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Re TCC Bottling Ltd and Retail, Wholesale & Department Store Union, Local 1065

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Re T.C.C. Bottling Ltd. and Retail, Wholesale & Department Store Union, Local 1065

[Indexed as: T.C.C. Bottling Ltd. and R.W.D.S.U., Loc. 1065, Re]

f *New Brunswick, I. Christie. January 17, 1993.*

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h EMPLOYEE GRIEVANCE alleging improper denial of return to work. Grievance allowed.

D. Brown and others, for the union.
W.B. Goss and others, for the employer.

AWARD

Employee grievance alleging breach of the collective agreement between the parties dated March 26, 1992, which counsel agreed was to govern this matter, and in particular of arts. 8 and 21 in that, for non-disciplinary reasons, the employer wrongly refused to allow the grievor to return to work after absence due to illness. The grievance requests "full redress".

At the outset of the hearing in this matter counsel for the parties agreed that I am properly seised of it, that I 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.

Although the grievor was, in the words of counsel for the employer, "a valued and capable employee", his employment was terminated, out of concern for his safety and the safety of his fellow employees, because he suffers from epilepsy.

The union position is that the employer has a duty to accommodate the grievor's disability and has not met that duty. The employer's position is that it has done everything it can to fulfil its legal obligations, and more, and that it cannot accommodate the grievor's disability without undue hardship.

There is no dispute that I am to take fully into account the *Human Rights Act*, R.S.N.B. 1973, c. H-11, as amended, particularly by S.N.B. 1985, c. 30, s. 5 [s. 3(1) rep. & sub. 1976, c. 31, s. 2; am. 1985 c. 30, s. 5(*a*); s. 3(7) rep. & sub. *idem*, s. 5(*b*)], which provides, in part:

> 3(1) No employer ... shall
>
> (*a*) refuse to ... continue to employ any person, or
>
> (*b*) discriminate against any person in respect of employment or any term or condition of employment,
>
> because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability or mental disability, marital status or sex.
>
> . . . . .
>
> (7) The provisions of subsections (1), (2), (3) and (4) as to physical disability and mental disability do not apply to
>
> (*a*) the termination of employment or a refusal to employ because of a *bona fide* qualification based on the nature of the work or the circumstance of the place of work in relation to the physical disability or mental disability, as determined by the Commission ...

The grievor has worked in the soft drink industry for 17 years, the last 10 of them with the employer, first when it was called Brunswick Bottling and then as T.C.C. Ltd. Throughout that whole time he has worked in quality control, although he has worked in

other parts of the plant as needed. He let the employer know from the start that he suffers from epilepsy, which he has had since he was 17.

The grievor testified that, although his seizures seem to have become less aggressive, flailing and thrashing will continue to be part of his affliction, for which there is no cure. When the grievor has grand mal seizures there is no forewarning; he passes out for the duration of the convulsion, from one to three minutes, goes into a deep sleep for one to two hours and then needs several seconds to reorient himself. He has no recall of this from beginning to end but understands from his wife that the convulsions pass very quickly. It is possible that his uncontrollable movements might injure someone trying to assist, but to his knowledge this has never happened.

The grievor testified that his battle with epilepsy has been a matter of changing medication every year or two. A particular medication works for a while and then does not work any more. It seems, according to the grievor, to be a matter of "over-familiarization". As far as his doctor knows, his seizures are now as controlled as they will ever be. His recent history, since the seizure in July, 1991, which led to him ceasing to work, is that he had a seizure nine months later, and then another four months after that, just two months before this hearing.

Apart from his medication, the grievor said that all that can be done is to strictly avoid alcohol, which he does, and get proper sleep. Mornings are the most dangerous for him, so he has always made it known that he prefers to work night shifts, and almost always has.

The grievor identified a two-page letter from Dr. Dale K. Robinson, the neurologist who is currently treating him, dated October 13, 1992. It was introduced into evidence as a medical description of his condition, and corroborates much of his testimony:

> (1) Mr. Chenard has a primary generalized epileptic disorder. I initially met him in the George Dumont Hospital Emergency Room on March 20, 1991, and have followed him subsequently, but he told me he has had seizures, always "Grand Mal" (generalized tonic-clonic convulsions) since about the age of 17. He has continued to have intermittent seizures since that time and gives an overall average of about once per year, although he has had more than this in the past 2 years.
>
> (2) There has apparently been difficulty in the past with regard to anticonvulsant medications prescribed to control his seizures. He told me that at the age of 17 he was using Valium and Dilantin and subsequently continued on Dilantin alone for many years. Tegretol and Phenobarbital had also been used in the past. He had been previously followed by Dr. David Silverberg, Neurologist, and apparently there was difficulty in maintaining good levels of

Dilantin and Tegretol in the past. At the time of our initial meeting he had been started on Zarontin, but did not tolerate this due to abdominal pain and vomiting. At my initial assessment, Zarontin was discontinued and Dilantin restarted, 100 mg 3 times a day. This was later increased to 4 times a day and, at a reassessment in August, Depakene (Valproic Acid) was added, 500 mg 3 times a day. He currently remains on these medications.

(3) It is probable that Mr. Chenard's seizure disorder will continue indefinitely. The anticonvulsant medications improve the control of his seizure disorder, but are unlikely to prevent all seizures, given his past history.

(4) The seizure frequency is quite irregular. He gave me a past history of an average of about 1 seizure per year but, as above, has had more than this since I know him. At our initial meeting he described 3-5 episodes per week of about 45-60 seconds each of generalized tonic-clonic convulsion, followed by sleeping for 2-2 1/2 hours. He had tongue biting at times, but no urinary incontinence. From April to August of 1991 he described 4-5 seizures, but then had no seizures when reevaluated in December 1991 and again in April 1992. He had a further generalized tonic-clonic seizure on August 31, 1992, of about 4 minutes duration, with which he presented to the ER. At that time, a Dilantin level was low at 17 uMol/L (350-700). Mr. Chenard has always claimed good compliance to his medication.

(5) A possible external condition with respect to triggering seizures is sub-therapeutic anticonvulsant levels, as apparently there have been difficulties maintaining adequate blood levels of such medications in the past. The most recent seizure, in August of 1992, may well have related to a sub-therapeutic Dilantin level. Otherwise, stressors may precipitate seizures in someone who is otherwise predisposed to seizures. Lack of sleep, alcohol, and some medications, such as antidepressant medication, are other factors which may lower the seizure threshold.

(6) With respect to Mr. Chenard's ability to return to his former job, his employer apparently seeks a guarantee that he will not have another epileptic seizure. It is not possible to give such guarantee. The major concern in the case of a seizure disorder is that one must avoid potentially dangerous situations should loss of consciousness (and therefore loss of control) occur. Such potentially dangerous situations (dangerous to the person with seizures, as well as to those around him or her) should certainly be avoided. Some examples of such situations would be driving a vehicle, working at heights, or around heavy equipment.

The employer operates a Coca-Cola bottling plant. It runs three product lines, one for returnables and 2-litre plastic bottles, one for non-returnable glass bottles and one for cans. There are also a pre-mix room, a post-mix room and a syrup room. The plant operates on a four-day work week, with two 10-hour shifts each day, with shifts added on Fridays and weekends during busy times, that is, in the summer or at Christmas. The shifts run from 7:00 a.m. to 5:30 p.m. and from 5:30 p.m. to 4:00 a.m. There are usually 22 or 23 people at work on each shift.

In the syrup room Coca-Cola concentrate, water and sugar are mixed in a large syrup tank, from which the mixture is fed to the "trimatic" on each product line, where it is mixed with water and

CO2 and cooled. There is normally one person per shift on duty in the syrup room.

a There is a quality control person at work on each product line which is running, so there are usually two each shift. That person is responsible for the quality of the product and the packaging. He or she oversees the mixing of the syrup, tests it and tests samples of the finished product. The quality control operation also includes,

b on each shift, a "sanitizer" who sanitizes all equipment, inside and out. In the summer period there is normally a third person in this function. The person who works in the lab or the syrup room is normally alone, and the water treatment plant is in a corner of the plant where it cannot be seen.

c Six or seven people on each shift work in shipping and receiving. Trucks bring in empty containers and carry away the product, the "red fleet" for the Moncton area and tractor trailers for Nova Scotia, P.E.I. and part of Newfoundland.

There is a maintenance department in which three people are

d employed on day shift, and one on nights.

For at least nine years prior to his termination the grievor mainly worked in quality control, including testing the quality of the product on the line and syrup making, although at times he worked on the product lines. There are four full-time quality

e control employees, who occasionally also mix the syrup. The grievor is the second most senior quality control person and one of two employees qualified to both test product on the lines and to oversee the syrup making. It is undisputed that he is also fully qualified to be a line attendant, a syrup maker and to work on both

f pre-mix and post-mix.

In a sense a quality control person works mainly in the lab but he is actually there only 25% to 30% of the time, and the rest of the time he or she is working on the product lines, taking samples. He or she takes samples from the trimatic or from bottles, and takes

g them to the lab for the Brix test, to determine the ratio of syrup to water and to the amount of carbonation. There are also tests twice a shift to determine the quality of the water, which is purified city water, and the quality of the containers.

These tests involve the use of sodium hydroxide acids, which can

h be harmful to the skin and the eyes if they are spilled, and which are dangerous to breathe. The water is tested for impurities by using micro test which involves boiling it. The washer for returnable bottles uses caustics, and two or three times a shift the washer is tested for caustics, and there is a test for caustic carryover.

The product lines are made up of many moving parts, and the area between them is used by fork-lift traffic, one per product line and two or three used in the shipping operation. Taking samples in the syrup room involves climbing ladders or stairways to 12 ft. to 15 ft. above floor level. There are guard rails, but no safety mesh, although there could be.

The first witness called by counsel for the employer was Dan MacKenzie, the production superintendent. For the entire nine years of the grievor's employment with the employer, Mr. MacKenzie worked closely with him for the three-quarters of each calendar year during which Mr. MacKenzie supervises the evening shift. As a teenager Mr. MacKenzie became familiar with epilepsy because a relative whom he was often with suffered from the disease.

A year or so after the grievor started to work for the employer Mr. MacKenzie assisted him when he had an epileptic seizure in the lunch-room. On that occasion the grievor was sent to hospital, and returned to work at the beginning of the following week. Some time later, not in the witness's presence, the grievor had another seizure at work, which caused him to pass out and slump to the floor. These were the grievor's only two seizures at work until 1991, but Mr. MacKenzie testified that it was common knowledge in the work place that the grievor had periodic seizures when not at work.

On January 8, 1991, the grievor had another seizure at work, in the doorway of Mr. MacKenzie's office. This was a more violent episode than the others. It was followed by an absence of several months. After that episode Mr. MacKenzie advised Parker Elliott, the plant manager, that he could not deal with the grievor's situation any more. He was scared for him and found the personal stress too great. Mr. Elliott testified that up to that time he had assumed that the grievor's disability "could be managed".

Mr. MacKenzie testified that on both occasions that he witnessed, the grievor's convulsions lasted for one-half to three-quarters of an hour. As noted above, the grievor's testimony was that his convulsions only ever last for a couple of minutes, followed by a deep sleep. Based on the medical documentation and observation of the witnesses, I accept the grievor's testimony as being much closer to an accurate description of what actually happens when he has a seizure.

In addition to his experience as a youth, Mr. MacKenzie has had first aid courses which deal incidentally with epilepsy, but he has had no specific training in how to deal with epileptics under his supervision. He was also concerned that in his absence other

employees might be considerably less well equipped than he to deal with the grievor's seizures.

When the grievor returned from sick leave on May 21st, by agreement, he was given a job as line attendant, where management felt he would be safer. The line attendant's job involves rotating through several functions, from "putting on" to inspecting before and after the bottle washer.

The grievor testified that after working on the rotation for a week he was assigned to the washing tanks, by Dan MacKenzie. That, he testified, was even less stressful and was said to have been done to give him a break. If caustic is required in the bottle washer, according to the grievor, the attendant goes in wearing a face shield and rubber clothes and puts what is required into a meter. A couple of ounces of caustic are held in rubber gloves. This is done twice a shift, and while a spill will burn, in his opinion the consequences are not really serious. The grievor did acknowledge that putting caustic in the bottle washer is dangerous. In that position the worker must also climb to the top of the bottle washer, eight feet off the floor, two or three times a shift, to count bottles for the "cut-off".

Working on the can line has few risks in the grievor's view, because you do not have to put caustic in the bottle washer.

On the can line sodium hydroxide (which is kept in glass containers, but could be in stainless steel ones) is used by quality control in a test to determine how much air there is in the cans. The sodium hydroxide comes in pellets, which are mixed by the quality control people in a stainless pail and put in the glass containers. Also, cutting equipment, which the grievor did not consider dangerous, is used in the "seam test".

The line attendant's job was thought by management to be less stressful, and did not involve heights, as many chemicals or working around as many moving parts. Mr. Elliott testified that the grievor had told him, in conversations prior to his return to work, that stress contributed to bringing on seizures, and that was consistent with his understanding from other sources. The grievor, however, testified that stress is not a trigger to his seizures. I note that this is contrary to what Dr. Robinson suggests in his letter, quoted above, is the norm.

Mr. Elliott testified that he had given careful consideration to how the grievor might be accommodated, in terms of what job would be safest for him. The grievor preferred quality control work because he did not have to deal with caustics in that position, but it does appear to normally involve working with acids. Mr. Elliott said

he had not considered the possibility of changing the quality control job in any way, because to do so would restrict the flexibility needed for the different areas and responsibilities of the job.

Six weeks later, at his own request, the grievor was returned to quality control. Mr. Elliott testified that he had thought that maybe the grievor's seizures were under control. Two or three weeks later, on July 24th, the grievor had another seizure at work, in the lab. He slumped to the floor and went into convulsions. His feet kicked against one cabinet and his head went into another, in which acids used in testing were stored.

Following this episode Mr. Elliott consulted with the employer's vice-president of human resources in Toronto, Donald Senior. Mr. Senior advised that the situation seemed unsafe and that Mr. Elliott should get an opinion from the occupational health and safety division of the New Brunswick Department of Labour.

Shortly thereafter Mr. Elliott contacted Ronald Grenier, a safety officer with the occupational health and safety division. They discussed Mr. Elliott's concerns on the telephone. Mr. Elliott commented that it was his responsibility to ensure that the work place was safe for all employees. Subsequently, Mr. Grenier visited the plant. He was familiar with it because he inspected it two or three times a year. By Mr. Elliott's estimate he spent about 20 minutes touring the plant, and did not speak to the grievor or any other people employed in quality control. There was no discussion with Mr. Grenier of any possible changes to the work place.

Counsel for the employer called Mr. Grenier as a witness. He has worked with the health and safety division for six years, prior to which he had been safety co-ordinator for New Brunswick Pulp and Paper Ltd. for five years, and a police officer for 20 years prior to that. His training had consisted of short courses in safety while with N.B. Pulp and Paper, a three-week advanced safety certificate course in Chicago and first aid courses.

Mr. Grenier testified that he was not familiar with all jobs in the plant. He said that when he visited the plant Mr. Elliott pointed out the places where the grievor had worked both on quality control and as a line attendant, and where he had had his seizures. He testified that he was very concerned because a year previously he had investigated a fatality which had occurred when an epileptic employee had had a seizure, fell and struck his head, rolled under a safety railing and fell to his death. He acknowledged in cross-examination that he knew of no other cases in New Brunswick involving seizure disorders. His department has no guidelines with

regard to the employment of people with seizure disorders, and he was not aware of any across Canada.

Mr. Grenier testified that he had had the feeling that Mr. Elliott "wanted something from me that I wouldn't allow the Grievor to work in the plant". He had told Mr. Elliott that he could not write such a document, and that the employer had to make the work place safe in either of two ways, by changing the work place or changing the grievor's assignment, or by being satisfied that the grievor was taking treatments that would ensure that he would have no more seizures.

Mr. Grenier did not talk to the grievor about his medical condition; his knowledge on that score was based entirely on what Mr. Elliott told him.

Mr. Grenier testified that he would not have accepted that it was safe for the grievor to work in the lab or in an area with moving belts. He said that if he had been called by the grievor and asked he would have said that the grievor had the right to refuse to work in those areas.

Mr. Grenier did not make any written report on his visit at the time, but on April 29, 1992, nearly a year later and after the filing of the grievance in this matter, wrote the following letter to Mr. Elliott, with no copies to anyone else:

> Further to our discussions and my visit to your plant to discuss work assignments for Mr. Vincent Chenard, I make the following comments.
>
> Mr. Chenard is subject to epileptic seizures which are somewhat controlled by medication, but absolute control is not guaranteed. Given *any* degree of uncertainty, it is my opinion that Mr. Chenard should not be assigned to any task on or around machinery or in the lab. A seizure coupled with the hazards of the machinery operating in the plant could prove to be dangerous or even fatal to Mr. Chenard or to other workers in the plant.
>
> I must point out that, under paragraph 9(1)(a) of the *Occupation Health and Safety Act*, an employer must take every reasonable precaution to *ensure* the health and safety of his employees. In the event of a mishap, you might well be found to be liable.

Not long after Mr. Grenier's visit Mr. Elliott wrote the following letter to the grievor, dated August 16, 1991:

> Dear Vince:
>
> It is only with concern for your safety that I must reaffirm the company's position, that it would be an unsafe situation for you to work in the plant, considering your current epilepsy problem.
>
> I must also reaffirm that unless there was a very dramatic discovery in the medical field, concerning the control of your epilepsy, our position would not change, and only then if our company doctor agreed with the findings.

If you have any questions, please call.

Regards,

Parker Elliott

The effect was that the grievor went on short-term disability, receiving "Weekly Indemnity Benefits" from the employer's insurance carrier, the Prudential Insurance Company of America. He testified that "the Company asked if I'd mind short term disability until the end of December" and that he had understood that he would almost automatically go from short-term to long-term disability.

Under date of November 8, 1991, the grievor filed a grievance requesting "full redress". Shortly thereafter Dr. Robinson filled out a form dated November 12, 1991, which stated the drugs the grievor needed and included the following scribbled notes:

I saw him 5/12 and would be able to work since then — seizures under improved control, but work restrictions remain — see below.

— Limitations and restrictions? avoidance of potentially dangerous substances/situations should he lose consciousness/ have a seizure. Seizure disorder will continue — not curative.

Then, by a notice dated December 24, 1991, the union withdrew the grievance "without prejudice" stating:

We understand Mr. Chenard is currently on Disability Insurance. However, if he is cleared by his Doctor at a future date to return to work and the company refuses to employ him, the union would intend to proceed with another grievance at that time.

The grievor's weekly indemnity benefits terminated at the end of January, 1992, under circumstances described from the insurer's point of view in the following letter, dated July 23, 1992, to the employer from Ginette Brossard, who signs herself as "Claim Advisor — Long Term Disability". This letter also explains why the grievor has not received long-term disability benefits:

We acknowledge receipt of Mr. Vincent Chenard's Long Term Disability application.

According to your group contract, under Long Term Disability Benefits, item elimination period: Benefits will be payable for each period of total disability after 26 weeks of continuous total disability or, if later[,] on the date that any weekly indemnity benefits paid under the group policy, should cease. Benefits will be paid as long as the person remains totally disabled.

Written proof of claim should be given to Prudential not later than 90 days after the end of the month for which Prudential is liable.

In reviewing Mr. Chenard's file, we noticed that Weekly Indemnity Benefits have terminated on January 27, 1992. Furthermore, the last medical certificate, dated December 11, 1991, indicated that Mr. Chenard had been seen on December 5, 1991 and Dr. Robinson, Mr. Chenard's physician, suggested that his patient would be able to work and since there "was no

seizures, he was under improved control, but work restriction"; avoidance of potential dangerous substance was also suggested.

I note that the passage placed in quotation marks by the author of this letter is a patent misquote of what Dr. Robinson wrote on the December 11th form which I have already quoted above. What Dr. Robinson wrote is: "I saw him 5/12 and would be able to work since then — seizures under improved control, but work restrictions remain — see below." Without commenting on the effect of this difference, I simply emphasize that what Dr. Robinson wrote was that the grievor's seizures were under improved control; what the insurance company quoted him as saying was that there "was no seizures".

The insurance company's letter concludes:

> Due to the fact that Mr. Chenard should have started working sometime in January 1992, that no current medical information has been provided since December 11, 1991 and no written proof of continuation of total disability was submitted after December 11, 1991, we have no alternative but to close our file.

In short, Mr. Chenard ended up without any income either because he had been told by the employer that his disability meant there was no job for him, but his doctor had said he could work subject to restrictions, and there had not been proper communications between those two and the insurance company, or (perhaps "and") because those responsible for advising him on the matter had allowed the time-limits in the employer's insurance policy to pass. The employer has since written to the insurer on his behalf, but, according to the evidence before me, has received no reply.

On February 27th, Dr. G.P. Reyes, the grievor's family doctor, provided a brief "certificate" to the employer which was entered into evidence by agreement. It states: "Mr. Vincent Chenard can return to work at any time he wishes to."

The employer, through Mr. Elliott, also retained a doctor who examined the grievor on February 12, 1992, and submitted a handwritten report to Mr. Elliott on March 16, 1992. This too was entered by agreement. The relevant part of that letter is:

> It is the opinion of Dr. Dale Robinson, Neurologist, and I would agree that this man is probably fit to return to work with no greater risk than existed from 1953 until Feb/91. Nobody of course can guarantee he will not have a seizure in the future but the risks are relatively small. This could further be guaranteed by insisting he submit anti convulsant blood levels every few months to make sure he stays within the therapeutic window.

On March 6th the grievor submitted the grievance now before me. It simply states:

> the Company is refusing to allow me to return to work although I have been cleared by my Doctors . . . I request full redress.

The grievor started on unemployment insurance on March 15, 1992, and in the meantime the employer had lent him $1,400.

The still further delay in this matter is at least partially explained by a letter from George Vair, the local representative for the union, to Mr. Elliott, dated May 28, 1992:

> This will confirm our intention as indicated to you at our meeting of May 6, 1992, that the above noted grievance will be put on hold pending further investigation into Mr. Chenard['s] eligibility for LTD.
>
> We reserve the right to bring this grievance forward should no acceptable resolve be found for Mr. Chenard['s] problem.

Mr. Elliott testified that after August of 1991 he had not thought seriously about how the grievor might be accommodated in the plant, because, as he testified, "we had looked at all that before". At the conclusion of his testimony Mr. MacKenzie expressed the considered opinion that there is no job in the employer's plant that the grievor could do without running a significant risk of injury in the event that he were to have another seizure at work. Mr. Elliott expressed the same view. Mr. Grenier, the provincial safety officer, said that while it was always *possible* to make the work place safe, "there would be no end it"; the concrete floor could be covered, the machinery could be "totally guarded", but, he said, he did not know "if it would work at all".

The grievor seemed to agree with this, stating that a bottling plant could be made like a bed, but then no work would get done. In fact he acknowledged that there are sharp corners, steel and other metals "all over the place". However, he said that he had always lived with some risk, such as falling to the sidewalk. He acknowledged that he did not have a driver's licence and could not get one unless he were seizure-free for two years.

The grievor testified that he would be willing to accept any job on any shift, and suggested that he would be willing to provide blood samples to be tested to ensure a proper level of anticonvulsant, and that he would wear a helmet, if that would reduce the fear that he would injure himself.

There is another known epileptic who has been employed in the plant, running the de-bulker on the can line, for many years. The evidence is that when he has a seizure his symptoms are quite different. He has some forewarning and remains aware of the situation, his speech slurs and his vision is impaired, but he has no convulsions.

Mr. Elliott said in cross-examination that no thought had been given to specific training for those working on the production lines

in how to deal with an epileptic, although such training was, he acknowledged, possible.

The issues:

There is no dispute that the grievor suffers from a disability for purposes of the New Brunswick *Human Rights Act*. Indeed, the position of the employer is that the grievor is totally disabled; that he is entitled to long-term disability, and that they will do what they can to get him the coverage to which they feel he is entitled. He has not been terminated, but is on leave of absence for medical reasons, although there is nothing about that status under the collective agreement.

The first issue is whether the grievor is entitled to return to work and, if so, the second issue is whether he is entitled to lost wages from August 16, 1991, to the date of his return.

The employer's position is that because of his condition the work place is unacceptably dangerous for the grievor, due to toxics, heights, vehicular traffic and moving machinery. It is not unreasonable to deny him a job, for his own safety and the safety of others. The medical prognosis is that he will have more seizures. The question is not "if", but "when". The fact that the employer has kept another person suffering from epilepsy on the job demonstrates that the employer has acted in good faith, and has judged the case on its individual merits.

The union's position is that this is a non-disciplinary discharge, in breach of art. 21.01, which provides, in part, that "Employees shall be disciplined or discharged only for just cause." In the union's submission there is not just cause because the grievor is being discriminated against, contrary to the New Brunswick *Human Rights Act*, both in that he has been discharged because of his disability and in that he has been treated differently than the other employee with epilepsy who has been allowed to continue on the job.

On behalf of the grievor the union claims that he is entitled to return to work, citing Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf, para. 8:3340:

> ... the most basic entitlement of [sick] persons is their right to return to their jobs upon their recovery. ... Where the [collective] agreement does not expressly provide for the right of an employee who has been absent from work owing to some illness to return to a particular job or jobs ... even if the employer were genuinely mistaken as to the extent of the employee's illness, it has been held that the employee was entitled to [exert] his seniority rights and [return to] his former job. Necessarily, if an employee were so incapacitated that he would never be able to return to his former classification, and if there were no other job he was capable of performing and to which he would

be entitled by virtue of his seniority, then the employer could properly deny his request to return to work. On the other hand, it has also been suggested that where an employee is only partially incapacitated, employers have an obligation to consider whether there is alternate employment she is able to perform, or whether, under human rights legislation, accommodation up to the point of undue hardship is required, or whether the former job could be modified to accommodate him.

With respect to the duty to accommodate the learned authors cite the decision of the Supreme Court of Canada in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417, [1990] 2 S.C.R. 489, 90 C.L.L.C. ¶17,025, upon which counsel for the union placed heavy reliance, and which I consider to be authoritative here.

Decision:

There was no dispute between counsel that the issue is as framed by the quote from Brown and Beatty. I agree with them. I need not concern myself with the grievor's status at the time of arbitration. Whether he is considered to have been discharged or simply denied the right he claimed to return to work in accordance with his seniority makes no difference.

Both counsel relied on what is, apparently, the only reported Canadian arbitration award dealing with loss of job for epilepsy: the award of a board of arbitration chaired by R.H. McLaren in *Re Stelco Inc., Gananoque Works and U.S.W., Loc. 3208* (1988), 33 L.A.C. (3d) 172.

Also put before me, by counsel for the employer, was the unreported 1977 award of a New Brunswick board of arbitration chaired by Lorne O. Clarke, now Chief Justice of Nova Scotia, in *Canada Cement Lafarge Ltd.* It was held there that the employer acted within its management rights in releasing the grievor from his regular duties following two epileptic seizures at work, having been unsuccessful "in an effort to find suitable employment . . .". That award is too dated to be of assistance on the question of what efforts the employer here is required to make, considering the New Brunswick *Human Rights Act* and the law as developed by the Supreme Court of Canada over the last 10 years.

Union counsel relied on the *Stelco* award for its statement of the issue and of the onus of proof. At pp. 182-3 the arbitration board stated:

The board finds that the onus is upon the company to demonstrate that . . . a person medically diagnosed as having a seizure disorder is (i) physically unable to perform the work, or (ii) in performing the work would be an undue risk to himself or the safety of others including the public as a result of a seizure disorder and the likelihood of its reoccurrence. Once an employer has met this onus then it can be considered to have acted reasonably in

> withholding an individual from returning to a particular job. At that point the onus shifts to the individual and to the union to establish that the reasons for action by the employer are not valid ... If this shifting onus is satisfied it will follow that: either a further consideration of the matter ought to be undertaken; or, if the state of the evidentiary record is satisfactory, reinstatement can be ordered by a board of arbitration.

That statement appears to accord very well with the subsequent decision of the Supreme Court of Canada in *Alberta Dairy Pool*, cited above. The court there was unanimous in upholding the decision of an Alberta human rights tribunal that the complainant had been discriminated against on the basis of religion and that the employer had failed to prove that it had adequately accommodated him. The court's decision is complicated by the fact that the four-judge majority, concurring in the reasons of Wilson J., reached its decision by a somewhat different route than did Sopinka J. and the two judges who concurred with him.

Like the arbitration board in *Stelco*, both judgments in *Alberta Dairy Pool* held that once the complainant had shown the discriminatory impact upon him of the employer's rule or decision the onus shifted to the employer to establish the defence set out in s. 7(3) of the Alberta *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as amended by S.A. 1985, c. 33, s. 2 [amending s. 7(1)], which is similar to s. 3(7) of the New Brunswick Act:

> 7(3) Subsection (1) [prohibiting discrimination] does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

However, it is important to an understanding of *Alberta Dairy Pool* to note that the discrimination there was "adverse effect" discrimination, meaning that the work rule in question was neutral on its face but discriminated against the complainant because it affected him adversely, due to his religious beliefs. For Wilson J. this meant that the BFOR defence did not apply. Rather, the applicable defence was the "duty to accommodate to the point of undue hardship" which the court had read into such legislation in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th) 421, [1985] 2 S.C.R. 536, 86 C.L.L.C. ¶17,002 (*O'Malley*). Her Ladyship states at p. 436 of *Alberta Dairy Pool:*

> For these reasons, I am of the view that *Bhinder* [*Bhinder v. C.N.R. Co.* (1985), 23 D.L.R. (4th) 481, [1985] 2 S.C.R. 561, 86 C.L.L.C. ¶17,003] is correct in so far as it states that accommodation is not a component of the BFOR test and that once a BFOR is proven the employer has no duty to accommodate. It is incorrect, however, in so far as it applied that principle to a case of adverse effect discrimination. The end result is that where a rule discriminates directly it can only be justified by a statutory equivalent of a

> BFOQ, *i.e.*, a defence that considers the rule in its totality. (I note in passing that all human rights codes in Canada contain some form of BFOQ provision.) However, where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.

Sopinka J., on the other hand, was "of the opinion that the duty to accommodate must be dealt with in the context of the *bona fide* occupational qualification ("BFOQ") exception or defence" (at p. 440).

Mr. Justice Sopinka's approach is particularly apt with respect to the grievance before me here, because the discrimination is direct, not indirect or "adverse effect" discrimination as it was in *Alberta Dairy Pool.* Here, the grievor was put off work because he suffered from epilepsy, explicitly because of his physical disability. Moreover, there is no doubt that this would have constituted a breach of s. 3(1) of the New Brunswick *Human Rights Act* were it not for s. 3(7), which it will be recalled provides:

> 3(7) The provisions of subsections (1), (2), (3) and (4) as to physical disability and mental disability do not apply to
>
> (*a*) the termination of employment or a refusal to employ because of a *bona fide* qualification based on the nature of the work or the circumstance of the place of work in relation to the physical disability or mental disability, as determined by the Commission . . .

Thus the New Brunswick *Human Rights Act* unavoidably poses the question whether there was a BFOQ "based on the nature of the work or the circumstance of the place of work in relation to [the grievor's] physical disability", and the judgment of Mr. Justice Sopinka in *Alberta Dairy Pool* provides the authoritative guide to reaching the answer. He states at pp. 444-6:

> The question, however, is how the BFOQ is established having regard to the duty to accommodate. I have referred above to the principle that in general a prerequisite to a successful BFOQ defence is a showing that there was no reasonable alternative to a rule that does not take into account the individual circumstances of those to whom it applies . . . What is reasonable in these terms is a question of fact. If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged and that the BFOQ has not been established.
>
> . . . . .
>
> . . . the employer must establish that it could not accommodate the appellant without undue hardship.

Has the employer established to my satisfaction that it could not accommodate the grievor without undue hardship? Some guidance

as to the factors to be considered can be found in the Madam Justice Wilson's reason in *Alberta Dairy Pool*, at p. 439:

> I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar — financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

Returning to the *Stelco* arbitration award, counsel for the employer relied on it because there the grievance was denied, and the grievor appears to have suffered from a similar seizure disorder to the grievor here. The main differences from this case, working in the grievor's favour, appear to have been; (i) that the grievor there first suffered a grand mal seizure while being treated in hospital following a car accident. When he sought to return to work the plant physician refused to clear him. In other words, he had no history of having worked for the employer, or elsewhere, while he suffered from the seizure disorder. (ii) There the grievor's job was as a heavy hammer operator. It was heavy, hot work, according to the award apparently more likely to actively precipitate a seizure than any work the grievor here might do. (iii) It also involved working as one of a team of four handling red-hot steel; probably more dangerous to the grievor himself, and certainly more dangerous to his workmates, than the grievor's work in this case.

On the other hand, the grievor there had not had seizures for three years preceding the arbitration hearing, whereas here the grievor's last seizure preceded the hearing by only two months, and he had had at least one other since being put off work.

I accept as correct the submission by counsel for the employer that the grievor will have more seizures, and will have some of them in the work place if he is returned to work. The evidence is that he has had four seizures at work over a period of about 10 years, two of them in a short span before he was put off on short-term disability. There is nothing in the evidence to suggest that they will occur more frequently than in the past, but neither can they be expected to occur less frequently.

I also accept that the employer has acted in good faith throughout. It has not intended to go beyond its rights under s. 3(7) of the New Brunswick *Human Rights Act*, and has acted on the basis that the individual particulars of the grievor's illness mean that he lacks *bona fide* qualification for any job in the plant. This is demonstrated in part by the fact that the employer has retained the other epileptic employee at work. I reject totally the suggestion by counsel for the union that the employer is discriminating improperly in keeping that employee at work while putting the grievor off. Rather this demonstrates that the employer has done what the law obliges it to do: consider the grievor's case individually. The question is simply whether I am satisfied with the employer's conclusion; that to continue to employ the grievor in any capacity would have involved undue hardship.

There was no evidence or serious suggestion that accommodating the grievor by assigning him a job other than quality control, or rearranging the work assigned to the various jobs he might do, would create problems with the collective agreement, the interchangeability of the work-force or employee morale. The accommodation of the grievor really boils down to a question of safety and, in a sense, cost.

Generally, "safety" in this context is a question of the safety of the public, of the grievor's fellow workers and of the grievor himself. There is no issue in this case of public safety.

From the evidence, the main dangers to the grievor's fellow workers would arise from him suffering a seizure while handling caustics or acids or driving a fork-lift or other motorized machinery. They might also be endangered if he fell from a height because he suffered a seizure. I have concluded that, on a balance of his equality rights and the dangers involved, he should not be allowed to work in those situations.

If the grievor fell into the moving machinery of the product lines those assisting him might be somewhat endangered but, I have concluded, not significantly more so than by other work involving that moving machinery, such as dislodging bottles, cans or cases that get stuck.

Beyond that, an untrained person could be injured by the thrashing movements during the seizure itself. The answer would appear to be some minimal level of training for at least some of the grievor's fellow workers.

The danger to the grievor himself is real. Apart from the situations in which I have just said he should not be allowed to work because of the danger to his workmates, the greatest danger to him would appear to be presented by the moving machinery of

the product lines. I do not believe that it can, at reasonable cost in terms of alterations and resulting inefficiency, be covered or guarded to the point where there is no real danger of the grievor being injured when he has a seizure. Moreover, when he has a seizure it is not at all improbable that he will hurt himself on the concrete floor or on any number of other hard objects and sharp corners that are almost unavoidably part of a work place such as this. In this respect I agree with the evidence of Ronald Grenier, the safety officer from the New Brunswick Health and Safety Commission.

The fundamental issue, though, is whether a person with the grievor's disability is to be so insulated from physical danger that he or she is injured in another way, which, while not so obvious, may be more serious. Is the danger to the disabled person so great that he or she is to be denied the right to equality of opportunity to work? The determination of the limits of the employer's duty to accommodate to the point of undue hardship necessarily involve that balance.

While they are not part of the law of New Brunswick, I have found helpful the "Guidelines for Assessing Accommodation Requirements for Persons With Disabilities Under the Ontario Human Rights Act, 1981, as Amended", which were put before me by counsel for the union. In part 4, "Health or Safety Risk", under the heading "Standard", the guidelines state:

> Undue hardship will be shown to exist where a person responsible for accommodation ... has attempted to maximize the health and safety protection through alternate means which are consistent with the accommodation required, but the degree of risk which remains ... outweighs the benefits of enhancing equality for disabled persons.

Then, under the heading "Factors Relevant to Health and Safety Risk" the guidelines make what is the crucial point here:

> In determining whether an obligation to modify or waive a health or safety requirement, whether established by law or not, creates a significant risk to any person, consideration will be given to:
>
> A) *the willingness of a person with a disability to assume the risk in circumstances where the risk is to his or her own health or safety*; ... and
>
> . . . . .
>
> (D) the types of risks tolerated within society as a whole ...

(Emphasis added.)

On the basis, not of these guidelines, but of the considerations so clearly expressed in them, I have concluded that the grievor must, in the end, be the one who decides whether to run the risks associated with even the safest jobs that he is qualified to do in the

employer's plant. Every day in his off-work life he faces the possibility that if he has a seizure he will fall on his face on the sidewalk, fall in front of a car, or bump into something hard or sharp and injure himself. *He* decides how to limit his activities because of those possibilities. The effect of the collective agreement and the New Brunswick *Human Rights Act* is that the employer does not have just cause to dismiss him because of his disability, if doing so denies him the right to make those same choices about his work, provided that by choosing to work he will not endanger his fellow workers significantly or cause his employer undue expense.

Mr. Grenier, the New Brunswick government's safety officer, stressed in his testimony that he had no guidelines or direction on, or experience with, the balancing of safety considerations and the equality rights of the disabled. Notwithstanding the tenor of his letter of April 29, 1992, he insisted that he could not tell, and had not told, the employer what to do. His function, he said, was only to determine whether the situation was safe.

Mr. Grenier expressed the opinion in his letter that "in the event of a mishap" the employer might well be found to be liable, and apparently fear of legal liability is part, at least, of what motivated the employer to put the grievor off work. I am not in a position to dispose of that question, but I must say that it seems apparent that if the employer were to put the grievor back to work under compulsion of, and in accordance with, a legally binding arbitration award, the employer could not conceivably be held to have been negligent or in breach of a regulatory statute in so doing.

Conclusion and order:

I have concluded that the employer can, without undue hardship in the sense of that phrase as used by the Supreme Court of Canada, put the grievor back at work, and it is obliged to do so.

As I suggested in the course of the hearing might be the case if I were to allow the grievance, I think the precise nature of the job the grievor will do, changes to the work place that must be made and accommodations by the grievor himself, can best be worked out by the parties. As counsel suggested in response to that suggestion, I will establish the parameters within which that agreement is to be made, but I want to be clear that the job, the changes to the work place and the grievor's obligations are to be formally agreed upon, without unreasonable delay. That agreement is to be submitted to me for my approval and incorporation in this award before the grievor goes back to work. If the parties are

unable to agree, I will reconvene at the request of either of them to hear further with respect to the details of the accommodation.

a The grievor is to be put back to work under agreed conditions that include the following or similar terms:

(1) The grievor is not to handle acids or caustics, drive a fork-lift or other motorized vehicle, or work at heights unless the place he works is rendered safe from the possibility of a fall when he b suffers a seizure. Paragraph (3) limits the employer's obligation in this respect. On the evidence it appears to me that this means the grievor must be employed as he was before he went back to the quality control job in the summer of 1991, on one of the product lines or in the pre-mix operation, at the employer's c option. In so far as the latter of those jobs involves handling caustics or driving the fork-lift, the job must be restructured by assigning those tasks to someone else. In so far as the former now involves a rotation of positions, the rotation is to be changed by giving the grievor a fixed position if there is one d that is safer, or if that minimizes the cost of making the job safer.

It seems to me that the grievor would be better off if he never worked where he was out of the sight of others, but I make no order to that effect.

e (2) The grievor is not entitled to be paid above the rate set by the collective agreement for the job he actually does.

(3) I accept that the plant need not be so covered and padded as to eliminate the chance that the grievor might injure himself f while in the throes of a seizure. To the extent that his immediate work place can be made safer for those circumstances by the expenditure of hundreds, not thousands, of dollars on safety rails, wire mesh and padding, that is to be done. For example, I have in mind a rail of some sort that would make it less likely that he would fall in the way of a g fork-lift. I do not think the employer needs to do anything about the concrete floor, hard objects, corners and the like, in general. Those, after all, are not different from the dangers that lurk for the grievor in his daily non-working life, when he crosses a busy street for example.

h (4) The grievor himself is to wear a hard hat with a chin strap or other safety helmet or some kind, and he is to be prepared to consider any other safety clothing that would help to insulate

him from injury while suffering a seizure, even though other workers are not required to wear it. The cost of the helmet and such clothing is to be borne by the grievor, unless it is provided by the employer to any other workers in the plant.

(5) The grievor is to be given the choice of working only night shifts, if the safest job that can be worked out for him in terms of para. (1) can be made available on that shift.

(6) The employer is to ensure that on each shift the grievor works there is at least one employee experienced or trained in administering first aid to a person with a seizure disorder. If there are no such people the employer is to make them available by providing for training. The grievor is to ensure that his most immediate fellow workers are aware of his disability and know who the trained employee on the shift is.

Damages:

The grievor has been without income, other than unemployment insurance, since January 27, 1992. The uncertainties surrounding his entitlement to long-term disability coverage may be seen as part of the reason why his loss of income has been allowed to build up to that extent, but there is nothing before me to suggest that the delay in that respect, or any other, is his fault. I have, therefore, concluded that, in the absence of proof to the contrary, he is entitled to be fully compensated for all lost income, in the normal way, from that date to the date upon which he is returned to work.

As agreed by counsel, I will retain jurisdiction to deal with matters that the parties are unable to settle by agreement. Specifically, if the parties are unable to agree on the precise amount of damages, or if there is relevant evidence not now before me with respect to the reasons for delay in bringing this matter to arbitration, I will reconvene the hearing at the request of either party to deal with those matters. Also, as stated above, I will reconvene if the parties are unable to reach agreement on the grievor's job, changes to the work place or the accommodations he himself must make. I will also hear any allegation that damages otherwise payable to the grievor have been unduly increased by unreasonable delay on his part or the union's in reaching that agreement.