the bases of any of these approaches it argues the reports are admissible. Alternatively, the Union argues that the reports are admissible pursuant to section 52 of the *Evidence Act* and if Dominion wished to cross examine the authors it was required to compel their attendance by means of subpoena or at the very least clearly advise the Union that it required the Union to ensure their attendance. Dominion, it argues, did neither.

Analysis with respect to Admissibility of Medical Records and Documents from the WSIB File

32. It is useful to set out sections 35 and 52 of the *Evidence Act*:

> 35. (1) In this section,
>
> > "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"record" includes any information that is recorded or stored by means of any device.

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

52. (1) In this section,

"practitioner" means,

(a) a member of a College as defined in subsection 1 (1) of the *Regulated Health Professions Act, 1991*,

(b) a drugless practitioner registered under the *Drugless Practitioners Act*,

(c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b).

(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action.

(3) Unless otherwise ordered by the court, a party to an action is entitled, at the time that notice is given under subsection (2), to a copy of the report together with any other report of the practitioner that relates to the action.

(4) Except by leave of the judge presiding at the trial, a practitioner who signs a report with respect to a party shall not give evidence at

> the trial unless the report is given to all other parties in accordance with subsection (2).
>
> (5) If a practitioner is required to give evidence in person in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay as costs therefor such sum as the court considers appropriate.

33. It will be apparent that there is an important distinction between business records subject to section 35 of the *Evidence Act* and medical reports which are subject to section 52 of the *Evidence Act*. A document which qualifies as a business record is admissible by virtue of section 35 provided appropriate notice has been given. By contrast, a medical report is admissible pursuant to section 52 with "leave of the court" and after appropriate notice has been given. The requirement for "leave of the court" introduces an additional criterion for the admission of medical reports not applicable to business records. In practice before the courts the opposing party can require the party tendering the report to produce its author for cross-examination.

WSIB Records

34. As argued by the Union, in *Toronto Community Housing Corp*., [2012] O.L.A.A. No. 622 (Snow), the arbitrator concluded that the WSIB is a business within the meaning of section 35, that the recording of factual information, as opposed to opinions, by WSIB employees constitutes a record of an "act, transaction, occurrence or event" and that it is the usual or ordinary course of the business of the WSIB that the making of such records would occur at the time of the act, transaction occurrence of event (see paras. 288-298). Accordingly the WSIB records were admissible for their truth pursuant to section 35 of the *Evidence Act*.

35. I agree with this conclusion with three caveats. First, in my view it is important to emphasize that only records of fact rather than opinion are admissible on this basis. Second, while admissible into evidence, the circumstances of the writing may nonetheless be such that, as contemplated by section 35(4), it be given little weight. Third, it does not follow that the entire contents of the WSIB's file are admissible as business records of the WSIB. In particular, documents submitted *to* the WSIB are not records made *by* the WSIB. Accordingly they are not business records of the WSIB. If such documents are admissible pursuant to section 35 it will be because they are business records of the person who submitted them to the WSIB.

36. Subject to the foregoing caveats I find that the WSIB records are admissible in these proceedings.

Medical Records

37. I begin by reviewing the authorities provided by the parties.

38. The reasons in *Toronto Transit Commission* are too brief to be of assistance to individuals who were not party to those proceedings.

39. In *Nitta Gelatin Canada Inc.* objection was taken to the admission of a report signed by a psychologist but containing the results of tests conducted by another individual under the supervision of the psychologist. The individual conducting the tests did not testify. The opposing party objected to the report on the basis that it contained hearsay statements. Arbitrator Abramsky admitted the report on the basis of her discretion under section 48(12). In doing so, however, she relied in large degree upon the fact that the psychologist had testified and been subject to cross-examination. There are no similar facts in this case. Accordingly, I do not find *Nitta Gelatin* to be of assistance.

40. In *Toronto (Metropolitan)* Arbitrator Springate, concluded that the general arbitral practice was to accept medical reports into evidence without requiring the practitioner who had prepared the report to be called as a witness, particularly when, as here, notice had been given under the *Evidence Act*. Any concerns with respect to the report, he held, would go to weight.

41. In *Miracle Food Mart of Canada*, (1996) 58 LAC (4^{th}) 232, Arbitrator Mitchnick, accepted that the principle stated in *Toronto (Metropolitan)* may be appropriate, but only in limited circumstances:

> That way of approaching the matter, I would comment, might well be appropriate where the "medical" document is of such limited and peripheral value in any event that it can fairly be admitted and accepted at face value without the time, expense and inconvenience of bringing the doctor to the hearing: for example, where it simply confirms the date and/or occurrence of a medical appointment; or perhaps even where it sets out in purely objective terms a course of treatment. Where the medical report is in any way subjective and consequential, however, arbitrators ought to be loathe to give even the appearance of allowing themselves to be influenced by such evidence, without according the other side if it insists the traditional right, in line with "natural justice", to subject the evidence to cross-examination. And where the arbitrator can see that the content of the disputed report is such that, as a matter of fairness, he or she would have no intention of relying on it without further and better evidence, the party tendering the report ought to be advised of that, rather than simply having the report admitted by the arbitrator.

42. Arbitrator Mitchnick then turned to consider section 52 of the *Evidence Act*. Following a review of authorities he concluded that while a medical report may be admitted into evidence without the necessity of calling the practitioner who authored it, if the opposing party wishes to cross-examine the practitioner then in general the party tendering the report will be required to produce the practitioner as a witness for that purpose. Arbitrator Mitchnick also expressed the view that as part of an arbitrator's overall discretion with respect to the control of the proceedings, in circumstances similar to those described in section 52(5) an arbitrator could properly order the opposing party to pay the costs incurred by the party producing the practitioner.

43. When Arbitrator Springate had occasion to revisit this question in *Abitibi Consolidated Inc.*, he specifically departed from the approach which he had previously

followed in *Toronto (Metropolitan)* and adopted the approach described by Arbitrator Mitchnick in *Miracle Food Mart of Canada*.)

44. In *Toronto District School Board* Arbitrator Albertyn approached the question as one of discretion informed by considerations of procedural fairness and natural justice. Having regard to the nature of the documents (which were in essence medical-legal reports, a term which I discuss further below) and the issue before him, he concluded that natural justice required that the documents would only be admitted if the doctor who made them was called by the party tendering the documents.

45. In my view, in determining whether to admit medical records it is important to consider both the nature of the medical record in question and the purpose for which it will be used. In particular, it is useful to distinguish between chart entries and a medical legal report.

46. A chart entry is a record made at the time by a health care practitioner in the course of his or her examination or treatment of a patient. This point is illustrated by consideration of a standard medical examination by a physician. The record of such an examination will generally consist of chart entries which have the following four components: subjective data, i.e. information provided by the patient which will include the presenting complaint and may include a history; objective data, which will include the physician's findings based on physical examination and review of test results or consultation reports if available; the physician's assessment which will include a diagnosis or tentative diagnosis (other terms may be used, including "impression" or "opinion"); and the plan for the patient, which may include a description of management options discussed, medication or treatments prescribed or referrals for tests or to other consultants. Arrival at a diagnosis or tentative diagnosis is a necessary part of the process: it is what determines the plan for the patient. The practice of medicine simply could not exist without the making of such records on a contemporaneous basis. They are in some respects, as discussed further below, business records within the meaning of section 35(2) of the *Evidence Act*.

47. Not all documents generated by health care practitioners are analogous to charts. Most notably, a medical-legal report, or the like, generated for the purposes of litigation is not akin to a chart. It is not made in the usual and ordinary course of a health care practice. Rather it is generally produced at the request of one of the parties to litigation and expresses an opinion about the interaction between the patient's medical condition(s) and work, for example: whether the work caused the condition; whether the condition caused some conduct at work; whether the condition is likely to cause some sort of conduct at the work in the future; or what type of change would be required at work in order to accommodate the condition. A review of the cases provided by the parties shows that where arbitrators required the health care practitioner to be produced for cross-examination as a condition of admitting a medical "report", the report in question was more in the nature of a medical-legal report than a chart. In particular, this is true of the cases relied upon by Dominion: see paragraph 3 of *Toronto District School Board*; paragraph 21 of *Sammons & Channer Men's Clothing*. The one possible exception is *Abitibi Consolidated Inc.* In that case, only a brief description is given of the document in question: see paragraph 3. What is clear, however, is that it was dated

October 1, 2001 and contained a description of a prior examination on May 4, 2001. That is, it was not made contemporaneously in the manner of a chart.

48. The statement that a chart is a business record is subject to several caveats. The first is that, statements in the subjective data portion of a health practitioner's chart, while recorded by the practitioner, are made by the patient. It is not the patient's usual or ordinary course of business to make such statements. They are not inherently reliable. They are therefore hearsay statements if tendered for their truth. The second is that to the extent that the chart is tendered as a record of the assessment of the treating health care practitioner, it may be more appropriate to apply section 52 of the *Evidence Act*. Both of these issues were addressed in *Adderly v. Bremner*, [1968] 1 O.R. 621 (Ont. H.C.):

> A serious question has been raised as to whether certain parts of the hospital records are admissible under s. 35a [now section 35] of the *Evidence Act*, R.S.O. 1960, c. 125, as amended by the *Evidence Amendment Act*, 1966, c. 51, s. 1, and I turn to that question at this time. Broadly speaking the objection is to those parts of the hospital record which are statements of opinion, diagnosis or impressions, and statements of events which occurred outside of hospital, being events which preceded the patient's admission to hospital as contained in the hospital history sheet.
>
> Dealing with the second aspect of the objection. Is the history taken on admission of the patient or while in the hospital of events preceding admission to the hospital admissible under this section? If it is admissible, is it for a limited purpose or is it admissible as proof of the truth of its content? If the words of the section [s. 35a (2)], "act, transaction, occurrence or event" relate to the particulars of admission of the patient, that is the time, the place and any services that were rendered to the patient at that time, that is one thing, but it is quite another thing to extend the meaning of those words to a reported chronology of events which preceded the patient's admission to hospital. The section is restricted by its closing line to a writing or record made at the time of such act, transaction, occurrence or event. In my opinion, the effect of the concluding line of this section is conclusive and the objection must succeed.
>
> Further, while the facts with which he was dealing are not set out in the reasons for the decision respecting the admissibility of hospital records under this section, my brother Morand on September 22, 1966, in *Aynsley et al. v. Toronto General Hospital*, ante, p. 425 at pp. 431-2, 66 D.L.R. (2d) 575 at pp. 581-2, said:
>
> > By this amendment it appears clear to me that the Legislature intended to allow in evidence certain matters which could not be admissible without calling the witnesses to prove each particular item in a record. And, I am bearing in mind that this section would cover such diverse things as, perhaps, pages and pages of stockbrokers' dealings with a client, pages and pages of a credit company's business affairs, perhaps pages and

> pages of records of one of the big stores in the community where the records might have been made by as many as twenty or thirty different people; and in the ordinary course, perhaps we would have had to call all these people to make that record admissible. So, clearly, I think this section must mean that what would normally be considered hearsay by the Court, that is, a record, may be admitted without calling the person who made that record.

But he went on to say:

> Now, I think I must go to the words, 'any act, transaction, occurrence or event is admissible'. Clearly, I think that would mean that such routine entries in a hospital record as the date of admittance, the time of admittance, the name of the attending physician, the routine orders as to care of the patient such as the administration of drugs, notation by the nurse of taking temperatures, all of these things are 'acts, transactions or occurrences' which take place routinely and which are recorded routinely in the hospital.

I agree with these reasons. Further, I do not think that the intention of the Legislature was to permit a plaintiff to prove his case by introducing as proof of the truth of its content the history that may be amongst the hospital records -- being a history that the plaintiff or some other person had recounted on the plaintiff's admission to or while in hospital. Nor do I think it was the intention of the Legislature to open to a plaintiff a means of escaping the test of truth through cross-examination by resort to the hospital history record. Rather the intention of the section was to provide for proof in the restricted areas referred to by my brother Morand.

As to the question of the admissibility of the hospital record as proof of diagnosis, opinion or impression which are recorded in the hospital record at the time that the diagnosis was made or opinion or impression formed, I should think there is no doubt that the making of medical diagnosis is basic to the business of a hospital and it is made in the usual and ordinary course of that business. However, diagnosis is a professional opinion, and in my view it is not an act, transaction, occurrence or event within the meaning of the words in this section. By contrast it should be observed that s. 50a [enacted 1966, c. 51, s. 2] of the *Evidence Act* [now section 52] while no doubt primarily intended to obviate the necessity of calling medical practitioners to give *viva voce* evidence before the Court permits the filing of his report which customarily contains statements of opinion, diagnosis and prognosis but only when the leave of the Court has been obtained.

49. In the result, while portions of a medical chart are not admissible pursuant to section 35 of the *Evidence Act* as a business record, equally portions of it are. In particular, the portions of a medical chart which record matters such as “the date of

admittance, the time of admittance, the name of the attending physician, the routine orders as to care of the patient such as the administration of drugs, notation by the nurse of taking temperatures" are admissible as business records without the necessity of calling the maker of the chart for cross-examination, even if requested. I note that this conclusion parallels in many respects the conclusion reached by Arbitrator Mitchnick in *Miracle Food Mart* set out above. However, my conclusion is based upon the operation of section 35 of the *Evidence Act*, while Arbitrator Mitchnick's conclusion was based upon the exercise of discretion pursuant to section 48(12)(f) of the *Labour Relations Act, 1995*.

50. As will become apparent, many of the entries relevant to the determination of the issues in this case in the medical documents tendered by the Union fall into this category. Accordingly, they are admissible whether or not a request was made to cross examine the health care practitioners in question and whether or not those health care practitioners were made available for cross-examination. Some of the entries, however, are records of statements made to the Grievor by his attending health care professionals about their plan for his treatment. On the basis of the reasoning in *Adderly v. Bremner*, those portions are not admissible as business records pursuant to section 35 of the *Evidence Act*. I will, return to those portions of the medical records below.

51. Second, and in any event, Dominion did not make a timely request that the authors of the documents be produced for cross-examination. Asserting that the documents should not be admitted because they are hearsay or difficult to read without the assistance of the authors is not the same as demanding that the authors be produced as witnesses for cross-examination. To the extent that there would have been any breach of natural justice to Dominion as a result of the authors not being produced for cross-examination, and for the other reasons stated in my view there is none, that breach was waived by Dominion by failing to raise the issue until final argument, after the evidence was complete.

52. Third, and also in any event, section 48(12)(f) of the *Labour Relations Act, 1995* provides that an arbitrator has power:

> to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

53. Having regard to the aspiration that arbitration proceedings will be expeditious and non-technical, the nature of the issues before me in this case, the nature of the records, the limited purposes for which they are relevant and the failure of the employer to give clear notice of its desire to cross examine the makers of the records in question, I exercise my discretion pursuant to section 48(12)(f) to admit the records into evidence, whether or not they would have been admissible in court of law.

54. Within this context, I wish to specifically address the portions of the medical records which contain statements of the treatment plan for the Grievor proposed by health care practitioners: to remain off work; take pain medication; and attend physiotherapy. If tendered for their truth (i.e. that the Grievor required time off work etc.), these statements

are hearsay. However, the central factual issue in this case is whether the Grievor quit his employment. The Union's theory is that the Grievor remained off work because he believed that he was being directed to do so by his health care practitioners. Thus whether these statements were made to him is itself relevant.

55. Before leaving this issue, I would add the following. To the extent that the Grievor had independent recollection of the facts set out in the records, the admission of the medical records could be seen as nothing more than oath-helping. To the extent that he did not, directing the Grievor to the statements set out in the records could be seen as a means by which he was led with respect to his evidence in chief. The Employer did not make either of these objections. I say this not to fault the Employer but as a matter of record. Indeed, given that the Grievor's evidence with respect to the directions he was receiving from his health care practitioners was uncontradicted and unchallenged, objections on such grounds would have been overly technical and likely dismissed on the basis of section 48(12)(f). Presumably it was for this reason that the Employer did not make such objections.

56. For all of the foregoing reasons, the Employer's objection to the admission of the WSIB records and medical records is denied.

Facts

57. I turn now to set out the facts relevant to the issues in dispute before me. Unless otherwise noted, they are not in dispute.

58. The Grievor commenced work with Dominion on June 30, 2011. On July 5, 2011 he left the workplace. As noted, there is a dispute about whether the Grievor suffered a compensable injury before he left the workplace and whether he reported the injury to the employer. While this was the subject of a great deal of evidence, I do not find it necessary to resolve these disputes. Nor do I consider it appropriate to in any way express a view on that evidence as it will be central to the claim for workers' compensation benefits which if it is pursued will be adjudicated elsewhere.

59. Greg Samoyloff was acting as the supervisor on July 5, 2011. He recalled speaking with the Grievor on July 5, 2011. That was the last time he saw the Grievor. Nick Spina was an assistant foreman on the site. He recalled working with the Grievor on July 5, 2011. He also recalled seeing the Grievor at the site on July 6, 2011, but did not talk to him that day. That was the last time he saw the Grievor. There was no suggestion that on July 5, 2011 the Grievor said he quit.

60. On July 6, 2011, the Grievor went to a walk-in clinic and saw a Dr. Ansari. He obtained a medical note dated July 6, 2011 from Dr. Ansari which recommends that the Grievor be off work from July 6 to July 12, 2011 due to injury and with the comment "will decide further after seeing results". He was also referred for diagnostic imaging of his left shoulder by ultrasound and by x-ray. These examinations were conducted on July 6, 2011.

61. The Grievor testified that he attended at the worksite on July 6, 2011 and gave the foreman, Pasquale DiFranco, Dr. Ansari's July 6, 2011 note. Mr. DiFranco testified that he recalled receiving the July 6, 2011 note, but he was not certain of the exact date on which he received it. Mr. DiFranco did make a notation on the time sheets which he submitted to Dominion for the week of July 5, 2011 that the Grievor "return to work Tuesday July 12, 2011".

62. The Grievor's father also was working for Dominion at this time. There is no dispute that the Grievor's father and Mr. DiFranco had an argument on July 6, 2011 following which the father told Mr. DiFranco that he was quitting and then left the worksite. Mr. DiFranco described it as a "small argument" during his evidence in chief. Counsel for Dominion sought to ask Mr. DiFranco whether the argument had to do with the Grievor. Counsel for the union objected on the basis of relevance. Based on the submissions on behalf of Dominion, I was not persuaded as to the relevance of the question and sustained the objection. I note, given one of the submissions made by Dominion in final argument, that there was no suggestion in Dominion's submissions on the relevance objection that the evidence would somehow establish that the Grievor quit his employment in sympathy with his father.

63. On July 7, 2011 the Grievor returned to the walk-in clinic and saw Dr. Ansari again. Dr. Ansari completed a "Health Professional's Report" to the WSIB (a "Form 8")

and a WSIB "Functional Abilities Form" (a "FAF") (the Grievor completed the biographical information portions of these forms). On the Form 8 Dr. Ansari indicated that the Grievor had injured his left shoulder and checked off boxes indicating that the description of the injury was "sprain/strain" and "tendonitis/tenosynovitis". In the Clinical Information Section, Dr. Ansari recorded that the Grievor was complaining of pain and stiffness in the left shoulder. Physical examination objective findings were listed as tenderness in the left shoulder. Abnormal signs were recorded for the following: active ROM (range of motion); passive ROM; and strength. Under "Diagnosis/Working Diagnosis", Dr. Ansari has written "Left shoulder muscle sprain (imaging test results are pending)". In the Treatment Plan and Return to Work Information Section Dr. Ansari has indicated that the current treatment and management plan for the Grievor are "medicine (advil)" and "rest for now (until results will be seen)". A referral for x-rays and ultrasound is noted. With respect to the Grievor's status and limitations, Dr. Ansari has written "unable to return to work for 2 weeks".

64. On the July 7, 2011 FAF Dr. Ansari has indicated that the "patient is physically unable to return to work at this time". The date of the next appointment to review the Grievor's abilities and/or restrictions is given as July 21, 2011.

65. Later on July 7, 2011, the Grievor went to the Union's office. He provided the Union with copies of the Form 8 and the FAF. With the assistance of the Union he completed a "Worker's Report of Injury / Disease" (a "Form 6") describing an accident at work on July 5, 2011 and indicating that that he had reported the accident to an individual subsequently identified as Greg Samoyloff.

66. On Friday July 8, 2011 the Grievor attended at the worksite in the morning and had a discussion with Mr. DiFranco about union dues. The Grievor testified that he returned to the worksite in the afternoon of July 8, 2011 and gave Mr. DiFranco copies of the Form 6, Form 8 and the FAF. In cross-examination the Grievor testified that not only had he given Mr. DiFranco these forms on July 8, 2011, but he gave him a second copy of the July 6, 2011 note and receipt from Dr. Ansari.

67. In cross-examination Mr. DiFranco testified that he could not remember whether he had received the forms but that it was possible that he had. In response to the suggestion that the Grievor never told him that he was quitting his job, Mr. DiFranco said that he could not remember but he did not think so.

68. The Grievor made a surreptitious recording of the second conversation he had with Mr. DiFranco on July 8, 2011. The Union produced a copy of the recording to Dominion in advance of the hearing. Neither Dominion nor the Union made reference to the recording during the examination of Mr. DiFranco. Dominion played the recording during its cross-examination of the Grievor. In the recorded conversation the Grievor tells Mr. DiFranco that: he wanted to work; he wanted to come back on light duties; his doctor wanted him to stay at home; he was awaiting results; and he would see Mr. DiFranco on Tuesday. I note that these statements are inconsistent with the proposition that the Grievor quit his employment in sympathy with his father, who had quit his own on July 6, 2011. At no point in the conversation does the Grievor state that he is quitting. The Grievor agreed that at no point during the conversation did he tell

Mr. DiFranco that he was in extreme pain. In note that Dominion asked me to find that the Grievor did not "sound" like he was in pain. I am not sure that I am able to assess whether someone is in pain by listening to a recording of their voice. In any event, this determination is not relevant to the issues before me.

69. During one of his visits to the worksite on July 8 the Grievor asked another worker to retrieve his tools. The Grievor explained that he did not have his construction boots on so he could not go on to the site itself. It was a Friday and he was concerned that his tools might be stolen.

70. On Tuesday July 12, 2011 the Grievor returned to Dr. Ansari to review the results of the x-ray and ultra sound imaging. Dr. Ansari's chart is difficult to read but appears to indicate that medication was prescribed along with "rest", with a review in one week. Dr. Ansari provided him with a prescription for medication. A copy of the prescription was filed. It is illegible. The Grievor testified that he was told that it was a pain medication.

71. Notwithstanding his statement to Mr. DiFranco on July 8, 2011, the Grievor did not return to the work site on Tuesday July 12, 2011. In cross-examination the Grievor stated that he was hoping to come back on July 12, 2011 but it was always dependent on the doctor's assessment on that date. He took his doctor's advice. When asked again on the next day of hearing why he did not report to work on July 12, 2011, he testified that he was in too much pain.

72. Richard Cushing is an Occupational Health and Safety Consultant retained by Dominion to assist it with workers' compensation claims, among other things. On July 12, 2011, Dominion contacted Mr. Cushing and advised him of the Grievor's workers' compensation claim. Mr. Cushing testified that he conducted an investigation of the claim. The Union challenges the extent of the investigation. I do not find it necessary to resolve this dispute other than as described below. What is clear from this evidence is that as of July 12, 2011 Dominion was aware that the Grievor had made a claim for workers' compensation.

73. In his examination-in-chief, Mr. Cushing testified that on July 12, 2011 Mr. DiFranco provided him with the July 6, 2011 note and receipt from Dr. Ansari. In cross-examination Mr. Cushing testified that he was not provided with copies of the Form 8 or July 7, 2011 FAF completed by Dr. Ansari.

74. On July 13, 2011, Mr. Cushing, completed an "Employer's Report of Injury/Disease" (a "Form 7") for submission to the WSIB on behalf of Dominion. The Form 7 indicates that Dominion disputed the claim and that Dominion was unaware of any witnesses to the accident. The Form 7 does not indicate that Dominion thought that the Grievor had quit his employment. The Form 7 also makes reference to the Form 6. Mr. Cushing conceded in cross-examination that he must have had the Form 6 when he completed the Form 7. He also testified that he knew it was likely that a Form 8 had been filed with the WSIB.

75. On Friday July 15, 2011, Mr. Cushing went to the Grievor's home to present a written offer of modified employment on behalf of Dominion. The Grievor was not home, but Mr. Cushing spoke with a woman who identified herself as the Grievor's wife. Mr. Cushing's evidence was that he asked her if the Grievor was at work and she said yes. He gave the woman a copy of the offer of modified employment and asked her to have the Grievor call him and then left. Mr. Cushing's evidence on this point was uncontradicted: the Grievor's wife was not called as a witness. In cross-examination, Mr. Cushing refused to concede the somewhat obvious proposition that when an unknown man unexpectedly knocked at the door of the house and asked the Grievor's wife if her husband was at work she might respond by saying yes, irrespective of the truth of the statement. In any event, as argued by Dominion, the making of the offer suggests that it did not consider him to have quit as of that day.

76. The Grievor testified that he was not at home on July 15 when Mr. Cushing came by. He testified that he had gone for a drive with his father who was going up to "the farm" to relieve "the stress" he felt as a result of his injury. He denied that he was at work on July 15 or any day prior to that since the date on which he states he was injured. The Grievor did not think that he would be capable of doing the work described in the letter. In cross-examination he was pressed as to why he would not have been able to perform the work of a traffic signal person. He stated that he lacked the necessary traffic control certificate. In order to obtain such a certificate it was necessary to first take a course from the Union.

77. On July 21, 2011 the Grievor returned to Dr. Ansari's office for a follow up visit. Dr. Ansari expressed the opinion that he was still unable to return to work and completed a further FAF to that effect with a review date of August 4, 2011. The Grievor provided a copy of the July 21, 2011 FAF to the Union; he did not provide a copy to the Employer.

78. On August 9, 2011, the Grievor saw his regular family physician, Dr. Alexander. Dr. Alexander provided him with a note indicating that he was "unfit to return to work August 9, 2011 until September 30, 2011". Dr. Alexander also referred the Grievor to physiotherapy. The records of the physiotherapy clinic show that the Grievor attended physiotherapy from August 9, 2011 to November 11, 2011.

79. By decision dated August 10, 2011 an "Eligibility Adjudicator" of the WSIB concluded that proof of accident had been established, but allowed the claim for health care benefits only on the basis of the advice of Mr. Cushing that the Grievor had terminated his employment with Dominion on July 6, 2011.

80. On August 12, 2011 the Grievor and Mr. Cushing had a telephone conversation. The Grievor's evidence was that he called Mr. Cushing in reaction to the August 10, 2011 WSIB decision letter which he had just received. Mr. Cushing's evidence was that he called the Grievor "to advise him that if he wished to put Dominion Forming to the time and expense of appeals processes, then Dominion Forming would be compelled to ask the WSIB to consider a fraud investigation in relation to the claim**."** In my view it is more plausible that the Grievor initiated the call for the reason he stated. There is no dispute that during this conversation Mr. Cushing confirmed that he had

visited the Grievor's house on July 15, 2011, spoken with his wife and been told that the Grievor was at work on that day. The Grievor became angry, used profanity and called Mr. Cushing a liar.

81. In cross-examination Mr. Cushing agreed that at no point during this conversation did the Grievor tell him that he had quit or was quitting his employment with Dominion. He was also asked if prior to the issuance of a Record of Employment to the Grievor on August 24, 2011 he was aware of any communication by Dominion with the Grievor indicating that in Dominion's view the Grievor had quit. Mr. Cushing answered no. In his examination-in-chief the Grievor was asked if during the conversation with Mr. Cushing on August 12, 2011 he told Mr. Cushing he had quit. He answered, somewhat unresponsively: "Absolutely not: he was the one telling me." He was then asked if he had any discussion with Mr. Cushing about his medical condition during the conversation. He answered, again somewhat unresponsively: "No. He said 'you quit, it's not my problem anymore'. He was pretty much smiling." The Grievor was then asked if this was face-to-face. He answered: "No, over the phone. It sounded like he was giggling. That is when I pretty much lost it."

82. On August 24, 2011 Dominion issued a Record of Employment ("ROE") to the Grievor. The expected date of recall was given as "not returning". The reason given for issuing the ROE was Code "E", i.e. "Quit".

83. In his examination-in-chief, Mr. Cushing testified that he had formed the conclusion that the Grievor had quit his employment based on several factors: the failure of the Grievor to respond to the July 15, 2011 offer of employment; the conversation he had with the Grievor on August 12, 2011; and the fact that he had been advised that the Grievor had picked up his tools from the worksite on or about July 7 or 8, 2011. He also testified that he had discussions with Marco Saverino, the principal of Dominion, about the Grievor's situation. But he was not specifically asked, and did not state, whether those discussions included conveying his conclusion that the Grievor had quit. More significantly, in cross-examination, Mr. Cushing stated that he was not involved in the preparation of the ROE. Neither Mr. Saverino, nor anyone else who may have given the direction that the ROE be issued was called as a witness.

84. In the result, no evidence was called by Dominion as to who made the decision to issue the ROE to the Grievor or why.

85. The Grievor testified that he received the ROE from the Company. He also testified that up until the date he received the ROE he had not told anyone at Dominion that he had quit his employment.

86. On September 14, 2011 a WSIB investigator attended at the worksite and interviewed Mr. Cushing, Mr. Samoyloff, Mr. DiFranco and Mr. Spina. It appears that based on the investigation report, by decision dated September 21, 2011, the "Eligibility Adjudicator" concluded that no workplace accident had occurred on July 5, 2011 and reversed her August 10, 2011 decision which had allowed the claim. The Grievor has filed appeals under the Workplace Safety and Insurance Act with respect to the August

10 and September 21, 2011 decisions of the WSIB. At the request of the Grievor, those appeals are being held in abeyance pending the outcome of this grievance.

87. A great deal of time was spent questioning witnesses on whether they made the statements recorded in the WSIB investigator's report. Any such statements were made on September 14, 2011, that is after August 24, 2011 on which date the Grievor's employment with Dominion came to an end, either as a result of quitting or being fired. Accordingly, the making of any such statements could have had no effect on Dominion's conclusion that the Grievor had quit his employment and therefore is not relevant to the issue before me. To the extent that reviewing the statements affected a witness' recollection of events that occurred prior to September 14, 2011, for example as a result of having his memory refreshed, it is included in my description of the events set out above. I do note that nowhere in the WSIB investigator's report is there any suggestion that the Grievor ever stated he quit his employment with Dominion.

88. On October 28, 2011 the Grievor received a note from Dr. Alexander clearing him to return to work with some restrictions.

89. On November 4, 2011 the Grievor received a "Member Clearance Form" from the Union which confirmed that the Grievor was a member in good standing and had been given clearance to commence employment with an employer called Prem-Form. Prem-Form and Dominion are both concrete forming companies and the Grievor received the same rate of pay while working at each. Subsequently, the Grievor left Prem-Form to accept a bargaining unit position operating a grout computer with a different employer.

90. On November 11, 2011, the Grievor received a note from Dr. Alexander clearing him to return to regular work.

91. No claim was advanced for lost wages subsequent to October 28, 2011. The Grievor does not seek reinstatement to employment with Dominion.

92. The Grievor's evidence was that he did not work from July 6, 2011 until November, 2011. The Union's records show no referrals to work during this period of time.

93. I note that the Grievor gave evidence of medical care during the period between the date on which Dominion issued a ROE indicating that it considered the Grievor to have quit his employment (i.e. August 24, 2011) and his ultimate return to work on or about November 4, 2011. This evidence is not relevant to the issue of whether or not he had quit his employment as of August 24, 2011. Further, as the Grievor's position is that he was unable to work during this period of time and therefore he does not seek damages for loss of earnings (as distinct from loss of WSIB benefits) in relation to this period of time that evidence is also not relevant to the question of remedy. Accordingly, I do not set it out here.

94. Before leaving this review of the evidence, I note the following. There is no dispute that the Grievor did not provide Dominion with any updates on his medical condition after July 8, 2011. The Grievor stated that on that date he provided

Mr. DiFranco with a copy of the July 7, 2011 FAF which indicated he was unfit to work with a review date of July 21, 2011. Mr. DiFranco only specifically recalled receiving the July 6, 2011 note from Dr. Ansari which indicated that the Grievor would be off work until July 12, 2011. With respect to the July 7, 2011 FAF he stated he could not remember whether he received it but he did not think so. At best, therefore, the Grievor provided Dominion with medical notes authorizing his absence until July 21, 2011 but not beyond. In particular, the Grievor did not provide Dominion with a copy of the July 21, 2011 FAF from Dr. Ansari authorizing absence until August 4, 2011, nor did he provide Dominion with a copy of the August 9, 2011 note from his regular family physician, Dr. Alexander which indicated that he was unfit to return to work until September 30, 2011. The question is why.

95. The Grievor testified that once he learned that Dominion considered him to have quit, he saw no purpose in providing further medical reports to Dominion. There is no question that the August 10, 2011 letter from the WSIB advised the Grievor that Dominion considered him to have quit. The Grievor also suggested that he visited Dominion's office on one occasion and was told by two women there that he had quit. The Grievor, however, gave several different accounts of this visit and two different dates, accordingly it is necessary to review the evidence in relation to this issue in some detail.

96. In his evidence in chief the Grievor first testified that he went to Dominion's offices on Monday July 18, 2011. According to him, there were two women at the offices. When he knocked at the door one of them "peeked out" and asked "are you Luis?" When he responded 'yes', the woman said she did not want to talk to him, that this was workers' compensation, she closed the door in his face and told him to get out of there. He stated that he concluded that Dominion did not want anything to do with him and therefore did not provide them with any further medical reports.

97. Subsequently in his evidence in chief, however, he stated that the visit to Dominion's offices may have been after he received the August 10, 2011 letter from the WSIB denying his claim.

98. In cross-examination the Grievor again related the timing of his visit to Dominion's offices to receipt of the July 15, 2011 offer of modified employment. In describing the incident on this occasion he said that there were two women at the offices but they didn't want to talk to him and that they closed the door is his face and said "you quit, you quit". He also referred to the fact that the workers' compensation representative engaged by the Union, Cleavon Emilio-Luis, had made several calls to Dominion's offices first.

99. Mr. Emilio-Luis is employed as a workers' compensation case manager for a company which has a contract to provide services to members of the Union. The services are provided within the Union's hall. Mr. Emilio-Luis acted as the Grievor's case manager. He gave evidence as to his interactions with the Grievor. In the course of his duties Mr. Emilio-Luis inputs notes of interactions with members into a case management system, as does anyone else involved with the member. The records in relation to the Grievor (redacted by the Union to remove communications which it

considered privileged) were entered as an exhibit without objection. Those records show visits by the Grievor to the union hall on a number of dates. For the purposes of determining when the Grievor first learned that Dominion considered that he had quit three consecutive contacts are of note. On July 18, 2011 the Grievor expressed the view that it was not right that Mr. Cushing had attended at his home with the offer of modified employment. There is no reference to quitting. The Grievor next attended at the union hall on August 8, 2011. The Grievor was inquiring as to the status of his file. Once again there is no reference to quitting. On August 10, 2011 Mr. Emilio-Luis recorded the following with respect to a telephone conversation he had with a WSIB adjudicator:

> She reported that the Mbr [member] terminated his employment with the ER [employer] on July 7, 2011 so there would be not [sic] loss of earning paid out on the claim. She reported that she has not been able to speak to the worker as he does not return her calls. She reported that the ER reported that the worker came in on July 7, 2011 and stated that he was not going to return to work at the company, he grabbed his tools and he requested his severance cheque. I informed her that the ER sent the mbr an offer of modified work on July 15, 2011 which is contradictory to there [sic] stance that he terminated his employment with the company. She reported that she would contact the company in regards to the offer of modified work.

The notes then record that Mr. Emilio-Luis called the Grievor and "outlined" the above conversation to him.

100. The notes do not contain any reference to the Grievor going to Dominion's offices. The notes also do not contain any references to Mr. Emilio-Luis calling Dominion.

101. While the Grievor's evidence with respect to his visits to Dominion's office was inconsistent at best, he was not challenged in cross-examination on the proposition that at some point he had attended at Dominion's offices. I also note as a matter of record that Dominion did not seek to call any witnesses to rebut the Grievor's evidence that he attended at its offices. (Of course, any attempt to do so would likely have been improper given that the Grievor's evidence on this point had not been subject to challenge.)

102. In my view, it is more probable that the Grievor visited Dominion's offices after he received or learned of the August 10, 2011 letter. As of July 15, 2011 Mr. Cushing, on behalf of Dominion, had offered him modified employment. It appears unlikely that Dominion considered him to have quit as of that date. Further, the fact that Dominion considered the Grievor to have quit is first remarked upon in Mr. Emilio-Luis' notes on August 10, 2011.

103. Accordingly, the Grievor has no explanation for his failure to provide Dominion with medical information explaining his continuing absence from work for the period July 12, or at best July 21, until on or about August 10, 2011.

Analysis on the Merits

104. It is trite law that the determination that an employee has quit requires proof of both the subjective intention to quit and an objective conduct consistent with carrying out that intention.

105. In this case, the Grievor never stated that he intended to quit. His actions must be scrutinized, therefore, not only to see whether they constitute objective conduct consistent with having quit but also to see whether the most plausible explanation for that conduct is the intention to quit.

106. The Grievor left the worksite on July 5, 2011 and did not return. Obviously such conduct could be consistent with a quit. Dominion, however, was aware that the Grievor filed a workers' compensation claim alleging that he had experienced a workplace accident and claiming benefits. Further, Dominion was aware that the Grievor was being advised by his doctors that he was unable to work until July 12 or perhaps July 21, 2011. Up until at least the earliest one of those dates there can be no basis for suggesting that the Grievor had quit his employment.

107. Dominion submits that the Grievor quit his employment in sympathy with the fact that his father had quit his employment with Dominion on July 6, 2011. There is simply no evidence to support this argument.

108. Dominion relies upon the Grievor's failure to remain in contact with it or to respond to its offer of modified employment. It is true that the Grievor has no explanation for his failure to provide Dominion with medical updates after July 7 or 8, 2011 which would justify his absence beyond July 12 or 21, 2011. Further, the Grievor has no compelling explanation for his failure to respond to Dominion's July 15, 2011 offer of modified employment. The Union argues that the Grievor had no obligation to respond because he was being advised by his health care practitioners that he was totally disabled. The difficulty with this argument is that the Grievor did not continue to share this information with Dominion. Again, at best, the information which the Grievor had provided to Dominion clearly indicated disability to July 21, 2011, but not beyond. At worst, the information which the Grievor had provided to Dominion indicated disability to July 12, 2011 only. In either event it was both reasonable and appropriate for Dominion to make the offer of modified employment which it made on July 15, 2011. Similarly, it was both unreasonable and inappropriate for the Grievor to fail to respond.

109. Whatever conclusions Dominion might have derived from these facts (an issue to which I return below), the issue is whether the Grievor had formed the subjective intention to quit his employment. Since this is an inquiry into the Grievor's state of mind, it is not limited to the facts known to Dominion.

110. The most pertinent additional fact is that the Grievor continued to be under medical care and was being advised by his medical practitioners that he was unable to perform any work until well after Dominion issued the ROE. Given this explanation for his continuing absence, I am not prepared to infer a subjective intention to quit notwithstanding his failure to maintain contact with Dominion during his absence.

111. In part because of the focus that both parties placed on the merits of the Grievor's workers' compensation claim, an undercurrent to some of Dominion's arguments was the suggestion that the Grievor had falsely filed a workers' compensation claim. Certainly such conduct, if true, could give rise to cause for discipline, possibly up to and including discharge. Dominion, however, did not assert that it had cause to terminate the Grievor's employment, even as an alternative argument. In any event, as noted in my review above, there was simply no evidence as to who made the decision to terminate the Grievor's employment or why.

112. In the result, I find that the Grievor did not quit his employment with Dominion. Rather, his employment was terminated without cause.

113. As noted at the outset, the Union does not seek reinstatement for the Grievor. Further, the Union does not claim any loss of wages for the period July 6 to November 4, 2011. Rather, during this period the Union asserts that the Grievor was totally disabled. The Union maintains, however, that the termination of employment also constitutes discrimination contrary to the *Code* entitling the Grievor to general damages under the *Code*.

114. Proof of discrimination under the *Code* requires three things: that the individual is a member of a group protected by the *Code*; that the individual has been subject to adverse treatment; and that membership in the protected group was a factor in the adverse treatment.

115. Section 5 of the *Code* prohibits discrimination in employment on the basis of, among other things, "disability". Disability is defined by section 10(1) of the *Code*. That definition includes:

> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> and
>
> (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*;

Section 10 (3) deals with perceived disability:

> The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability.

116. Whether or not the Grievor had a disability within the meaning of section 10(1)(a) of the *Code*, as of August 24, 2011, the date on which Dominion terminated his employment, he had both claimed and received benefits under the WSIA in relation to an injury or disability (the decision by the WSIB to disallow the claim came on September 24, 2011). He was, therefore, disabled within the meaning of 10(1)(e), or perceived to have been so as of August 24, 2011, and accordingly was a member of a group protected by the *Code*. Further, my finding that his employment was terminated without just cause means that he was subject to adverse treatment. The only remaining issue is whether the fact that he was a claimant for workers' compensation benefits was a factor in the unjust termination of this employment.

117. In *Peel Law Association v. Pieters*, 2013 ONCA 396, the Court of Appeal recently had occasion to discuss what constitutes a *prima facie* case of discrimination so as to shift an evidential burden to the responding party to provide a non-discriminatory basis for its actions (the burden of proof remaining at all times with the applicant):

> **71** Sopinka J. explained the difference between the burden of proof and the evidential burden in *Snell v. Farrell*, [1990] 2 S.C.R. 311, a medical malpractice case. Medical malpractice cases are an apt comparison to discrimination cases because as Sopinka observed at p. 322, "The physician is usually in a better position to know the cause of an injury than the patient". At pp. 328-329 he said that in medical malpractice cases because "the facts lie particularly within the knowledge of the defendant ... very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary". He recognized that "[t]his has been expressed in terms of shifting the burden of proof" and went on to explain why that is not correct. At pp. 329-330 he said:
>
> > ... It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted. [Citations omitted].
>
> **72** And so it is in discrimination cases. The question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The

> respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.
>
> **73** In discrimination cases as in medical malpractice cases, the law, while maintaining the burden of proof on the applicant, provides respondents with good reason to call evidence. Relatively "little affirmative evidence" is required before the inference of discrimination is permitted. And the standard of proof requires only that the inference be more probable than not. Once there is evidence to support a *prima facie* case, the respondent faces the tactical choice: explain or risk losing.
>
> **74** If the respondent does call evidence providing an explanation, the burden of proof remains on the applicant to establish that the respondent's evidence is false or a pretext.

118. In this case, the fact that the Grievor's employment was terminated after he claimed and received workers' compensation benefits and the fact that the explanation offered by the employer for the termination of his employment (i.e. that he had quit) does not pass muster is more than sufficient affirmative evidence to support an inference that the termination was not only unjust but also discriminatory. The evidential burden of an explanation therefore has shifted to Dominion.

119. As noted earlier, Mr. Cushing stated that he had concluded that the Grievor had quit. Notwithstanding the fact that I have not reached the same conclusion, termination of the Grievor for that reason alone would rebut at least any inference of intentional discrimination (I leave aside the issue of adverse effect discrimination). Mr. Cushing, however, is not a directing mind of Dominion. He is a consultant hired by Dominion to assist it with workers' compensation matters. Further, he specifically stated that he was not involved in the decision to issue the ROE which terminated the Grievor's employment. No evidence was called on behalf of Dominion with respect to who made that decision and why. I conclude, therefore, that Dominion's decision to terminate the Grievor's employment was not only unjust but also discriminatory.

120. This leaves the question of damages for breach of the *Code*.

121. The union provided one case on this issue: *Ottawa and Civic Institute of Professional Personnel*, 2007 CLB 12589 (Weatherill). I do not find it of assistance. It awarded $5,000 in general damages without explanation as to how it arrived at that figure.

122. The leading decision of the Human Rights Tribunal of Ontario with respect to the assessment of general damages under the *Code* is *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII). In that case the Associate Chair of the Tribunal stated the following:

> [44] The approach to awards for damages for the intrinsic harm of discrimination has evolved in *Code* jurisprudence. Prior to the significant amendments that took effect in June 2008, the *Code* established a limit of $10,000 on damages for "mental

anguish" which required a finding of wilfulness or recklessness on the part of the respondent (see s. 41(b) of the *Code* as it read prior to June 30, 2008). Tribunal decisions, however, routinely awarded greater damages for intangible losses, awarding separate amounts for mental anguish as a result of findings of discrimination on different grounds and by different respondents. After the Divisional Court's decision in *Ontario (Human Rights Commission) v. Shelter Corporation*, [2001] O.J. 297 confirmed that this was permitted under the *Code*, amounts were awarded for "general damages", which were considered as separate from amounts awarded for mental anguish.

[45] The amendments to the damages provisions in the *Code* remove the need for the Tribunal to divide damages awards into amounts for mental anguish and for other intangible losses. They require the Tribunal to make a general evaluation of the circumstances of the *Code* violation and its effects to determine the appropriate monetary compensation for injury to dignity, feelings and self-respect.

[46] Monetary compensation for injury to dignity, feelings and self-respect recognizes that the injury to a person who experiences discrimination is more than just quantifiable financial losses, such as lost wages. The harm, for example, of being discriminatorily denied a service, an employment opportunity, or housing is not just the lost service, job or home but the harm of being treated with less dignity, as less worthy of concern and respect because of personal characteristics, and the consequent psychological effects. As noted by the Supreme Court of Canada in considering damages for breaches of the *Canadian Charter of Rights and Freedoms* in *Vancouver (City) v. Ward*, 2010 SCC 27 (CanLII), 2010 SCC 27 (CanLII) at para. 27:

> Compensation focuses on the claimant's personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant's intangible interests. In the public law damages context, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety: *Dunlea*; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429. Often the harm to intangible interests effected by a breach of rights will merge with psychological harm. But a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury.

[47] The principle that intangible losses are compensated with monetary awards is not unique to statutory human rights law. For example, negligence law provides for damages for pain and suffering, "fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in a particular case": *Ward, supra* at para. 50; *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC),

[1978] 2 S.C.R. 229. In the law of defamation, damages take into account injury to the plaintiff's feelings in light of the nature of the conduct of the defendant, see *McCarey v. Associated Newspapers Ltd. (No. 2)*, [1965] 2 Q.B. 86 (C.A.) at pp. 104-04, cited with approval in *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 at para. 105.

[48] While principles from other areas of law may be useful analogies, the Tribunal's approach to the exercise of its remedial discretion must be centered in the values of and statutory language in the *Code*. *Code* damages are meant to compensate, not punish, and *Code* violations, unlike some other areas of law, arise in a variety of very different social and legal contexts.

[49] Damages for *Code* violations, as in other areas of law, must be fair to both the applicant and respondent(s), given the violations of the *Code* found: see *Ward*, *supra*, at para. 53. Damages under the *Code* must not be so low as to trivialize the social importance of the *Code* by effectively creating a license fee to discriminate (see *Lane*, *supra* at para. 152). At the same time, *Code* damages for intangible losses should not be "unduly high": see *Ward*, *supra* at para. 54, referring to the approach of courts in other jurisdictions to damages for violations of constitutional rights. The Tribunal should be attentive to the possibility of ongoing inflation of damage awards for non-pecuniary losses that was recognized in the tort context in *Andrews*, *supra* in the 1970s. I do not agree with the applicant that an assumption that damage awards are "increasing" should affect the determination of awards.

[50] In a system in which many decisions on the merits are made each year, there is a particular importance that damage awards for intangible losses be consistent and principled. As the Supreme Court stated in *Andrews*, *supra* at p. 263, in relation to the assessment of damages for intangible losses in negligence law:

> [T]here is a great need in this area for assessability, uniformity and predictability. In my opinion, this does not mean that the courts should not have regard to the individual situation of the victim. On the contrary, they must do so to determine what has been lost. For example, the loss of a finger would be a greater loss of amenities for an amateur pianist than for a person not engaged in such an activity. Greater compensation would be required to provide things and activities which would function to make up for this loss. But there should be guidelines for the translation into monetary terms of what has been lost. There must be an exchange rate, albeit conventional.

[51] Cases with equivalent facts should lead to an equivalent range of compensation, recognizing, of course, that each set of circumstances is unique. Uniform principles must be applied to determine which types of cases are more or less serious. Of course there will always be

> an element of subjective evaluation in translating circumstances to dollars, but the Tribunal has a responsibility to the community and parties appearing before it to ensure that the range of damages based on given facts is predictable and principled.
>
> [52] I turn now to the relevant factors in determining the damages in a particular case. The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII), 2009 HRTO 940 at para. 16 (CanLII).
>
> [53] The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> [54] The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII), 2005 HRTO 53 (CanLII) at paras. 34-38.

123. As noted in *Arunachalam*, general damages (which term continues to be used as shorthand for "damages for injury to dignity, feelings and self-respect") should not be so low as to constitute a licence fee for breaching the *Code*. In my view, however, it is equally important to realize a determination that there has been a breach of the *Code* is not akin to a winning lottery ticket. Rather, general damages, like all damages, are awarded to compensate for losses which are real (even if intangible), non-trivial, caused by the breach and proven. Recognition of the difficulty of calculation of such damages does not remove the requirement of causation.

124. The Tribunal has also stated that the conduct of the aggrieved party may result in a reduction in general damages payable: see *Abouchar v. Metropolitan Toronto School Board* [1999] O.H.R.B.I.D. No. 2 at para. 24; *McLean v. DY 4 Systems Inc. (c.o.b. Curtiss Wright Controls)*, 2010 HRTO 1107, at para 106. In *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230, the Tribunal considered the conduct of the complainant in determining the appropriate award for general damages:

> 108 However, I also find that the complainant's suspicious behaviour leading up to the impugned exchange and aggression

> during the interaction are relevant factors in determining the appropriate quantum of the award. I find that any "experience of victimization" suffered by the complainant must be assessed against the backdrop of the suspicious and intimidating conduct he engaged in preceding the discriminatory remarks. I recognize that there needs to be sensitivity towards situations where a complainant reacts negatively in response to a poisoned environment; however, such circumstances are far different from the case at hand. I am satisfied that, in this case, the complainant's behaviour was a precipitating and contributing feature to the confrontation with the personal respondent. While the complainant's conduct in no way excuses the personal respondent's discriminatory remarks, his own behaviour in engendering the acrimony must be acknowledged in assessing the degree of harm he claims he suffered because of the discrimination. In conclusion, I find that, although the complainant did suffer some injury to his dignity and self-respect because of the personal respondent's demeaning remarks, an award for general damages should reflect the fact that the complainant himself bears some responsibility for the hostile tenor of the culminating incident.

125. In terms of cases with similar facts, I am aware of only one. In *Szabo v. Poley*, 2007 HRTO 37, in a proceeding in which the responding employer failed to participate, the Tribunal found that a worker was dismissed because her employer believed that she had filed a WSIB claim and would file more as a result of the allergic reaction she experienced in the course of her employment (there was no evidence that she had in fact filed a claim). Turning to the question of general damages, the Tribunal stated:

> [25] I address first the seriousness of the offensive treatment and the vulnerability of the Complainant, which in my view are the most significant factors in this case. The summary dismissal of an employee because she has experienced a health condition from work, leading to the completion of a WSIB form, is a serious abuse of the *Code* that would have an significant impact on any employee.
>
> [26] Ms. Szabo was a temporary employee working on a piecework basis doing industrial cleaning. The law recognizes that there is a "power imbalance" between the employer and employee in most individual employment relationships: *Wallace v. United Grain Growers Ltd.*,1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 at para. 92. This power imbalance is particularly pronounced in the type of employment in this case, where workers earn low wages doing relatively unskilled work. The clear message sent by the employer's conduct in this case was to discourage Ms. Szabo, and other workers like her, from complaining, seeking treatment, or claiming benefits if they experienced adverse physical effects from their work. Her dismissal suggested that if a worker claimed WSIB benefits, or sought treatment and the physician advised her to take time off work or fill out a WSIB form, she could lose her job.
>
> [27] It is also clear that Ms. Szabo was hurt and felt mistreated by the decision. She deposed that she felt degraded, treated as disposable, and wondered how she could be treated so badly. These

> reactions are unsurprising, given that she was dismissed merely because she sought treatment for a medical condition that arose from her work.
>
> [28] Accordingly, in my view the $8,000 in general damages sought by the Commission is appropriate, and I so order.

126. With these general principles and the specific precedent of *Szabo* in mind, I turn to consider the question of general damages under the *Code* in this case.

127. The first criterion is the objective seriousness of the conduct. The Grievor was terminated for claiming workers' compensation. This is a very serious matter. Further, he was potentially vulnerable at the time that his employment was terminated in the sense that he was at the time being advised by his doctors that he was totally disabled. However, unlike in *Szabo*, the objective circumstances of the Grievor's employment did not constitute him a particularly vulnerable worker. He was a member of a construction trade union during a period of incredibly strong demand for construction workers. Indeed, the Grievor was able to obtain alternative employment as soon as his doctors cleared him to return to work. Further his actual employment with Dominion was of very short term and his period of active employment only three or four days. Even if he had not been discharged, the nature of the work assignment was such that it would have been completed in a matter of months, and therefore so would his employment. The discharge itself was a singular event; unlike in *Szabo*, it was not preceded by a prolonged period of harassing comments.

128. The second criterion is the effect on the particular worker. The only evidence in that respect was with respect to the conversation which the Grievor had with Mr. Cushing on August 12, 2011. There is no question that the Grievor was very angry. The Grievor's anger, however, was not with respect to the loss of his employment with Dominion. Indeed, the Grievor's failure to ensure that Dominion was provided with current information as to his ability to return to work or to respond in any way to the July 15, 2011 offer of modified employment demonstrated at best a cavalier disregard for his ongoing employment with Dominion. Rather the Grievor's anger was with respect to the fact that Dominion had, in his mind, improperly interfered with his workers' compensation claim resulting in the discontinuance of benefits. Indeed, that was the entire thrust of the claim advanced through out these proceedings. Accordingly I conclude that the termination of the Grievor's employment *per se* had little or no effect upon the Grievor.

129. What then is the appropriate measure of damages? In this case, the fact that the Grievor was terminated for claiming workers' compensation supports and the fact that he was vulnerable at the time, in the limited way which I have described, support an award of damages. The conduct was not otherwise objectively serious. There is no evidence of any subjective effect on the Grievor which contributes to or compounds the damages which he should be awarded. Accordingly, I award $2,000 in general damages.

130. For clarity, I do not decide whether improper interference by an employer with an employee's workers' compensation claim could give rise to general damages under the *Code*. This issue was not fully argued before me. Further, as noted at the outset of this

decision, any such claim presupposes entitlement to workers' compensation benefits which is an issue for the WSIB and the WSIAT, not this Board. Accordingly, I defer consideration of that issue.

Disposition

131. For the reasons stated, I find that the termination of the Grievor's employment by Dominion was without cause, contrary to the collective agreement. I also find that Dominion's actions were contrary to the *Code*. Reinstatement is not sought and there was no wage loss. I award $2,000 in damages under the *Code* for injury to dignity, feelings and self-respect.

132. I remain seized with respect to any damages arising from the allegation that Dominion wrongfully interfered with the Grievor's claim for workers' compensation benefits pending a final disposition of the Grievor's appeal under the *WSIA*. It is up to the Grievor to make reasonable efforts to pursue his appeal. It is the responsibility of the Union to keep the Board apprised of the status of that appeal. Accordingly, this matter is adjourned *sine die* for a period of one year. Unless within that time the Union seeks a further adjournment based on reasonable efforts of the Grievor to pursue his appeal or advises the Board that there has been a final disposition of the appeal under the *WSIA* and requests that the Board proceed with this matter, it will be deemed abandoned by the Union without any further notice to the parties.

"Ian Anderson"
for the Board