1-8-1992

Re St Vincent's Guest House and CUPE, Loc 1082

Innis Christie

M Tynes

Donald H. McDougall

Re St. Vincent's Guest House and Canadian Union of Public Employees, Local 1082

[Indexed as: St. Vincent's Guest House and C.U.P.E., Loc. 1082, Re]

Nova Scotia, I. Christie, M. Tynes, D.H. McDougall. January 8, 1992.

EMPLOYEE GRIEVANCE alleging improper denial of promotion. Grievance denied.

A. Somerville, for the union.
B.G. Johnston and others, for the employer.

AWARD

The union alleges that the employer breached the collective agreement between the parties effective January 1, 1989 to December 31, 1990, and in particular art. 13.01, Seniority. The union requests that the grievor be granted the position in question and compensated for any lost income which resulted from the alleged breach.

At the outset of the hearing in this matter the parties agreed that this arbitration board is properly constituted and properly seised of this matter, that we should remain seised after the issue of this award to deal with any matters arising from its application, and that all time-limits, either pre- or post-hearing, are waived. By agreement of the parties time-limits in the grievance procedure were extended and do not concern us here.

We are dealing here with a claim to a posted job under a "competition" type seniority clause. The grievor is senior to the employee to whom management awarded the job and the employer concedes that the grievor was at least as well qualified as the incumbent in all respects except that at the times of both the posting and the awarding of the position, and for some time before, and after, the grievor suffered from a back injury and was off work on workers' compensation.

The incumbent, Deborah Townsend, who was the successful applicant for the position in question, was advised of the hearing by a letter from the employer and attended. She was fully advised by the board of her right to participate and to be represented in the proceedings before the board, but declined to take any part.

The board was informed that there is another grievance arising out of the same job posting, by Ms Joan Moulton who is also senior to the incumbent, which has been postponed pending this award.

The employer, St. Vincent's Guest House, is a home for the elderly in Halifax. It has 154 beds and provides both level 1, personal care, and level 2, nursing care. There are about 200 employees in all, 35 of them in the dietary department in which this matter arose.

The grievor, Norma Craig, started to work for the employer in July of 1982. She started as a part-time employee and is still employed part-time, currently as a temporary cook's assistant. She is married and has two children, who are three and four years old. Part-time employment in this context involves 21 scheduled hours of work a week and more hours as requested, often totalling 40 hours or more. A full-time job such as the one in question involves 40 hours a week on regularly scheduled shifts.

The grievor suggested in her testimony that part-time work was harder than full-time work because part-time employees were often disciplined, in that they got warning letters, if they turned down many requests to take extra shifts. However, on all of the evidence, including that of Andrea Welburn, shop steward in the dietary department, we are satisfied that these letters are not disciplinary. The employer simply advises part-time employees who turn down requests to work extra shifts that if they continue to do so they will not be asked any more. Nevertheless, we accept that full-time jobs with the employer are more desirable than part-time ones not only because weekly earnings are normally higher but also because it is easier for a full-time employee to schedule his or her life. The grievor was most emphatic about this point in claiming that, quite apart from the actual work involved, it would have been easier for her to do the full-time job she seeks here than a part-time one like the one she now holds.

The job in question here is that of full-time trays person. Trays persons fill the trays and deliver them to the rooms of residents who are not well enough to come to the dining-room. The grievor has done that job on a part-time basis, and there is no dispute that, apart from the injuries that put her off on workers' compensation for extended periods, she was as well qualified for the job as the incumbent.

Indeed, in November of 1989 the grievor was awarded the trays job on a temporary full-time basis, for three months, when the employee who had been doing it was awarded a trial period an another job. She was in that job when she suffered the injury that has plagued her since. On November 26, 1989, she slipped twice on

a wet floor. The details of the accident or her injuries need not concern us here because the employer did not suggest that any of her lost time was other than legitimate and justified by her injuries. Indeed, the employer's evidence is that the grievor was "trying her best" throughout.

The grievor was on workers' compensation until March 5, 1990, when she returned to the trays position. She worked seven shifts, March 5th, 6th, 8th, 9th, 12th, 13th and 15th, four or five of them on trays and two or three as assistant cook. It is clear from the grievor's testimony that, while the work as assistant cook in the meat or vegetable area may be somewhat heavier, in this period she took that work, for which the pay is somewhat higher, voluntarily. She testified that her work in that period, particularly the turning involved, caused muscle spasms which made it necessary for her to see her doctor. She went back on workers' compensation, which, it turned out, continued until the following September.

Throughout these periods on workers' compensation the grievor supplied the employer with certificates from her doctor, which are in evidence. The one for March 20th says, simply, "Norma has been advised to remain off work until reassessed April 13/90", and is signed by the doctor. There are similar certificates dated April 12th, "until reassessed May 7th", May 8th, "until reassessed June 18/90" and June 21st, "until reassessed July 23rd". The next certificate in evidence is dated September 14, 1990, and states, "Norma has been advised she may return to regular duties as tolerated."

The grievor testified that she provided the employer with a similar certificate in August of 1990, but no copy or direct record of it was put in evidence. The employer's only witness was Susan Moriarty, director of the employer's dietary department. She herself had been off on sick leave from mid-June, and when she returned to work on August 13th she found that there was no certificate from the grievor's doctor for July 23rd onwards. She was told by supervisors that the grievor had called to say that she would be going to her doctor in early August. She called the grievor to tell her that the employer was missing a doctor's certificate and, according to Ms Moriarty's testimony, the grievor said she would get it, but Ms Moriarty has no record of having received it. She admitted that it was possible that the employer had received a certificate and misplaced it, but did not think that was at all likely. In cross-examination she testified that the employer had had a question from the Workers' Compensation Board about the

August period as well, suggesting that there had indeed been a problem with the grievor's medical certification in that period.

On the other hand, a letter from the grievor's doctor to the lawyers who are handling a workers' compensation appeal for her, which counsel for the employer insisted be put in evidence after the grievor referred to it on the witness stand, indicates that she visited her doctor on August 1st, and that her situation was unchanged from June 13th. The doctor's note in relation to the grievor's June 13th visit is: "No consistent improvement. Unable to do household chores. Refer to [orthopaedic surgeon] (July 30). Anti-inflammatory treatment." We return later in the sequence of events to this missing certificate. It is only necessary to find that the employer does not now have it, that Ms Moriarty never saw it and that she thought it had not been provided although she had reminded the grievor that she was supposed to provide it.

On May 17, 1990, the employer put up a posting for "Temporary Full-Time Position Trays" to be held for "approximately 3 months". Although the grievor was on compensation she applied for this job. She did not get it. The successful applicant was Deborah Townsend, the incumbent in the matter before us. Although she was unhappy with the result, the grievor did not grieve the awarding of this temporary full-time trays position to a less senior employee. She testified that she raised the matter with Susan Moriarty, who told her that she had not gotten the job because she was on workers' compensation, and it was only a temporary job for the time she was off. She said that she decided not to grieve because it was only a temporary job and she realized that she would not be able to actually do the work for at least part of the period.

Susan Moriarty's testimony on this point did not differ significantly.

On August 23rd, over Ms Moriarty's signature, the employer posted the same job, but this time on a permanent basis:

NOTICE OF VACANCY:	Dietary Department
JOB DESCRIPTION:	Permanent Full-time Tray Area must be able to work 6:15-2:15 and 10:30-6:30 shifts.
SALARY:	See Schedule "A" Union Contract
DUTIES:	Job description and hours of work available in Dietary Department.
APPLY TO:	The undersigned by August 30, 1990.

This is the posting which is the subject of the grievance before us. The job description, which was last revised in 1983, is in evidence. It states:

POSITION DESCRIPTION:

The tray staff, under the direction of the Dietician or Food Service Supervisor, are responsible for the proper preparation of trays for those guests who require it, taking into consideration special diets and other individual needs. They also deliver and collect these trays at specified times. Any special requests or problems that a Guest is having should be reported to the Dietician. Responsible for cleanliness and sanitation of work area and equipment used. Responsible for completion of tasks in the proper manner. Punctuality is expected at all times.

MAJOR DUTIES AND RESPONSIBILITIES:

(1) Total responsibility for setting up and serving trays.

(2) Check meals service for appearance, color etc. Make sure all trays are sat [*sic*] up properly and served without any spills.

(3) Observe and enforce sanitary methods of preparation; work area kept clean, food covered, trays covered at all times when transporting to the floors.

(4) Maintain order and cleanliness in; (a) counters, cupboards, utensil containers (b) sink (c) refrigerator (d) portable steam table (e) meals on wheels trolleys (f) trolleys used for collecting trays.

(5) Responsible for washing their own serving dishes.

(6) Responsible for ordering supplies from storeroom.

(7) Report needed repairs to Supervisor so maintenance can be informed.

(8) May be called upon at times to perform other tasks not included in this job description. (but consistent with the job.)

The grievor submitted her application on August 27, 1990. She testified that, although she did not have her doctor's permission to go back to work, and would not in fact get it until she next visited her doctor, on September 14th, she did not want to miss the opportunity to get a permanent full-time job for which she was qualified.

The grievor was not contacted for an interview or otherwise in connection with her application except to be advised that she had not gotten the job. Susan Moriarty testified that she never interviews people under her supervision in connection with applications for positions because she knows them all well. This practice is well established and has never been grieved.

Ms Moriarty testified that, in the context of the decision that she and Mr. Duggan, the administrator, made to offer the permanent full-time job to a less senior employee, she was painfully aware of how disabled the grievor was. She said that later in the week of August 13th, after her telephone conversation with the grievor about the missing medical certificate, the grievor had come in to pick up her pay cheque and they had talked in the hall. She testified that in response to a question as to how she was the

grievor had said that she was having difficulty with her home responsibilities, and specifically that she could not lift her children or drive long distances, and that some of her medications were making her drowsy. When Ms Moriarty asked her about coming back to work she replied that she would be seeing her doctor in mid-September and that in previous visits the doctor would not answer her questions about going back to work, beyond saying, "We'll have to see how you're doing". In that context Ms Moriarty mentioned to the grievor that she should perhaps be thinking about the possibility of retraining through Canada Manpower. This evidence was uncontradicted by the grievor.

Ms Moriarty testified that she was very concerned about the lifting, pushing, pulling and turning that the grievor would have had to do on the tray job, let alone the demands of any of the other work that she might have occasionally been asked to do while in that position. She mentioned that the tray job involved standing for seven or eight hours on a hard floor, which was, at times, slippery. In cross-examination she said that she did not give the grievor the job, after much discussion with Mr. Duggan, because she was uncertain that the grievor would fulfil the requirement of regular punctual attendance. Earlier she had made it clear that by "punctuality" she meant regular attendance, there being no evidence whatever that the grievor had ever had any problem with lateness.

In this context Ms Moriarty and Mr. Duggan reviewed Deborah Townsend's attendance record, which was put in evidence. It is, without question, much better, showing only four sick days in 1990 prior to the decision at the end of August to give her the job.

In the course of her testimony Ms Moriarty also stressed the importance that she attached to regular attendance of the full-time trays people. She said that the part-time people who otherwise had to fill in were slower, and since the filling of the trays is done on an assembly line basis this caused the whole meal operation to back up, which, she said, impacted on the whole day's operations. She also testified that trays people interact importantly with the residents, coming to know their likes and dislikes and so on. The grievor contradicted this testimony to some degree, pointing out that all diets are set out in a book, which the trays people must simply follow.

On August 31, 1990, the grievor filed the grievance before us. In it she states, in part: "On Aug 30-1990 I was told by Susan Moriarty that I did not receive the position due to being off on Workers Compensation the last nine months." On September 4th

she received a written reply to her grievance from Mr. Duggan, as follows:

> This is in response to your grievance dated August 31, 1990 in which you claim that Article 13 of the Collective Agreement has been violated.
>
> Firstly, we should point out that Article 13 must be read in conjunction with Article 14 and in particular Article 14.04 (4).
>
> We had to fill the position identified in the posting to which you responded by August 30th. Also, we had to ensure that the person appointed to the position could actually do the work, including some heavy lifting.
>
> You have been on Workers' Compensation since November 30, 1989. Our records indicate that there has been a great deal of uncertainty about how long you have to stay off work. You did return to work part time on March 5 and over the following two weeks you worked a total of 54.75 hours following which you required further treatment. Our most recent information is your verbal indication that you will be returning on September 17th. However, we do not have a doctor's certificate verifying this and indicating that you will be able to fulfil the requirements of your part time position.
>
> Because of the uncertainty concerning the date of your return to work and your ability to fulfil the physical requirements of the position, and because of our need to fill the position we are unable to offer it to you.
>
> Because of these circumstances the grievance is denied.

There was a good deal of evidence of the grievor's work record after the filing of the grievance. It was not objected to and appeared to be relevant, at least to the remedy. Our findings of fact in that respect will be set out briefly.

The grievor returned to work on September 17, 1990, in accordance with the medical certificate set out above. Apparently the grievor went back to work as a part-time trays person. There was some conflicting testimony about what the grievor was asked to do and by whom in the days after her return, but it suffices to say that she worked only seven days before Monday, October 1st, when she once again saw her doctor and was given a certificate putting her off work for a month. She did not return to work until May of 1991.

In November of 1990 the grievor's workers' compensation payments were stopped. At the time of the hearing in this matter she had an appeal under way. There was no other evidence with respect to that matter. The grievor was then granted a leave of absence as provided for in art. 21.02 and the employer paid out all accumulated sick pay and vacation pay. The employer also issued a separation slip which allowed the grievor to collect unemployment insurance sickness allowance. The grievor continued to receive treatment for her back, and on May 8th and 10th her doctor and the Canadian Back Institute advised the employer that she was ready to go back to work. There was some evidence of a

disagreement between the parties in relation to the timing of the grievor's return to work. However, that was settled and need not concern us here.

With the aid of a series of photographs, Susan Moriarty testified to the various functions that make up the daily work of a trays person. Prior to that testimony the grievor had been cross-examined with reference to the same photographs. Andrea Welburn, who is the shop steward in the dietary department, also testified briefly on the amount of heavy lifting required in the trays job. Ms Welburn and the grievor thought there was considerably less heavy lifting in the trays job than Ms Moriarty's testimony suggested. All of this testimony was useful in giving us a sense of the job in question, but we do not propose to set it out in detail here.

Rather, we will simply state that we find that, while there are undoubtedly differences in the amount of physical effort required in the various jobs in the dietary department, the differences are not so significant as to be relevant in the train of events described above. In other words, we do not find that any of the grievor's time on workers' compensation or on leave of absence was shown to be attributable to the differences between the demands of the trays job and the various tasks she performed from time to time as assistant cook in either the meat or vegetable area or in the pots area.

Moreover, we are satisfied that there are elements in the trays person's job, as well as in any other of the jobs the grievor is qualified to do and has done, that quite properly gave rise to serious concern abut her physical capacity to do that work at the time the decision was made to give the permanent full-time job to another less senior employee.

The issues: The union representative, Mr. Somerville, put the case simply. The grievor, he said, was the senior applicant for the trays job and was as well qualified as the person who got the job. Therefore, under the collective agreement she was entitled to it. The fact that she was on workers' compensation at the time of the posting and the decision to award the job did not mean that the collective agreement did not apply to her. Article 13.01, the seniority clause, he said, overrode art. 14.04(4), which gives the employer the right to determine qualifications. In Mr. Somerville's submission, the grievor had been punished for having been injured on the job and having gone on workers' compensation. This, he said, constituted discrimination contrary to the collective agreement and the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, although he did not pursue the latter point.

Mr. Somerville stressed the employer's failure to consult with the grievor or her doctor at the time the decision to award the job to a less senior employee was made. He pointed to the fact that neither the posting nor the job description made any special requirement of regular attendance.

Counsel for the employer, Mr. Johnston, agreed that the grievor was the senior applicant and that in all respects, other than her attendance record, physical capacity to do the work and the fact that she was not actually available to do the job, her qualifications were at least equal to those of the employee who had been awarded the job. He submitted, however, that present ability to do the job was a most important qualification. Faced with the fact that the grievor had been on workers' compensation for months and with no way of knowing when she would be able to return, the employer had acted properly and reasonably in awarding the job to the incumbent. Through Ms Moriarty's knowledge of the grievor's situation, the employer had had a proper basis upon which to make its decision. The capacity to be in regular attendance is, Mr. Johnston submitted, a perfectly reasonable qualification for the employer to have required. He reminded the board that the union bears the onus in a case such as this.

There appear to be no awards on the question of the entitlement of an employee on sick leave or workers' compensation to promotion in accordance with a collective agreement, but counsel for the employer relied upon a line of awards on the appropriateness of employers considering absenteeism records in promotion cases.

Decision: It was not argued by counsel for the employer, and there appears to be no basis for saying, that the collective agreement does not apply to an employee on workers' compensation. We can, therefore, proceed on the basis that when the grievor applied for the job in question she had the right to do so, and had the normal rights to be considered for the job.

In our view there is no need to say, as the union representative suggested, that art. 13.01 "overrides" art. 14.04(4). They are both quite standard clauses and they work together in a way that has been canvassed frequently in the reported arbitration awards.

Article 13.01 provides:

> Seniority is defined as the length of service with the Employer and shall be used in determining preference or priority for promotion, transfers, demotions, lay-offs, recall and reduction of workforce. Seniority shall operate on a bargaining-unit-wide basis [following the completion of a probation period]

Article 14.04(4) provides:

> The Employer has the right to determine promotions, but it agrees that where qualifications are relatively equal, such promotions shall be made on the basis of seniority.

Reading the seniority and promotion clauses together makes it clear that they do not conflict, but work together. The first defines seniority. The second states what role it is to play in promotions.

Article 14.04(4) is clearly a seniority provision of the kind that "involves a contest between competing applicants, and *seniority governs only when their competence or ability is relatively equal*" (emphasis added), to quote the famous passage from the award of arbitrator Laskin, as he then was, in *Re U.A.W. and Westeel Products Ltd.* (1960), 11 L.A.C. 199 at p. 199. It is to be contrasted with the "threshold" type of seniority clause, which provides that the senior applicant is entitled to the job provided he or she is qualified or able to do the work.

Counsel for the employer relied on *Re Suncor Inc. and McMurray Independent Oil Workers, Loc. 1* (1983), 13 L.A.C. (3d) 432 (Mason), in which the majority of the board concluded that in considering an application for a transfer management had discretion whether or not to transfer the senior applicant. The collective agreement there stated:

> 11.08 Before the Company seeks candidates from outside the Bargaining Unit, preference shall be given to senior qualified employees who have applied pursuant to the procedures described below.

The point of citing the case, presumably, was that art. 13.01 of the collective agreement before us also uses the word "preference". Without suggesting that we agree with the conclusion of the board there, it suffices to say that *Suncor* has no application here. We are dealing with what is obviously a promotion, not a transfer, and the majority of the *Suncor* board appears to have considered that distinction important (see p. 435). Much more important, however, is the fact that the grievor's claim here does not rest on art. 13.01, the primary function of which is to define seniority, but on art. 14.04(4), which is quite unequivocal in providing that where qualifications are relatively equal "promotions *shall* be made on the basis of seniority" (emphasis added).

It is admitted that in all respects other than her attendance record, her physical capacity to do the work and her availability the grievor was at least equal to the incumbent, so we need not concern ourselves here with degrees of equality, except in relation to those particular "qualifications". In respect of them our concern is, the precedents suggest, in a sense twofold. We must determine

whether the employer acted properly in accordance with the collective agreement in setting the qualifications required for the job in question and we must determine whether, measured against those qualifications, the grievor was in fact "relatively equal" to the incumbent. In reality, of course, employers often do not clearly separate these two elements of the decision-making process. Nevertheless, provided arbitrators do not seek to impose a formalism not contemplated by the parties, the arbitral review of employers' promotion decisions under seniority clauses is best approached in this way.

Rather than reviewing the myriad awards on the standards to be applied in the arbitral review of such employer decisions, which were not argued by the parties here, we will repeat the following from Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., para. 6:3300 (footnotes omitted):

> As previously noted, in reviewing an employer's determination as to whether a particular employee has the requisite ability to perform the job for which he applied, arbitrators will, in the first instance, assess the propriety and reasonableness of the standards utilized by the employer. As to this aspect of the employer's decision, most arbitrators have conceded that, in the absence of some specific clause in the collective agreement to the contrary, management has the prerogative to determine initially what standards must be met by an employee who desires to secure a particular job. Nevertheless, regardless of the type of seniority clause which the parties have included in their agreement, it is also firmly settled that an employee's claim that he was improperly denied a particular job would prevail if it could be established that the standards and criteria relied upon by the employer in making its judgment were not contemplated by the collective agreement and did not bear any reasonable relationship to the work to be done, were unclear or subjective, were discriminatory and in violation of Human Rights legislation, were not invoked in good faith, that such standards were not fairly or uniformly applied to all applicants, or were not specified in the job posting, or did not constitute a balanced assessment.

The first question is whether the reference to "qualifications" in art. 14.04(4) can be taken to include the likelihood of regular attendance and the physical capacity to do the work which concerned the employer here.

For the union, Mr. Somerville submitted that it cannot. He referred to the suggestion in Palmer, *Collective Agreement Arbitration in Canada*, 3rd ed., at pp. 491-2, that "qualifications" generally refers to formal training of some kind. That, however, only holds true where the collective agreement refers to "qualifications, skill and ability" or some other such combination, so that if the word "qualifications" is not to be treated as redundant it must be given a meaning of that sort. This point was clearly made by the arbitration board in *Re Dominion Stores Ltd.*

and Retail, Commercial & Industrial Union, Loc. 206 (1983), 9 L.A.C. (3d) 47 (Saltman) at p. 54, to which we were referred. This, therefore, is not a reason to conclude that the term "qualifications" cannot have the broad meaning given it by the employer here.

We will turn shortly to the serious question of whether the employer's interpretation of "qualifications" as including attendance record, physical capacity and availability to do the job bore "any reasonable relationship to the work to be done", but first we will deal with the other grounds of challenge to the standards against which the employer judged the grievor here.

Mr. Somerville submitted that the employer had discriminated against the grievor. The following provisions of the collective agreement are relevant:

> 1.02 The Union recognizes that it is the right of the Employer to exercise the regular and customary function of the Employer, and to direct the working forces, subject to the terms of this agreement. The question of whether any of these rights is limited by this agreement shall be decided through the grievance and arbitration procedure. The Employer shall exercise its rights in a fair and reasonable manner. The Employer's rights shall not be used to direct the working force in a discriminatory manner. Nor shall these rights be used to deprive any employee of his/her employment, except through just cause.
>
> . . . . .
>
> 2.01 The Employer agrees that there shall be no discrimination, interference, restriction, or coercion exercised or practiced with respect to any employee in the matter of hiring, wage rates, training, up-grading, promotion, transfer, lay-off, recall, discipline, discharge or otherwise by reason of age, race, creed, colour, national origin, political or religious affiliation, sex or marital status, place of residence nor by reason of his membership or activity in the Union, or any other reason.

The listed grounds of discrimination do not include "physical disability" which is, of course, a prohibited ground of discrimination under the Nova Scotia *Human Rights Act.* The Act obviously applies to the employer and by virtue of both the *Trade Union Act*, R.S.N.S. 1989, c. 475, and the general law we could not give effect to an illegal basis of promotion. However, the Act is far from simple in its application where a physical disability conflicts with a *bona fide* occupational requirement and it is far from clear when illness, particularly short or medium-term illness, is to be considered a disability for purposes of the Act. None of these questions were argued before us, although counsel for the employer touched upon them. In those circumstances we have concluded that the Nova Scotia human rights does not help the grievor here and that the questions of its possible applicability and any remedy it might afford must be left to the process under the Act itself.

Counsel for the employer invoked management rights in support of the decision not to promote the grievor, while quite properly noting that this is a somewhat unusual management rights clause in that it specifically limits their general exercise by the requirement that "The Employer shall exercise its rights in a fair and reasonable manner" and shall not use them "to direct the working force in a discriminatory manner".

As the quote from Brown and Beatty, above, makes clear, and as will be seen when we turn to the reported awards dealing specifically with the review of management promotion decisions which have taken absenteeism into account, reasonableness is commonly invoked by arbitrators in reviewing such decisions, even with no such explicit limitation on management rights. The explicit requirement here that the employer must act in a fair and reasonable manner can only lend added authority to our review of the decision here.

The explicit prohibition against directing the working force "in a discriminatory manner" appears to add nothing more in the circumstances before us. If the word "discriminatory" as used here reflects the meaning of "discrimination" in art. 2.01, such discrimination, as we have already said, has not been shown. If it means, as it probably must, that the employer cannot conduct itself contrary to the provincial *Human Rights Act*, any suggestion of a breach of the Act has been dealt with above. Moreover, if the employer was reasonable in its requirements and in their application to the grievor it cannot be said to have been "discriminatory" in a general sense. We will turn to that question shortly.

There is no suggestion that the employer applied its requirements of availability to do the job, physical capacity to do the work and likelihood of regular attendance differently to the grievor than to the other applicants.

The only suggestion of bad faith lay in the claim that the employer denied the grievor promotion to the permanent full-time trays position "to punish her" for being on workers' compensation. On all of the evidence, we are satisfied that this somewhat rhetorical claim has not been made out. There was nothing before us to indicate that the employer held the view that the grievor's claims to workers' compensation were not well-founded. Moreover, we are satisfied that in denying the grievor the promotion Ms Moriarty and Mr. Duggan did so for the reasons Ms Moriarty gave in her testimony; because they wanted someone who could do the job when required, who had the physical capacity to do the work and whose regular attendance they felt they could count on. Any

suggestion to the grievor that the simple fact that she was on workers' compensation disqualified her was a shorthand way of saying the same thing, which she misunderstood, perhaps because she chose to. We return below to the legitimacy of the employer's actual reasons, and the way the decision was made. What we are saying here is that there was no bad faith, in the sense there was no proof that the decision was made for a wholly different reason than the one given.

The employer's requirements of availability and regular attendance were not spelled out in the job posting, despite Ms Moriarty's attempt to transform the phrase in the job description, "punctuality is expected at all times", into a specific requirement of regular attendance. However, as the arbitration awards to which we will turn shortly make clear, not every normal, obvious or reasonably expected requirement of a job need be spelled out.

The serious question, therefore, is whether the employer can be said to have established requirements for the trays person's job which "did not bear any reasonable relationship to the work to be done" or otherwise failed to exercise its right under art. 14.04(4) "to determine promotions . . . in a fair and reasonable manner" as required by art. 1.02.

Counsel for the employer relied upon a series of arbitration awards which hold that, unless the collective agreement clearly says otherwise, an applicant for promotion is not entitled to a training period. In other words, he or she must have "the present ability" to do the job. See, for example, *Re Lennox Industries (Canada) Ltd. and U.S.W., Loc. 7235* (1983), 12 L.A.C. (3d) 241 (Kennedy) at pp. 246-7. Counsel suggested that here too, to get the job for which the grievor applied, an applicant had to have the present ability to do the job, and the grievor did not because she was on workers' compensation and unable to work.

In our view the arbitral awards dealing with whether entitlement to a training period can be implied where the collective agreement does not provide for it have no relevance here. The question here is whether the employer was reasonable and fair in its requirement when it decided who would get the job. Whatever may be the generally held view with regard to training periods, it certainly cannot be invoked to justify the conclusion that an employee who is absent for any reason whatever when a job is posted or awarded, or both, may be eliminated from consideration. In other words, "present ability" is not a concept transferable to this context.

The employer acknowledged that an employee on maternity leave would be considered for promotion to a position posted while

she was on leave. In that context, counsel agreed that the serious problems with the grievor were not that she was absent at the time of the posting and the decision, but, as Mr. Duggan suggested in his letter of reply to the grievance, the uncertainty of her return date, her physical capacity to do the work and her future regular attendance.

In support of his submission that the employer acted in a fair and reasonable manner counsel quoted from four awards in which arbitrators concluded that, in the circumstances before them, promotion had been properly denied on the basis of the candidate's absenteeism record, although that absenteeism had not, and could not have been, the subject of discipline.

In *Re I.T.T. Communications, Division of I.T.T. Canada Ltd. and I.B.E.W., Loc. 2038* (1973), 4 L.A.C. (2d) 420 (Flynn), the majority of the board stated, at p. 421:

> A second matter that must be looked at in all grievances of this nature is what is meant by the word "qualifications". In short, what criteria should be employed by the company to determine the relative qualifications. In *Denison Mines Ltd. and U.S.W.* (1965, Anderson), the board had this to say:
>
> > "Among the matters which the Company has a right to assess before making the decision are such matters as innate capacity, prior job experience and performance, attendance, health and relative factors, including absence. In other words, *all factors* which would indicate likelihood of successful performance in a manner satisfactory to the Company in a new position."
>
> The foregoing statement is in my opinion a correct statement of what the company may look at in determining who is the better qualified.

They then concluded, at p. 422:

> The major portion of [the grievor's] absenteeism was for reason of ill health and medical certificates were provided. From the evidence it may well be that the major portion of this illness was probably of a type not likely to recur. She appears now to be and, in fact testifies she is in good health. It is also a fact that sick leave is provided for in the agreement. Be those facts as they may, the company has on one hand an employee with a very high record for absenteeism and one with a very low record for absenteeism applying for the job. Under those circumstances, in the absence of medical opinions to the contrary, they were perfectly justified in drawing the conclusion that the one with a lower record for absenteeism would be more likely to perform in the job in a manner satisfactory to the public. This board has no medical evidence before it to indicate that the conclusion drawn by the company was wrong. Not only therefore has the grievor failed to satisfy the onus of showing she is as qualified in this regard but, to the contrary, in the absence of such evidence it is the opinion of this arbitration that the company's decision regarding absenteeism was the correct one.

This award was quoted and followed in *Re Manitoba Telephone System and I.B.E.W., Loc. 2363* (1975), 10 L.A.C. (2d) 26

(MacLean), in which the grievor was denied promotion because of her poor attendance record. That board said, at p. 28:

> The board is of the opinion that the company had made it clear to the grievor from the outset, and to all employees generally through posted notice, the concern of management regarding absenteeism, and had a right to assume that a person's attendance record was a factor to be taken into consideration in determining an employee's qualifications and particularly so in the case of the grievor.
>
> The company, in having a right to consider an employee's attendance record in determining one's qualifications, must at the same time, exercise that right in a just and reasonable manner. In the case of the grievor the board is satisfied the company has done so. The grievance is therefore dismissed.

The next two awards are by arbitrator Kevin Burkett, who considers the issue with characteristic care and common sense.

In *Re Air Canada and Canadian Air Line Employees' Assn.* (1981), 2 L.A.C. (3d) 314, the grievor was seeking to transfer to the position of "CIDA agent", that is to be the airline's ticketing agent who handled all the many requests from that federal government agency. The arbitrator points out in his award (at p. 315) that "The job is a single incumbent job which the company views as critical to the maintenance of its business with the agency." There was evidence that the agency had complained to Air Canada about difficulties with the previous incumbent in the job and had stressed the need for continuity. After citing the two awards just referred to, arbitrator Burkett concluded, at p. 322:

> Where, as in this case, the job is a single incumbent position which requires the processing of complex itineraries over an extended period . . . I am satisfied that the employer is entitled to look at an employee's attendance record in assessing qualifications. Indeed, I go so far as to hold that, given the nature of this job and the fact that it is a single incumbent position, regular attendance is of critical importance . . .
>
> If it is established, as in this case, that an individual has a history of prolonged absences, suffers from a chronic condition which sometimes results in absence from work, and has a below average attendance record for the most recent period, an inference can be drawn as to the individual's inability to provide satisfactory attendance. It is, of course, open to the union to rebut this inference by showing that the most recent period is anomalous or that the factors precipitating the poor attendance have been eliminated. No such evidence was led in this case. Accordingly, I am satisfied that the grievor is unable to provide the level of attendance the company is entitled to require of someone filling the "CIDA" position. I make this finding in the absence of a specific criteria having been developed by the company. However, I am satisfied that whatever the attendance requirement might be in absolute terms, the grievor has failed to meet it.

We note the evidence that arbitrator Burkett considered relevant in such a case.

In *Re Denison Mines Ltd and U.S.W.* (1983), 10 L.A.C. (3d) 209, the same arbitrator again relied on this line of awards. That case was different in that the grievor's many past absences had been because he held union office, and there was no suggestion that things would be any different were he to be promoted. Although union business leaves were perfectly legitimate under the collective agreement, arbitrator Burkett again held that the promotion was properly denied. In concluding he said, at p. 218:

> ... given the nature of the job, I am satisfied that the grievor's significant absences from work would affect efficiency and, therefore, the company was entitled to take this factor into account in balancing the competing interests under art. 12.13.

It is important to note, however, that the seniority clause referred to was much more equivocal than is art. 14.04(4) in the collective agreement before us, in that it provided:

> 12.13 *Taking into account* training requirements and *the needs for overall efficiency*, the Company will give preference on the basis of Divisional Seniority to individual employee shift or assignment preferences that are *consistent with the attainment of production objectives* and the protection of seniority rights.

(Emphasis added.)

The approach taken in these awards is in line with general principle. The arbitrator must ask whether the employer has set standards that are reasonably related to the job in question and has applied them correctly to the grievor. These awards clearly accept that, depending on the job, a reasonable basis for expecting an especially high standard of attendance may be a "qualification" for a posted job. They also demonstrate that such a qualification may even be implied, if it would be in accord with the natural expectations of those involved, given the nature of the job.

In *Re Drug Trading Co. and E.C.W.U., Loc. 11* (1990), 12 L.A.C. (4th) 445 (Hinnegan), the arbitrator said the same thing in a different context. There the employer had decided that the grievor had failed to satisfy the requirements of a new position during her probationary period and she was transferred back. The issue was whether the fact that her transfer back was based on her record of absence necessarily made it disciplinary in nature. The arbitrator held that it did not, because, as was decided in the cases on qualification for promotion, a particular job may require not only someone capable of doing it, but someone who will be in attendance at work on a relatively regular basis. That is a different question, he said, than the question of whether absences are just cause for discipline. It is also a different question, we suggest

incidentally, from the question of whether an employee's attendance record, while faultless, is so poor that the employer is justified is terminating him or her for innocent absenteeism.

Counsel for the employer also provided us with one award in which, while accepting that the prospect of regular attendance can be a qualification for promotion, the arbitrator takes a different approach, and the result on the facts is different. In *Re Queen Elizabeth Hospital and C.U.P.E., Loc. 1156* (1988), 2 L.A.C. (4th) 281 (Craven), the arbitrator accepted that attendance could be a "qualification" for promotion, including where it was not spelled out. He said, at pp. 292-3:

> The employer submitted a number of arbitral authorities for the proposition that an employee's attendance record is a matter that may properly be considered by the employer in making promotion decisions. In my view, the employer's concern in the selection process is not whether an applicant has attended work regularly in the past, but whether there is a reasonable likelihood that she will meet whatever standard of attendance is appropriate to the position being sought. I am satisfied that the standard of attendance for the porter position may properly be set somewhat higher than for a nurses' aide, because there is only one porter at each location and the position entails a degree of familiarity with the daily and weekly routines that makes it burdensome to employ casual replacements . . . the employer may have placed rather more weight on this aspect of the job requirements than it can reasonably bear, but I think the general principle — that the employer must be able to rely on the porter to attend work regularly — has been established.

The facts were that the successful applicant for the porter's job in the hospital had less seniority than the grievor and "The employer's sole ground for denying the promotion to the grievor was her record of absences due to illness" (at p. 282). The collective agreement provided simply that "appointment shall be made of the senior applicant able to meet the normal requirements of the job", but the posting did state specifically, "Applicants must be in good physical condition . . .".

The *Queen Elizabeth Hospital* case is similar to the one before us in that candidates were not interviewed in the selection process, and the grievor was simply weeded out on the basis of her attendance record, without ever having been counselled or disciplined for excessive absenteeism. "She was not informed during the selection process that her attendance record posed a problem, and she was not invited to explain it" (at p. 291). The grievor testified as to the nature of her illness and that she felt she had it under control.

On this basis the arbitrator [at pp. 293-4] said:

> In order to make a proper judgment, it is not enough to know how many sick days the applicant has taken in the past; it is also necessary to know whether the circumstances which gave rise to that record are likely to be recurring

> ones. The evidence is clear that in the circumstances of the present grievance, the employer did nothing to satisfy itself on that point ... I cannot escape the conclusion that the employer simply failed to determine whether there was a reasonable likelihood that the grievor would meet the standard of attendance required for the porter job.
>
> . . . . .
>
> In my view this amounts to a violation of art. 9.05(b). The article requires the employer to make an honest assessment of the senior applicant's ability to meet the normal requirements of the job. An assessment of the applicant's ability to meet an unstated attendance requirement that is based solely on sick-leave statistics for some period in the past, and which affords the applicant no information about the requirement and no opportunity to explain the circumstances of past absences, does not meet this standard. To this extent the grievance must succeed.

He then ordered that the grievor be given an opportunity to present medical evidence to the employer demonstrating that her poor attendance was unlikely to continue, and directed that her application be reconsidered in light of his award.

This series of cases is instructive on what other arbitrators have considered it reasonable for employers to require as an attendance "qualification" in the context of particular jobs and, of course, each has been decided on the wording of the particular collective agreement under consideration.

It is absolutely critical that art. 14.04(4) of this collective agreement in which the right to promotion is stated is a "competition" type seniority clause, as contrasted to the "threshold" type, with which the arbitrator was dealing in *Queen Elizabeth Hospital*, for example.

We accept that "the need to fill the position" *may* justify an employer in rejecting an applicant for promotion, but that requirement must be a reasonable one, it must be applied reasonably and, under this collective agreement at least, both in establishing the standard and in applying it the employer must act fairly. The mere fact that an applicant was on maternity leave, sick leave or workers' compensation at the time of the posting or of the decision or, indeed, at the time when the employer planned to fill the position, would not likely be enough to justify rejection. As counsel for the employer acknowledged, reasonableness and fairness would be more likely to be demonstrated by showing that the applicant's return to work was uncertain than by showing that the employer would have to wait a while, as in the case of maternity leave.

In so far as Ms Moriarty and Mr. Duggan based their refusal to promote the grievor on "uncertainty" about her date of return to work it was uncertainty to a considerable degree of their own

making. The grievor was never told that they needed up-to-date advice from her doctor for the promotion decision. It was certainly unfair for them not to give her a real opportunity to provide that information in the context of the promotion competition, and then to base their decision, to some extent at least, on "uncertainty".

The employer did not specify in the job posting or the job description any special high standard of attendance for the trays person's job but, although the evidence does not convince us that the job is one that those involved would naturally expect to require a particularly high standard of attendance, in promoting an employee from a part-time to a full-time position it was reasonable for the employer to require that the successful candidate be someone who could be expected to be normally regular in attendance. That was a fair standard against which to judge the grievor in relation to less senior applicants for the job.

In making the judgment whether the grievor could be expected to be normally regular in attendance management would, obviously, and quite appropriately, have been concerned by her attendance record. It is not, as the cases make clear, that promotion is a reward for excellent attendance or that denial of promotion is a punishment for absences which do not justify discipline. Rather it is that the employer is entitled, as a starting point, to draw the natural inference that poor attendance is likely to continue.

In his reply Mr. Duggan also suggests that the refusal to promote the grievor was based on uncertainty about her "ability to fulfil the physical requirements of the position". Clearly, Ms Moriarty had very good reason to doubt that the grievor would be able to do the work, based on her knowledge of the history of the case and her hallway conversation with the grievor a couple of weeks previously.

We agree with the arbitrator in the *Queen Elizabeth Hospital* case that the fair and appropriate thing for management to have done would have been to advise the grievor that her serious health problems seemed to make it unlikely that she would be considered to be as well qualified as a less senior candidate, and to give her an opportunity to meet those concerns. She should have been asked to address concerns about her future inability to attend regularly and about her continuing physical inability to perform the various functions of the trays job on a regular basis.

However, if the grievor had been given that opportunity the best she could conceivably have done would have been to produce a doctor's certificate like the one she subsequently got on September 14th, saying that she had been advised that she could "return to regular work duties as tolerated". Even if we were to accept the

unlikely proposition that she might have been able to provide a completely clear bill of health from her doctor, that would still have been just one important factor for Ms Moriarty and Mr. Duggan to consider in deciding whether the grievor, rather that Deborah Townsend, should get the promotion.

In spite of our concerns with the way Ms Moriarty and Mr. Duggan reached their decision, bearing in mind all they knew about the grievor's physical condition and employment history, and Deborah Townsend's much better record of absenteeism, we cannot conclude that management was wrong or unfair in concluding that the grievor was not "relatively equal" to Ms Townsend in terms of the "qualifications" with which we are concerned here. We are satisfied that, even if they had given the grievor full information and every opportunity to meet their concerns about her physical capacity to do the work on the trays job and about the likelihood of her regular attendance in the future, they could not conceivably have concluded that she was relatively equal to Deborah Townsend in those respects.

Conclusion and order: It was reasonable and fair for the employer to decide to judge the grievor against the other applicants for the trays person's position partly on the basis of both her likely ability to attend regularly in the future and her physical capacity to do the work. Under this collective agreement the questions for management were not whether the grievor was likely to attend work regularly and whether she could meet the physical demands of the position. Rather the questions for management were whether she was relatively equal to Deborah Townsend in those respects. On the evidence, the union has not satisfied us that Ms Moriarty and Mr. Duggan were wrong or unfair in deciding that she was not.

The grievance is therefore dismissed.