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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

TELECOMMUNICATIONS EMPLOYEES ASSOCIATION OF MANITOBA INC. (TEAM – IFPTE LOCAL 161), applicant,	)	KRIS M. SAXBERG, ALYSSA CLOUTIER for the applicant
- and -	)	
BELL MTS INC. aka BELL CANADA, respondent.	)	KRISTIN L. GIBSON, BRET M. LERCHER for the respondent
	)	JUDGMENT DELIVERED: January 26, 2023

GREENBERG J.

[1] The applicant ("TEAM") seeks judicial review of the decision of an arbitrator dismissing a grievance by John Cameron, an employee of the respondent ("MTS"), regarding his right to work while he was facing a charge of murder. The arbitrator dismissed the grievance, finding that MTS's decision not to allow Mr. Cameron to work or to pay him pending the outcome of the charge was justified. As Mr. Cameron had been acquitted and re-instated in his position prior to the grievance being heard, the effect of

the arbitrator's decision was to deny him back pay. TEAM says that the arbitrator's decision was unreasonable and should be quashed.

BACKGROUND

[2] Mr. Cameron began full-time employment with MTS in November 2007. On July 1, 2014, while Mr. Cameron was on vacation, his former girlfriend, Michelle Stobbe, died of a gunshot wound in Mr. Cameron's apartment. Mr. Cameron was arrested and charged with criminal negligence and firearms offences. A few days later, the charge was elevated to second degree murder.

[3] The circumstances of the offence alleged by the Crown at Mr. Cameron's bail hearing were, briefly, as follows. Mr. Cameron was living in an apartment in downtown Winnipeg. He owned a handgun and a shotgun that he kept in his apartment. He was licensed for both. Although he had a gun safe, on the night of the incident, the firearms were being passed around among a group of friends. The handgun was loaded. At some point in the evening, Ms Stobbe arrived at the apartment. She was intoxicated and behaving strangely. Shortly after, the other guests left. At about 2:00 a.m., Mr. Cameron made a frantic call to his brother and told him that Ms Stobbe had grabbed the gun from him and shot herself. Mr. Cameron's brother went to the apartment. Although Mr. Cameron wanted to call police right away, his brother suggested that they first get rid of an aquarium that was being used to grow magic mushrooms, which they did. When they returned, Mr. Cameron called 911.

[4] At the time of the offence, Mr. Cameron was working out of MTS's Winnipeg offices as a network provisioner. Some network provisioners, including Mr. Cameron, have

security clearance that allows them to work on a telecommunications network used by police. On July 2, 2014, police advised MTS that Mr. Cameron was facing charges and that his security clearance had been revoked. On July 8, 2014, MTS sent a letter to Mr. Cameron indicating that, "Your absence due to incarceration is being considered an unpaid and unauthorized leave until further notice."

[5] Mr. Cameron remained in custody until December 2, 2014, when Bond J. accepted the bail plan proposed by Mr. Cameron's defence counsel and released him. The bail order required him to live with his parents in Eden, Manitoba, and to be under a 24-hour curfew. The only exceptions to the curfew at that time were that Mr. Cameron was allowed to leave the house in the case of a medical emergency or if in the company of one of his sureties (his parents and an aunt and uncle). In her reasons on bail, Bond J. stated that she had not made an exception to the curfew for employment because she had not been told if Mr. Cameron had employment at the time, but that if his employment situation changed, he could return to court.

[6] After the bail hearing, Shimon Segal, Mr. Cameron's defence counsel, spoke to Don Rooney, MTS's Director, Labour Relations, about Mr. Cameron's return to work. Their conversation was followed by a letter (dated January 13, 2015) to Mr. Rooney from Mr. Segal, which stated:

> I understand that MTS takes the position that Mr. Cameron not return to active work status until his charges are dealt with. I also understand that MTS's position to be that Mr. Cameron's employment status is not at risk during same. However, MTS is not seeking out opportunities for Mr. Cameron at this time. Practically speaking, this means Mr. Cameron can continue to be employed at MTS "on paper".
>
> . . .

> I can indicate on behalf of Mr. Cameron that he is willing to return to work at MTS in any position that would be reasonable given his prior experience and work history. As was decided at the bail hearing, conditions may in fact be crafted that would allow Mr. Cameron to return to work. The bail process is fluid and conditions can be varied on application. In this particular case, Justice Bond ruled that variation for employment had been contemplated and can be addressed in the future.

[7] TEAM also wrote to Mr. Rooney asking that MTS conduct a risk analysis to determine whether Mr. Cameron could return to work, and advising that Mr. Cameron's bail conditions could be varied to accommodate a return to work. Mr. Rooney replied that given Mr. Cameron's 24-hour curfew, there was no position available for him. He also indicated that because of the serious nature of the charge, MTS would have to consider whether his return to work would harm MTS's image and reputation.

[8] On February 13, 2015, Mr. Rooney wrote to Mr. Segal, stating that:

> ... MTS has looked at employment opportunities for Mr. Cameron in accordance with its legal obligations and based on his bail conditions, MTS did not have a position for Mr. Cameron. MTS will continue to look at employment opportunities for Mr. Cameron in accordance with its legal obligations, if provided with new relevant information.

[9] On February 18, 2015, TEAM filed a grievance on behalf of Mr. Cameron alleging that MTS violated the term of the collective agreement requiring it to act "reasonably, fairly and in good faith". They asked that MTS make reasonable accommodation to allow Mr. Cameron to return to work or, alternatively, that they suspend him with pay.

[10] Emails among MTS management, after the grievance was received, indicate that they understood that they had an obligation to consider whether they could accommodate Mr. Cameron by modifying his position or allowing him to work outside Winnipeg. They

also understood that the bail plan could be varied. An email sent by Mr. Rooney to his colleagues on February 27, 2015, states:

> I do not think it's in MTS's interests to have an employee alleged to have committed this kind of offence anywhere in the workplace until his name is cleared, but under the law, we have to go through the process to determine if there is an opportunity for him.

[11] In the email exchanges among MTS staff, it appears that they concluded that Mr. Cameron could not work remotely because they believed, wrongly, that he had no internet access at his parents' home in Eden. However, in his evidence before the arbitrator, Mr. Rooney said that, even if Mr. Cameron had internet access, MTS would not have allowed him to work remotely.

[12] On March 13, 2015, as required by the collective agreement, Mr. Rooney provided MTS's response to the grievance. The response stated:

> MTS has a significant concern with the negative impact accommodating Mr. Cameron would have on its reputation and image with employees, customers and in the community. As a result, MTS will not be providing the judge with an employment option to consider with respect to revising Mr. Cameron's bail conditions. This notwithstanding, the Company did a review of potential opportunities for Mr. Cameron and determined that there are no opportunities at MTS buildings or locations that MTS would be comfortable offering to Mr. Cameron. A working from home scenario was also considered however, Mr. Cameron would still be required to interact with MTS staff.

[13] As I said, Mr. Rooney testified that, even if the bail conditions had been varied, MTS would not have allowed Mr. Cameron to work in any capacity because of its overarching concern about reputational harm. The company was also concerned about the effect that Mr. Cameron's presence in the workplace would have on other employees. Although, Mr. Rooney testified that there were two camps of employees at MTS, one that

wanted Mr. Cameron to return to work and one that did not, and there was no evidence as to how many were in each camp.

[14] In its brief in this court, MTS states that the seriousness of the charge was a factor in its risk analysis. The alleged circumstances of the offence had been relayed to Kelvin Shepherd, the president of MTS who made the decision regarding Mr. Cameron's employment, by Mr. Rooney. Mr. Shepherd testified that he was "shocked" by those circumstances and that they suggested a "distressing" lifestyle. Mr. Rooney had attended Mr. Cameron's bail hearing and reported to Mr. Shepherd that the Crown alleged that Ms Stobbe died by an "execution-style shooting" and that Mr. Cameron admitted firing the gun. In fact, Mr. Cameron did not admit shooting Ms Stobbe. His position, as stated at the bail hearing, was that Ms Stobbe died from an accidental discharge of a firearm and that she had fired the gun herself.

[15] In October 2016, Mr. Cameron sought variation of his bail order to allow him to work for a construction company, a job that included working on private homes. That variation was allowed with the consent of the Crown.

THE ARBITRATOR'S DECISION

[16] The arbitrator dismissed Mr. Cameron's grievance. She found that MTS acted reasonably, fairly and in good faith in deciding not to provide a position to Mr. Cameron. She found that MTS reasonably balanced the risk to their business posed by Mr. Cameron returning to work with the presumption of innocence. MTS believed that, because of the serious nature of the charge, Mr. Cameron's return to work posed a significant risk to its image and reputation. The arbitrator found the fact that MTS relied on incorrect

information that Mr. Cameron had fired the gun was not of significant consequence to its decision.

[17] The arbitrator concluded that Mr. Cameron's absence from work was a result of his incarceration and subsequent bail conditions and not a result of a suspension by MTS. She distinguished the cases regarding suspensions that were relied upon by TEAM on the basis that those cases dealt with situations where the employer had caused the suspension. Her finding that it was Mr. Cameron's bail conditions that prevented him from working was fundamental to her decision. She said:

> The bail conditions posed by the Court, after its consideration of the plan proposed by the grievor's criminal counsel and the Crown's position, restricted the grievor's location to his parents' home in Eden, Manitoba, 24 hours per day, seven days a week, except for medical emergencies or when accompanied by one of four specifically identified relatives. These bail conditions effectively prevented the grievor's attendance at the workplace.
>
> These bail conditions make the matter before me distinguishable from the many cases filed before me dealing with suspensions, including whether an employee is to be paid while suspended and facing criminal charges. Most of these cases dealt with situations where the employer triggered the absence by suspension. Given the strict nature of the bail conditions imposed by the Court on this grievor I do not accept TEAM's assertion that they are a red herring. To the contrary they are integral to this case.

[18] Notwithstanding her finding that the bail conditions were integral to the case, the arbitrator refused to allow Mr. Cameron's defence counsel to testify about the possibility of changing the bail conditions because she found this evidence was neither relevant nor necessary.

THE STANDARD OF REVIEW

[19] The parties agree, as do I, that the applicable standard of review is reasonableness ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65,

[2019] 4 SCR 653). ***Vavilov*** establishes a number of principles regarding the application of that standard of review:

- The onus is on the party challenging a decision to show that it is unreasonable. (***Vavilov***, para. 100)
- A reasonable decision is one that is justified, transparent and intelligible in the context of the facts and law which constrain it. (para. 85)
- A reasonableness review should be approached with an attitude of deference by the reviewing court. The court must be satisfied that any flaws relied on by the party challenging the decision are sufficiently significant to render the decision unreasonable. (para. 100)
- The focus of the review is on both the decision maker's reasoning process and the outcome. "[A]n otherwise reasonable outcome also cannot stand if it was reached on an improper basis." (para. 86)
- Absent exceptional circumstances, a reviewing court will not interfere with factual findings. (para. 125) But, "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it." (para. 126)

POSITION OF THE PARTIES

[20] TEAM raises a number of issues with the arbitrator's decision, which can essentially be summarized as follows. MTS did not meet the onus on it to justify not allowing Mr. Cameron to return to work. The evidence did not establish that Mr. Cameron's return to work would cause serious and immediate risk to MTS's reputation or the safety of other employees. Upholding MTS's decision not to allow Mr. Cameron to return to work was not reasonable because MTS's decision was based on erroneous facts as to the seriousness of the offence (in particular, that Mr. Cameron admitted shooting the victim). The arbitrator erroneously distinguished case law on when to suspend an employee with

pay because she erroneously found that it was Mr. Cameron's bail conditions, not a decision by MTS, that precluded him from working.

[21] In response, MTS argues that the arbitrator's conclusion was reasonable and justified in light of the facts and the applicable law. The arbitrator's finding that MTS did not cause Mr. Cameron's absence from the workplace was a factual determination that is owed deference and justifies the arbitrator distinguishing those cases relied upon by TEAM.

[22] MTS says that its risk assessment was based on a consideration of the serious nature of the charges against Mr. Cameron and the potential risk of harm that his return to work would cause to MTS's reputation. The arbitrator provided a detailed review of the evidence on which MTS's risk assessment was based and her award meets the requirements that it be justified, transparent and intelligible.

THE LAW

[23] Determining whether an employer is justified in suspending an employee pending the outcome of criminal charges involves balancing the interests of the employer to protect its business and reputation against the interests of the employee, who is presumed innocent of the charges, to maintain his livelihood.

[24] The decision in ***Ontario Jockey Club v. Mutual Employees' Assn., S.E.I.U., Local 528***, [1977] O.L.A.A. No. 4, is referred to frequently as a seminal case on the principles to apply when determining whether a suspension pending the outcome of criminal charges is justified. The principles set out in that case are (at para. 6):

> 1. The issue in a grievance of this nature is not whether the grievor is guilty or innocent, but rather whether the presence of the grievor as an employee of the

> Company can be considered to present a reasonably serious and immediate risk to the legitimate concerns of the employer.
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> 2. The onus is on the Company to satisfy the Board of the existence of such a risk and the simple fact that a criminal charge has been laid is not sufficient to comply with that onus. The Company must also establish that the nature of the charge is such as to be potentially harmful or detrimental or adverse in effect to the Company's reputation or product or that it will render the employee unable properly to perform his duties or that it will have a harmful effect on other employees of the Company or its customers or will harm the general reputation of the Company.
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> 3. The Company must show that it did, in fact, investigate the criminal charge to the best of its abilities in a genuine attempt to assess the risk of continued employment. The burden, in this area, on the Company is significantly less in the case where the Police have investigated the matter and have acquired the evidence to lay the charge than in the situation where the Company has initiated proceedings.
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> 4. There is a further onus on the Company to show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position.
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> 5. There is a continued onus on the part of the Company during the period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facets (sic) or circumstances which may come to the attention of the Company during the course of the suspension. These matters, again, must be evaluated in the light of the existence of a reasonable risk to the legitimate interests of the Company.

[25] In ***Jockey Club***, the grievor, whose job was to set up machines and sell tickets for the Jockey Club, was suspended when he was charged with keeping a common betting house. The suspension was found to be justified because it was "a basic requirement of [the Jockey Club's] continued legal existence that it rigorously avoid any form of association with the illegal forms of bookmaking." (at para. 12)

[26] TEAM referred to a number of cases where the decision to suspend an employee facing criminal charges was found not to be justified even in cases of serious offences, including murder (see e.g. ***Re British Columbia Railway Co. and Canadian Union of Transportation Employees, Local 6***, 1987 CarswellBC 2004; ***Re Treasury Board***

(Revenue Canada-Taxation) and Cotter, 1988 CarswellNat 1657). There are, of course, cases that come to the opposite conclusion (see e.g. ***Victoria Hospital v. O.P.S.E.U., local 106***, 1997 CarswellOnt 7434; ***British Columbia and B.C.G.E.U., Re***, 1995 CarswellBC 3598). The cases are, not surprisingly, fact specific. But the governing principles, as articulated in ***Jockey Club***, appear to be settled.

[27] The principles set out in labour arbitration decisions regarding when an employee charged with a criminal offence can be suspended were adopted by the Supreme Court in ***Cabiakman v. Industrielle Alliance cie d'assurance sur la vie***, 2004 SCC 55, [2004] 3 SCR 195, in the context of an individual employment contract. In that case, the employee was a sales manager in a branch office of the appellant insurance company who was suspended without pay when he was charged with attempted extortion. He was re-instated after he was acquitted. The court held that he was entitled to the salary that was withheld while the charge was pending. Suspension without pay was reserved for exceptional circumstances, which did not exist in this case.

[28] As I said, although ***Cabiakman*** involved an individual employment contract, the court relied on decisions of labour tribunals in the context of collective agreements (see paras. 66, 70 and 79). And, although the decision concerned a case under the *Civil Code of Québec*, the same principles have been applied in common law jurisdictions (***Potter v. New Brunswick (Legal Aid Services Commission)***, 2015 SCC 10, [2015] 1 SCR 500, paras. 86-93).

[29] Arbitral decisions in Manitoba have found that whether a suspension without pay is justified requires a distinct analysis from whether the suspension was justified. In ***St.***

James-Assiniboia School Division and St. James-Assiniboia Teachers' Assn. (MTS), Re, 2014 CarswellMan 331, the grievor, a high school physical education teacher, was suspended without pay after being charged with sexually assaulting a female education assistant who worked at a different school in the division. The assault did not occur at work. After reviewing the arbitral case law and noting the five principles set out in ***Jockey Club***, Arbitrator Peltz found that (at para. 32):

> Based on the foregoing, in Manitoba at least, suspension and pay appear to be discrete issues. Even if suspension is justified, the arbitrator must continue the analysis and consider whether the employer's interests can only be protected by withholding the grievor's pay. Essentially the same *Jockey Club* principles apply. The employer's reputational interest is again a factor. The employer's capacity to bear the cost of an non-producing employee will also need attention.

[30] Arbitrator Peltz upheld the suspension as he was satisfied that the School Division had shown a potential risk to its reputation, but he found that the decision not to pay during the suspension was not justified. He found that the onus is on the employer to justify not paying the employee. In determining whether the employer has met the onus, the nature of the charge, whether it was work-related, evidence as to whether co-workers would object to the employee being paid, the employer's ability to absorb the loss (a larger employer would have more flexibility in managing resources), and whether there was a past practice of paying employees during suspension are relevant factors.

[31] In ***Manitoba Government and General Employees' Union v. St. Amant Inc.***, [2010] M.G.A.D. No. 34 (QL), the grievor was put on a leave of absence without pay from his job as a night support worker in a residence for disabled adolescents. This action was a result of an investigation that was being conducted by police into an off-work

incident in which the grievor was alleged to have abused an international student who was living in his in-laws' home. While the arbitrator found the decision to suspend reasonable because of the nature of the workplace, she found that the presumption in these cases was that the suspension should be with pay, adopting the following comments of Arbitrator Freedman (as he then was) in ***Winnipeg (City) and Winnipeg Police Association, Re***, 1998 CarswellMan 1392 (the "***Eakin"*** case):

> 146 An employer can generally accomplish most of what it seeks to accomplish in terms of protecting its legitimate interests, when an employee faces a criminal charge, by removing the employee from the workplace if circumstances require, without at the same time cutting off the employee's pay. It can certainly protect its other employees, its operations, and unless evidence demonstrates to the contrary, its financial stability, by suspension, but with pay. But suspension without pay may be justified if some factors or circumstances exist beyond those warranting the suspension itself. Possibly that would occur in the case of a public sector employer such as this Police Service, where the reputation of the Service with the public and the perception of the Service by the public, are important considerations. Perhaps it is correct that the public would be incensed or outraged if an officer in Constable Eakin's position was suspended, but with his pay maintained. Perhaps the legitimate interests of the Service can only be protected by suspension accompanied by the removal of pay. Evidence would be required to support such a conclusion.
>
> 147 Although my view is that the power to suspend without pay exists, it can only be exercised in circumstances where some lesser sanction, including suspension with pay, would not achieve the necessary protection of the employer's interests.
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> [emphasis added]

[32] The facts in ***Eakin*** were that a police officer was suspended without pay after being charged with assault cause bodily harm of a citizen while on duty. The incident had been caught on a security videotape which the police chief, who had imposed the suspension, felt compelling. The arbitrator found that the police chief had placed too much weight on the video as the issue for him was not whether the employee was guilty

or innocent. The police chief had not given a good reason for departing from the police service's previous practice of suspending with pay.

[33] Suspension without pay may be justified where the grievor is subject to bail conditions that make it impossible for him to attend his workplace. For example, in ***Victoria Hospital v. O.P.S.E.U., Local 106***, 1997 CarswellOnt 7434, the grievor, an x-ray technologist, was suspended when a female patient accused him of improperly touching her. Once reinstated, he sought back pay. The arbitration board found that he was not entitled to back pay because he had been unable to work due to a condition in his undertaking on the criminal charge that prohibited him from attending his workplace.

[34] Similarly, in ***U.A.W., Local 251 v. Ontario Engineered Suspensions Ltd.***, 2006 CarswellOnt 8795, the arbitrator upheld a decision not to pay the grievor while he was suspended. The grievor had been charged with mischief after the employer received a bomb threat while they were negotiating a collective agreement with the grievor's union. When the charges were later quashed, the grievor sought his lost pay. The arbitrator dismissed the grievance finding that the grievor had been unable to work because of a condition of his recognizance which prohibited him from going within 50 metres of the employer's plant, and there was no evidence of any prospect of getting the conditions of his release altered to allow him to attend work while the charges were pending.

[35] That is to say, an employer may not be required to pay an employee during suspension if no modification of the job can accommodate the bail restrictions (see also ***Humber River Regional Hospital v. O.P.S.E.U., Local 577***, 2003 CarswellOnt 4467;

Langley (Township) v. C.U.P.E., Local 404, 1995 CarswellBC 3154; ***Ottawa (City) v. C.U.P.E.***, 2009 CarswellOnt 7931).

ANALYSIS

[36] My task in reviewing the arbitrator's decision is to determine, using a deferential approach, whether the decision is reasonable. Is it justified, transparent and intelligible having regard to the facts and applicable law?

[37] There are three issues raised by the grievance: 1) was MTS's decision to suspend Mr. Cameron justified; 2) was the decision not to consider a modified position for Mr. Cameron justified; and 3) was the decision not to pay him during the suspension justified? In reviewing the employer's decisions on these issues, the arbitrator's decision is constrained by the factual and legal context reviewed above. As I will explain, while the arbitrator's decision on the first issue was reasonable, her decision on the second and third issues was not.

[38] In upholding Mr. Cameron's suspension, the arbitrator concluded that MTS had properly balanced its interests against the interests of Mr. Cameron and had come to a reasonable and fair conclusion. TEAM argues that the arbitrator's conclusion was unreasonable because it did not take into account that MTS's decision was based on incorrect facts. Kelvin Shepherd, whose decision it was to place Mr. Cameron on leave, testified that he was shocked by the allegation that the charge against Mr. Cameron involved an execution-style shooting. Moreover, he believed that Mr. Cameron had admitted shooting Ms Stobbe. In fact, Mr. Cameron had always maintained that Ms Stobbe's injury was self-inflicted. However, Mr. Shepherd also testified that there were other factors that were more important to his decision to suspend than whether Mr.

Cameron had admitted firing the gun. Based on this evidence, the arbitrator found that the misinformation about whether Mr. Cameron admitted firing the gun was not an error of significant consequence. In my view, this finding was reasonable. It followed directly from Mr. Shepherd's evidence.

[39] The arbitrator reviewed the factors on which Mr. Shepherd relied and accepted his conclusion that the risk to MTS's reputation of Mr. Cameron's continued employment outweighed his right to continue working. Her decision in this regard is transparent and intelligible.

[40] TEAM argues that the arbitrator misapplied the onus on MTS to show that it properly assessed the risk to its reputation of Mr. Cameron continuing to work. TEAM says that the evidence does not support MTS's decision. They say it was not reasonable to assume that the reputation of a company of 3,000 employees would be affected by one employee facing a murder charge, especially when the offence was not work-related. Mr. Cameron's continued employment would not pose a threat to other employees and, in any event, MTS did not adequately consider whether the risk of continued employment could be mitigated through modification of Mr. Cameron's job. Notably, MTS rejected the possibility of remote work on the incorrect information that Mr. Cameron did not have access to high speed internet.

[41] The arbitrator reviewed the factors that MTS relied upon and found that the decision to suspend was reasonable. In my view, the fact that the arbitrator accepted the factors on which MTS relied, as opposed to the factors identified above by TEAM, does not render her decision unreasonable. Her assessment of the evidence is entitled

to deference. However, her reasons on MTS's decision not to offer Mr. Cameron a modified position, such as one that allows for working remotely, are unclear. Had the arbitrator decided that MTS was justified in deciding that any return to work would create too great a risk to its interests, it would be difficult to take issue with the decision. However, the arbitrator's decision on mitigation appears to be based, not just on an assessment of the evidence, but on a finding that there was no obligation on MTS to even consider a modified job position. This finding stems from an incorrect interpretation of the bail order and therefore a rejection of the applicable law.

[42] The arbitrator found that MTS did not "suspend" Mr. Cameron; rather at all times MTS treated his circumstances as a "leave of absence". MTS argues that this distinction rendered inapplicable the cases on suspensions, referred to above, such as ***St. James-Assiniboia***. In my view, it is a mischaracterization to describe Mr. Cameron's absence from work as a leave of absence. While it is true that he sought a leave while he was incarcerated (and he is not seeking back pay for that period), he actively sought reinstatement once released on bail. And it appears from the correspondence among MTS management that MTS considered his absence to be a suspension without pay. For example, in an email to Don Rooney, dated July 25, 2014, Kelvin Shepherd says: "Part of me thinks that the best approach is to disown this employee and distance ourselves from this unfortunate situation as much as possible by at a minimum continuing to suspend him without pay."

[43] In any event, in considering the employer's obligations where the employee has been charged with an offence, the cases do not distinguish between a leave of absence and a suspension. As explained by the arbitrator in ***St. Amant***, *supra*:

> 110. Respecting the characterization of St. Amant's action of removing the grievor from the workplace, I agree with Arbitrator Hamilton that ultimately that characterization does not make a significant practical difference to the decision before me. Whether the action of removing the grievor from his position is termed a leave or a suspension, and whether I characterize it as disciplinary, or having a punitive aspect (as Arbitrator Freedman did in the Eakin case) I believe that the tests in Ontario Jockey Club must be applied in the same fashion.

[44] To the extent that there is a distinction in the cases on the right to suspend an employee, that distinction is between disciplinary decisions and non-disciplinary decisions (see e.g. ***Winnipeg Regional Health Authority and MNU (Ahmed) Re***, 2016 CarswellMan 90).

[45] The fundamental flaw in the arbitrator's decision was not just an error in nomenclature. She misapprehended the evidence as to the effect of the bail order. The arbitrator found that MTS had not in fact triggered or caused Mr. Cameron's absence from work. Rather it was the bail conditions imposed by the court that prevented him from working. And this finding was integral to her decision. I repeat this excerpt from her reasons, which I referred to earlier:

> These bail conditions make the matter before me distinguishable from the many cases filed before me dealing with suspensions, including whether an employee is to be paid while suspended and facing criminal charges. Most of these cases dealt with situations where the employer triggered the absence by suspension. Given the strict nature of the bail conditions imposed by the Court on this grievor I do not accept TEAM's assertion that they are a red herring. <u>To the contrary they are integral to this case.</u>

And later in her reasons, she says:

> TEAM argued that in assessing the Employer's decision, the test, articulated by Arbitrator Peltz in St. James School Division, of whether a fair minded, well informed member of the public would reasonably lose confidence in the employer's ability to carry out its mandate, is applicable here. I agree it is applicable where the employer has caused the suspension, as it did in St. James. That though, is not the situation before me. The circumstances are different and unique and as such the St. James test is not applicable here.
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> [emphasis added]

[46] However, it was not the bail conditions that prevented Mr. Cameron from working. The original bail order did not provide a curfew exception to accommodate work because Mr. Cameron's job status was unknown at that time. Bond J. invited counsel to return to court when his job status was known. She said:

> I have not included an exception for employment because I haven't heard that there is any current employment. If that was to change, then I'd suggest that counsel come back to court and we can address it at that time.

[47] In fact, the bail conditions were subsequently varied to allow Mr. Cameron to work at a construction job, which included working on private homes. And the arbitrator was aware of this. Moreover, she found that the original restrictive bail conditions imposed by the court were "suggestive of serious and immediate risk". The fact that the bail variation allowed Mr. Cameron to work on private homes would suggest otherwise.

[48] The arbitrator found that there was no obligation on MTS to seek to mitigate any risk by modifying Mr. Cameron's job. In doing so, she rejected the application of cases like ***Jockey Club*** and instead relied upon ***Nechako Lakes School District No. 91 v. C.U.P.E., Local 4177***, 2004 CarswellBC 3356. In that case, the grievor, who worked in the human resources office of the school district, was suspended after being charged

with the murder of a principal who worked in the district. It was a condition of her bail that she not have contact with a number of people who worked in the administration office where she worked. It was also a condition of her bail that she not enter the Village of Vanderhoof, where the administration office was located, except in limited circumstances, such as attending medical appointments. The suspension was upheld. The arbitrator here relied on this comment from ***Nechako Lakes***:

> 41 The Union argued that the Employer could have sought different bail conditions, allowing Ms. Senner to work in a different capacity in the School District. However, in my view that is not necessary and presumes the Employer has to go a lot farther in its mitigation than is necessary. If an employer were obligated to seek changes to bail conditions in order to accommodate an employee in this situation, the balancing of interests, as described in Philips Cable, supra would surely tip in the employee's favour.

[49] With respect, in my view, this comment misconstrues the obligation on the employer. The employer has no obligation to seek a bail variation. Indeed, they would have no standing to do so. The employer's obligation is to consider whether there is a modified position that would mitigate the risk to its reputation. It is then for the employee to see if the court will vary the bail to accommodate the job he is offered.

[50] In any event, MTS's decision to suspend Mr. Cameron was not based on his bail conditions. Mr. Rooney's evidence was clear. MTS would not have allowed Mr. Cameron to work at any position even if the bail restrictions were lifted. In spite of this evidence, the arbitrator found that it was the bail conditions that prevented Mr. Cameron from working. And, as I said, this led her to find no obligation on MTS to consider a modified job for Mr. Cameron.

[51] The arbitrator's decision that MTS did not have to pay Mr. Cameron during the suspension is also unreasonable. Even where an employer is justified in suspending an employee, the decision whether to pay during that suspension requires a separate analysis. In ***Cabiakman***, the Supreme Court held that suspension without pay is reserved for exceptional circumstances. This principle followed a review of decisions by labour arbitrators.

[52] Manitoba arbitral decisions hold that the decision to suspend without pay must be based on balancing the impact that continuing to pay the employee will have on the employer's reputation against the impact on the employee who is presumed innocent (***St. James-Assiniboia***, ***Eakin***, ***St. Amant***). The decision in ***Nechako Lakes***, which was relied upon by the arbitrator in distinguishing those Manitoba cases, found that the suspension without pay was justified, but also noted that the school district might be faced with a claim for lost wages if the grievor was acquitted, which was the main issue before the arbitrator.

[53] In distinguishing cases like ***St. James-Assiniboia***, the arbitrator here also relied on ***Winnipeg Regional Health Authority and MNU (Ahmed) Re***, *supra*. In that case, the grievor, a nurse who worked in the emergency department of a hospital, was accused of inappropriate touching of a patient. He was charged with sexual assault and released on a recognizance that prohibited him from being alone with female patients. The College of Registered Nurses of Manitoba (CRNM) placed a similar restriction on his registration. His employment was terminated, not because of the assault allegation, but because he failed to disclose the condition in the recognizance to the employer. Arbitrator

Freedman found that the grievor's termination was an excessive sanction and should be replaced by a 21-day suspension without pay. Although the criminal charge had been dismissed so the recognizance was no longer in effect, the restrictions imposed by the CRNM had not been lifted. Arbitrator Freedman found that the grievor was not entitled to be paid for the period between the end of his 21-day suspension and his actual return to work because his inability to work was not the fault of the employer and so the employer bore no obligation to redress it. The arbitrator in the case at bar found that reasoning persuasive. However, in ***Ahmed***, Arbitrator Freedman declined to follow cases like ***St. James-Assiniboia*** because he was dealing with a disciplinary measure. He said that ***St. James-Assiniboia*** would apply if he was dealing with a non-disciplinary suspension:

> 190 Finally, the Union nominee says that the majority has not conducted an analysis "in accordance with the required jurisprudence" of whether the leave should be with or without pay, and in support of that position he cites the *St. James* decision (Arbitrator Pelts, 2014). In *St. James*, the employer had suspended a teacher without pay pending a determination of criminal charges that had arisen in regard to a non-work related incident. That case and others cited therein involved non-disciplinary suspensions where the employer removed the employee from the workplace pending a determination by another tribunal.
>
> 191 In such cases an analysis is indeed commonly conducted to determine whether the employer was entitled to impose a non-disciplinary suspension, without pay, pending the outcome of proceedings in that other forum. But the circumstances of this case are quite different, and unique, and render such an analysis inapplicable. This was a disciplinary act by the Employer not dependent in any way on findings by a criminal court. Whether the grievor could have returned to work had he been suspended and not terminated, and if not whether he is nevertheless to be paid while he has not worked at the hospital after the 21-day period, is not determined by asking what is necessary to protect the Employer's interests, as in *St. James*.
>
> [emphasis added]

[54] The suspension in this case was not a disciplinary measure.

[55] In my view, the arbitrator's decision in this case was unreasonable because she fundamentally misapprehended the effect of the bail order and therefore the cause of Mr. Cameron's absence from work. Mr. Cameron was not at work because MTS made a decision to suspend him. The arbitrator's finding that MTS had not caused Mr. Cameron's absence from work was integral to her decision and led her to incorrectly distinguish the applicable case law and to find that MTS had no obligation to consider a modified job position.

[56] The arbitrator did not distinguish in her analysis between MTS's decision to suspend and its decision not to pay Mr. Cameron during the suspension. Even if it was reasonable for the arbitrator to accept MTS's decision that allowing Mr. Cameron to return to work in any capacity would create a serious risk to its reputation, she did not conduct a separate analysis of the decision to suspend without pay. In this regard, the decision is not justified, transparent and intelligible because the reasons do not distinguish between the justification for the suspension and the justification for not paying during that suspension. Even allowing that the reasons should not be held to a standard of perfection and must be read in light of the evidence before the arbitrator, the rationale for upholding MTS's decision not to pay Mr. Cameron is not apparent. As stated in ***Vavilov***:

> 98 Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

[57] In my view, because the arbitrator fundamentally misapprehended evidence that was integral to her decision and incorrectly distinguished the applicable law, the decision was unreasonable.

REMEDY

[58] As I have found the arbitrator's decision to be unreasonable, I must consider what remedy is appropriate. The usual practice where a decision cannot be upheld is to remit the case back to the decision maker to reconsider with the benefit of the court's reasons (***Vavilov***, para. 141). The issue of remedy was not addressed in oral argument and there is only a brief reference to the issue in TEAM's brief. As a result, I have no basis for diverging from the usual practice. The matter is, therefore, referred back to the arbitrator for reconsideration.

[59] Costs may be spoken to if not agreed upon.

_____J.