Citation: Northern Regional Health Authority v Manitoba Human Rights Commission et al, 2017 MBCA 98

Date: 20171005
Docket: AI16-30-08687

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

NORTHERN REGIONAL HEALTH AUTHORITY	)	***T. J. Hansell*** *and* ***I. Khan*** *for the Appellants*
(Applicant) Respondent	)	***R. A. Watchman*** *and* ***T. C. Andres*** *for the Respondent*
- and -	)	
MANITOBA HUMAN RIGHTS COMMISSION and LINDA HORROCKS	)	*Appeal heard:* ***March 1, 2017***
(Respondents) Appellants	)	*Judgment delivered:* ***October 5, 2017***

On appeal from 2016 MBQB 89

MAINELLA JA

Introduction

[1] The central question in this appeal is when can a human rights tribunal adjudicate a complaint of discrimination in a workplace governed by a collective agreement? The relevant legislation is set out in the Appendix to my reasons.

[2] The appeal arises from a judicial review of the decision of the Chief Adjudicator of the adjudication panel of the Manitoba Human Rights Commission (the Commission) as to her jurisdiction to hear and determine the discrimination complaint of Linda Horrocks (the complainant) against her former employer, the Northern Regional Health Authority (the NRHA).

[3] During the hearing under *The Human Rights Code*, CCSM c H175 (the *Code*), the NRHA objected to the Chief Adjudicator's jurisdiction, arguing that the essential character of the dispute underlying the discrimination complaint was within the exclusive jurisdiction of a labour arbitrator appointed under the governing collective agreement. The Chief Adjudicator disagreed and then went on to determine that the NRHA had violated the discrimination provisions of the *Code* on the basis of the complainant's alcohol dependency disability during her employment. Various remedial orders including reinstatement of the complainant in her job were made.

[4] The Chief Adjudicator's decision as to her jurisdiction was set aside on judicial review. The reviewing judge concluded that the essential character of the dispute underlying the discrimination complaint was whether there was just cause to terminate the complainant's employment, which in his view was a matter within the exclusive jurisdiction of a labour arbitrator, given the wording of the *Code*, *The Labour Relations Act*, CCSM c L10 (the *Act*) and the factual context.

[5] For the following reasons, I conclude that the reviewing judge erred in overturning the Chief Adjudicator's determination as to the essential character of the dispute underlying the discrimination complaint. Properly

defined, it was one that fell within the statutory scheme of the *Code* for an adjudicator to hear and determine. That said, as I will explain, the Chief Adjudicator also erred by taking too sweeping a view of her jurisdiction, given the circumstances of the case.

Background

Termination of Complainant's Employment and Labour Proceedings

[6] The complainant was employed as a healthcare aide at one of the NRHA's personal care homes in Flin Flon, Manitoba. She was a member of the Canadian Union of Public Employees, Local 8600 (the union) and was subject to a collective agreement between the NRHA and the union.

[7] The *Code's* definition of "discrimination" includes "differential treatment" based on a statutorily protected characteristic or failure to provide "reasonable accommodation" for the special needs of an individual based on a statutorily protected characteristic (see section 9(1)). The collective agreement forbids discrimination based on "physical or mental disability", which is also a statutorily protected characteristic under the *Code* (see section 9(2)(l)). However, the *Code* deems a discriminatory standard or practice in employment non-discriminatory if the employer demonstrates that it is "based upon bona fide and reasonable requirements or qualifications for the employment or occupation" (at section 14(1); and see *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 54-68).

[8] Most of the residents of the personal care home are elderly and have significant personal care needs because of frail physical health and/or

cognitive decline. The work of a healthcare aide is a demanding job with a high degree of responsibility, given the vulnerability of the residents.

[9] The complainant suffers from alcohol dependence which the NRHA concedes is a disability protected by the anti-discrimination provisions of the collective agreement and the *Code*. In the summer of 2010, she began counselling with the Addictions Foundation of Manitoba (the AFM) as a result of an incident of impaired driving. In the spring of 2011, the complainant failed to disclose her disability and the counselling she was receiving to the NRHA when meetings were held with her to discuss her chronic absenteeism from work.

[10] It is undisputed that, on June 3, 2011, the complainant was intoxicated at work. The NRHA suspended her without pay pending an investigation. A meeting between the complainant, representatives of the NRHA and the union took place on June 7, 2011, to discuss her suspension. At that meeting, the complainant first disclosed that she had an alcohol addiction and was enrolled in a six-month high-risk program offered by the AFM. Part of the AFM's program includes participants signing abstinence agreements for a minimum of three months. The complainant signed a three-month abstinence agreement on June 6, 2011.

[11] On June 21, 2011, the NRHA offered to allow the complainant to return to work if she entered into a memorandum of agreement (the proposed agreement). The terms of the proposed agreement included: her total abstinence from alcohol consumption, participation in weekly counselling with the AFM and attendance at meetings of Alcoholics Anonymous, mental health counselling to address personal stress, participation in a residential

alcohol rehabilitation treatment program and permanent submission, while employed with the NRHA, to random alcohol and drug testing. A breach of any of the conditions of the proposed agreement would be deemed by the parties to be "just cause" for the termination of the complainant's employment with the NRHA.

[12] The complainant had concerns with the necessity of aspects of the proposed agreement. On the advice of the union, she refused to sign it. The union made the following representation to the NRHA at a meeting on July 14, 2011:

> It is [the union's] position to not recommend [the complainant] sign the [proposed] agreement. If [the complainant] signs it then she would be setting herself up to fail. This discriminates toward[s] a person with a disability. Employees are not supposed to sign agreements outside the collective agreement. [The complainant] has an illness and is not in the right frame of mind to sign anything. Agreement should be in place prior to coming back to work not before treatment.

[13] On July 20, 2011, the complainant's employment with the NRHA was terminated (the first termination). The principal reasons provided in the termination letter were her being under the influence of alcohol while on duty on June 3, 2011, and a lack of "reasonable assurance" that her alcohol addiction was under control and that she was serious about ongoing abstention from alcohol. In the termination letter, the NRHA stated that it had attempted to accommodate the complainant's disability by the proposed agreement, but the offer was refused.

[14] The collective agreement defines a "grievance" as "any dispute arising out of [the] interpretation, application, or alleged violation of the

Agreement." The collective agreement sets out a three-stage grievance procedure for resolving grievances and, failing a satisfactory settlement, either the union or the NRHA have the right to refer the dispute to binding arbitration.

[15] The union grieved the complainant's termination on her behalf on the basis that she was terminated without just cause. The union requested reinstatement and recovery of lost wages, seniority rights and benefits. The grievance was denied by the NRHA. The union then requested arbitration of the dispute.

[16] While the arbitration was outstanding, the complainant continued to participate in counselling with the AFM. Ultimately, on April 5, 2012, a settlement of the grievance was reached just prior to the commencement of the arbitration hearing. The complainant, the union and the NRHA entered into a written agreement (the settlement agreement). The NRHA agreed to allow the complainant to return to work on certain terms. Those terms were similar to the terms of the proposed agreement, including: her total abstinence from alcohol consumption, continued weekly counselling with the AFM, participation in the AFM Reducing the Risk Program, mental health counselling to address personal stress, and permanent submission, while employed with the NRHA, to random alcohol and drug testing. Part of the period between the first termination and the date of the settlement agreement was classified as a suspension for being intoxicated at work on June 3, 2011, with the remaining time being considered as unpaid medical leave.

[17] Under the terms of the settlement agreement, a breach of the abstinence, counselling or random testing conditions, in the first two years of

her return to work, would be considered by the NRHA to be "just cause" for the termination of the complainant's employment, "subject to the right of the [u]nion and [the complainant] to challenge any decision of the [NRHA] through the grievance and arbitration procedure set forth in the Collective Agreement."

[18] The final clause of the settlement agreement reads as follows:

> [The complainant] confirms that she understands the terms of this Agreement and she considers them to be satisfactory and complete and that all obligations of the [NRHA] and the [u]nion to her (including the Duty to Accommodate) have been met and that she signs this Agreement freely and voluntarily.
>
> [emphasis added]

[19] After the signing of the settlement agreement, but prior to the complainant's return to work, the NRHA received two reports of her being intoxicated outside the workplace. A meeting between the complainant and representatives of the NRHA and the union took place on April 30, 2012, to discuss the alleged breaches of the terms of the settlement agreement, which the complainant denied.

[20] After the meeting, the complainant's employment with the NRHA was terminated (the second termination). The primary reason provided in the termination letter was the breach of her commitment in the settlement agreement to abstain from the consumption of alcohol.

[21] Unlike the situation with the first termination, no grievance of the second termination was filed under the collective agreement. The deadline to file one expired in May 2012.

The Human Rights Complaint and its Adjudication

[22] On November 14, 2012, the complainant filed a complaint of discrimination against the NRHA with the Commission pursuant to the *Code*. The complaint alleged that the NRHA unlawfully discriminated against the complainant in her employment on the basis of her disability (alcohol addiction) and/or failed to reasonably accommodate her special needs arising from her disability.

[23] In its response to the complaint, the NRHA noted that no grievance was filed regarding the second termination. It denied that it had discriminated against the complainant on the basis of her disability (alcohol addiction). The NRHA also argued that it had attempted to accommodate her disability by the settlement agreement, which she breached, and that the sobriety condition in the settlement agreement was a bona fide occupational requirement, given the demands and responsibilities of the complainant's job.

[24] The Commission investigated the complaint. It then requested that the complaint proceed to adjudication before the adjudication panel of the Commission. A hearing before the Chief Adjudicator took place on several dates in the winter and spring of 2015.

[25] During the course of the hearing, there was no suggestion or tangible evidence that the union did not act in good faith in its previous representation of the complainant (see section 20 of the *Act*). According to the Chief Adjudicator, the only evidence she heard about the union's role after the second termination came from the complainant, who testified that she filed the complaint with the Commission because the "[u]nion could no longer help her."

[26] On September 9, 2015, the Chief Adjudicator issued her decision on the complaint. She dismissed the NRHA's jurisdictional objection. Her jurisdictional ruling was premised on three propositions. First, she concluded that the essential character of the dispute arose from the alleged violation of the complainant's human rights and not out of the operation of the collective agreement. In her view, the mere fact that the context here was a workplace governed by a collective agreement did not necessarily mean that a labour arbitrator had exclusive jurisdiction over any dispute between an employer and a unionized worker. Second, she agreed with the Commission's submission that the settlement agreement did not allow the parties to "contract out of the *Code*" because of the "fundamental nature of human rights legislation". In her view, she had to consider the appropriateness of the settlement agreement itself in light of the total interactions of the parties. Finally, she stated that the complainant was not precluded from filing a complaint because she grieved her first termination, signed the settlement agreement and then failed to grieve the second termination. According to the Chief Adjudicator, the second termination gave the complainant "a fresh opportunity to elect the forum for resolving her dispute with her employer" through the *Code*.

[27] The Chief Adjudicator then went on to decide the merits of the complaint that the NRHA had discriminated against the complainant by terminating her employment because of a disability, being addiction to alcohol. She further held that for procedural and substantive reasons, that the settlement agreement did not constitute reasonable accommodation of the complainant's disability or that the conditions imposed in it were not bona fide occupational requirements. In terms of a remedy, the Chief Adjudicator

ordered that the NRHA develop, in conjunction with the Commission, a reasonable accommodation policy for the workplace, that the complainant be reinstated in her position at the personal care home at no loss of seniority, that she be compensated for her lost wages and benefits and that she receive $10,000 in compensation for injury to her dignity, feelings and self-respect.

Judicial Review of the Chief Adjudicator's Decision

[28] The NRHA sought judicial review of the Chief Adjudicator's decision on the basis that, by virtue of the *Act*, the subject matter of the complaint was within the exclusive jurisdiction of an arbitrator appointed pursuant to the terms of the collective agreement to decide; alternatively, that arbitration was the more appropriate forum if the Chief Adjudicator did have concurrent jurisdiction over the subject matter of the complaint and, finally, that her decision was unreasonable in terms of her various findings as to discrimination, as were the remedies ordered.

[29] As previously stated, the reviewing judge allowed the judicial review and set aside the decision of the Chief Adjudicator on the basis that she lacked jurisdiction to hear and decide the complaint. Accordingly, he did not deal with the reasonableness of her decision as to the discrimination issues or remedies ordered. Four aspects of his decision are noteworthy for this appeal.

[30] First, the reviewing judge decided that the standard of review regarding whether the Chief Adjudicator had jurisdiction to hear and decide the complaint under the *Code* was correctness, because the case involved "drawing . . . jurisdictional lines between labour arbitration and human rights adjudication" (at para 35).

[31] Second, the reviewing judge determined that the Chief Adjudicator erred in her conclusion that the essential character of the dispute before her was an alleged violation of the complainant's human rights as opposed to the interpretation, application, administration or violation of the collective agreement. The reviewing judge ruled that the Chief Adjudicator took too narrow an approach as to the essential character of the dispute before her, by looking only at the legal character of the dispute without appropriate regard to the broader factual context of the dispute. He stated (at para 49):

> [T]he essential character of the dispute in issue is whether there was just cause to terminate employment of a unionized employee with an alleged addiction problem. A secondary issue is whether an alleged breach of the [proposed agreement] negotiated between the [NRHA], the [u]nion, and the complainant constitutes just cause for termination of employment. My review of the Supreme Court of Canada's decisions noted above is that the tribunal should not examine the essential character of the dispute in a formalistic or legalistic manner.

[32] Third, the reviewing judge's interpretation of the relevant sections of the *Code* and the *Act* was that labour arbitrators are required to consider and have jurisdiction to enforce the substantive rights and obligations in the *Code*. In his view, the termination of the complainant's employment for breaching the abstinence condition of the settlement agreement was a matter governed by the collective agreement between the union and the NRHA and the fact that a human rights complaint was made, did not take the dispute out of the process set out by the collective agreement and the *Act*. He stated (at para 57):

> The legislative provisions in the ***Act*** and the ***Code*** support a finding that the legislative intent for any dispute involving the termination of a unionized employee, including any human rights

> violation associated with the termination, is within the exclusive jurisdiction of labour arbitration.

[33] Finally, in the circumstances of this case, the reviewing judge determined that labour arbitration was a "better fit" (at para 65(6)) for determining the dispute as opposed to a human rights adjudication.

[34] As part of his decision setting aside the Chief Adjudicator's decision, the reviewing judge ordered that when the grievance and arbitration procedure in the collective agreement was initiated regarding the second termination, the NRHA would be barred from raising objection to it on the basis that the grievance was not made within the time requirements set out in the collective agreement.

[35] It should be highlighted that the union was never a party to the judicial review proceeding and, although the complainant was served with the application, she was not present or represented by counsel. The reviewing judge made his decision based on the representations of the NRHA and the Commission only.

Discussion

Standard of Review

The Governing Principles

[36] The question at the heart of any discussion of the standard of review is "Should the reviewing court approach the decision below with deference?" (*Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 19). Often there is an obvious reason to show deference, such as the expertise of an administrative

decision-maker in a particular subject area, the advantage that an original fact finder enjoys hearing evidence first hand or legislation that limits the right to judicially review or appeal a particular type of decision. Accordingly, central to the task of identifying the applicable standard of review to apply, the reviewing court must decide if there is some principled reason to afford deference in the given case.

[37] The customary rules regarding appellate deference set out in *Housen v Nikolaisen*, 2002 SCC 33, apply to an appeal of a judgment of a superior court on an application for judicial review. The role of the appellate court is to consider two questions: whether the reviewing court identified the appropriate standard of review of the administrative decision-maker and, if so, did he or she apply that standard correctly? (see *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43; and *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 45).

[38] The reviewing court's identification and application of the appropriate standard of review is a question of law and, therefore, according to *Housen*, the standard of review on appeal is one of correctness (see *Dr Q* at para 43; *The Armstrong's Point Association Inc v The City of Winnipeg et al*, 2013 MBCA 110 at para 3; *Friesen (Brian Neil) Dental Corp et al v Director of Companies Office (Man) et al*, 2011 MBCA 20 at para 78; *ARW Development Corporation v Beaumont (Town)*, 2011 ABCA 382 at para 25; *Judges of the Provincial Court (Man) v Manitoba et al*, 2013 MBCA 74 at para 45; *Victoria University (Board of Regents) v GE Canada Real Estate Equity*, 2016 ONCA 646 at para 84; *Al-Ghamdi v Peace Country Health Region*, 2017 ABCA 31 at para 8, leave to appeal to SCC refused, 2017

CarswellAlta 1294; and see John M Evans, "The Role of Appellate Courts in Administrative Law" (2007) 20 Can J Admin L & Prac 1 at 19-22).

[39] However, in the event that a reviewing court is required to make an original finding of fact or exercise of discretion in deciding the judicial review, those aspects of his or her decision are entitled to greater deference on appeal in the manner described in *Housen* (see para 10) as to findings of fact and in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76-80 as to exercises of discretion (see Evans at pp 30-35).

[40] Where a reviewing court identifies the wrong standard of review, or applies it incorrectly, then the appellate court is to conduct its own examination of the decision of the administrative decision-maker, applying the correct standard of review (see *Dr Q* at para 43; *Bourgouin v Rosser (Rural Municipality) et al*, 2014 MBCA 103 at para 17; and *Friesen (Brian Neil) Dental Corp* at para 78).

Application of the Governing Principles

[41] As this Court noted in *Loewen v Manitoba Teachers' Society*, 2015 MBCA 13 at paras 39-41, the application of the principles in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51-56, typically leads to the conclusion that the appropriate standard of review for the sorts of decisions of administrative decision-makers commonly challenged on judicial review is one of reasonableness.

[42] The Supreme Court of Canada commented in *Stewart* that, as a general rule, the decision of a human rights tribunal attracts "considerable

deference" (at para 20). Based on the analysis in *Dunsmuir*, the presumptive standard of review of reasonableness applies to the decisions of an adjudicator as to the evaluation of evidence or interpretation and/or application of the *Code* (see *Korsch v Human Rights Commission (Man) et al*, 2012 MBCA 108 at para 9). Accordingly, if an adjudicator's decision is "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47), deference should be afforded to it by a reviewing court.

[43] However, in dealing with the NRHA's objection to her jurisdiction, the Chief Adjudicator was doing much more than simply evaluating the evidence and interpreting or applying a home statute, the *Code* (see *Quebec (Attorney General) v Guérin*, 2017 SCC 42 at para 33). In her application of the principles in *Weber v Ontario Hydro*, [1995] 2 SCR 929, she was deciding the jurisdiction of another decision-maker, a labour arbitrator, and interpreting that decision-maker's home statute, the *Act*. Both parties agree that the Chief Adjudicator's jurisdictional decision has implications well beyond the instant case regarding which forum arbitrators, adjudicators or both should deal with complaints as to violations of the *Code* in workplaces subject to a collective agreement.

[44] One of the recognized exceptions to the presumptive standard of review being reasonableness is, as the judge stated, "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (*Dunsmuir* at para 61; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26; and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 24). While the Commission argues that the Chief Adjudicator's decision as to her jurisdiction should have been reviewed by the

reviewing judge on a standard of reasonableness, as opposed to correctness, in my view, the reviewing judge identified the appropriate standard of review because the issue before the Chief Adjudicator was one of whether the dispute between the complainant and the NRHA arose out of the collective agreement or whether it fell within the statutory scheme set out in the *Code* (see *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14 at para 27; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39 at para 11 (*Morin*); and *Hebron v University of Saskatchewan*, 2015 SKCA 91 at paras 45-47).

[45] As I will explain, this appeal turns on the second issue discussed in *Dr Q* being whether the reviewing judge erred in applying the correctness standard in his determination of the essential character of the dispute between the complainant and the NRHA. That question has to be resolved on the basis of the principles set out in *Weber*.

[46] The NRHA argued that this Court should show deference to the reviewing judge's determination of the jurisdictional lines between human rights adjudicators and labour arbitrators. I am not persuaded by the NRHA's argument that the reviewing judge's decision should be reviewed by this Court on a standard of palpable and overriding error (absent an extricable legal question).

[47] In my view, the NRHA's position is not consistent with this Court's interpretation of para 43 of *Dr Q*, as discussed in *The Armstrong's Point Association Inc*; *Friesen (Brian Neil) Dental Corp et al;* and *Judges of the Provincial Court (Man)*, both the identification and the application of the appropriate standard of review by a superior court judge conducting a judicial

review is a question of law under the standard of review framework as set out in *Housen*. Similarly, in *Blank v Canada (Justice)*, 2016 FCA 189, the Federal Court of Appeal rejected an alike submission to that of the NRHA and determined that an appellate court hearing an appeal of a judicial review "is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard" (at para 23).

[48] Leaving aside the question of precedent, I see no principled reason why there is a need to show deference to the reviewing judge in this case, given that the standard of review he was required to apply was correctness. Rothstein JA (as he then was) explained in *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, leave to appeal to SCC refused, 2006 CarswellNat 1981, that the practical reality of appeals of a judicial review of the decision of an administrative tribunal is that, in order to decide whether the reviewing court applied the appropriate standard of review correctly, the appellate court must "step into the shoes" (at para 14) of the subordinate court and consider the decision of the administrative tribunal.

[49] If one returns to the basic question discussed in *Stewart* (see para 19) as to whether there is a principled reason to afford deference here, I am satisfied that there is not. The record before the reviewing judge was the same that was before the Chief Adjudicator. He was not required to make any original findings of fact or exercises of discretion. Additionally, there are no limitations on the Commission's right of appeal of the reviewing judge's decision pursuant to section 89 of *The Court of Queen's Bench Act*, CCSM c C280, such as a requirement that the decision being appealed must have wider significance beyond the parties such that leave to appeal must first be obtained. Taken together, these circumstances make it difficult to justify, on

a principled basis, that a margin of appreciation should be afforded to the reviewing judge's decision when he was not required by *Dunsmuir* (at para 61) to afford deference to the decision of the Chief Adjudicator on the same issue. Therefore, I conclude that the reviewing judge was required to be correct in his determination that the Chief Adjudicator was incorrect as to the essential character of the dispute between the complainant and the NRHA.

Determining the Best Fit for Resolving a Dispute—Weber

[50] In *Weber*, the Supreme Court of Canada set out a framework to decide questions of competing forums over a dispute in a situation where an employer moved to strike an employee's civil action against it on the basis that the same dispute was also the subject of grievance arbitration. According to *Weber*, there are three models that legislatures employ in determining what is the appropriate forum for the resolution of disputes: concurrency, overlapping and exclusivity (see paras 38-58; and *Morin* at paras 7-10). As Chief Justice McLachlin explained in *Morin*, "the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix" (at para 11; and see also *Phillips v Harrison*, 2000 MBCA 150 at para 65). The parties agree that the controversy here was whether the Chief Adjudicator had concurrent jurisdiction over the dispute or, alternatively, whether a labour arbitrator would have had exclusive jurisdiction if a grievance had been filed and referred to arbitration pursuant to the collective agreement.

[51] Deciding which of the three models the legislature employed to resolve a particular dispute is a two-step process under the *Weber* analysis. First, the "essential character" of the dispute must be identified, taking into

account the entire factual and legal context (see *Weber* at para 67; and *Bisaillon v Concordia University*, 2006 SCC 19 at para 19). Second, the decision-maker must determine whether the nature of the identified dispute implicitly or explicitly falls within the ambit of the collective agreement, in the case of an arbitrator, or a statutory tribunal's governing legislation, in the case of an administrative tribunal (see *Bisaillon* at para 32; and *Millen et al v Hydro Electric Board (Man) et al*, 2016 MBCA 56 at para 20, leave to appeal to SCC refused, 2017 CarswellMan 37).

[52] The *Weber* analysis does not favour claims of supposed expertise by one type of decision-maker over another in a particular subject matter. The *Weber* analysis is the same regardless of the nature of the competing forums (see *Regina Police Assn Inc* at para 39).

[53] Where jurisdiction of a particular forum is not exclusive, a further question arises, being that of deferral. The decision-maker may decide to adjourn the proceeding in favour of a related proceeding in another forum with jurisdiction over the particular dispute (see Donald JM Brown & David M Beatty, *Canadian Labour Arbitration*, 4th ed (Toronto: Thomson Reuters) vol 1 (loose-leaf updated 2016) at 1-21, 1-26).

[54] Post-*Weber*, on several occasions, the Supreme Court of Canada has dealt with jurisdictional objections to the consideration of human rights legislation in disputes arising from the workplace (see, for example, *Morin*; *Quebec (Attorney General) v Quebec (Human Rights Tribunal)*, 2004 SCC 40 (*Charette*); *Canada (House of Commons) v Vaid*, 2005 SCC 30; and *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52). Some of the relevant principles necessary to decide this appeal from the

jurisprudence of the Supreme Court of Canada and this Court on the principles arising generally from *Weber* are as follows:

i) Absent legislative intent to the contrary, arbitrators appointed under a collective agreement have jurisdiction to decide, and the responsibility to consider, human rights and employment-related legislation in a grievance arbitration. The quasi-constitutional status of human rights legislation does not reserve for human rights tribunals exclusive or concurrent jurisdiction to decide human rights disputes (see *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42 at paras 23, 28, 52-55; and *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at paras 14, 39);

ii) There is no legal presumption of jurisdictional exclusivity in favour of a particular type of decision-maker (see *Morin* at para 14; and *Tranchemontagne* at para 39). Rather, each situation "depends on the governing legislation, as applied to the dispute viewed in its factual matrix" (*Morin* at para 11; and see also *Millen* at para 21). The Supreme Court of Canada's decisions in *Morin*, *Charette* and *Vaid* illustrate that resolving jurisdictional contests between human rights tribunals and either an arbitrator or another administrative body, is a case-by-case determination;

iii) A *Weber* analysis cannot produce the result that denies a claimant access to justice by providing them with no effective remedy to have their dispute heard and determined (see *Millen* at para 20; and *Giesbrecht v McNeilly et al*, 2008 MBCA 22 at paras 55-62). For

example, exclusive jurisdiction to decide a dispute cannot be assigned to an arbitrator if the union is opposed in interest to the individual employee or is unprepared to advance a grievance to arbitration, thereby leaving the individual employee with no effective legal recourse (see *Morin* at para 28; *Bohemier v Centra Gas Manitoba Inc*, 1999 CarswellMan 32 (CA) at para 17, leave to appeal to SCC refused, 2000WL33290404; and *Sachdev et al v University of Manitoba et al*, 2001 MBCA 132 at para 15);

iv) An exclusivity model is unlikely to arise where a dispute is to a collective agreement itself, as opposed to its operation, or where an arbitrator lacks jurisdiction over a relevant party to a dispute (see *Morin* at paras 24, 29; *Billinkoff v Winnipeg School Division No 1*, 1999 CarswellMan 82 (CA) at para 22; and *Bohemier* at para 33); and

v) A *Weber* analysis seeks to avoid multiple proceedings, even in the case of concurrent jurisdiction over a particular dispute (see *Bisaillon* at paras 58-64). A palpable unfairness arises from the practice of forum shopping by a party in order to achieve a favourable result (see *Canada (Human Rights Commission) v Canadian Transportation Agency*, 2011 FCA 332 at paras 25-28). Accordingly, the general rule at common law is that a human rights tribunal cannot judicially review or reconsider a previous decision of another decision-maker having concurrent jurisdiction over the same human rights dispute (see *Figliola* at paras 35-38). To do otherwise would run contrary to the principle of issue estoppel. However, the principle of issue estoppel may not apply if the prior proceeding was unfair or an

> injustice arises from using a prior result to preclude a subsequent proceeding because there are "significant differences" between "purposes, processes or stakes" in the two proceedings (see *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at paras 39, 42-43).

Positions of the Parties

The Commission

[55] The Commission submits that the Chief Adjudicator had concurrent jurisdiction to a labour arbitrator, if one had been appointed to hear a grievance arising from the NRHA's treatment of the complainant. In support of its position that the reviewing judge erred in finding otherwise, the Commission makes four arguments.

[56] First, the Commission says that there is no presumption of exclusive jurisdiction for labour arbitrators to decide human rights disputes simply because they arise in a unionized workplace. It points to the decisions of *Charette* and *Vaid* and argues that the *Act* provides no legislative direction granting exclusive jurisdiction of arbitrators in respect of human rights disputes. The Commission also relies on appellate authorities from Alberta and Nova Scotia to argue that there is concurrent jurisdiction for arbitrators and human rights tribunals to decide human rights issues in unionized workplaces (see *Amalgamated Transit Union, Local 583 v Calgary (City of)*, 2007 ABCA 121, leave to appeal to SCC refused, 2007 CarswellAlta 1437; *Calgary Health Region v Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120; and *Halifax (Regional Municipality) v Nova*

Scotia (Human Rights Commission), 2008 NSCA 21, leave to appeal to SCC refused, 2008 CarswellNS 480 (*Nova Scotia (Human Rights Commission)*).

[57] Second, the Commission submits that the legislature has set out in the *Code* a broad scheme and comprehensive mandate for the Commission to investigate and adjudicate human rights disputes. The Commission says that the reviewing judge did not properly consider the framework created by the *Code* in reaching his decision and that the effect of his conclusions would be the unsuitable situation that the Commission would have no role in cases where a human rights dispute arises in a unionized workplace.

[58] Third, the Commission disputes the reviewing judge's conclusion that the Chief Adjudicator committed the error of "examin[ing] the essential character of the dispute in a formalistic or legalistic manner" (at para 49) without appropriate attention to the factual context (see *Weber* at para 49; *Morin* at para 11; and *Phillips* at para 65).

[59] Finally, the Commission says that the reviewing judge relied on the speculative assumption that the complainant had an alternative legal remedy to a complaint under the *Code* in the form of grievance arbitration under the collective agreement. The Commission submits that there is simply no evidence to support his conclusion.

The NRHA

[60] The NRHA argues that the reviewing judge was correct in deciding that the essential character of the dispute here fell within the exclusive jurisdiction of a labour arbitrator. It also says that, in the alternative, if this

were a case of concurrent jurisdiction, labour arbitration is the more appropriate forum. The NRHA makes essentially three arguments to defend the decision of the reviewing judge.

[61] First, on the question of the relevant legislation and its intent, the NRHA says that section 78 of the *Act* is similar to the Ontario legislation considered in *Weber*. It deems that every collective agreement in Manitoba contains a clause for binding arbitration of "all differences" between parties to a collective agreement. Accordingly, any discipline or dismissal of an employee is arbitrable. The NRHA submits that the wording of the *Code* does not affect the reality that the substantive provisions of the *Code* are enforceable through labour arbitration. Section 42 of the *Code*, which deals with the jurisdiction of adjudicators hearing a complaint, also does not carve out exclusive jurisdiction for the Commission to hear and decide human rights issues contrary to the general principles in *Parry Sound* and *Tranchemontagne* that labour arbitrators are obligated to consider, and have the necessary expertise to decide, human rights issues relating to disputes arising from the operation of a collective agreement.

[62] Second, as to the factual context here, the NRHA submits that the reviewing judge was correct in concluding that the essential character of the dispute here was the termination of employment of a unionized employee with a disability. It says there was much more to the context here than the anti-discrimination rights and reasonable accommodation obligations set out in the *Code* that the Chief Adjudicator focussed on. There was a comprehensive collective agreement that was applied historically to the complainant because of her behaviour, leading ultimately to the settlement agreement relating to

her grievance of the first termination and a second termination for breach of that agreement which was never grieved.

[63] The NRHA argues that, while human rights tribunals look solely at the question of discrimination, labour arbitrators are also required to consider the question of just cause, which includes an assessment of the employee's behaviour in the workplace. The NRHA points out that the Chief Adjudicator specifically stated in her reasons that she would not consider whether the complainant breached the settlement agreement. She stated, "The issue for determination in this matter is not whether the [c]omplainant was drinking on a given day but rather whether the [NRHA] made reasonable efforts to accommodate the [c]omplainant as soon as it was aware that she had a disability and special needs associated with that disability." The NRHA submits that the determination of whether there was just cause for discipline here was central to deciding this dispute, yet the Chief Adjudicator ignored that circumstance.

[64] As stated by the NRHA, the problematic result of such an approach is apparent by the fact that the remedies ordered here included reinstatement and recovery of lost wages and benefits without any consideration of the fact that the complainant was intoxicated in the workplace while exercising a position of trust over the vulnerable residents of the personal care home. By virtue of the Chief Adjudicator's order, the complainant returns to her job without any appropriate disciplinary consequences for her culpable behaviour.

[65] Finally, the NRHA also says that the reviewing judge was correct in deciding that, to the extent there was concurrent jurisdiction for the Chief

Adjudicator in this case, labour arbitration was the more appropriate forum to resolve the dispute.

Analysis and Decision

[66] While my ultimate conclusion is that the Commission's appeal must be allowed, I reach that result largely agreeing with the analysis of the reviewing judge except in two important aspects.

[67] To begin, I agree with the reviewing judge's legal analysis that the interplay of the *Act* and the *Code* leads to the conclusion that an alleged breach of the *Code*, giving rise to the termination of the employment of a unionized worker, is a matter within the exclusive jurisdiction of a labour arbitrator appointed pursuant to the relevant collective agreement to hear and decide.

[68] The starting point is that the *Code* does not override the common law set out in *Parry Sound*, *Tranchemontagne* and *Figliola*, that human rights tribunals are not superior forums for the adjudication of human rights disputes. While the wording of the *Code* provides for "substantive" paramountcy of the rights and obligations set out in the *Code*, it does not provide for procedural paramountcy (see section 58). Unlike other provincial legislation, the *Code* does not give the administrative tribunal created by the statute exclusive jurisdiction to hear and determine matters relating to the *Code* (see section 65(13) of *The Manitoba Public Insurance Corporation Act*, CCSM c P215; and sections 60(1) and 60.8(1) of *The Workers Compensation Act*, CCSM c W200). Rather, the *Code* is a statute of general application to all administrative decision-makers in Manitoba (see *Figliola* at para 53).

[69] The Commission's argument that the Chief Adjudicator had concurrent jurisdiction to decide a discrimination complaint in a unionized workplace because of the broad powers given to adjudicators by virtue of section 42 of the *Code*, is not persuasive. Section 42 is only relevant to matters properly before an adjudicator in the first place, which would not include a matter within the exclusive jurisdiction of a labour arbitrator by virtue of the *Act*.

[70] The decisions of *Amalgamated Transit Union, Local 583, Calgary Health Region* and *Nova Scotia (Human Rights Commission)* do not stand for the broad proposition advanced by the Commission that human rights tribunals always enjoy at least concurrent jurisdiction on a *Weber* analysis when a breach of human rights legislation is raised in a unionized workplace. Such a statement of law is contrary to the case-by-case application of the *Weber* analysis endorsed in *Morin* (see para 11). Also, the legislation in Alberta regarding the jurisdiction of labour arbitrators (see sections 135-136 of the *Labour Relations Code*, RSA 2000, c L-1) is, as noted in *Amalgamated Transit Union, Local 583*, "arguably weaker" (at para 55) than the comparable statutory language used in Ontario that was at issue in *Weber* (see section 45 of the *Labour Relations Act*, RSO 1990, c L.2). As for the *Nova Scotia (Human Rights Commission)* decision, while there are similarities in the labour legislation between Manitoba and Nova Scotia (see section 78(1) of the *Act*; and section 42(1) of the *Trade Union Act*, RSNS 1989, c 475), as I will explain, the nature of the dispute in the case of *Nova Scotia (Human Rights Commission)* transcended the specific employment relationship.

[71] Section 78(1) of the *Act* is worded similarly to the Ontario legislation discussed in *Weber* and the federal legislation considered by this

Court in *Giesbrecht* (see section 57(1) of the *Canada Labour Code*, RSC 1985, c L-2). Section 78(1) of the *Act* gives labour arbitrators in Manitoba broad authority to decide "all differences" arising from a collective agreement, which includes violations of the *Code* or an employment-related statute (see *Tranchemontagne*; and *Brown v University of Windsor*, 2016 ONCA 431 at para 45). By virtue of sections 79(1) and 79(2) of the *Act*, an employer cannot discipline or dismiss a unionized employee absent "just cause." Section 121(1) of the *Act* also requires an arbitrator to have regard to the "real substance" of the dispute. Taken together, these provisions mean that an employer such as the NRHA can only dismiss an employee for just cause. What is just cause in the context of an alleged breach of the *Code* would require the arbitrator to consider the rights and obligations set out in the *Cod*e to get at the real substance of the matter in such a dispute. Finally, by virtue of section 78(1) of the *Act*, legislature assigns to labour arbitrators the role of deciding all differences in disputes arising from the operation of a collective agreement.

[72] The Commission's argument that it has a broad mandate and obligation to investigate potential breaches of the *Code* as alleged by any person (which includes union workers), while accurate (see sections 7(2)(a), 22(1), 26), does not assist it in persuading me that the reviewing judge erred in his interpretation of the interplay between the *Act* and the *Code*. There is an important distinction between receiving and investigating a complaint and whether the complaint is ultimately adjudicated by a member of the adjudication panel of the Commission.

[73] In *Amalgamated Transit Union, Local 583*, the Alberta Court of Appeal concluded that one of the reasons that the Alberta Human Rights and

Citizenship Commission had concurrent jurisdiction to a labour arbitrator hearing a grievance arbitration was because the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14, as amended by the *Alberta Human Rights Act*, RSA 2000, c A-25.5, did not give the human rights tribunal a deferral power where another legal remedy is being pursued (see para 60). The wording in Manitoba of the *Code* is different than the Alberta legislation.

[74] The Manitoba legislature has provided the Commission with a power to defer consideration of a human rights complaint in favour of another forum. Section 29(3) of the *Code* gives a broad discretion to the Commission as to whether a complaint should be referred to adjudication (see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 21 (*Halifax*)). Referral to adjudication requires the Commission to be "satisfied" that further proceedings would either further the objectives of the *Code* or assist the Commission in its discharge of responsibilities under the *Code*. Where no referral occurs, the Commission must terminate its proceedings in respect of the complaint (see section 29(4) of the *Code*). The Commission's exercise of its referral discretion under section 29 of the *Code* is to be reviewed for reasonableness (see *Halifax* at para 17; and *Korsch* at para 6).

[75] In *Korsch*, the Commission terminated proceedings based on a reasonable settlement being offered by a respondent, but rejected by a complainant (then section 29(2)(b) of the *Code*, (now section 24.1(4))). On the appeal of the judicial review of the Commission's exercise of discretion to terminate proceedings, this Court acknowledged that the legislative scheme

of the *Code* gives the Commission a "gatekeeper" function as to which complaints are referred to adjudication (see para 10; and see also *Halifax* at para 20).

[76] The current version of the *Code* provides for the power of the Commission to screen out complaints from being adjudicated in the course of its gatekeeper function where the complaint does not have a reasonable prospect of success (see section 29(1)) or where, as previously mentioned, the Commission is not satisfied that it is necessary in the circumstances for an adjudication to take place, despite its potential merits (see section 29(3)). One of the most obvious examples of the latter discretion of the Commission would be where the protections and objectives of the *Code* can be honoured in another forum such as a labour arbitration.

[77] The errors of the reviewing judge in this case relate to how he dealt with factual context in arriving at his determination as to the essential character of the dispute.

[78] The reviewing judge was not correct when he decided that the dispute here was about the termination of employment of a unionized employee with a disability. Put another way, on a close analysis, there is simply no evidence in this case to support the conclusion that the dispute between the complainant and the NRHA before the Commission arose out of the collective agreement. The situation here was quite different than in the cases of *Amalgamated Transit Union, Local 583* and *Calgary Health Region*; in this case, there is no grievance arbitration of the second termination that was competing with the complaint to the Commission. The situation here was much more analogous to *Nova Scotia (Human Rights Commission)* where

there was also no competing grievance arbitration to a human rights complaint.

[79] The decision of *Figliola* is clear authority to the effect that the complainant did not have the right to litigate her claims twice, once before an arbitrator and once before an adjudicator. That said, it is possible for an arbitrator to hear issues of discipline and dismissal and for a human rights tribunal to hear a complaint of discrimination arising from outside the operation of the collective agreement (see *Naraine v Ford Motor Co of Canada*, 2001 CarswellOnt 4441 (CA) at para 57, leave to appeal to SCC refused, 2002 CarswellOnt 3428).

[80] How the complainant defined the dispute in her complaint to the Commission is not determinative (see *Guérin* at para 40; and *Phillips* at para 65). The essential character of the dispute raised in the complaint to the Commission must be examined in light of the factual context, particularly the absence of a grievance of the second termination. This was not a case of forum shopping. Rather than hedging her bets, by not grieving her second termination, the complainant made a choice to sever her claims relating to discipline and discharge from her claim relating to discrimination on the basis of alcohol dependency. By doing so, she abandoned her rights under the collective agreement to just cause protection, the grievance procedure and union representation (see *Paterno v Salvation Army*, 2011 HRTO 2298 at para 33). She also gave up any right to challenge the second termination in terms of her discipline and dismissal, given that in Manitoba only a labour arbitrator can decide issues of whether there was just cause to dismiss an employee who was subject to a collective agreement. On these facts, both the Chief Adjudicator and the reviewing judge should have analyzed the essential

character of the dispute from the perspective that the operation of the collective agreement was not at issue in this case.

[81] In *Nova Scotia (Human Rights Commission)*, the Nova Scotia Court of Appeal agreed with the motions judge that there was an issue of racial discrimination at the unionized workplace that went beyond the specifics of the complainant's case (see paras 51-52). That was an important factor which supported the Nova Scotia Human Rights Commission having concurrent jurisdiction to investigate a complaint of racial discrimination by demanding information from an employer. In *Vaid*, where the opposite result was reached, the Supreme Court of Canada concluded that there was nothing unique about the allegation of racial discrimination to "lift [the] complaints out of their specific employment context" (at para 94). The Canadian Human Rights Tribunal had no authority to investigate what was a routine constructive dismissal case properly before another statutory tribunal. In my view, the question that the Chief Adjudicator and the reviewing judge should have answered is whether there was anything about the discrimination complaint under the *Code* that went beyond the specific employment context.

[82] In my view there was. The parties here do not dispute, and it is now well settled on the basis of the *Stewart* decision of the Supreme Court of Canada, that drug or alcohol dependency is a recognized disability in the workplace (see para 3). Subject to section 14(1) of the *Code*, differential treatment in Manitoba by an employer against an employee based on this disability is therefore protected against by virtue of section 9(2)(l) of the *Code*; as well, employers have a legal obligation to reasonably accommodate workers suffering from drug or alcohol dependence once they are aware of the

disability regardless of whether the workplace is subject to a collective agreement.

[83] Accommodation of any disability in a workplace is a complex matter involving the individual, other employees and adjustments to the operation of the employer's enterprise. In *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, Deschamps J highlighted the difficulty in ensuring the accommodation of a mental and physical disability of a worker with these comments (at para 22):

> The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street. In *O'Malley* [*Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536] (at p. 555) and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Court recognized that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed. As Sopinka J. wrote in *Central Okanagan*, "[t]he complainant cannot expect a perfect solution" (p. 995). The obligation of the employer, the union and the employee is to come to a reasonable compromise. Reasonable accommodation is thus incompatible with the mechanical application of a general standard. In this sense, the Union is correct in saying that the accommodation measure cannot be decided on by blindly applying a clause of the collective agreement.

[84] If the workplace has obvious dangers, as is the situation here, safety issues have to be considered in assessing the reasonable necessity of the employer's discriminatory treatment (see *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at 520-21). The NRHA has various statutory safety obligations to honour in the operation of its personal care homes under *The Protection for Persons in Care Act*, CCSM c P144; and *The Workplace Safety and Health Act*, CCSM c W210.

[85] The policies that an employer has to design and implement to reasonably accommodate a worker's alcohol or drug dependency in a workplace with significant safety issues, such as here, is squarely a human rights issue. I say that because it is irrelevant to a vulnerable person under care whether the workplace they reside in is or is not unionized. Such third parties, and the public generally, require reasonable assurance that safe and humane caregiving is being performed by persons suffering from drug or alcohol dependency. Accordingly, the law must balance both an individual worker's dignity to be free of any form of discrimination based on a disability while, at the same time, not creating unreasonable risks to those in their care or undue hardship to an employer. Additionally, the expected standards of accommodating workers with an alcohol or drug dependence should not depend on the nature of a particular collective agreement or the prudence of a particular employer where a workplace is not subject to a collective agreement. A degree of consistency in methodology in designing individualized accommodation for disabled workers is in the overall public interest. These are issues in which the Commission properly plays an important role in defining. Accordingly, unlike the situation in *Vaid*, the substance of the discrimination complaint here is larger than the specifics of

what occurred in the employment relationship between the NRHA and the complainant. As in the case of *Morin*, the discrimination complaint here transcends the particular collective agreement and is not in the exclusive jurisdiction of a labour arbitrator to decide.

[86] I also agree with the Commission that the reviewing judge erred in a second way by relying on the speculative assumption that grievance arbitration was an alternative remedy to address the dispute between the complainant and the NRHA. The *Act* implements in Manitoba the general rule across Canada that unions enjoy exclusive agency on behalf of all employees falling under a collective agreement. One of the powers of unions is an exclusive monopoly over seeking grievance arbitration of a dispute (see *Gendron v Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298 at 1328; and *Noël v Société d'énergie de la Baie James*, 2001 SCC 39 at paras 41-42). Absent wording to the contrary in a particular collective agreement, a unionized worker cannot take over carriage of, or independently advance, a grievance arbitration. The remedy for an employee upset with his or her union's representation, is filing an unfair labour practice complaint under section 20 of the *Act* (see *Rowel v Hotel and Restaurant Employees and Bartenders Union, Local 206 et al*, 2005 MBCA 82 at para 1; and *Wong v The Globe & Mail*, 2013 ONSC 2993 at paras 28-30).

[87] In my respectful view, the reviewing judge misdirected himself in determining that labour arbitration of potential breaches of the *Code* by the NRHA was realistic on the record before him. The wording of the collective agreement confirms that the complainant had no independent standing to seek arbitration of alleged breaches of the *Code* by the NRHA during the course of

her employment. Also, the union was not interested in grievance arbitration and, as previously mentioned, there is no basis to suggest that the union's position was contrary to its duty of fair representation for the complainant. This misdirection led to the result that the reviewing judge's *Weber* analysis denied the complainant access to some form of justice altogether.

[88] As earlier stated, the errors of the reviewing judge in his application of the *Weber* analysis require this Court to examine the decision of the Chief Adjudicator as to whether she was correct in deciding that she had jurisdiction over the complaint. While I do not agree with all of the Chief Adjudicator's reasoning on the question of her jurisdiction, I do agree with her ultimate conclusion that the essential character of the dispute fell within the statutory scheme set out in the *Code*. After considering the two-step analysis set out in *Weber*, in my view, the essential character of the dispute is the manner of accommodation to be afforded to a worker suffering from a drug or alcohol dependency who is in a position of trust over vulnerable persons. That is a dispute within the jurisdiction of an adjudicator to decide under the *Code*.

[89] I would add a few caveats to my comments as I am of the view that the Chief Adjudicator misconstrued her jurisdiction in her reasons by taking too generous a view of what she could determine in this case. In particular, nowhere in her reasons does she consider the implications of *Figliola* and *Penner* in relation to her exercise of jurisdiction, given that the NRHA was relying on the settlement agreement as to the issue of reasonable accommodation; this raises the issue of issue estoppel.

[90] The starting point of my concern about the reasoning of the Chief Adjudicator regarding the scope of her jurisdiction are the comments of

Abella JA (as she then was) in *Naraine* as to the trite, but important point, that jurisdiction of an administrative decision-maker is always circumscribed by law (at para 60):

> In my view, ***Weber*** stands for the proposition that when several related issues emanate from a workplace dispute, they should all be heard by one adjudicator to the extent jurisdictionally possible, so that inconsistent results and remedies, such as those in Mr. Naraine's case, may be avoided.
>
> [emphasis added]

[91] The obvious problem with the Chief Adjudicator's *Weber* analysis is that she looked at the situation here as one of a binary choice; jurisdiction existed for her or it did not. Properly understood, the Chief Adjudicator had to recognize that, if she had jurisdiction, it was not unlimited. Two significant nuances of this case affected her exercise of jurisdiction.

[92] First, she had no jurisdiction to decide any questions of discipline or dismissal or to grant any related remedy as those matters were within the exclusive jurisdiction of a labour arbitrator appointed under the collective agreement. As previously explained, in Manitoba, only a labour arbitrator has the power to rule on questions of discipline, dismissal and whether there was just cause to do so because such matters relate to the meaning, application or alleged violation of a collective agreement. Concurrent jurisdiction did not give the Chief Adjudicator the power to engage "lateral adjudicative poaching" of matters reserved by the *Act* to labour arbitrators (see *Figliola* at para 38).

[93] Accordingly, the Chief Adjudicator was required to acknowledge in her exercise of jurisdiction that the employment relationship between the

NRHA and the complainant was permanently severed by virtue of the complainant's choice to forego grievance arbitration in favour of the human rights process. That employment relationship could not be resurrected by operation of the *Code* without doing violence to the legislative intent of the *Act*. The Chief Adjudicator erred in her comment that filing a human rights complaint gave the complainant a "fresh opportunity to elect the forum for resolving her dispute with her employer". That suggestion is forum shopping which, as previously stated, is not permitted on a proper *Weber* analysis; litigants don't get two bites at the proverbial cherry (see *Figliola* at paras 36-38). Properly understood, the situation before the Chief Adjudicator was exactly the same as what occurred in *Naraine*. There were issues for a labour arbitrator and others for a human rights tribunal. The Chief Adjudicator could determine those issues regarding the latter, but not the former.

[94] Second, the Chief Adjudicator's ability to look at, as she put it, "the totality of the interactions between the parties" was limited in one important aspect. The first termination was settled on April 5, 2012, to the satisfaction of all parties, including the complainant, as to whether the NRHA reasonably accommodated her alcohol dependence disability to that point. As previously stated, the Commission argued before the Chief Adjudicator that the *Code* cannot be contracted out of and that she had the jurisdiction to assess whether the NRHA had discriminated against the complainant notwithstanding the terms of the settlement agreement.

[95] It is a mischaracterization of the context here to equate settlement of a labour arbitration with an attempt to contract out of the *Code*. This is not a situation like *New Flyer Industries Ltd. v. CAW-Canada, Local 3003*, 2010

CarswellMan 838 at para 55, where the labour arbitrator ruled that the substance of a collective agreement cannot narrow the protections of a worker guaranteed by the *Code*. The settlement agreement does no such thing. Rather, it says that the events that transpired up to April 5, 2012, complied with the substantive protection the complainant enjoyed under the collective agreement and the *Code* to have her disability accommodated by the NRHA. As a general rule, settlements of grievance arbitrations should be enforced in subsequent proceedings, absent good reason not to do so. The real question before the Chief Adjudicator was whether based on *Figliola* and *Penner*, there was cause for her to take a fresh look at the facts and issues already settled in another forum.

[96] In my view, by agreeing with the Commission's submission, the Chief Adjudicator erred in principle by taking too expansive a view of her jurisdiction. Human rights tribunals do not have the final say on whether human rights legislation is complied with (see *Figliola* at para 53). A human rights tribunal is prohibited, on the basis of the common-law principles regarding issue estoppel as set out in *Figliola* and *Penner*, from reopening or reviewing disputes appropriately settled in another forum except in very limited situations. I see nothing in the record here that would have given the Chief Adjudicator good cause to take a fresh look at the NRHA's treatment of the complainant prior to April 5, 2012.

[97] The three pre-conditions giving rise to issue estoppel are satisfied here: the same issues had to be decided in the human rights proceeding as in the labour arbitration, reasonable accommodation of the complainant's disability by the NRHA; the settlement of the labour arbitration was a final one; and the parties to the labour arbitration were the same as the human rights

proceeding, with the exception that the complainant's agent in the arbitration was the union, and in the human rights proceeding it was the Commission (see *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25; and *Figliola* at para 27).

[98] There is also no basis to exercise the discretion not to apply the principle of issue estoppel as it relates to the settlement agreement's impact on the subsequent human rights proceeding. To begin, there is no suggestion of unfairness in the labour arbitration process (see *Penner* at para 40). As previously mentioned, the NRHA's efforts to accommodate the complainant's alcohol dependency in the course of her employment was essentially the same issue that was the subject of grievance arbitration of the first termination. The complainant knew the case to meet in the labour arbitration process and she was properly represented by her union in putting forward her case (see *Figliola* at para 37). Perhaps most significantly, she personally signed the settlement agreement freely and voluntarily, and acknowledged that her disability had been properly accommodated by the NRHA. Her voluntary acceptance of the reasonableness of the NRHA's accommodation of her disability should have been given far more weight by the Chief Adjudicator, who disregarded completely this important part of the factual context.

[99] Looking at the nature and purposes of the *Act* and the *Code* and the factual circumstances, I also have not been persuaded that differences between the human rights adjudication and the labour arbitration are so significant that an injustice would arise by the use in the human rights proceeding of the result from the labour arbitration process as to the NRHA's accommodation of the complainant (see *Penner* at paras 42-47). The complainant could have fully litigated any violation of the *Code* in the arbitration of the first termination, as

labour arbitrators have the power and responsibility to decide such claims. The stakes for the complainant were actually higher in the labour arbitration than in the human rights proceeding as, due to the wording of the *Act*, only a labour arbitrator could have remedied her dismissal by reinstating her in her job. In such circumstances, I am satisfied that all of the parties to the grievance arbitration relating to the first termination were entitled to assume that the settlement of the dispute of the NRHA's accommodation of the complainant's disability was final and would be treated as such by other adjudicative bodies (see *Figliola* at para 38; and *Penner* at para 43).

[100] The idea that a human rights adjudicator may have their jurisdiction curtailed by a settlement of the parties is also consistent with the operation of the *Code*. When a complainant and a respondent reach a satisfactory settlement during the course of a human rights complaint, the Commission must terminate its proceedings in respect of a complaint (see section 24.1(2) of the *Code*). Neither the Commission nor a member of the Commission's adjudication panel have an independent jurisdiction to continue proceedings thereafter.

[101] As explained in *Penner*, the discretion to not apply the principle of issue estoppel is a broad one that cannot be reduced to a "checklist" or be engaged in by "mechanical analysis" (at para 38). Here, the Chief Adjudicator entirely ignored the significance of the settlement agreement in relation to the NRHA's accommodation of the complainant's disability. Because the NRHA was relying on the settlement agreement, she should have decided whether the pre-conditions of issue estoppel arose and, if so, whether this was a case to exercise her discretion not to apply that principle because it would be unfair in some principled way to do so. For the reasons I have articulated, in my

view, this is clearly a case where the principle of issue estoppel arises because the NRHA relies on the settlement agreement from the labour arbitration to fully answer the complaint of discrimination in the human rights context. I have also not been persuaded that deviating from the principle of issue estoppel was necessary to ensure that an injustice did not occur. Rather, the orderly administration of justice favoured finality and prohibiting the relitigation of an issue appropriately settled in a previous proceeding.

[102] In short, the Chief Adjudicator had to accept for the purposes of her consideration of the discrimination complaint that, up until April 5, 2012, the NRHA had reasonably accommodated the disability of the complainant. It will be for the reviewing judge to consider the reasonableness of the Chief Adjudicator's decision on the merits of the discrimination complaint, but any finding of the Chief Adjudicator that contradicts the April 5, 2012 settlement agreement, would be unreasonable in fact and law based on the principles set out in *Danyluk*, *Figliola*; and *Penner*.

[103] In summary, the complainant had an individual right under the *Code* to make a claim of discrimination against the NRHA, separate and apart from any other rights she enjoyed as a unionized worker under the collective agreement. The human rights issues in this case are much broader than simply whether there was just cause to terminate the complainant's employment which was not an issue that the Chief Adjudicator could consider because it involved the operation of the collective agreement. The Chief Adjudicator's role here, while important, was also modest. She was required to apply the *Code* to the facts and decide the unresolved human rights issues that fell outside the operation of the collective agreement and to provide, if appropriate, a rationally connected remedy.

Disposition

[104] I would allow the appeal with costs in favour of the Commission, set aside the judgment and remit the matter back to the reviewing judge to determine whether the decision of the Chief Adjudicator, on the merits of the discrimination complaint, and the remedies she ordered, was reasonable in fact and law.

Mainella JA

I agree: Monnin JA

I agree: Pfuetzner JA

APPENDIX "A" – RELEVANT LEGISLATION

The Human Rights Code, CCSM c H175

Preamble

(e) these various protections for the human rights of Manitobans are of such fundamental importance that they merit paramount status over all other laws of the province;

Responsibilities of executive director
7(2) In addition to discharging his or her other responsibilities under this Code, the executive director shall

(a) act as registrar of complaints received by the Commission and ensure that they are disposed of in accordance with this Code;

"Discrimination" defined
9(1) In this Code, **"discrimination"** means

. . .

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or

. . .

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

Interpretation
9(1.1) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of

(a) the form of the act or omission; and

(b) whether the person responsible for the act or omission intended to discriminate.

Applicable characteristics
9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

. . .

9(2)(l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;

Discrimination in employment
14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

Complaints
22(1) Any person may file, at an office of the Commission, a complaint alleging that another person has contravened this Code.

Investigation of complaint
26 As soon as is reasonably possible after a complaint has been filed, the executive director shall cause the complaint to be investigated to the extent the Commission regards as sufficient for fairly and properly disposing of it in accordance with section 24.1 or 29.

Dismissal of complaint
29(1) The Commission shall dismiss a complaint if it is satisfied that

(a) the complaint is frivolous or vexatious; or

(b) the acts or omissions described in the complaint do not contravene this Code; or

(c) the evidence in support of the complaint is insufficient to substantiate the alleged contravention of this Code.

. . .
Adjudication or prosecution
29(3) If a complaint is not settled, terminated or dismissed and the Commission is satisfied that additional proceedings in respect of the complaint would further the objectives of this Code or assist the Commission in discharging its responsibilities under this Code, the Commission shall

(a) request the chief adjudicator to designate a member of the adjudication panel to adjudicate the complaint; or

. . .

Termination of proceedings
29(4) If a complaint is not settled or dismissed and the Commission does not proceed under subsection (3) or (3.1), the Commission must terminate its proceedings in respect of the complaint.

Jurisdiction re decisions
42 Subject to the other provisions of this Code, every adjudicator has exclusive jurisdiction and authority to determine any question of fact, law, or mixed fact and law that must be decided in completing the adjudication and in rendering a final decision respecting the complaint.

Remedial order
43(2) Where, under subsection (1), the adjudicator decides that a party to the adjudication has contravened this Code, the adjudicator may order the party to do one or more of the following:

(a) do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention;

(b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;

(c) pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;

Paramountcy of Code
58 Unless expressly provided otherwise herein or in another Act of the Legislature, the substantive rights and obligations in this Code are paramount over the substantive rights and obligations in every other Act of the Legislature, whether enacted before or after this Code.

The Labour Relations Act, CCSM c L10

Duty of fair representation
20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,

(a) in the case of the dismissal of the employee,

(i) acts in a manner which is arbitrary, discriminatory or in bad faith, or

(ii) fails to take reasonable care to represent the interests of the employee; or

(b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

Provision for final settlement
78(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation.

Just cause provision
79(1) Every collective agreement shall contain a provision requiring that the employer have just cause for disciplining or dismissing any employee in the unit bound by the collective agreement.

Deemed just cause provision
79(2) Where a collective agreement does not contain a provision as required under subsection (1), it shall be deemed to contain the following provision:

> The employer shall not discipline or dismiss any employee bound by this agreement except for just cause.

Substance of matter arbitrated
121(1) An arbitrator or arbitration board shall, in respect of any matter submitted to arbitration, have regard to the real substance of the matter in dispute between the parties and to all of the provisions of the collective agreement applicable to that matter, and the arbitrator or arbitration board is not bound by a strict legal interpretation of the matter in dispute.

Remedial authority
121(2) The arbitrator or arbitration board shall provide a final and conclusive settlement of the matter submitted to arbitration, and without restricting the generality of the foregoing the arbitrator or the arbitration board may

(a) determine the monetary value of an injury or loss suffered by an employer, employee or other person, or a union or employers' organization, as a result of a contravention of a collective agreement, and make an order directing

a person or organization to pay all or part of the amount of that monetary value; or

. . .

(c) order an employer to reinstate an employee dismissed in contravention of a collective agreement; or

(d) order an employer to rescind and rectify any disciplinary action taken against an employee in contravention of a collective agreement; or

Canada Labour Code, RSC 1985, c L-2

Provision for final settlement without stoppage of work
57(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

Labour Relations Act, RSO 1990, c L.2[1]

Arbitration provision
45.(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Idem
45.(2) A collective agreement that does not contain an arbitration provision described in subsection (1) is deemed to contain the following:

This provision applies if a difference arises between the parties relating to the interpretation, application or administration of this agreement, including a question as to whether a matter is arbitrable. This provision also applies in case of an allegation that this agreement has been violated. After exhausting any grievance procedure established by this agreement, either party may give written notice to the other that it wishes to submit the difference or allegation to arbitration. The parties shall then appoint a person to act as arbitrator. If they are unable to agree upon the appointment of an arbitrator within ten days after the

[1] Note this is the legislative provision in effect in Ontario at the time of *Weber*. The current legislative provision is worded similarly, see: sections 48(1)-(2) *Labour Relations Act*, 1995, SO 1995, c 1, Sched A.

notice is given, the arbitrator shall be appointed by the Minister of Labour for Ontario at the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision. The arbitrator's decision is final and binding upon the parties and upon any employee or employer affected by it.

Labour Relations Code, RSA 2000, c L-1

Requisites of collective agreement
135 Every collective agreement shall contain a method for the settlement of differences arising

(a) as to the interpretation, application or operation of the collective agreement,

(b) with respect to a contravention or alleged contravention of the collective agreement, and

(c) as to whether a difference referred to in clause (a) or (b) can be the subject of arbitration

between the parties to or persons bound by the collective agreement.

Model clauses
136 If a collective agreement does not contain the provisions required under section 135, the collective agreement is deemed to contain those of the following provisions in respect of which it is silent:

(a) If a difference arises between the parties to or persons bound by this collective agreement as to the interpretation, application, operation or contravention or alleged contravention of this agreement or as to whether such a difference can be the subject of arbitration, the parties agree to meet and endeavour to resolve the difference.

(b) If the parties are unable to resolve a difference referred to in clause (a), either party may notify the other in writing of its desire to submit the difference to arbitration.

. . .

(g) The arbitrator shall inquire into the difference and issue an award in writing, and the award is final and binding on the parties and on every employee affected by it.

Trade Union Act, RSNS 1989 c 475

Final settlement provision

42(1) Every collective agreement shall contain a provision for final and binding settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation, including any ques-tion as to whether a matter is arbitrable.

42(2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:

> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minis-ter of Labour and Workforce Development for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.

42(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.