

IN THE MATTER OF THE ARBITRATION OF  
THE JULY 6, 2006 GRIEVANCE FROM DAVID MILLIGAN  
PURSUANT TO THE COLLECTIVE AGREEMENT

BETWEEN:

ADVANCE ENGINEERED PRODUCTS LTD.  
(the "Company")

AND:

ADVANCE EMPLOYEES' ASSOCIATION  
(the "Union")

Before: William F.J. Hood – Chairperson

Appearing for the Union: Larry Kowalchuk  
Appearing for the Company: Meghan McCreary

Hearing: November 21 and 22, 2006  
Regina, Saskatchewan

**AWARD**

**I. INTRODUCTION:**

1. David Milligan ("Milligan"), the grievor, claims that he was discharged without cause from employment with the Company on May 28, 2004. At that time Milligan was absent from work, awaiting surgery on his lumbar spine for a disc herniation. Milligan claims that the Company did not provide proper accommodation for his disability. The surgery and rehabilitation cured his back problem, and he is now ready to return to his regular job without any further accommodation. The Company, however, is not prepared to reinstate or rehire him.

2. The Company makes a preliminary objection to arbitrability. The Company alleges that this grievance is time barred. The Company was not notified of the grievance until May 29, 2006, some two years plus one day after the termination. The Collective Agreement provides that grievance procedures be commenced within five days after the alleged grievance comes to the notice of the employee concerned. The Company submits, and the Union agrees, the time limit in the Collective Agreement is mandatory. The Company also submits that this is not a case warranting the exercise of an arbitrator's statutory discretion to relieve against a breach of the mandatory time limit. In addition, the Company claims prejudice as a result of the delay because

the Company is now precluded from calling medical evidence as to Milligan's condition two years ago. Also, reinstatement to Milligan's former position will necessitate the stepping down of another employee who is in training for such position.

3. Substantively, the Company claims the discharge was justified because there was no evidence, at the time, of any reasonable possibility that Milligan could return to work and that any further accommodation would have resulted in undue hardship on the Company.

4. At the time of the discharge, neither the Company, the Union, nor Milligan were aware of the obligations and rights that arise from the duty to accommodate medical disabilities in the workplace.

5. This award determines whether the time limitation in the Collective Agreement is fatal to this grievance, and, if not, whether the Company ought to have accommodated Milligan's disability.

## **II. FACTS:**

6. Milligan commenced work for the Company on March 1, 1994, initially in the job classification as general duty laborer, and later as calibrator. A calibrator tests for leaks in tanks on trailers and tank trucks. The Company presently has over 700 employees and is in the business of manufacturing semi-trailer units. The Company has branches mainly located throughout western Canada. Milligan was employed at the Regina branch of the Company. Milligan is now 44 years old. The Regina branch of the Company has 201 employees.

7. Milligan first injured his back when he slipped and fell on his tailbone in 1999. He was not at work at the time. As a result, he was off work for approximately two years. He had back surgery and returned to work some four months later, in 2001.

8. In November 2001, Milligan re-injured his back. At the time of this incident he was not at work with the Company, but rather was working as a volunteer fire fighter for the Town of Qu'Appelle. He grabbed a water line and twisted the wrong way. As a result, he was unable to work and was off work from approximately November 21, 2001 to September 26, 2002. During this period he received disability benefits from Workers' Compensation. The injury was assessed against the Town of Qu'Appelle. The Company did not receive or ask for medical information on Milligan regarding the injury.

9. Milligan, with the assistance of Workers' Compensation and physicians, enrolled in therapy. On September 16, 2002, the Canadian Back Institute Physiotherapy and Rehabilitation Centre ("CBI") were of the opinion that Milligan was fit to return to work on a graduated basis.

10. On September 26, 2002, Milligan returned to work and continued his therapy with CBI. He did not work regular and full shifts. On October 4, 2002, he was formally diagnosed with a herniated disc. Milligan's condition became progressively worse and, as a result, he stopped working on November 26, 2002.

11. On December 4, 2002, CBI advised the Company that Milligan was unable to perform his work tasks. The letter from CBI states as follows:

December 4, 2002

Advance Engineered Products  
144 Henderson Dr.  
Regina, SK S4N 5P7

To Lany Nguyen:

Re: David Milligan, WCB Claim #1022 3626 05B

Mr. Milligan is awaiting surgery on his lumbar spine for a disc herniation, thus is unable to perform his work tasks.

If you have any questions or concerns, please contact the undersigned at 522-8797.

Sincerely,

Julie Schick,  
B. Sc. P.T.

12. During the period, while he was off work, Milligan would keep in touch, from time to time, with the Company by talking to his foreman, Mr. Nguyen.

13. On April 23, 2003, the Company requested that Milligan provide twelve post-dated cheques for the period commencing May 1, 2003. These cheques were to cover his share of the monthly premiums for short and long term disability. Milligan provided the Company with monthly payments in the amount of \$85.68.

14. Mona White ("White") testified on behalf of the Company. She started work with the Company in September 2001, and is the payroll and benefits administrator. She observed that

there were a lot of employees on the Company's payroll records that were not at work. She contacted Labour Standards and was advised that such employees could be terminated if they were absent from work in excess of six months. She discussed this with management, and it was decided that employees absent from the workplace for eighteen months would be terminated and removed from the payroll records and the benefit plan.

15. Accordingly, on April 2, 2004, White authored and sent a letter to Milligan which states as follows:

April 2, 2004

David Milligan  
Box 83  
Qu'Appelle, Saskatchewan  
S0G 4A0

Dear David:

A review of our records indicate that you have been absent from the workplace longer than a period of eighteen months.

We will be terminating your group insurance coverage as of **April 30, 2004**. Upon group termination you have the option to convert your life insurance to your own Sun Life Financial Insurance Plan without proof of health. To exercise this option you must apply within **31** days from the date your group coverage ends. Attached is the information and form you will require to convert your life insurance.

This letter will also serve as written termination notice as [of] the date of this letter. You will be terminated as an Advance Engineered Products Ltd. employee as of May 28, 2004 if you are unable to return to regular full time duties.

Please call if you have any questions.

Yours truly,

ADVANCE ENGINEERED PRODUCTS LTD.

Mona White,  
Payroll & Benefits Administrator [emphasis in original]

16. White testified that after sending the letter "the ball was in his court" and Milligan's employment was terminated, as a matter of course, on May 28, 2004 because there was no response. In cross examination, White acknowledged that she was not aware of the duty to accommodate at the time the letter was sent. This form of letter was used to terminate other employees who were absent from the workplace for such period. Gord Secuur ("Secuur"), the

health and safety coordinator, subsequently advised White to stop using this letter and the letter is no longer used.

17. Milligan had no advance notice that his employment with the Company would be terminated. The termination letter was a complete surprise. He had no indication that his employment was in jeopardy. After receiving the letter he did not contact the Company, but rather called Labour Standards. Milligan testified that Labour Standards told him that the Company had the right to terminate him after absence from work for a period of six months. This was the same answer that was received when White contacted Labour Standards. Milligan also showed Workers' Compensation the letter, and they were of a similar belief that he could not go back to the Company because he did not have a job there. When pressed on cross examination as to why Milligan did not provide a response to the Company's termination letter, his answer was "what's the point" referring to the advice he had received and that the letter was "self-explanatory". It was for this reason that he did not contact the Union and did not contact the Company. At the time of receiving the letter, Milligan knew that he could not return to his regular job by May 28, 2004. The surgery was not yet scheduled and even if the surgery was performed before May 28, 2004, he understood that he needed at least four months after the surgery before he could work.

18. Milligan had been placed on a list for surgery and was told that he could be waiting for two and one-half years. Eventually, the surgery was performed on August 3 2004. Except as set forth above, during this period, no one from the Company contacted Milligan.

19. Following his surgery, Milligan again attended physiotherapy in what was to be a twelve week program, which he completed in February 2005 after nine weeks. At this point, he had met or surpassed every requirement necessary to return to work at his job with the Company, but he no longer had a job. Workers' Compensation encouraged Milligan to go to school and increase his employability. With the assistance of Workers' Compensation, Milligan commenced school while in physiotherapy and continued his schooling until April 2006. He upgraded his education.

20. On April 24, 2006, Milligan received full-time employment installing irrigation systems for golf courses. The working conditions were not pleasant. Milligan lived in a trailer, away from home, with other workers, and without adequate washroom facilities. Often he was required to go for periods of one to one-half weeks without a shower. Milligan quit this job and gained employment with a construction company, framing houses. He has continued with this work for

two and one-half months and is still receiving assistance from Workers' Compensation to top up his present wage to the wage received during employment with the Company.

21. Mark Hannant ("Hannant") testified on behalf of the Union. He is presently the President of the Union and has held all the positions in the Union during his employment with the Company. The Company did not provide the Union with a copy of the April 2, 2004 termination letter. The Union, however, was generally aware that the Company had sent out letters like this to those who had been absent from the workplace for an extended period of time. Hannant testified that the Union, like the Company, did not really have any knowledge of the duty to accommodate medical disabilities in 2002. The Union only became apprised of the obligations and rights flowing from the duty to accommodate when it became involved in the Neil Wirth grievance in November 2005. In May 2006, Hannant approached Milligan and advised him that he might have a chance to get his job back if he was interested in pursuing the matter. Milligan was interested and, as a result, Hannant contacted the Company, and in particular, Secuur.

22. The Company, however, was not interested in reinstating or rehiring Milligan. On May 31, 2006, Secuur, on behalf of the Company, sent the following memo to the Union:

**Date:** May 31, 2006

**To:** Advance Employees Association

**From:** Gord Secuur

**Re:** Dave Milligan

Due to an injury sustained while off-duty, Mr. Milligan was off work from approximately November 26, 2002 until he was dismissed for innocent absenteeism on April 2, 2004. At no time prior to or following Mr. Milligan's termination, did Mr. Milligan or anyone else on his behalf request that Mr. Milligan be accommodated, or advise that he required accommodation. As more than two years have passed since Mr. Milligan's dismissal[,] Advance is not prepared to reinstate Mr. Milligan now. There is no evidence that there was any reasonable possibility that Mr. Milligan could have shortly returned to work at the time he was dismissed for innocent absenteeism.

23. Secuur and White were the only witnesses called to give evidence on behalf of the Company. Secuur had no personal knowledge concerning the termination of Milligan. Secuur and White were not involved in the decision to not rehire or reinstate Milligan. The plant manager and those senior to Secuur were involved in this decision and did not give evidence. As a result, no evidence was provided by the Company as to the reasoning to not rehire or reinstate

Milligan in May 2006. Also, the Company did not challenge Milligan's statement that he was physically fit to return to work without any further accommodation.

24. Secuur acknowledged, in cross examination, that since June of this year the Company has hired twenty new employees at its Regina branch alone. Secuur testified that the Company presently has no openings for the position of calibrator. There are three calibrators employed full time, and one in training. Secuur testified that if Milligan was reinstated to the position of calibrator, the employee in training would have to return to the job of general duty labourer. No evidence was provided as to when the decision was made to place this person in training for the position of calibrator.

25. On May 29, 2006, the Union notified the Company of this grievance. The grievance which is dated July 6, 2006, states as follows:

Grievance Number 007

Grievant Name David Milligan Clock No. 110 Date: July 6, 2006

Home Address Box 83 Qu'Appelle Saskatchewan S0G 6A0 Phone # 306-699-2999

Work Address 144 Henderson Drive Regina plant Work # 306-721-5678

Job Title Welder/Fitter I Company Department Final Assembly

Wage Level Rate of Pay Approximately \$20.11

Assoc. Exec. taking complaint Mark Hannant Date received May 28, 2006

Date incident occurred April 2, 2004

Date company notified of grievance May 29, 2006

Notice given verbally to Gord Secuur awaiting legal coun[s]el before grievance can be filed, time limits waived on this date

#### Complaint

Dave Milligan was dismissed without cause. The company did, and continues to, discriminate against David Milligan because of his disability. The company has not attempted to and continues to refuse to accommodate David Milligan. David Milligan is, and for quite some time, able to return to work full time and resume his normal duties.

Article violation and all applicable provision of the contract Article 16.08 of our collective agreement and various other violations in the labour standards act and human rights code.

What past practices apply; the company's ability to accommodate previous employees with similar and varying disabilities with great ease i.e. Niel Worth, John Mustachia, Rick Violet other examples can be given upon request.

What settlement is expected The remedies sought include, reinstatement without loss of seniority; reinstatement to his former job and the rate of pay and benefits he would be entitled to but for the violations of the collective agreement, labor standards act and the human rights code; compensation **FOR ALL** lost wages and benefits; and an amount in general damages to be determined.

Company answer at 1<sup>st</sup> step

Company answer at 2<sup>nd</sup> step

Grievance meeting minutes, documentation, copies of appeal letters and rationale for appealing to the third step are attached.

Association Executive President "Mark Hannant" Date July 6, 2006

26. Under both the former Collective Agreement (November 1, 2002 to October 31, 2005) and the current Collective Agreement (November 1, 2005 to October 31, 2008) Articles 6 and 7 deal with grievances and discharge cases, respectively. The provisions under Articles 6 and 7 of the former Collective Agreement and the current Collective Agreement are essentially the same, except that the former Collective Agreement provided a two (2) day time limit for bringing a grievance or requesting a review of dismissal, and the current Collective Agreement contains a five (5) day time limit. The relevant provisions from the former Collective Agreement are as follows:

#### **Article 6 – Adjustment of Grievances**

**6.01** When differences arise between the Company and the Association as to the meaning, application, operation or alleged violation of this agreement, the said differences shall be resolved through the operation of the grievance procedure, but shall only relate to or concern any grievance which has arisen or arises subsequent to the date of this agreement.

**6.02** The differences referred to above shall be taken up in the following manner, but not later than two (2) working days after the alleged grievance comes to the notice of the employee concerned.

...

**6.09** Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this Agreement has been violated, either of the parties may, after exhausting the grievance procedure established by this Agreement, notify the other party in writing of its desire to submit the question to arbitration. The parties agree that within ten (10) days of the receipt of such notice an arbitrator shall be selected in the manner outlined in ARTICLE 6.10 and the arbitrator jointly advised of his selection.

...

**6.11** The parties agree that an arbitrator set up under this Article shall not have the power to add to, delete from or change the provisions of this Agreement.

...

#### **Article 7 – Discharge Cases**

**7.01** If an employee is dismissed for any cause whatsoever and feels that he has been unjustly dealt with, he may, within two (2) working days from receipt of notice of dismissal, notify the Local Committee who shall, within two (2) working days, apply to the Company in writing, for a review. The dismissal shall be dealt with in accordance with the procedure on Adjustment of Grievances beginning at the Third Step, Article 5. If subsequently it is decided that the employee is unjustly dismissed, he shall be reinstated at his regular rate of pay from the time of such dismissal or by any other arrangement which may be found to be just and equitable, in the opinion of the Parties.

27. The Collective Agreements are silent on discrimination and the duty to accommodate medical disabilities.

### **III. ISSUES:**

28. The issues are as follows:

- (a) First, is the grievance time barred (the preliminary issue)?
- (b) Second, if the grievance is not time barred and is arbitrable, the substantive issue is whether the Company was entitled to discharge Milligan because of absenteeism while awaiting surgery for a herniated disc.

### **IV. LAW AND ARBITRAL JURISPRUDENCE:**

#### **A. Time Limits**

29. The Union acknowledges that the time limitation in the Collective Agreements is mandatory, but refers to the statutory provision granting arbitrator's the discretion to relieve against a breach of mandatory time limits.

30. Section 25(2)(f) of *The Trade Union Act*, R.S.S. 1978 c. T-17 reads as follows:

25(2) An arbitrator or the chairperson of an arbitration board, as the case may be, may:

...

(f) relieve, on terms that, in the arbitrator's opinion, are just and reasonable, against breaches of time limits set out in the collective bargaining agreement with respect to a grievance procedure or an arbitration procedure;

...

31. The Union submits that section 25(2)(g) of *The Trade Union Act* is also applicable and that I should only dismiss this grievance if there is unreasonable delay and prejudice to the Company. Section 25(2)(g) of *The Trade Union Act* reads as follows:

25(2) An arbitrator or the chairperson of an arbitration board, as the case may be, may:

...

(g) dismiss or reject an application or grievance or refuse to settle a difference if, in the opinion of the arbitrator or the arbitration board, there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement and the delay has operated to the prejudice or detriment of the other party; and

32. The Union argues that section 25(2)(f) of *The Trade Union Act* permits an arbitrator to frame the appropriate remedy when there is a delay in bringing the grievance. In this case, the Union concedes that the Company is not liable for damages that occurred during the delay period, but rather only seeks damages during the processing period of the grievance.

33. The Collective Agreements are silent on discrimination. Accordingly, the obligation of the Company to not discriminate because of a medical disability is found in human rights legislation. The relevant provisions of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (the "Code") are as follows:

2(1) In this Act:

...

(d.1) "disability" means:

(i) any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes:

(A) epilepsy;

(B) any degree of paralysis;

- (C) amputation;
- (D) lack of physical co-ordination;
- (E) blindness or visual impediment;
- (F) deafness or hearing impediment;
- (G) muteness or speech impediment; or
- (H) physical reliance on a service animal, wheelchair or other remedial appliance or device; or

(ii) any of:

- (A) an intellectual disability or impairment;
- (B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or
- (C) a mental disorder;

...

(m.01) “**prohibited ground**” means:

- (i) religion;
- (ii) creed;
- (iii) marital status;
- (iv) family status;
- (v) sex;
- (vi) sexual orientation;
- (vii) disability;
- (viii) age;
- (ix) colour;
- (x) ancestry;
- (xi) nationality;
- (xii) place of origin;
- (xiii) race or perceived race; and
- (xiv) receipt of public assistance;

...

16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment, on the basis of a prohibited ground.

34. In *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324* 2003 SCC 42 [*Parry Sound*], the Supreme Court of Canada held that the substantive rights and obligations in employment related statutes, including the statutory provisions of the Code, are implicit in every collective agreement.

35. The Company points out that section 27(5) of the Code provides that the Human Rights Commission must refuse to accept the complaint where the complaint is made more than two years after the alleged infraction. Section 27(5) reads as follows:

Notwithstanding any other provision of this Act, the commission shall refuse to accept a complaint where the complaint is made more than two years after the person making the complaint became aware, or ought to have been aware, of the alleged act of discrimination.

36. The Company submits that because a grievor is barred from pursuing its statutory remedy before the Saskatchewan Human Rights Commission that it should also not be able to rely upon the statutory provisions of the Code to pursue the same issue in a grievance arising under the Collective Agreement.

37. Recently, in *Isidore Garon Ltee v. Syndicat du Bois Ouvre de la Region de Quebec Inc.*, [2006] 1 SPS. C.R. 27, the Supreme Court of Canada clarified that only those substantive statutory provisions which are “compatible” with the labour relations scheme are incorporated in the collective agreement.

38. Counsel for the Union submits that I can exercise my discretion as to what is just and reasonable as I think fitting in the circumstances.

39. Counsel for the Company referred to the decision in *Re Abitibi-Price, Inc., and United Paperworkers International Union, Local 1375* (1993), 38 L.A.C. (4<sup>th</sup>) 59 (Rennie), which sets out certain criteria to evaluate the reasonableness of the delay. The criteria are as follows:

1. Does the agreement provide explicit time limits?
2. How long was the delay?

3. Was the party alleging delay “surprised by the existence of the dispute”?
4. Is there a reasonable explanation for the delay?
5. Was the grievor personally responsible?
6. What is the nature and severity of the prejudice suffered by the party alleging delay, including:
  - (a) financial prejudice;
  - (b) fading of memory and potential unavailability of important witnesses; and
  - (c) the impossibility of retroactively analyzing the grievor’s medical condition and occupational central.
7. Was the prejudice unequivocally or unavoidably the result of the delay?

40. In the often cited case of *Greater Niagara General Hospital and O.N.A.* (1981), 1 L.A.C. (3d) 1, Arbitrator Schiff considered the following factors:

1. Nature of the grievance.
2. Whether the delay occurred initially, in launching the grievance or at some later stage.
3. Whether the grievor was responsible for the delay.
4. The reasons for the delay.
5. The length of the delay.
6. Whether the employer could reasonably have assumed that the grievance had been abandoned.

41. Counsel for the Union submits that the above jurisprudence concerning the guidelines to evaluate the reasonableness of the delay is not applicable because such jurisprudence precedes the statutory discretion of an arbitrator found in *The Trade Union Act*.

**B. Substantive Issue**

42. An employer may not dismiss a disabled employee for reasons related to the disability unless it can show that accommodation would cause undue hardship (see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4<sup>th</sup>) 417 (S.C.C.)).

43. In *Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4<sup>th</sup>) 577, the Supreme Court found that in circumstances where the union was a co-discriminator with the employer, both shared a joint responsibility to seek accommodation for the subject employee. The Court, however, also stated that the employer can be expected to initiate the accommodation process and take steps that are reasonable. Furthermore, the Court held that the search of accommodation is a multi-party inquiry, which requires the employee to assist in securing the appropriate accommodation.

44. Counsel for the Company, in argument, takes the position that employees are required to request an accommodation before the employer's duty to investigate and accommodate is triggered. The Company places blame on Milligan for not responding to the April 2, 2004 termination letter.

**V. ANALYSIS:**

**A. Time Limit**

45. In my opinion, this is a case where the statutory discretion conferred pursuant to section 25(2)(f) of *The Trade Union Act* should be exercised in favour of Milligan and relief granted against the time limit set out in the Collective Agreement. In my opinion, it is just and reasonable to grant this relief for several reasons.

46. The evidence establishes a reasonable explanation for the delay in bringing the grievance. Milligan was unaware, at the time of termination, that the Company had any obligation to accommodate his disability. I cannot find Milligan at fault for this belief. After receiving the termination letter Milligan contacted Labour Relations and was advised that the Company could terminate him due to his extended absenteeism. This is also the information the Company received, which they acted on in formulating a policy to automatically terminate employees due to extended absenteeism. The Company admitted that when sending the termination letter they

neither understood nor appreciated the duty of the employer to accommodate disabilities in the workplace. Further, the Union did not know, at the time, that there was any right to pursue or challenge the dismissal.

47. The argument was put forward by the Company that ignorance of the law is not an excuse. I understand this proposition when used as a defence to a particular act or omission. Ignorance of a legal right, however, provides a reasonable explanation for a delay. This is especially true where the Company and Union were also ignorant.

48. This is not a case where a party was sitting on its legal rights. Sitting on its legal rights requires knowledge of such legal right and a deliberate decision to not pursue legal rights in a timely manner.

49. One cannot be said to be sitting on their legal rights if he or she does not know what they are sitting on.

50. I do not accept that the Company has suffered any real prejudice in this delay. Inconvenience, perhaps, but not prejudice. The Company suggested that they are now prejudiced because they cannot now rely on timely information to challenge Milligan's medical condition in 2004. While the statement that they cannot retroactively do this may be true, it is pure conjecture without any foundation that the Company would have done this at the time, or if they had done this at the time, that anything would result from this other than the finding that Milligan had a herniated disc and was awaiting back surgery. The Company had full notice of Milligan's back problem and pending surgery in 2003 and 2004. Notwithstanding such knowledge, the Company made no inquiries as to the status of Milligan's progress, nor did they express any interest to have him submit to further medical analysis. In my view, it would be repugnant to find the Company is now prejudiced because they cannot retroactively evaluate Milligan's medical condition when this inability is a direct result of the Company's ignorance of their duty to accommodate. Had the Company appreciated their duty to accommodate and shown any interest at the time in seeking accommodation for Milligan's disability, they would have had the opportunity to perform the medical analysis.

51. I also do not find any prejudice in this case merely because an employee in training for the calibration will be returned to the position of general duty labourer. There is no evidence as to when such person entered training; It could have been after the grievance. Even if such person

was placed in this position before the grievance, there is no evidence that if that person is returned to a general duty labourer that this will set off a chain reaction of other bumping. The position of general duty labourer is an entry level position. I also am of the view that it is significant that since June 2006 the Regina branch has hired 20 new employees. Being forced to now take Milligan back does not appear to me to be any more prejudicial than what the Company is typically exposed to in filling positions in the workplace.

52. The time delay of two years is extensive, but is, in itself, only one of several factors that I have taken into consideration. I have also considered that although Milligan was not made aware of his rights until May 2006, the Union was aware of the duty to accommodate in November 2005 and still waited until May 2006 before bringing this to the attention of Milligan. While this delay is important, in the totality of the facts, I am of the opinion that it is just and reasonable in the circumstances that relief be granted against the time limit. The duty to accommodate a medical disability is not the type of grievance that should be lightly shut out on a time limit technicality when the reason for the breach was that none of the participants were aware of the rights and obligations that flow from the duty to accommodate.

53. As stated, the Collective Agreement is silent on discrimination. The provisions concerning discrimination come from human rights legislation. Accordingly, the duty to accommodate medical disabilities comes as a result of the incorporation of the statutory provisions of the Code giving rise to such rights into the Collective Agreement. The Company makes the interesting argument that because the grievance is beyond the two year limit in the Code, in this case by one day, if the grievor is statute barred from pursuing such rights before the Human Rights Commission, such right should also cease to exist in this Collective Agreement. In essence, the Company says that if I am to imply into the Collective Agreement the statutory provisions of the Code that give rise to the Company's duty to accommodate medical disabilities, then I should also imply into the Collective Agreement the statutory provision in the Code imposing the two year time limitation.

54. I am not satisfied that the two year time limitation in the Code is compatible with the labour relations scheme and accordingly the time limitation is not implicit in the Collective Agreement. More importantly, even if counsel for the Company was correct in this argument and my view of this point in error, I am of the view that this would be nothing more than another time limit to commence the arbitration procedure, which *The Trade Union Act* gives an arbitrator

discretion to grant relief against a breach of such time limit. Simply put, if the time limit in the Code is implicit in the Collective Agreement, it stands on the same footing as any other time limitation in the Collective Agreement. For the foregoing reasons, in my opinion, it is just and reasonable, in the unique circumstances of this case, to relieve against a rigid application of the time limits in order to permit the determination of the substantive issue.

**B. *Duty to Accommodate***

55. Implicit in the Collective Agreement are the statutory provisions of the Code. An employer cannot terminate an employee for absenteeism resulting from a medical disability unless the accommodation extended would cause undue hardship to the employer.

56. Some guidance as to the factors to be considered with respect to undue hardship are found in *Alberta Dairy Pool, supra*, where Madam Justice Wilson stated the following:

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

57. In this case, the Company granted some form of accommodation to Milligan. The Company did retain Milligan as an employee while absent due to his medical disability until May 28, 2004; Milligan had a job to come back to when ready.

58. The termination letter ceased any further accommodation. In my view, there is no question that Milligan was absent from work due to a medical disability and the Employer was aware of this medical disability and knew or ought to have known that the medical disability was the sole reason for his absenteeism.

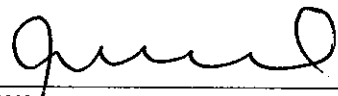
59. The evidence does not support the finding that there is any real hardship, other than inconvenience, on the Employer, which falls far short of undue hardship to continue to keep him

employed while awaiting surgery. It is not Milligan's fault that the surgery lists extended a two and one-half year time frame. To some employers, leaving a position open for such an extended period may constitute an undue hardship. In this case, not only was there no evidence of any real undue hardship, the evidence was contrary to such proposition. This is a large company, 700 employees in total, with 201 employees in Regina alone; It is not a small business. The Company has hired twenty new employees since June of this year alone. In my view, it was not a hardship, let alone an undue hardship, to accommodate Milligan to continue to retain him as an employee in 2004 on medical leave, awaiting surgery that could and did fully correct the disability.

#### VI. CONCLUSION:

60. For the foregoing reasons I sustain the grievance and hold that the Company dismissed Milligan without cause and failed to accommodate his medical disability in the workplace. The parties agreed at the outset that if I find in favor of the grievance that I withhold from making any award as to the appropriate remedy, but rather remain seized with the power to do so if the parties are unable to resolve the remedy. Accordingly, I shall remain seized and continue to retain jurisdiction to determine the remedy in the event the parties are unable to reach such an agreement.

DATED this 9 day of January, 2007.

  
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William F.J. Hood, Chairperson