WORKERS CHARGED AND CONVICTED OF A CRIME

Presented by Joel Deeley and Greg Bartel

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INTRODUCTION

Circumstances where an employee is charged and/or convicted of a crime are typically very fact specific. They can range from very high profile cases (i.e. a childcare worker is facing criminal charges of assault on a child) to low profile cases (i.e. a factory worker is facing assault charges as a result of a bar fight). The cases can also range from the extreme, such as extensive media coverage and mention of the work location of the charged person, to little or no media coverage and no mention of the place of employment of the accused. Furthermore, cases can range between those where the alleged criminal act took place during work hours and in the workplace, to cases where the alleged criminal act had no relationship whatsoever to the workplace.

This paper will consider employment issues that arise when an employee is charged with a criminal offence, and the subsequent issues that can arise if that employee is ultimately convicted of the crime.

PART I: WORKERS CHARGED WITH A CRIMINAL OFFENCE

As a fundamental starting point, an employee who has been charged with a criminal offence is presumed innocent until he or she is proven guilty. Until (and if) he or she is proven guilty of a criminal charge, the employee must be presumed innocent by the employer and also must be presumed innocent by an Arbitrator or Board of Arbitration.

In many cases, when an employee is charged with a criminal offence, employers will consider imposing a suspension on the employee until the resolution of the criminal charges. In the event that an employee is suspended, and a grievance is filed on his or her behalf, the issue is not whether the Grievor is guilty or innocent. Rather, an Arbitrator must consider whether the Grievor's right to continued employment can be balanced against the Employer's legitimate business interests.

(a) The Test for Suspension Pending Criminal Charges

We set out below the test that an employer must meet in order to convince an Arbitrator that the Grievor's right to employment should be set aside pending the resolution of criminal charges.

The seminal cases in circumstances involving the suspension of an employee following the laying of criminal charges are *Re Philips Cable* (1974) 5 L.A.C. (2d) 274 and *Ontario Jockey Club* (1977) 17 L.A.C. (2d) 176.

The *Philips Cable* decision established that when an employee is charged with a criminal offence, and the Employer considers suspending the employee pending the resolution of their criminal charges, both the Employer and the employee's interests have to be balanced by an Arbitrator. The Employer's interests are defined as the protection and safety of its employees, its reputation and its business. Meanwhile, the employee's interests are in maintaining his/her source of livelihood until the charges have been determined, either in the employee's favour or not.

In *Philips Cable*, the arbitration panel set out the relevant considerations:

1. In some circumstances a Company can suspend an employee charged with a criminal offence pending the disposition of the criminal charges. In many situations a work-related criminal charge will substantially undermine the employee's effectiveness in the workplace. In these circumstances, it may not be fair to impose a financial obligation upon an employer when the outcome of the criminal proceedings is known.

2. Competing with the employer's interest defined in #1 above, one must take into account an employee's interest, who may be innocent of the charges.

3. Depending on the circumstances and its role in the investigation, the employer may face a financial penalty when the process fails to convict the employee.

4. The existence of the criminal charges must reasonably give rise to a legitimate fear for the safety of other employees, or of property, or of substantial adverse effects upon business. The Company must establish that the risk of the employee's guilt presents a substantial and immediate hardship to itself or its workers and this hardship cannot practically be met by anything other than suspension of the employee. To meet this requirement, the Company has to investigate the criminal charges to the best of its abilities in order to assess the risk of conviction and assess what can be reasonably done in the circumstances.

The *Ontario Jockey Club* decision is another leading case regarding the suspension of an employee following a criminal charge. In that decision, the arbitration panel assessed a number of cases, including *Philips Cable*, and defined the relevant principles as follows:

1. The issue in a grievance of this nature is not whether the Grievor is guilty or innocent, but rather whether the presence of the Grievor as an employee of the Company can be considered to present a reasonably serious and immediate risk to the legitimate concerns of the Employer.

2. The onus is on the Company to satisfy the board of the existence of such a risk and the simple fact that a criminal charge has been laid is not sufficient to comply with that onus. The Company must also establish that the nature of the charge is such as to be potentially harmful or detrimental or adverse in effect to the Company's reputation or product or that it will render the employee unable properly to perform his duties or that it will have a harmful effect on other employees of the Company or its customers or will harm the general reputation of the Company.

3. The Company must show that it did, in fact, investigate the criminal charge to the best of its abilities in a genuine attempt to assess the risk of continued employment. The burden, in this area, on the Company is significantly less in the case where the police have investigated the matter and have acquired the evidence to lay the charge than in the situation where the company has initiated proceedings.

4. There is a further onus on the Company to show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position.

5. There is a continued onus on the part of the company during the period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facts or circumstances which may come to the attention of the Company during the course of the suspension. These matters, again, must be evaluated in the light of the existence of a reasonable risk to the legitimate interests of the Company.

We look more closely at these principles in the sections that follow.

(b) The Employer's Obligation to Investigate the Circumstances of the Criminal Charge

The Employer's obligation to investigate criminal charges is highly dependent on whether the charge(s) stems from an incident or incidents that took place inside or outside of the workplace.

When the charges stem from outside of the workplace, the Employer can typically satisfy its onus to investigate by contacting the police and making an inquiry about the charges, and by hearing the employee's side of the story before making a decision.

In *Ontario Jockey Club*, the Arbitration panel held that the Employer had satisfied its onus:

> The Company checked with the police department which laid the charges and ascertained that in the view of the police officers involved there was a good case against the grievor. It would be unlikely that the police department would divulge any additional information with respect to the case and any further intrusions by the company into the matter might well constitute an interference with the administration of justice. Since the presence of an individual under the shadow of a betting-related charge is not permitted on company premises, there would be no alternative areas of employment or modification in the supervisory procedures which would meet the basic objection of having the grievor present at the track. Any additional evaluation or consideration of the situation would merely have involved the company in an evaluation of the evidence which is the proper function of the Court hearing the charges and not a matter for the company or for this board of arbitration.

The Board concluded that it would be inappropriate for the Employer to interfere with the administration of criminal justice by seeking detailed information about the criminal case. This passage also emphasizes that it is neither the role of the company nor the Arbitrator to engage in an evaluation of the evidence that will be placed before the criminal court.

In *Dominion Stores* [1974], 6 L.A.C. (2d) 373 (Johnston), the Board held that an Employer's burden to investigate the criminal charges can be satisfied by making an inquiry into why a grievor has been charged. In that case, the Employer had contacted the police to ask about the charges. The Board found that the Employer had no obligation to investigate the nature of the criminal charge any further and, in particular, that it had no obligation to search for evidence or resolve conflicts in the evidence.

The Arbitrator made the following comments about the Employer's duty to investigate the criminal charges:

Thirdly, however, so far as we can tell the company made no attempt to investigate the circumstances surrounding the charge. This should not be too substantial a burden on the employer because it must be careful not to interfere with the administration of criminal justice. But at the least it can ask the police why this person was charged and examine the circumstances of that charge in so far as they relate to evidence on company premises and in so far as other employment possibilities within the company might be reasonably available. It is not sufficient for management simply to react to a charge by concluding it is work-related and suspend. It must attempt to analyze the charge and its relationship to continued work.

Had the company investigated the circumstances surrounding the charge here it might have been told nothing by the police. If so, its obligation to ascertain the basis for prosecution would have ceased. On the other hand it might have been told enough to realize that a conflict existed between a police officer and another employee as to when the grievor went to his car on the Sunday morning and when the glass particles appeared in the car. In our opinion the company would not be obliged to resolve this conflict. Additionally, the company should not have any obligation to take the initiative in examining the other item of material evidence -- the testimony of others which placed the grievor away from the scene of the crime. Thus, though apparently management did not here examine the circumstances surrounding the charge we are satisfied that had it done so, its decision would have been no different. Accordingly, we deny the grievance.

In *Alberta and AUPE* [1995], 51 L.A.C. (4th) 248 (Moreau), the Arbitrator stated:

As stated in the *Ontario Jockey* decision, the employer must acquire sufficient facts in order to make an informed decision on whether continued employment is appropriate. As the same case points out, that does not mean that it falls on the employer to conduct a wide-ranging inquiry to determine the employee's guilt or innocence. This is particularly so, as in this case, where the police have initiated the criminal proceedings.

But the Arbitrator went on to find that the Employer should have met with the employee and heard their side of the story in order to properly assess the risk of continued employment:

I cannot, under the circumstances, criticize the employer for deciding not to pursue further discussions with the R.C.M.P. I do, however, believe that the employer should have arranged to meet with the grievor and attempted to obtain his side of

the story before making the decision to suspend his employment. The employer, at that point, would have satisfied its obligation to take appropriate steps to investigate the allegations in order to then properly assess the risk of the grievor's continued employment. I find that the employer should have followed this procedure notwithstanding the fact the grievor had clearly violated the prohibition on off-duty conduct set out in the employer staffing manual.

An Employer is clearly not obligated to investigate the grievor's guilt or innocence, particularly where the police are involved. However, as part of its investigation, the Employer is free to ask a Grievor for his side of the story, and often must do so to meet its burden. The authorities illustrate that this must be done prior to determining whether to suspend the grievor or not.

In *Concordia Hospital v. CUPE, Local 1973)* [2010] M.G.A.D. No. 1 (Wood), the Hospital had placed the Grievor on an unpaid leave of absence from her health care aide position after it was revealed publicly that she had been charged with multiple counts of fraud with Manitoba Public Insurance. While the charges arose from off-duty conduct, the Hospital did not actively pursue any specifics either from the Grievor or the police prior to making its determination to place the Grievor on unpaid leave. Arbitrator Wood stated:

> **87** …that evidence leaves one concluding that the investigation function referred to in the arbitral authorities was not undertaken before the decision to suspend was made.
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> **88** I am mindful that the Hospital learned of the criminal charges only after they had been brought. As noted in *Ontario Jockey*, the investigation burden is significantly lessened where the police have investigated and laid charges…. In some cases the actual investigation, although minimal, is found sufficient. But even in circumstances of charges being laid by the police without the employer having been involved in the lead up to those charges, there must be some investigation. Here the decision to place the grievor on an unpaid leave of absence was without any such investigation.

Arbitrator Wood did not find any comfort in the fact that the employer sought to obtain further information and explanation from the Grievor after she was placed on the leave, and in the result reinstated her with compensation.

To summarize, the employer's duty to investigate criminal charges can be summarized as follows:

- "The Company must show that it did, in fact, investigate the criminal charges to the best of its abilities in a genuine attempt to assess the risk of continued

employment. The burden in this area on the company is significantly less in the case where the police have investigated the matter and have acquired the evidence to lay the charge than in the situation where the company has initiated proceedings." (*Ontario Jockey Club*)

- The Employer can check with the police department and ask about the case against the Grievor. Any additional intrusion by the Company might interfere with the administration of justice (*Ontario Jockey Club*)
- Any further evaluation of the evidence is the function of the court, not the Company and not the Arbitrator (*Ontario Jockey Club, Phillips Cable*)
- The Employer's burden is not substantial because the employer must not interfere with the administration of criminal justice (*Dominion Stores*)
- The Employer can ask the police why the person has been charged, and insofar as there is evidence on Company property, examine that evidence (*Dominion Stores*)
- The Employer is not obligated to resolve any conflicting evidence the police have uncovered (*Dominion Stores*)
- The Employer is not obligated to examine other material evidence (i.e. testimony of other witnesses) (*Dominion Stores*)
- The Employer must determine the "particulars of the charges" so that it has facts to make its decision (*Toronto Harbour Commission*)
- If the Employer contacts the police about the nature of the charges, and asks the Grievor for an explanation, its duty to investigate is fulfilled (*Alberta v. AUPE*)
- If the Employer asks police for information about the circumstances and is rebuffed, then it has a complete answer to the allegation it did not dig deeply enough. In other words, it does not have to investigate further on its own (*Toronto Harbour Commission*)
- The duty to "fully investigate" charges may be satisfied by asking the Grievor for an explanation (*Chilliwack Hospital*)

(c) Adverse Effects on the Employer's Reputation or Operation

In many cases, the Employer will argue that an employee's criminal charges will reflect poorly on the Company. Whether or not an Arbitrator agrees with that assessment is decided on a case-by-case basis. The test for reputational interest is based on what a "*well-informed and fair minded person would think of continued employment*."

This was the issue in *Ontario Nurses Association v. Cambridge Memorial Hospital* [2012] O.L.A.A. No. 596 (Jesin). The Hospital had issued an unpaid suspension on a nurse after she was charged with serious drug offences. Her arrest made the local news. The Hospital based its decision to suspend the Grievor over concerns about its reputation in the community if the Grievor was permitted to return to work. However, the Arbitrator concluded that the notoriety of the charges alone did not prevent the Hospital from providing its services safely and efficiently with the Grievor in its employ. Arbitrator Jesin stated:

> **29** In the circumstances of this case I do not see how the charges themselves, without any other evidence, are sufficiently detrimental to the hospital so as to justify the suspension of the grievor for the significant amount of time while she is awaiting trial…. There is no evidence that the grievor is either working under the influence of any narcotic or sharing it with patients or co-workers. In addition there is no evidence that she is stealing drugs from the hospital. <u>There is no evidence that other staff or patients would be unable or unwilling to deal with the grievor. I do not think that in these circumstances, the potentially innocent employee (or even if guilty, guilty of some lesser charge or misconduct) should bear the entire costs of waiting for the outcome of the prosecution of the charges against her. The employer essentially asserts that the notoriety of the charges</u> themselves <u>is sufficient to establish damage to the employer's reputation</u> and interest…. <u>The employer must do more than show that the charges</u> are notorious. <u>The employer must be able to establish that the circumstances impede the employer's ability to run an efficient and safe operation for its patients and their families.</u>

In the result, the Arbitrator remarked that "there is insufficient evidence to justify continuing to keep the Grievor out of the workplace." He allowed the grievance, and ordered the Hospital to reinstate the Grievor.

The opposite conclusion was reached in *Canadian Staff Union v. Canadian Union of Public Employees* (2006) B.C.C.A.A.A. No. 45 (Sullivan). The Grievor, a National CUPE Representative, had been charged with drug trafficking (cocaine) and possession of the proceeds of crime. The Employer suspended the Grievor pending resolution of the charges, primarily because the charges were extremely adverse to the employer's

reputation as a leading trade union. The issue at arbitration was whether a suspension was warranted while the charges were pending. The Arbitrator commented:

> **34** An application of these well-established principles to the circumstances at hand leads me to conclude that the suspension imposed by the Employer was warranted. The risk that the grievor's guilt in trafficking cocaine and possession of the proceeds of crime would be extremely adverse to the employer's reputation as a leading trade union with a mandate of fighting for workers' rights, and seeking to create safe and strong communities. The credibility of CUPE as an organization, which effectively "sells" representation services, depends in large part on the reputation and integrity of their National Representatives as citizens in the community. The Employer's ability to maintain the Grievor as its representative was seriously compromised after he had been charged with the crimes described at these proceedings by Constable Walker.
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> **35** The evidence supports a conclusion that the National Representative position is, in many respects, the "face" of CUPE, responsible for providing front-line services on behalf of the organization, such as giving advice to union locals, negotiating collective agreements, and dealing with management on behalf of members. The National Representative also represents the Union to the community in regards to the Labour Council, collection campaigns, bargaining bulletins and organizing drives. I cannot help but believe the Employer's legitimate business interests would be seriously compromised by the existence of the particular publicized charges against him, notwithstanding his constitutional right to be presumed innocent until proven guilty in a court of competent jurisdiction.

In *Canadian Union of Public Employees, Local 4177 v. Nechako Lakes School District No. 91* (2004) B.C.C.A.A.A. No. 251 (Ready), the Employer suspended the Grievor, a secretary in the Human Resources Department in the School District, after she was criminally charged with the murder of a Principal in the same School District. Upon being granted bail, the Grievor was suspended without pay by the Employer pending the disposition of the criminal charges.

The Arbitrator ultimately upheld the unpaid suspension pending disposition of the charges. Although the Arbitrator found that the Employer never considered the possibility of maintaining the Grievor in active employment, he held that, in light of the serious nature of the charge, the District's special place in the community, and the potential damage to

its reputation, the Employer's decision to suspend the Grievor was entitled to a certain amount of deference. He stated:

> **41** The School Board and its staff have to set examples for the community at large and the children under its care. Granted Ms. Senner was not a teacher so not directly involved with children, but the actions of the School Board are still under scrutiny. What example is the School

Board setting if an employee charged with the murder of a Principal in the same School District can continue to work at the school district?

> **42** And what of the other employees? How would they feel about working with Ms. Senner knowing such a charge was pending?

[…]

44 … as a public school system in charge of the education of the public's children, I believe that the answer to the previous question in this case and in these circumstances would be that the risk of Ms. Senner's guilt of having killed a Principal of the same School District and a fellow employee would be harmful to the Employer's reputation.

Contrast this decision with *Re Toronto District School Board and C.U.P.E., Local 4400*, (2013) O.L.A.A. No. 215 (Gray), in which a school caretaker was charged with three counts of sexual assault and interference on a female complainant under 14 years of age. The charges stemmed from historical incidents, and the alleged victim was the Grievor's step-daughter. His bail conditions prohibited any contact with persons under the age of 16. The Union argued that there were alternate positions available where the Grievor would have no contact with students. Moreover, the Employer had not asserted that the Grievor created a risk to adults or to school property.

The Arbitrator noted that the charges were of highly reprehensible conduct, but ultimately set aside the suspension. He found that revulsion about the charges had to be tempered by a recognition that the allegations may not be true. Knowing there was a position available that would involve no risk of contact with students, the Arbitrator concluded that a fair-minded member of the public could not reasonably lose confidence in the Employer's ability to meet its obligations for the care and safety of children by keeping the Grievor in its employ in this manner.

Conversely, in *United Food and Commercial Workers, Local 401 v. Canada Safeway Ltd.* (2005) A.G.A.A. No. 77 (Ivankovich), the Grievor, a pharmacy technician, was required to take a 10-month unpaid "personal leave of absence" after she was charged with cultivating and trafficking in drugs. The Arbitrator found that there was a "sufficient relationship… between the charges of cultivation and trafficking in drugs and the job of a pharmacy technician to present a serious and immediate risk to the company's reputation."

However, the Arbitrator found that the Company should have explored whether the grievor's removal from working at the company could be mitigated through techniques such as closer supervision or transfer to another position at another store. Because of this failure, he ordered the Employer to compensate the Grievor for lost wages and to restore her seniority for the 10-month period while she was suspended.

***Toronto Transit Commission v. Amalgamated Transit Union Local 113 (Morawski Grievance)*, [2021] O.L.A.A. No. 98**

The Grievor was terminated from his employment with the Toronto Transit Commission in July 2018 after the TTC was made aware of a physical altercation between him and a loss prevention officer at a Canadian Tire store after the officer had accused him of stealing. At the time of the incident, the Grievor was off duty, having just finished his shift as a subway operator, but was still wearing his TTC uniform. He was charged with theft under $5,000 and assault arising from the incident.

The TTC alleged that the Grievor's conduct has broken the trust necessary to sustain the employment relationship. The Union argued that the Grievor had done nothing wrong, as he did not steal from the store, and any physical contact with the store officer was in self-defence against an excessively aggressive store security guard. In any event, there was no actual or even potential harm to the TTC from the incident.

The Arbitrator concluded that the Grievor did not steal from Canadian Tire, and there was no reason to discipline him for theft. He further concluded that, while the Grievor had assaulted the officer while off-duty but while in his TTC uniform, he had been provoked, and so the termination of Grievor's employment was not justified on the basis. Further, the TTC provided no evidence to its assertion that the Grievor's reinstatement presented an elevated risk of violence to his co-workers or TTC customers.

The Arbitrator stated:

> **101** Whether that link between an employee's off-duty conduct and the employer's legitimate business interests can be shown depends in large part on the conduct at issue and the type of position the employee holds. While TTC workers are public employees, they do not carry with them the same level of moral and legal authority as some of the public sector jobs in the cases cited in the Brown and Beatty text, including teachers, correctional officers, police officers and fire fighters (the latter group who, Arbitrator Newman said in the *City of Toronto* case cited above, must bring "honour to the uniform.") Rather, in my view, TTC employees are not expected by the public to be models of rectitude in their off-duty lives. Even where

discharges for off-duty behaviour have been upheld, arbitrators have emphasized the seriousness of the conduct involved.

The Arbitrator substituted the dismissal for a one-week unpaid suspension.

Conclusion on Adverse Effects on Employer's Reputation and Operations

In summary, each case will be fact dependent and whether or not a suspension ought to be imposed will depend largely on an Arbitrator's perception of what a "well-informed and fair minded person would think of continued employment."

(d) Alternative Employment Opportunities

Another principle from *Ontario Jockey Club* is that there is an onus on the Employer to show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision, or transfer to another position. Several cases have considered this issue.

In *Province of Manitoba and Manitoba Government and General Employees' Union (Grievance of LL)* [2005] M.G.A.D. No. 36 (Teskey), the Grievor worked as a Correctional Officer at the Pas Correctional facility. He has charged with 2 sexual offences involving a minor. The Province placed the Grievor on a leave of absence without pay pending the resolution of the charges. The only issue before Arbitrator Teskey was whether the Grievor should have been paid during the period of the suspension.

The Province maintained that the Department had acted fairly, reasonably and in good faith. The suspension was non-disciplinary in nature but was required in the circumstances and was an appropriate exercise of its management rights. The Province was of the view that, until the charges were disposed of, the employee could not work in any correctional facility. Additionally, the Province stressed that it was not possible to transfer the Grievor because there was no opportunity for closer supervision.

Arbitrator Teskey stated that an obligation rests on the Employer to find a balance between the rights of the employee and the Employer in any given case. However, each case is dependent on its own facts. He determined that it would have been possible to transfer the Grievor to another position while the charges were pending:

58 The issue here is whether or not reasonable steps were taken to find alternative employment to remove the grievor from his position during a time that the process of investigation was taking place. It does not appear that there was much cooperation in terms of dealing between the various departments. I agree that the search for alternative employment should not be departmentalized within the government given that there has not been found a finding of guilt. I also do not agree that simply the nature of the charges should preclude the possibility of alternative employment during that time of investigation. It is possible to take the grievor out of risk and put him/her in a position whereby there is no risk involved. It appears to me that would have been possible in this instance based upon the evidence before me.

In the result, Arbitrator Teskey allowed the grievance and ordered that the Grievor be compensated for the loss of wages suffered during the period of the unpaid leave. He stated as follows:

61 … Anybody can be charged with anything and, given the circumstances, it is appropriate for the Department to have suspended the grievor although there is a risk attached to same if the charges are not upheld…. I think it is important that the other departments realize that there is an obligation to look at the situation and not simply at the nature of the charges until the basis for same is established.

In *St. James-Assiniboia School Division v. St. James-Assiniboia Teachers' Assn. of the Manitoba Teachers' Society* (2014) M.G.A.D. No. 15 (Peltz), the Grievor, a gym teacher, was charged with sexual assault causing bodily harm. The alleged victim was a female educational assistant employed by the division at a different school. The Grievor pleaded not guilty to the charge. When the Division learned about the criminal charge, it suspended the Grievor without pay pending resolution of the charges. The Union grieved.

Among other arguments, the Union argued that the Grievor could have been accommodated with an alternate assignment, specifically an online teaching course that would have met any perceived safety or reputational concerns. The Division argued that the allegation of sexual assault causing bodily harm would be sufficient to convince a fair-minded, well-informed observer that a teacher charged with this offence should not be permitted in the classroom pending trial.

On that issue, Arbitrator Peltz agreed with the Division. He commented:

127 I do not accept the Association's position. Leaving aside for a moment the likelihood of conviction and simply considering the charge and the school context, it seems almost inevitable that an independent observer would be apprehensive about continuing to employ a teacher in these circumstances. Teachers are skilled and respected professionals. They hold a special place in our community because we entrust our children to them day in and day out. The public has very high expectations of teachers and for this reason, it is difficult to countenance a teacher continuing to work closely with students while facing a sexual assault charge. To uphold teacher standards and protect the Division's reputation, it may be necessary to suspend the grievor whereas the same considerations might not apply to other occupational groups in a school division. *Toronto District School Division, supra*, relied on heavily by the Association, involved a caretaker. The case was primarily decided on the mitigation issue (para. 25, 33) but I would also question its direct applicability to the present circumstances. Teachers play a pivotal role in the school system's mission. Day to day, they are the face of the Division to parents and the public, so their conduct or alleged misconduct bears most directly on the Division's reputation.

Concerning the onus on the Employer to consider alternative employment, Arbitrator Peltz stated:

133 How far must an employer go to find an alternative job that mitigates the risk? Based on the principles and precedents reviewed earlier in these reasons, I conclude that the Division was bound to make reasonable efforts. As held in *Phillips Cable, supra*, the test is whether there are "practical means" of minimizing the adverse effects (para. 63). In the present case, the Association essentially argued that the Division could and should have created a unique position for the grievor doing on- line teaching but without any student contact. That element of his job would have to be picked up by another teacher. Even leaving aside the disruption and cost of such a proposal, which may or may not be reasonable under the circumstances, I find that the on-line alternative in this particular case was unreasonable because it necessitated stripping out student contact from a teacher's job. The essence of teaching is engagement, support and involvement with students.

There are considerable case law authorities for the principle that teachers are held to a higher standard than most workers. Therefore, an employee in another industry may be treated differently by an arbitrator. Each case will be assessed on its own facts.

(e) Should a Suspension Pending Resolution of Criminal Charges be with Pay or Without Pay?

In addition to the issue of whether a suspension is appropriate pending the resolution of criminal charges, a subsequent issue arises: should the suspension be a paid or unpaid? Many cases have considered this issue.

In *Re Winnipeg* (1998) M.G.A.D. No. 15 (Freedman), the Grievor, a police officer, was charged with assault on a suspect. The incident was captured on videotape. The Grievor was suspended without pay by the City pending the resolution of the charges. The following comments from Arbitrator Freedman are noteworthy:

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

Arbitrator Freedman set aside the suspension without pay and ordered the Grievor back to the workforce. However, he explained that his decision was heavily influenced by the

Police Service's past practice not to suspend officers when charged with assault (except in the most extreme cases). He found that the Grievor had been discriminated against because similar cases had not been treated in a similar fashion. Nonetheless, the comments of Arbitrator Freedman are of assistance when determining whether a suspension ought to be with or without pay.

In *Manitoba Government and General Employees' Union v. St. Amant Centre Inc. (Tawo Grievance*) (2010) M.G.A.D. No. 34 (Gibson), the Employer ran a residential facility for persons with intellectual and physical disabilities. The Employer placed the Grievor on an unpaid leave of absence after it received notification from a social services agency that the Grievor may have caused a child to be in need of protection. The agency directed that the Grievor was not to be put in a position of trust or left unsupervised with any person under 18 years of age. The Union alleged that the Employer had acted improperly in placing the Grievor on an unpaid leave of absence.

The Employer argued that the unpaid leave was reasonable and done in good faith on the basis of a serious concern communicated to it by the agency. Further, the duty to investigate had been discharged to the best of the Employer's ability in the circumstances, and financial constraints involved with having to replace the Grievor and the public's perception of the circumstances prevented the Employer from imposing a paid leave of absence on the Grievor.

The Union argued that the action of placing the Grievor on leave was disciplinary, and that the leave of absence ought to have been a paid leave of absence. Further, the Union asserted that there was a past practice of imposing paid leaves of absence on employees.

Arbitrator Gibson ultimately found that the leave of absence should have been a paid leave of absence. She commented:

> **127** In light of this evidence, about which I will comment more shortly, I am not persuaded that protection of the employer's reputation either within or outside of its walls requires the withholding of pay to the grievor. It is not disputed that in cases of internal allegations of wrongdoing St. Amant has had a practice of paying employees who are suspended or placed on involuntary leaves, I do not feel that either the public or other employees would therefore be outraged by payment to an individual who is removed from the workplace pending the resolution of off duty conduct allegations.
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> **129** In the event that I am wrong in finding that there is a general presumption of paid leave pending resolution of charges or allegations absent proof of compelling

circumstances of employer interest as described in the *Eakin* decision, I am of the view that the past practice of the employer in maintaining pay pending investigation of allegations of internal wrongdoing has not been distinguished in the case of the grievor.

In *The Province of Manitoba v. M.G.E.U.* (2005) M.G.A.D. No. 45 (Hamilton), three correctional officers were placed on unpaid leaves pending the investigation of a number of serious allegations of workplace misconduct. The investigation took two weeks and resulted in the bulk of the allegations being unsubstantiated, at which point the grievors were returned to work.

Arbitrator Hamilton considered whether the leaves ought to have been with pay using the following test:

> The decision to place an employee on a leave with or without pay in circumstances such as these is an exercise of discretion. This discretion is subject to arbitral review under the standards of reasonableness, good faith and fairness in any event.... There is an onus on an employer to establish that a decision of this interim nature was reasonable and that a proper balancing of all interests took place at the end of the day. This balancing is reflected in the 5 tests from *Jockey Club.* (page 25)
>
> […]
>
> **69** But, having acknowledged the legitimacy of Forester's prima facie concerns, I still return to the basic reality that these same legitimate interests could have been met by either suspending or ordering the Grievors to take a leave of absence with pay. This option was available when the Department decided there were no alternative positions in which the Grievors could be placed.

[…]

In *Manitoba v. MGEU,* [2006] M.G.A.D. No. 25 (Jamieson), the Grievor alleged that he was suspended and ultimately dismissed by the Employer without just cause from his employment as a Correctional Officer at the Winnipeg Remand Centre following his second conviction for driving a motor vehicle with a blood alcohol level exceeding .08. His sentence included twenty-one (21) days of incarceration.

In reinstating the Grievor, Arbitrator stated as follows:

45 Dealing quickly with the suspension grievance, it appears to me that at the time, there was perhaps some valid justification for the Employer's actions taking into account the nature of the occupation and the concerns of Mr. Leslie that they needed time to assess the potential impact of the Grievor's pending incarceration and particularly as it related to his personal safety. In that case, however, even if the precaution of removing the Grievor from the work place was justified, it surely should have been by way of a leave of absence with pay, which is the industrial norm today in these situations.

Finally, in *St. James-Assiniboia School Division v. St. James Assiniboia Teachers' Assn. of the Manitoba Teachers' Society* [2014] M.G.A.D. No. 15 (Peltz) (explained above), the Arbitrator determined that the suspension of a teacher pending the resolution of criminal charges should have been with pay. He commented:

139 Would a fair minded and well informed member of the public question the Division's reputation unless the grievor in this case was denied his pay pending suspension and eventual trial? I find the answer is no. As

discussed earlier, the grievor was removed from the workplace due to the primacy of maintaining public confidence in the school system. But the corollary is that a suspension may need to be imposed with pay to avoid unfairness. This is part of the balancing process mandated by *Jockey Club*. Both employer and employee have legitimate interests. The grievor has an interest in preserving his livelihood while defending himself in the criminal justice process.

A Recent Manitoba Decision:

Telecommunications Employees Assn. of Manitoba Inc. v. Bell MTS Inc., [2023] M.J. No. 27

The Union sought judicial review of an arbitrator's decision dismissing a grievance by an employee regarding his right to work while he was facing a charge of murder. The arbitrator had dismissed the grievance, finding that the decision not to allow the grievor to work or to pay him pending the outcome of the charge was justified. The Union alleged that the arbitrator's decision was unreasonable and should be quashed for several reasons, including that the arbitrator had determined, inappropriately, that the grievor's return to work would cause serious and immediate risk to the Employer's reputation or the safety of other employees, the decision was based on erroneous facts about the seriousness of the offence, and that it was wrong to have determined that it was the grievor's bail conditions, not a decision by the Employer, that had precluded him from working.

The Court determined that the arbitrator had fundamentally misapprehended the effect of the bail order (which could have allowed him to continue his work with the Employer) and therefore misconstrued the cause of his absence from work. In reality, the reason he was not at work was not caused by his bail conditions, but rather a decision by the Employer to suspend him. As a result of that misapprehension, the arbitrator had determined that the Employer had no obligation to consider even a modified position pending the resolution of charges, which was not appropriate. Further, she had not conducted an analysis of whether the suspension ought to be with or without pay.

The Court referred the matter back to the parties for reconsideration.

CONCLUSION ON CRIMINAL CHARGES

There is no doubt that the facts in each and every case will drive the issue of whether or not an Employer can successfully suspend an employee pending the outcome of criminal charges. The cases cited in this paper are just a few examples of the principles from *Ontario Jockey Club* and *Phillips Cable* in action. Whether a suspension is justified or not relies heavily on those principles, and what a "well-informed and fair minded person would think of continued employment."

Even where a suspension is justified, questions may arise about whether that suspension ought to be paid or unpaid. There are numerous case law precedents in Manitoba that speak to this issue that have been addressed in this paper.

Finally, as a precaution, it is important to keep in mind that any decision to proceed to arbitration on a suspension grievance pending the resolution of criminal charges should be done carefully and in consultation with the Grievor's defence counsel, so as to lessen the possibility of having a negative impact on the worker's criminal trial.

What about criminal charges stemming from offences committed in the course of employment?

Except where extenuating circumstances exist, employees who are fired after they have been charged with a criminal offence committed in the course of their employment are rarely successful in persuading arbitrators to return them to their jobs.

***Ontario Secondary School Teachers' Federation, District 16 v. York Region District School Board*, 2016 Canlii 84432 (Waddingham):**

A teacher was charged criminally after purchasing stolen goods from a student, namely clothes, headphones, etc. The teacher and the student were caught on surveillance entering into teacher-only rooms on multiple occasions and exchanging funds when they left. The teacher was charged with possession over $5,000; those charges were dropped after he completed community service. Nonetheless, the school terminated the teacher for breach of trust and serious misconduct, as well as misappropriation of school property (he as given the student two school lighters as part of the exchange).

At arbitration, the grievor maintained that he was unaware that goods were stolen, and believed that the student's father was selling him as part of his business. The School Board alleged that the teacher was aware that the goods were stolen, given the circumstances (the secrecy with which the goods were exchanged, for example).

The arbitrator ultimately dismissed the grievance, determining that the grievor knew the goods were stolen. Given that determination, termination was a reasonable penalty, particular because of the higher standards required of teachers and the fact that the grievor, through purchasing stolen goods, was essentially encouraging the student to break the law. Termination was justified in this case.

Does an Employee Charged with a Criminal Offence Have to Disclose their Conditions of Release to their Employer?

Manitoba Nurses' Union (Victoria Nurses Local 3) v. Winnipeg Regional Health Authority (Victoria General Hospital) (Ahmed Grievance), **[2016] M.G.A.D. No. 3 (Freedman, Q.C., Shrom, Kells)**

The employee, a registered nurse at the Victoria hospital, grieved his dismissal for having failed to disclose a restriction on his ability to "be alone with any female patients while working as a nurse". This restriction arose as the result of a criminal charge of sexual assault, subsequently dismissed, based on a patient's complaint of inappropriate touching. The employer only found out about the Grievor's restriction after receiving a phone call from the College of Registered Nurses. The Hospital argued that by failing to disclose the restriction, the Grievor breached his professional obligation and demonstrated that he was not honest. By failing to disclose, he had irreparably breached the trust required in an employment relationship. The Grievor told the employer that his criminal lawyer had advised him that he did not have to disclose the restriction to his employer. The Union argued that there was no basis for discipline because when the Grievor had to attend to female patients, he had brought a housekeeper in with him.

The grievance allowed in part. The Hospital had just cause to impose discipline on the Grievor because it had the right to expect a proper exercise of judgment from a professional employee, namely that the Employer had a legitimate and compelling need to know of any legal restriction on his ability to be alone with female patients. However, in light of the fact that he relied on the advice of his lawyer and that he observed the legal restriction by asking a housekeeper to attend with him, the dismissal was replaced by a

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21-day suspension without pay. Further, the Hospital was directed to place the Grievor on an unpaid administrative leave until the restriction was removed, at which time he was to be restored to his former position.

Compensation for Legal Costs

Some collective agreements provide for reimbursement of legal costs incurred by an employee, who is charged with a criminal offence in the course of performing their duties. If a member is charged with a criminal offence in the course of their duties, it is important to review the collective agreement to determine whether such a benefit is available.

Whether an employee is covered will depend on the nature of the conduct that led to the criminal charges, the language in the collective agreement, and sometimes, the result of the criminal proceedings.

For instance, in ***Toronto (City) v. Canadian Union of Public Employees, Local 79 (Burnett Grievance),*** **[2005] O.L.A.A. No. 643 (Davie)**, the collective agreement contained the following indemnification provision:

> *Where an employee is charged with an offence under the Criminal Code ... arising out of an act done in the performance of his/her duties:*
>
> *(i) The employee shall, in the first instance, be responsible for his/her own defence including the retaining of legal counsel or a paralegal.*
>
> *(ii)* ***If the employee is acquitted*** *and his/her legal costs do not exceed twenty-five thousand dollars ($25,000) the Chief Financial Officer and Treasurer shall be authorized to reimburse the employee for such costs on the approval of the City Solicitor and the Executive Director of Human Resources.* (bold added)

In that case the grievor was a nurse working at a long-term care facility, who had been dismissed after she was investigated by the employer and the police for allegedly slapping a resident of the facility. The grievor's criminal case was resolved by way of a "peace bond" and she sought reimbursement for the legal fees arising from the criminal case.

The arbitrator found that the effect of a "peace bond" is not the same as an acquittal and the collective agreement only required the employer to reimburse the employee in the event of an acquittal. Therefore, the grievor was not entitled to reimbursement for legal costs under the collective agreement.

In the recent decision of *OPSEU and Ontario (Ministry of the Solicitor General) (Du Preez),* (2023), 353 L.A.C. (4th) 329, though the criminal charges against the grievors were withdrawn, the employer refused to reimburse them for their legal fees based on language in the collective agreement regarding good faith. The arbitrator ultinmately ordered the grievors be reimbursed by the employer.

The greivors were three correctional officers who used force against an inmate. While their use of force was found to be justified and reasonable, a fourth officer was convicted of assault causing bodily harm for their role in the same incident.

In connection to the incident, the greivors were disciplined for engaging in “Code of Silence behaviour”. This behaviour was addressed seperately by a Memoranada of Settlement between the parties.

The employer tried to suggest that reference to good faith in the relevant collective agreement provision disqualified the greivors from being reimbursed for their legal fees,given that their “Code of Silence behaviour” was not done in good faith.

Counsel for the union argued that any conduct other than the on-duty use of force for which the greivors were charged criminally was irrelevant to the question of reimbursement. Given the specific wording of the collective agreement operating at the time, the arbitrator agreed.

In ordering the employer to reimburse the greivors, the board emphasized the employer itself stated in the Agreed Statement of Facts that the grievors acted in good faith in the physical application of force.

A more nuanced analysis was required in the case ***Amalgamated Transit Union Local 1505 v. City of Winnipeg*****, (Gavin Wood, unreported, November 25, 2016),** application for judicial review denied, Lanchbery J., November 27, 2017).

In that case the collective agreement provided for the appointment of a lawyer if an employee was charged criminally for an action that arose "in and out of said employee's actions while in the performance of his/her duties and provided his/her duties do not constitute a gross disregard or neglect of his/her duties as an employee…".

The grievor was a bus operator who was involved in a physical altercation with a passenger following a dispute over a transfer. The grievor ended up being charged with assault and public mischief.

The employer refused the grievor's request for appointment of a lawyer under the collective agreement, which the Union grieved successfully. Two issues that were raised were whether the conduct arose within her duties and whether there was gross disregard and neglect of duties.

On the issue of whether the conduct occurred in the performance of duties, the arbitrator noted that the cases make a distinction between within and without the scope of employment based on whether the conduct in question was made by an employee in an effort to carry out their job duties. The arbitrator found that was the case here.

The arbitrator further found that while the grievor may have made mistakes in judgment, since she was trying to defend herself and since she was trying to carry out her duties as a bus operator, there was no gross disregard or neglect of duties.

In summary, where a member is charged with a criminal offence arising out the performance of their work, a union should review the collective agreement to see if it provides compensation for legal costs or the provision of legal representation in the criminal matters.

Further, if the employer tries to take the position that the employee is not entitled to the benefit because in the employer's view the behaviour constituted misconduct, the union should consider grieving because that is not necessarily the test.

Adjournments of Arbitration Hearings Pending Criminal Trials

When a member is facing both discipline at work and criminal charges, an issue that can come up is whether an arbitration should go ahead before the criminal proceedings are complete.

This is an area where it is important for the Union and its member to get both criminal law and labour law advice. Especially in a termination case, a member might want their termination grievance to go ahead as quickly as possible in an effort to get their job back. However, there may be implications on their criminal case if they do so, which need to be considered. In some cases, it might be in their interests to delay arbitration proceedings until their criminal trial has been completed.

An example of this is in *Grand River Hospital Corp. v. Ontario Nurses' Assn. (Ward Grievance)*, [2023] O.L.A.A. No. 263.

In that case, the grievor (a registered nurse) was both terminated from her employment and also criminally charged for alleged theft of drugs. The arbitration was scheduled to start in November of 2023, while the criminal trial would not start until June of 2024. The union brought a motion to adjourn the start of the arbitration hearing, which was granted.

The arbitrator emphasized the case law is clear that a request to adjourn a hearing to accommodate a grievor's criminal trial is not automatic, and that arbitration hearings and criminal trials can run concurrently. The arbitrator referenced a case called *Windsor (City) v. C.U.P.E., Local 543* which outlines eight factors that must be balanced when considering a request to adjourn.

These factors are as follows: expeditious results; efficiency of resources; proceedings dealing with the same alleged conduct; accruing liability for the employer; inconsistent decisions; prejudice in criminal trial; prejudice in grievance arbitration; and other potential exceptional circumstances.

Of these criteria, the arbitrator explained that expeditious results, accruing liability for the hospital, and prejudice in a criminal trial were the most relevant factors to be considered. In that case, the arbitrator emphasized that while an adjournment would mean the arbitration hearing would *commence* later than November of 2023, it would not significantly delay the *end* of the multi-day hearing, which, even without the adjournment, would not be able to conclude until 2025 due to scheduling availability. As the hearing regarding criminal charges was set to commence in 2024, the arbitrator found the delay would ultimately be minimal.

With regard to the accrual of liability for the employer, the arbitrator explained that as an adjournment would cause some delay, and as it was at the request of and for the benefit

of the grievor, it was appropriate to find that damages would not accrue during the period of adjournment (if the union succeeded with the grievance).

While it was acknowledged the grievor's right against self-incrimination is protected by s. 13 of the *Charter*, the arbitrator found there could still be prejudice to the grievor. In particular, the arbitrator commented that testimony from other witnesses is admissible in a criminal trial, and police officers can attend arbitration hearings to take notes of the testimony of any witnesses.

PART II: WORKERS CONVICTED OF A CRIME

When an employee is convicted of a criminal offence, different considerations come into play when determining whether an Employer can discipline the employee for their conviction. However, each case is dependent on its facts.

First off, and except when there are extenuating circumstances, employees who are terminated after they have been convicted of a criminal offence committed in the course of employment are rarely successful in persuading arbitrators to return them to their jobs. The following are examples of cases of convictions arising from incidents in the workplace.

(a) Convictions Resulting from an Incident or Incidents Within the Workplace

***Manitoba & M.G.E.U.,* [2003] M.G.A.D. No. 79 (Jamieson)**

The Grievor was employed as a Registered Psychiatric Nurse by the employer for 14 years and was a well-regarded employee. Following an altercation with a patient, the Grievor overpowered a patient and dragged him along the floor for a distance over 100 feet causing abrasions to the patient's knees. There were concerns that the patient had suffered some throat injury during the struggle. The Grievor was charged with assault causing bodily harm, and ultimately pleaded guilty to assault. He was granted a one- year conditional discharge. The Employer's investigation was delayed by the criminal proceedings.

More than two years after the incident, the Grievor was discharged. In addition to the criminal proceedings and his dismissal from employment, the Grievor was found guilty of professional misconduct by his professional college. In response to his discharge, the Grievor, who had already grieved being placed on absence without pay pending investigation, also grieved his dismissal.

The grievance was denied. Finding that the Grievor was in a position of public trust, was responsible for the injuries to the patient, and physically abused him, the Arbitrator determined termination was appropriate. The need to protect helpless mental patients from a repetition of such abusive behaviour overshadowed any thought of rehabilitation or concern for the Grievor's continued career as an RPN. In addition, the Grievor showed little remorse, and any admission or acceptance of responsibility, were consistently tempered by attempts to minimize, rationalize or justify his conduct.

***Interlake School Division No. 21* & CUPE 2972, [1993] M.G.A.D. No. 8 (Chapman)**

The Grievor, a school custodian, was dismissed for assaulting a child (his daughter), while at school. The child misbehaved while at school and the Grievor strapped her in the washroom of the school. He was ultimately charged and convicted of assault. Following his conviction, the School Division dismissed the Grievor. The Grievor argued that he was acting in the capacity of a parent and his state of mind was altered at the time.

The Arbitrator dismissed the grievance. The Grievor's actions were a fundamental breach of the Division's child abuse policy and his dismissal was justified.

***Canadian Airlines International* (1989) C.L.A.D. No. 6 (Thistle)**

The Grievor was a customer sales agent in the cargo area of an airport where the Employer operated their airline. The Grievor was responsible for handling shipments coming into the airport, and notifying both customs and the purchaser of the goods of the arrival of the shipment. The Grievor used his position to obtain heroin. He was terminated after being convicted for trafficking. The Grievor had no previous disciplinary record and grieved the termination.

The grievance was dismissed. The Grievor's criminal conduct was carried out directly through his connection to his position with the Employer. The Arbitrator found the Grievor's actions were in gross violation of the employment relationship in that he used his status as an employee to provide assistance to a group whose intentions were to

illegally import illegal drugs into Canada. The offence was a serious one impacting on the integrity and reputation of the company's operations. The Grievor occupied a position of trust with the company. There was no reason for the Arbitrator to mitigate the discharge. Discharge was not excessive.

Canada Post Corp. **[1990] C.L.A.D. No. 9 (Christie)**

The Grievor, a mail service courier, was stopped while driving a company vehicle for suspected impaired driving. The Grievor was subsequently charged and convicted.

The Grievor's Employer then terminated his employment. The Union alleged unjust discharge, submitting that the Grievor should have been given one last chance due to the fact that he was an alcoholic and that the incident leading to his termination was rooted in his alcoholism. The Employer took the position that the Grievor should not be reinstated as he was a truck driver and there were significant public policy considerations to take into account. In the alternative, the Employer argued that the evidence did not establish that the Grievor was an alcoholic.

The grievance was denied. Even if the Grievor were an alcoholic, reinstatement was not appropriate. Reasonable prospects of overcoming his alcoholism were not enough to outweigh the policy considerations against reinstating a driver who had been discharged for impaired driving. Also, the Grievor had only worked for the Employer for a short time and his misconduct was of a serious nature. The grievance was denied.

Seneca College & OPSEU, **[2002] O.L.A.A. No. 415 (Carter)**

The Grievor was a professor who was caught with child pornography on the computers in the student computer lab. The Grievor was suspended pending an investigation, which showed that he had been using the computers to view child pornography for more than two years. He was discharged, and ultimately pled guilty to possession of child pornography. He commenced a grievance, claiming that while punishment was warranted, termination was too harsh.

The grievance was dismissed. The discipline imposed was justified. He had irretrievably broken the bond that was essential between the college and its employees.

British Columbia Maritime Employers Association, **[1995] C.L.A.D. No. 1161 (Munroe)**

The Grievor was dismissed for fraudulently cashing another employee's pay cheque. The pay cheque, together with 7 others, had gone missing from the dispatch hall. He was ultimately convicted of forging a cheque. The Union argued that dismissal was excessive and that a moderate suspension should be substituted as a penalty.

The grievance was dismissed. The Grievor's misconduct was a form of work-related theft and was an act of gross dishonesty. The Grievor's fraudulent conduct was known and deliberate. The Grievor did not acknowledge any wrongdoing and there were no extenuating personal circumstances. There was proper cause for dismissal.

(b) Convictions Resulting from an Incident or Incidents Outside the Workplace

Convictions for offences that occur outside of the workplace may also result in discipline being issued by an Employer. Even if the offence takes place outside working hours, a criminal conviction may justify an Employer in terminating an employee or imposing a lengthy suspension if it prejudices the Employer's property, security, reputation, and/or the interests of other employees. For example, criminal convictions for sexual offences, fraud, theft, obstructing justice, impaired driving, narcotic offences, etc. that pertain to events that occurred outside the course of employment can be seen to interfere with a viable and productive employment relationship, and may provide an Employer with legitimate grounds on which to discipline an employee.

However, employees who are convicted of criminal offences that are unrelated to their employment, and which do not affect their Employer's legitimate interests, cannot be disciplined for having committed a crime when they were not at work.

Whether a causal connection can be made between a conviction and the workplace typically depends upon three factors:

- the nature of the offence;
- the employment duties of the Grievor; and
- the nature of the employer's business.

The leading case that sets out the test for when Employers can discipline employees for off-duty conduct is *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union*, [1967] O.L.A.A. No. 4. In that case, the Grievor was discharged after harassing an

employee who continued working and crossed picket lines during a strike. The harassment included threats and damage to the homes of the other employees. According to the Chair of the arbitration panel, J.C. Anderson, "the offence of willful damage to fellow employees was directly related to the employment of the grievor and [the other employees] at the Company's plant, and it would result in an intolerable situation if one employee who threatens another employee and who actually does willful damage to other employees' property, cannot be disciplined because such threatening language and willful damage took place away from the Company's premises".

In other words, Arbitrator Anderson was saying that simply because the behaviour happened away from the workplace does not mean that it cannot result in discipline. Arbitrator Anderson also provided the following factors that justify discipline for off-duty conduct, which continue to be applied by arbitrators:

1. the conduct of the grievor harms the Employer's reputation or product

2. the grievor's behaviour renders the employee unable to perform his duties satisfactorily

3. the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him

4. the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Employer and its employees

5. [the conduct] places difficulty in the way of the Employer properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.

It is not necessary for an Employer to show that *all* of the factors are present in order to discipline an employee for their off-duty conduct. For some employers, the fact that an employee has been convicted of a drug offence, for example, may not significantly interfere with their ability to do their job. However, for other Employers, it may irreparably prejudice their reputations and/or threaten the well-being of their employees.

(i) Off-duty conduct resulting in a criminal conviction that did not warrant termination

***Correctional Officer convicted of impaired driving*: Manitoba v. MGEU (Thomsen Grievance)**, **[2006] M.G.A.D. No. 25 (Jamieson)**

The Grievor was placed on leave without pay and ultimately terminated from his job as a Correctional Officer at the Winnipeg Remand Centre after he was convicted and sentenced for his second offence of driving with a blood alcohol level over .08. His sentence included 21 days' incarceration, which were to be served intermittently on weekends. To serve his sentence, he spent the first weekend at a halfway house, and the rest of the weekends under house arrest. For the three years following the actual date of the offence, up until the leave of absence without pay, the Grievor continued to work and performed his duties without complaint, except that he could not perform some escort duties because he did not have a valid license.

The Employer argued that due to the very nature of the Grievor's employment as a prison guard, the fact that he had been convicted and imprisoned himself meant he was no longer competent to perform his job. It also argued there was clearly damage to its public reputation and image.

The Arbitrator found that the fact that the Grievor had been caught drinking and driving had little or no detrimental impact on the Employer's operations, the Grievor's ability to do his job, or on the employment relationship. According to the Arbitrator, the real reason he was terminated was the incarceration. So, applying *Millhaven*, the question was whether incarceration affected the Employer's interests. The Arbitrator said that he could find very little detrimental impact on any of the *Millhaven* factors, certainly not enough to justify the Grievor's termination. However, *while he was serving his sentence* (which took 7 weeks), it was appropriate for him to be removed from the workplace, and that period was considered a suspension.

***Child and Youth Care Worker convicted of sexual assault*: Toronto District School Board v. Ontario Secondary School Teachers' Federation)*, [2010] O.L.A.A. No. 493 (Albertyn)**

The Grievor was terminated after he was given a conditional discharge for sexually assaulting a woman in her early 20's at a shopping centre. At the time, the Grievor was a child and youth worker for special education. Again, the *Millhaven* decision was relied upon, and the Arbitrator had to decide the extent of harm, if any, to the Employer's interests. As it turned out, the Arbitrator found there was no risk of harm to the students under the Grievor's supervision, the Grievor's "moral authority" would not be impaired, and there was no risk to the school board's reputation.

On the latter point, the Arbitrator said that "the public's perception is to be judged not on the standard of sensationalism and superficial over-reaction, but on tested and relevant information" or "what a fair-minded and well-informed member of the public may think of the off-duty conduct". In the board's view, since there was no likelihood of the Grievor posing a risk, there was no risk of damage to the board's reputation.

Importantly, in that case, the Arbitrator found that the board was correct in not allowing the Grievor back into the workplace until he satisfied the Employer that he did not pose a risk. This was accomplished when he was put through the grievance arbitration process, he admitted to his conduct and expressed remorse, and there was medical evidence that supported the Grievor.

***Community support worker convicted of possession for the purpose of trafficking*: Kenora Assn. for Community Living v. OPSEU Local 702,* [2005] O.L.A.A. No. 374 (Springate)**

The Employer was an organization that provided support for vulnerable people in the community. The Grievor was charged with possession of marijuana for the purpose of trafficking following a drug raid on his farm. He was suspended after the incident was reported in the local press, and was terminated after he pleaded guilty. The Union grieved both the suspension and termination, and both grievances were allowed.

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The Arbitrator found that the Grievor was growing marijuana for his personal use and to sell to others. However, there was no evidence that the Grievor was providing drugs to clients of the Employer or that the Grievor ever came to work under the influence of drugs. The Arbitrator rejected the notion that a concern that the Grievor *might* do those things justified removing him from the workplace. Also, there was nothing about the charges and conviction that interfered with the Grievor's ability to do his job, caused other employees to refuse to work with him, or inhibited the Employer's ability to efficiently manage the operation. Finally, the Arbitrator also found that the Grievor's activities did not have a detrimental effect on the general reputation of the Employer, despite the public service aspect of its operation.

***Off-Duty Assault on a Supervisor*: Lecours Lumber Co.& United Steelworkers, *Local 2995* (2006), 150 L.A.C. (4th) 357 (Marcotte)**

The Grievor was involved in an altercation with his supervisor (who was a relative) at the supervisor's house outside of company time. The Grievor was intoxicated, and punched the supervisor. He was charged and convicted of assault on the supervisor, and his Employer suspended him for five days without pay. He claimed that he was unjustly suspended, and ought not to have been punished for an event that had essentially nothing to do with his work environment.

The Arbitrator found that the onus was on the Employer to show that a connection existed between the conduct in question and the employment relationship. The altercation between the supervisor and the Grievor did not establish such a connection, and the discipline should not have been imposed. The Grievor was to be paid the wages he lost while suspended.

***Firefighter convicted of possession of a stolen property over $5,000*: Prince George (City) v. Prince George Firefighters Local 137*, [2016] B.C.C.A.A.A. No. 114 (Nordlinger)**

The Grievor was terminated from his position as a firefighter after being found guilty of the possession of stolen property over $5,000, namely, a boat and trailer he bought from another firefighter. Later, he was given an absolute discharge. It was undisputed that the grievor took possession of the boat and trailer from a fellow firefighter, and that the boat and trailer were stolen. The Employer submitted that the Grievor was dishonest

and that, as a public employee, expectations were higher than an employee in the private sector.

The grievance was allowed. The Grievor was a skilled firefighter and his misconduct was an isolated incident not likely to be repeated. While the Employer could not be faulted for a lack of trust in the Grievor, there was not a sufficient nexus between the Grievor's misconduct and his duties to warrant termination. The negative media attention, embarrassment and dishonour the grievor brought to himself were part of the penalty already imposed. The Grievor was reinstated as of the date of the award but was not entitled to receive any compensation, seniority or benefits from the date of termination to the date of his reinstatement.

***Teacher involved in cross-border cheese smuggling ring*: Grand Erie District School Board & Ontario Secondary School Teachers' Federation, [2016] O.L.A.A. No. 397 (White)**

A teacher at a youth correctional facility grieved his dismissal for smuggling cheese across the border and selling it for personal gain over a three-year period. He was never charged or convicted in connection with these acts because he cooperated with police and blew the whistle on other smugglers, specifically two police officers.

The Union argued that there was an insufficient nexus between the Grievor's off-duty conduct and his employment to merit any disciplinary response. In the alternative, dismissal was too severe a penalty. The Employer argued that dismissal was warranted because the Grievor's conduct was serious and took place over a lengthy period of time. Additionally, the Employer said that the non-existence of criminal charges was not important because the Grievor's conduct was criminal in nature and, but for his cooperation with the police against other smugglers, he would have been charged.

The Arbitrator allowed the grievance. While the Grievor's off-duty misconduct breached the high standard expected of teachers, and a disciplinary response was justified, he determined that there was no evidence of any difficulties caused by his off-duty conduct that directly and negatively impacted his ability to work with colleagues or perform his

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duties and responsibilities. His actions did not preclude his ability to be a role-model in the classroom. In addition, his expression of remorse was genuine. The termination was substituted for a nine-month suspension. Arbitrator White stated that the Grievor's reinstatement was his chance to demonstrate that he could conduct himself in accord with the high expectations for those in the teaching profession.

Convictions from a domestic relationship far removed geographically from the workplace: **Public Service Alliance of Canada v. Dominion Diamand Ekati, 2018 Canlii 55877 (Glass):**

The grievor, a worker in a diamond mine, was terminated for off-duty conduct resulting in multiple criminal convictions, including assault. Each of the convictions stemmed from the grievor's domestic relationship with his common law spouse back at home, some 500 km's away from the mine. The Employer maintained that the grievor's convictions posed a risk to the workplace and impeded the Employer's operations. The Union alleged that there was no causal connection between the grievor's convictions as a result of his domestic relationship and his work at the mine.

Arbitrator Glass noted that all of the charges and convictions all stemmed from the relationship between the grievor and his common law spouse and involved a "unique set of circumstances and a specific history" having taken place 500 kilometres away "in a stormy cocaine and alcohol-fuelled domestic relationship far removed geographically, emotionally and structurally from his workplace" and did not "reasonably relate to an assessment of his future conduct at the mine site." He also noted there was no evidence of anger, violence, insubordination or any other misconduct of that nature in the grievor's employment record.

He also found that the Employer's investigation was flawed in that there was no consideration of the true circumstances of the charges and convictions.

Given that the conduct was confined to the employee's domestic life, the reputational interests of the employer did not come into play, and his position did not attract a higher standard of conduct. As a result, he concluded that the grievor's behaviour had no impact on the employer's interests warranting discipline.

(ii) Off-Duty Conduct resulting in a criminal conviction that warranted termination

Computer technician convicted of internet luring: ***Bell Aliant Regional Communication L.P.*** **(2010), 203 L.A.C. (4th) 407 (Archibald)**

The Grievor, a Bell technician, was terminated after being convicted of internet luring. The grievance was dismissed by the Arbitrator, who considered the fact that the Grievor's misconduct involved the misuse of the Employer's computers and abuse of a customer's Wi-Fi system in order to support his luring. This harmed the reputation of the company. The termination was upheld.

Sexual Assault on Minors by a Conservation Officer: ***Ontario (Ministry of Natural Resources)*** **(2008), 174 L.A.C. (4th) 225 (Jackson)**

The Grievor, a Conservation Officer, was terminated after being convicted of sexual assault on a minor and child pornography. The termination was upheld by the Arbitrator, who found that the Grievor had attracted "the moral and community revulsion that attaches to him and all persons who admit to or are convicted of such grievous and a deviant sexual behaviour....". The Arbitrator found that the Ministry's reputation amongst both the public and the community of law-enforcement agencies to which it belonged would be damaged if it did not discharge the Grievor.

Robbery by school custodian and transport of illegal guns onto school property: ***Ottawa-Carleton District School Board*** **(2006), 154 L.A.C. (4th) 387 (Goodfellow)**

The Grievor was a custodian at an elementary school. During his lunch break, the Grievor robbed a local bank. He was convicted for the crime and given a non-custodial sentence. He was then terminated by the Division.

The grievance was dismissed. There was evidence that the Grievor had planned the robbery. The Arbitrator found that the school community could not be expected to tolerate a convicted felon in a school with children:

> **18** …All of this has serious and obvious implications for the safety and security of members of the school community from someone whose role includes, as prominently listed in the job description, "ensur[ing] a safe, healthy, and secure environment for staff, students, and the public at the school/facility". And, again, there is no satisfactory medical explanation for any of it. In all of the circumstances,

the Board was, in my view, entitled to act as it did. It had just cause for terminating Mr. Cobb's employment.

***Letter Carrier Sending Himself Drugs in the Mail*: *Canada Post & CUPW,* [2011] C.L.A.D. No. 437 (Ponak)**

The Grievor sent a package containing marijuana to a co-worker in Newfoundland prior to his vacation there. The package was discovered. The Grievor pleaded guilty to possession of marijuana for the purposes of trafficking. The Employer contended that the Grievor was discharged because employees could not use the mail to commit a crime and because the Grievor had not been candid with management during the investigation process or at the arbitration hearing. The Union submitted that the penalty of discharge was excessive. It argued that the incident was isolated and that the Grievor had already paid a heavy price for his stupidity.

The grievance was dismissed. The Grievor was not only convicted of trafficking in marijuana, but had used his own Employer's services as a means for the trafficking. The potential risk to the Employer was self-evident. The Grievor used knowledge gained as an employee to try to avoid detection and enlisted a co-worker to facilitate the transaction. Therefore, the dismissal was justified.

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<u>Corrections Officer Mishandling Family Funds</u>: Saskatchewan (Public Service) v. Saskatchewan Government and General Employees' Union, [2017] S.L.A.A. No. 2:

The grievor, a correctional officer, was terminated as a result of a conviction of theft under $5,000 conviction related to her handling of family funds, in particular a vulnerable family member under her care. The employer argued that the conviction, although stemming from off-duty conduct, was evidence of public disrepute and constituted an irreparable breach of trust. The Union argued that while some discipline was merited, termination was an excessive penalty. The grievor had 10 years of discipline-free employment.

The grievance was dismissed. The conviction had been prominently and negatively publicized in the newspaper, and the grievor had been identified as a correctional officer. As a result, there was a sufficient nexus between her off-duty behaviour and her workplace to cause public disrepute towards the Employer. While there were several mitigating factors, including her lengthy discipline-free record, that was outweighed by the severity of her crime, her attempt to cover up her wrongdoing, her refusal to admit responsibility, the lack of contrition following her conviction, and the negative publicity which was damaging to the Employer's reputation.

***<u>Corrections Officer Operating a Grow-Up in his Home</u>: Peterson v. Deputy Head (Correctional Service of Canada),* [2017], 277 L.A.C. (4th) 1:**

A correctional officer was terminated after the police discovered unsafely stored firearms, large quantities of marijuana, and equipment required to operate a marijuana grow-op in his home. He was charged with three indictable offences. The grievor eventually pled guilty to summary conviction offences. His several court appearances were reported in the local papers, which identified him as a corrections officer. He was sentenced to a term of probation.

The Union did not dispute that the grievor's misconduct warranted discipline, but it argued that dismissal was excessive in light of mitigating factors such as his delicate mental condition (PTSD), his unblemished record and his sincere remorse.

The Employer argued that the grievor's illegal off-duty conduct reflected badly on the Correctional Service of Canada and on the public service in general and could affect his performance on the job. The Employer was unaware of the medical issues that the grievor raised at the hearing, including PTSD.

The Arbitrator dismissed the grievance. He found that the grievor's off-duty conduct had tarnished the Employer's reputation, compromised the safety of staff and the institution, and made it impossible for him to continue as a corrections officer. Reducing the penalty would have trivialized his illegal conduct. Regarding his medical issues, the arbitrator disregarded this as a factor, noting that at the time of his termination, the grievor had not been diagnosed with PTSD.

***Discharge for possession of child pornography*: Unifor Local 892 v. Mosaic Potash Esterhazy Limited, 2018 SKQB 68:**

The Saskatchewan Court of Queen's Bench upheld an arbitrator's decision to uphold the discharge of an employee following their conviction for possession of child pornography. The Court endorsed the arbitrator's determination that continuing to employ the employee had the potential to harm the employer's reputation, even though the employee was not in a public or prominent role (the grievor was a mine operator) because of the Employer's unique position as a major employer in the community with significant involvement in public works and the fact that the convictions were publicized and well-known in the community.

***Discharge for Assault on a Minor*: Canadian Union of Public Employees v. A Nursing Home Inc. (W.M. Grievance), [2019] P.E.I.L.A.A. No. 1:**

The Grievor, an Resident Care Worker in a nursing home, pled guilty to a single charge of assault and received a 60 day jail sentence and two years probation (he could serve his jail sentence intermittently, allowing him to continue to work full time hours). The guilty plea to the common assault charge was a reduction from the original charge, which was sexual interference on a minor relating to a son of a family friend. He was subsequently terminated from his employment.

Notably, the Grievor sought to challenge the factual basis for his conviction at the arbitration- however, he had pled guilty to the charge of assault and had entered into an agreed statement of facts in his criminal proceedings, and both were binding on the arbitrator.

The Employer argued that the health care context at the nursing home is a critical lens by which to assess just cause. The Grievor, as a Resident Care Worker, performed very personal and direct care to vulnerable perons with cognitive challenges in a setting that only permits minimal supervision. In that context, the Grievor's continued employment was untenable.

The Union argued that there was no evidence of any harm to the Employer's reputation, no evidence that he was unable to perform his duties, and no evidence of a negative impact on other employees.

The arbitrator dismissed the grievance, finding that the Grievor's conviction for assault would reasonably raise real concerns in the mind of a fair-minded and reasonably informed member of the public, and that continued employment would present a real risk to the personal integrity of nursing home residents. There was a serious reasonable negative impact on the Employer's reputation sufficient to warrant the Grievor's termination.

PART III: INCARCERATION

Additional considerations arise if the conviction results in incarceration. In these circumstances, a separate issue may arise as to whether or not the employer can legitimately discharge an employee for an unauthorized absence for the period while the employee is incarcerated. Although in early awards arbitrators ruled that employers had the right to terminate such employees, it has now been accepted that an employer should, where it is reasonable to do so, grant a leave of absence.

Over time, it has come to be accepted that if an employee who is sentenced to jail applies for a leave of absence or some other similar arrangement, or requests the employer to participate in a temporary absence program, the employer cannot automatically deny the request and discharge the employee simply because he cannot come to work during the period he must serve his/her sentence. Even if a collective agreement recognizes that the employer has a discretion in deciding whether to grant or refuse such requests, the employer must exercise its powers fairly and reasonably.

Just like the test for suspending pending the outcome of criminal charges, when faced with an employee who is going to be incarcerated the Employer must balance its own interest in maintaining production against the employee's interest in continued employment. To justify a refusal of a request for a leave of absence, an Employer must show that its production requirements and/or other business interests would be prejudiced by granting the leave. In making its decision, Arbitrators have ruled that an Employer may also take account of a variety of factors, such as:

- the nature of the offence;
- the length of the sentence;

- the employee's honesty; and
- the employee's prior work record.

On this approach, although an Employer cannot be compelled to participate in a temporary absence program, neither will it be allowed to terminate an employee for an unauthorized absence if the cost and inconvenience of its involvement are minimal.

On the same logic, some Arbitrators have taken the position that being held in custody prior to being convicted, or having to absent oneself from work in order to attend one's trial, raise special issues and will not generally by itself be regarded as sufficient grounds for a person to lose his or her job.

Finally, employees who choose to go to jail rather than pay a fine are not likely to receive a sympathetic hearing.

In *Port Moody (City) and C.U.P.E., Loc. 825*, [1997] B.C.C.A.A.A. No. 853 (Laing), the Grievor had been convicted of gross indecency, sexual intercourse with a female under age 14, and sexual assault, and was sentenced to one year in jail. The grievor requested early retirement, but was subsequently released on bail pending the appeal of his conviction. He then sent a second letter to the Employer withdrawing his request for early retirement, and the Employer responded with a letter that said it considered that the grievor had resigned. The Employer argued that grievor had retired voluntarily, or alternatively, that the Grievor was dismissed for cause as the grievor's convictions detrimentally affected the city's reputation and the public's trust in the employer, affected the grievor's ability to carry out his job, caused other employees to be reluctant to work with him, and inhibited the employer from properly managing its workforce.

In the end, the arbitrator found there was an insufficient nexus between to the employment relationship to justify termination, and reinstated the Grievor.

One issue that arose was that some other bargaining unit employees indicated that they would refuse to work with the grievor. On that issue, Arbitrator Laing found that such attitudes did not justify termination:

From the evidence, it is clear that these employees refuse to work with the grievor, not because they are afraid or concerned for themselves but because they are repelled by the crime the grievor committed. The employer argues this is a determining factor in support of their decision to terminate the grievor. I do not agree. The other employees are entitled to their personal views about the grievor and his conduct. If they do not want

to work with him, that becomes a matter between them and the employer. It cannot be used as a reason for the employer to alleviate its responsibility towards the grievor. In our system of labour relations, the buck stops with the management and cannot be passed off to other employees to decide in accordance with their views of the grievor's criminal conduct, however sincerely those views are held. I cannot think of a more unjust work environment than one where decisions affecting the employ-ability of workers is based on popularity. Only if there is reliable objective evidence that employees could be injured or harmed in some way by the grievor can their refusal to work with the grievor be considered as a proper factor in deciding on his continuing employment.

City of Winnipeg and UFFW (Award of Arbitrator Robinson dated March 15, 2018)

The City terminated the grievor, a firefighter, after being charged and convicted of criminal offences, all relating to the breakdown of his marriage. The grievor was incarcerated both while awaiting trial or as a sentence for pleading guilty. The City initially granted a leave of absence to the grievor while incarcerated but ultimately terminated him solely because it was unknown when he would be able to return to the workplace.

Arbitrator Robinson found that the City was wrong to have ended the leave of absence and that in balancing the parties respect interests, the scales tipped decidedly in favour of the grievor maintaining his employment, particularly given that the grievor's absence had no material effect on the Employer's operations, his seniority, his discipline free record prior, and given that the grievor and the Union had kept the City apprised of developments and any updates that it could provide about his incarceration. As a result, the City did not act reasonably in terminating the grievor. The grievor was reinstated to his former position retroactive to the time following his release from custody.

PART IV: WORKERS ACQUITTED OF A CRIMINAL OFFENCE

Following the Supreme Court of Canada's decision in *Toronto (City) v. CUPE Local 79*, 2003 SCC 63, arbitrators have held that where a Grievor is convicted in a criminal trial of conduct which was also the subject of Employer discipline, they are bound by the findings of the judge in the criminal trial and re-litigating those issues would be an abuse of process. A question then arises: what happens if the Grievor is acquitted of the criminal charges?

Even if an employee is ultimately acquitted of criminal charges, an Employer may still be justified in disciplining the employee for the same conduct. In other words, simply because a judge finds that the employee did not commit a criminal offence does not necessarily mean that the employee is also innocent of committing an employment

offence. In other words, even if the judge in a criminal trial finds that the employee did not commit a criminal offence, in the context of a grievance arbitration, the Arbitrator has the ability to find that the employee did commit the alleged misconduct and that discipline is warranted. The reason relates primarily to the different standard of proof in criminal and civil proceedings.

In a criminal trial, the Crown (prosecution) must prove *beyond a reasonable doubt* that the individual committed a criminal offence. On the other hand, in a civil proceeding the lower standard of proof of *the balance of probabilities* is applied. In a grievance arbitration dealing with discipline, the Employer must only satisfy the Arbitrator that *on the balance of probabilities* the employee committed the misconduct in question. Therefore, the acquittal is not proof that the employee did not commit an employment offence.

One issue that might arise is the significance of the findings made by the judge in the course of the criminal trial, and whether those findings are *binding* on the Arbitrator.

There are cases that suggest that an Arbitrator is bound by the findings of a judge in a criminal trial where the person was acquitted. These kinds of findings might be favourable to the Grievor, since the judge found the person not guilty. However, more recent case law suggests that an Arbitrator is not bound in this way when the Grievor was acquitted.

Arbitrator Etherington recently dealt with this issue in the case *Sault Area Hospital v. Ontario Nurses Assn. (Maione Grievance)*, [2013] O.L.A.A. No. 113 (Etherington). In that case a nurse was terminated for allegedly assaulting a patient, which she denied. She was also criminally charged for the incident and acquitted by the trial judge. According to the Arbitrator, the reasons for the trial verdict went beyond simply rendering a verdict of acquittal and included comments about the evidence of various witnesses including the Grievor and the main witness of the prosecution.

The Union brought a preliminary motion which, in effect, asked the Arbitrator to find that certain statements made by the trial judge in the reasons for acquittal required the Arbitrator to uphold the discharge grievance and reinstate the Grievor with compensation, or alternatively, bar the Employer from calling evidence on certain issues that were central to the resolution of the grievance.

The Union first argued that the factual findings made by the trial judge were determinative of the main issues in the grievance, and it would be an abuse of process to proceed with the arbitration. Alternatively, the Union argued the Employer was not permitted to call evidence on the issues where the trial judge made findings of fact in

the criminal decision, such as the issue of whether the Grievor did intentionally strike the patient with her elbow.

As an additional alternative, the Union argued that the Arbitrator should nevertheless consider the findings of the criminal court trial judge and determine the relevance and weight of the criminal judge's findings and how they could impact on the Arbitrator's decision-making and fact-finding in that case.

An abuse of process might occur where a party attempts to re-litigate an issue and contradict findings made in a different legal proceeding. In *Sault Area Hospital*, the Union asked the Arbitrator to find that any attempt by the Employer to lead evidence that would contradict the finding of the trial judge that the Grievor did not strike the patient in the face deliberately would constitute an abuse of process.

Arbitrator Etherington rejected the Union's first two arguments, and left the third argument to be considered when the matter was heard on the merits (as this was only an interim decision).

Arbitrator Etherington agreed that the Ontario Court of Appeal's decision in *Polgrain Estate v. Toronto East General Hospital*, [2008] O.J. No. 2092 (C.A.) is the leading decision on the impact of a criminal acquittal and the judge's findings of fact on a subsequent civil proceeding, whether that be a court action or an arbitration proceeding. The Court of Appeal in that case noted that the judicial finding made by a criminal court is simply whether the case has been proven beyond a reasonable doubt.

Since a criminal court decides only whether a person is *guilty beyond a reasonable doubt*, as opposed to finding whether the person is actually *innocent*, the findings of fact made by criminal trial judges in acquitting a person charged with an offence are not binding on an arbitrator. On that basis, Arbitrator Etherington rejected the first two arguments.

With respect to the Union's third argument in *Sault Area Hospital* – that the findings by the criminal court trial judge should be *considered* – Arbitrator Etherington reserved that issue for the final decision on the merits. He commented that in the *Polgrain Estate* decision the Court of Appeal did not appear to deal directly with potential admissibility and weight of the findings of a trial judge as evidence on the issues that arise in subsequent proceeding. He noted s.48(12)(f) of the Ontario *Labour Relations Act*, which is analogous to s.120(1)(d) of *The Labour Relations Act* of Manitoba, and left it to the parties to make submissions in argument as to what weight, if any, should be given to the statements, findings and comments made in the reasons of the trial judge rendered with the verdict of acquittal of the Grievor in the criminal trial.

At the end of the day, what we can take from the *Sault Area Hospital* decision is that an acquittal is not proof that the employee is innocent of an employment offence, and that the factual findings made by a trial judge in a criminal proceeding are not *binding* on an Arbitrator. It might still be possible to refer to a trial judge's findings in support of an argument that the Grievor should not be disciplined, however, it is not clear what weight an Arbitrator would give those findings.

However, where an employee has been acquitted at his or her criminal trial, it would not be an abuse of process for an Employer to lead evidence that could "contradict" the criminal court's findings with respect to the alleged misconduct. An employee could be found "not guilty" of an assault at a criminal trial, but in an arbitration be found to have committed the same assault (depending, of course, on the evidence presented).

In the recent case of *Haro Park Centre Society v. Hospital Employees' Union*, [2023] B.C.C.A.A.A. No. 122, the grievor was charged with assault on a patient. The grievor and her coworker (who accused the grievor of hitting the patient), both testified at the grievor's criminal trial. The grievor was ultimately acquitted of the assault charge.

Despite the availability of a transcript of the court's reasons, neither the union nor the employer suggested the transcript should bear on the arbitrator's determination. The arbitrator agreed, and did not rely on the transcirpts in reaching their decision. She held that the court's reasons turned on principles unique to the higher standard of proof in criminal proceedings. As such, the criminal trial transcript was not considered.

PART V: WORKERS APPEALING THEIR CONVICTION

Amalgamated Transit Union, Local 1505 v. Winnipeg (City), [2015] M.G.A.D. No. 7 (Graham)

The grievor, a bus driver, was suspended without pay and subsequently terminated as a result of his conviction for sexual assault on a minor and two other related charges on a minor. The grievor denied his guilt, pleaded not guilty to the charges, and appealed his conviction.

The City initially took no immediate steps in relation to the grievor's employment, as he was off on medical leave at the time. When he later returned to work, he was placed in an accommodated position as a General Helper (he could not work as a bus driver due in part to an undertaking not to have any contact with anyone under 18 years of age).

When he was convicted of the charges, the City suspended the grievor without pay. The City later claimed that this decision was made because they believed the grievor would be immediately incarcerated (he was not). The City was subsequently advised that the grievor would be appealing the conviction.

Later, the City decided to terminate the grievor's employment. The City took the position that the convictions rendered him unsuitable for the position for which he was hired to work, i.e. Bus driver.

The grievor was later sentenced to 4 ½ years' incarceration. He filed an appeal of his convictions and the sentence which had been imposed. He was later released on bail pending his appeal.

The Union grieved his termination, arguing the City's decision was seriously flawed, particularly given that nothing had changed and they had accommodated him for some time in an alternative position.

The Arbitrator determined that the City had properly balanced its interests up to the date of conviction by monitoring the situation and placing him in an accommodated position. However, the City had acted hastily when deciding to suspend the grievor without pay following his conviction, and when it proceeded to terminate without considering available alternatives. The City ought to have considered whether the grievor could continue his work as a General Helper, and ought to have potentially kept him in this position while he appealed his conviction and sentence.

Arbitrator Graham ordered the City to make a decision as quickly as possible on whether to return the Grievor to active employment as a General Helper, or alternatively, if the City was unwilling to return him to work, a suspension with pay was necessary to balance the interests of the City and the grievor, pending the outcome of his appeal.

Note that Arbitrator Graham declined to determine whether s. 9(1)(a) of *The Human Rights Code* had been violated by the City.