KING'S BENCH FOR SASKATCHEWAN

Citation: **2026 SKKB 12**

Date: **2026 01 15**
Docket: KBG-SA-01625-2024
Judicial Centre: Saskatoon

BETWEEN:

CITY OF SASKATOON

Applicant

- and -

SASKATOON CIVIC MIDDLE MANAGEMENT ASSOCIATION and AN ARBITRATION BOARD COMPOSED OF DENNIS P. BALL, K.C. (SOLE ARBITRATOR)

Respondent

Counsel:

Tyson J. Bull — for the applicant
Gary L. Bainbridge, K.C. — for the respondent

JUDGMENT — WEMPE J.
January 15, 2026

Introduction

[1] This is an application for judicial review of two awards following a labour arbitration between the City of Saskatoon, [City] or [Employer], and the Saskatoon Civic Middle Management Association [Association].

[2] For the reasons that follow, I find that the Arbitrator's Award dated October 21, 2024 [*Award*], and Supplementary Award dated November 4, 2024 [*Supplementary Award*], are reasonable and there is no basis for this Court to interfere with his findings.

[3] Although the Collective Agreement contained a provision allowing for "without cause termination" with payment in lieu, the Arbitrator found that clause only included organizational or technological change. It did not mean that the employer could terminate any employee at will for any reason simply by declaring that the termination was without cause.

[4] The Arbitrator found the City terminated the greivor for disciplinary reasons. Although the City called the termination "without cause", in actuality the evidence showed it was a "with cause" termination.

Factual Background

[5] The respondent, the Association, is the certified bargaining agent for all "administrative, supervisory and professional staff" (with certain specified exceptions) employed in numerous departments within the City. There are approximately 400 members in the bargaining unit.

[6] Jackie Morley [Ms. Morley] started her employment with the City on July 2, 2002, and held numerous positions during that time. On August 15, 2015, she became an Operations Superintendent with Roadways. She remained in that position until September 13, 2023, when she was terminated effective immediately.

[7] In her position as Operations Superintendent, Ms. Morley managed a team of employees who were members of a different bargaining unit and was responsible for hiring, training, coaching and disciplining her team. She reported to the Roadways Manager and the Director of Roadways, Fleet and Support Services, which

are out-of-scope managers. Ms. Morley took an active role in the Association and was president of the Association at the time of her termination.

[8] Ms. Morley's letter of termination stated that her dismissal was without cause and that she would receive eighteen months pay in lieu of reasonable notice. The letter did not provide any reason for the termination.

[9] Following Ms. Morley's termination, the Association filed a grievance dated September 12, 2023, and subsequently amended on October 2, 2023.

[10] The grievance arbitration was heard on August 15, 2024, before the Honourable Dennis P. Ball, K.C. [Arbitrator]. The Arbitrator issued an *Award* on October 21, 2024, which found the City violated the Collective Agreement when it terminated Ms. Morley's employment and ordered her reinstated. The Arbitrator issued a *Supplementary Award* on November 4, 2024, which found that the City infringed upon Ms. Morley's rights of freedom of expression and conscience, and discriminated against her on the grounds of sexual orientation and gender identity. The Arbitrator ordered the City to pay Ms. Morley $15,000.00 in compensation under s. 40 of *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 [*Code*].

[11] Ms. Morley is a member of the LGBTQIA2S+ community and identifies as "queer". She used the words "human" or "my humans" when speaking to or about staff in the workplace. There was a complaint about Ms. Morley's use of the term. At a meeting August 10, 2023, she was instructed to stop using that language when referring to staff and colleagues. Ms. Morley indicated she was seeking to be inclusive and respectful when using the gender-neutral term. Ms. Morley was also provided with a memorandum (which was placed on her file) instructing her to stop using the terms "human" or "my humans" when communicating with City employees and suggesting she use a different term that is more reflective of a professional business environment and the City's corporate values, but no further disciplinary action was taken against her.

[12] The Arbitrator found the events leading to Ms. Morley's termination began with a disciplinary meeting on August 10, 2023, on the instructions of the HR Director, Ashlee Kazsas, to stop what she believed was Ms. Morley's offensive use of the gender-neutral words "human" or "my humans". When Ms. Morley refused to immediately comply with the direction, the City took the first steps of progressive discipline by placing a document requiring her to cease referring to individual employees as "human" or "my humans" on her personnel file.

[13] The Arbitrator found the City then abandoned its intention to impose progressive discipline because of a concern it would lead to workplace unrest and instead terminated Ms. Morley saying that the termination was without cause. Subsequently, the City publicly denied why it had terminated Ms. Morley and substituted other allegations of culpable behaviour by Ms. Morley.

[14] The Arbitrator held that the only concern or consideration by the City which was supported by evidence was Ms. Morley's use of the words "human" and "my humans" to address persons whose gender identity was unknown. He found all other concerns and considerations were compiled after the fact to create an alternate rationale for the decision to terminate Ms. Morley.

Issues

[15] The issues in this judicial review are as follows:

1. What is the appropriate standard of review?

2. Was the Arbitrator's *Award* decision reasonable?

    (a) Did the Arbitrator fail to apply the principles of collective agreement interpretation?

    (b) Did the Arbitrator exceed his jurisdiction, act unreasonably or

breach the duty of procedural fairness by finding the collective agreement only permitted termination without cause for organizational or technological change?

(c) Was the Arbitrator's finding that the termination was "with cause" unreasonable?

(d) Did the Arbitrator breach procedural fairness by drawing adverse inferences against the City?

(e) Did the Arbitrator exceed his jurisdiction and act unreasonably by ordering reinstatement?

3. Was the *Supplementary Award* decision unreasonable?

(a) Did the Arbitrator fail to apply the correct test for breach of freedom of expression or conscience or fail to consider whether the City's request was a reasonable restriction?

(b) Did the Arbitrator fail to apply the correct test for discrimination or base his findings on a more remote causal link than permitted?

1. What is the appropriate standard of review?

[16] Both counsel on behalf of the City and the Association agree for the most part that the reasonableness standard of review applies to this judicial review. They take differing views on whether the *Supplementary Award* relating to the application of the *Code* should be reviewed on a correctness standard. In this regard, the City argues issues relating to the jurisdictional boundaries between the Arbitrator and the Saskatchewan Human Rights Commission are subject to the correctness standard of review.

[17] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court clarified that the presumptive standard of review in a judicial review application is reasonableness. At paragraph 17, the Court held the presumption of reasonableness may be rebutted in two scenarios:

> (i) where the legislature has prescribed a standard of review in a governing statue or has provided a statutory appeal mechanism; and
>
> (ii) where the rule of law requires the standard of correctness to be applied, namely on constitutional questions, general questions of law of central importance to the legal system as a whole, or questions related to jurisdictional boundaries between two or more administrative bodies.

[18] I agree that if there were issues relating to jurisdictional boundaries between the Arbitrator and the Human Rights Commission, the correctness standard would apply; however, there do not appear to be any jurisdictional issues at play in this judicial review.

[19] At paragraph 8, the *Supplementary Award* stated:

> 8. … It is settled (and the parties agree) that this Board has the jurisdiction and the responsibility to enforce substantive rights and obligations of human rights and other employment-related statutes as if they were part of the Collective Agreement. See *Parry Sound (District) Social Services Administration Board v O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 SCR 157; *Mitchell's Gourmet Foods Inc. v UFCW Local 247-P*, 2004 CarswellSask 932.

[20] I agree with the respondent that jurisdictional issues relating to the *Code* were not raised before the Arbitrator, and it appears that both parties were in agreement regarding the Arbitrator's authority to apply the *Code*. I also agree it is well-established that labour arbitrators have the jurisdiction to apply human rights legislation.

[21] In *Parry Sound (District) Social Services Administration Board v O.P.S.E.U., Local 324*, 2003 SCC 42 [*Parry Sound*], the Supreme Court confirmed that human rights protections are minimum standards which are incorporated into all collective agreements. More recently in *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 [*Horrocks*], the Supreme Court reinforced the primacy of labour arbitrators in human rights matters arising in a unionized workplace.

[22] The *Supplementary Award* considered the issues of whether the termination was a violation of the *Code* and, if so, what the appropriate remedy was. There were no jurisdictional issues at play.

[23] Accordingly, I find that the appropriate standard of review for both the *Award* and the *Supplementary Award* is reasonableness. This is not a case where the presumption of reasonableness is rebutted as envisioned in *Vavilov*.

[24] *Vavilov* provided a reviewing court with guidance on the nature of the reasonableness review. Reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov*, at para 102). More specifically, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para 85). Alternatively, a decision will be unreasonable if there is no rational chain of analysis or an irrational chain of analysis if the conclusion does not follow from the preceding reasoning, if the reasoning is impossible to understand on a critical point considering the reasons together with the record, or if the reasoning is marked by clear logical fallacies (*Vavilov*, at paras 103-104).

[25] It is with this reasonableness lens in mind that I now turn to consider the Arbitrator's *Award* and *Supplementary Award* decisions.

2. Was the Arbitrator's *Award* decision reasonable?

[26] The dispute in this case surrounds the issue of whether the City can characterize the termination as "without cause" (even though there was evidence that the termination was motivated by what the City viewed as culpable behaviour) and thereby bypass the just cause protections in the Collective Agreement.

[27] The City argues that where termination is without cause, the Arbitrator's jurisdiction is limited to determining whether the amount of compensation is appropriate. They reference Article 16.2 of the Collective Agreement which specifically states, in part: "For a termination without cause, the parties understand and agree that an arbitrator may only determine an amount of fair and equitable compensation applicable." They argue the Arbitrator never turned his mind to the fact that the Collective Agreement expressly permits termination without cause and that the Arbitrator's decision renders the without cause provisions in the collective agreement meaningless.

[28] The Association takes the position that the Arbitrator appropriately found the evidence showed the termination was in fact a with cause termination. Just because the City called it a "without cause" termination does not make it so; rather, it is the context and the evidence which determines whether a termination is disciplinary or not. They argue that merely asserting the termination was without cause does not make it so.

[29] The relevant provisions of the Collecitve Agreement are as follows:

> **ARTICLE 16. TERMINATION OF EMPLOYMENT**
>
> **16.1 Resignation**
>
> An Employee holding a permanent SCMMA [Saskatoon Civic Middle Management Association] position who intends to resign shall send a formal letter of resignation

to his manager with a copy to his General Manager at least four (4) weeks before the proposed date of resignation. A copy of the letter must also be sent to Human Resources. The four (4) weeks' notice period may be waived at the discretion of the General Manager and/or Human Resources. These notice periods are expected to be in addition to any unused vacation entitlement.

16.2 Dismissal and Disciplinary Action

The Employer reserves the right to dismiss any Employee for just cause. Where it is feasible or possible, the Association President, Vice President or Labour Relations Director will be notified, in advance of any dismissal action being taken. The Employee will be informed, in writing, of the reasons for and the effective date of the dismissal. A copy of the letter will be forwarded to the Association President. The Association will have fifteen (15) days to investigate the dismissal and possibly file a grievance. Failure to raise a grievance within the time limit will result in no further grievance action being taken. The time limit may be extended by mutual agreement.

In cases of dismissal or discipline, with cause, pursuant to Article 14.3 of this Agreement, if a grievance proceeds to arbitration for a decision, an arbitrator shall have the authority to dispose of the grievance in a fair and equitable manner by substitution of a lesser penalty or reinstatement of the Employee, or in upholding the decision of the Employer.

For a termination without cause, the parties understand and agree that an arbitrator may only determine an amount of fair and equitable compensation applicable.

Notwithstanding the above, jobs classified at Grade I, II, III or IV (excluding the Engineering Intern) shall not be terminated without cause.

16.3 Retirement

Normal retirement date shall be deemed to be the first (1st) of the month coinciding with or next following the Employee's 65th birthday. Subject to the provisions of the superannuation plan an Employee may retire before the normal retirement date, or if the Employee wishes, duties and responsibilities may be reduced on terms mutually

agreeable to the Employee, the Manager and/or General Manager, and Human Resources.

16.4 Final Payment

Upon termination of employment, the final salary cheque will not be issued until all material and financial obligations to the Employer have been satisfied.

ARTICLE 17. GRIEVANCE PROCEDURE

A grievance is an appeal in writing with respect to the interpretation or application of this Agreement. An Employee may be dismissed by the Employer, either by providing sufficient notice or for just cause and such dismissal shall be confirmed in writing.

The Association, on behalf of an Employee may grieve within fifteen (15) days of the alleged event. If a grievance is not filed within fifteen (15) days of the alleged event, it shall not be grievable. The time limit may be extended by mutual agreement. The following procedures shall apply:

17.1 The grievance shall be first filed with the General Manager who shall, within fifteen (15) days, conduct a hearing and provide a written response.

17.2 If the Association, wishes to appeal the decision of the General Manager, the matter may be referred for a hearing, in order, to:

1) City Manager;

2) Arbitration.

In the above case, the City Manager shall have fifteen (15) days from receipt of the grievance to provide a written response.

17.3 The Association agrees to advise the City within fifteen (15) days of receipt of the decision should the Association decide to proceed to arbitration. If the grievance is not so referred, it shall be considered withdrawn.

17.4 Failure by the City to respond in any of the above steps within the time limits will automatically move the grievance to the next step in the grievance procedure.

[30] In reviewing the Arbitrator's decision, his path for concluding the City

breached the Collective Agreement was clear, logical and coherent. First, he considered the relevant provisions of the Collective Agreement. Then he went on to be guided by the established principles of collective agreement interpretation and applied those principles to this Collective Agreement. He then used the concept of disguised discipline to find that although the City called the termination without cause, in reality the City had terminated Ms. Morley with cause within the meaning of the Collective Agreement. Finally, he found that Ms. Morley's termination with cause was not just and reasonable and ordered she be reinstated.

(a) Did the Arbitrator fail to apply the principles of collective agreement interpretation?

[31] The City argues that although the Arbitrator correctly summarized the principles of collective agreement interpretation, he failed to apply those principles by failing to consider the agreement contextually as a whole, considering terms in isolation without considering the intent of the parties or the factual matrix and failing to consider some of the language in the agreement.

[32] At paragraphs 101 and 102 of the *Award*, the Arbitrator cited the principles of collective agreement interpretation. He noted the mutual intentions of the parties at the time the agreement was made must be determined by the plain, literal and ordinary meaning of the words that are used unless the context requires otherwise. Words and phrases should not be interpreted in isolation, but rather in the context of the entire agreement.

[33] In applying those principles, the Arbitrator began by referencing two long-established norms of labour relations and collective agreements:

(i) Where an employee is terminated for non-disciplinary reasons or "without cause" confining the arbitral jurisdiction to awarding fair and equitable compensation is consistent with the generally

recognized management right to make organizational changes in the workplace, and

(ii) Excluding the right of an employee dismissed for cause to seek a remedy which might include reinstatement would be a departure from long-established norms of labour relations and collective agreements.

[34] At paragraph 109, the Arbitrator concluded that the only reasonable interpretation of the relevant provisions of the Collective Agreement was that they were intended to confirm an arbitrator's jurisdiction to award compensation but not order reinstatement where an employee is terminated or laid off for non-culpable reasons such as organization or technological change.

[35] The Arbitrator rejected the City's argument that the purpose and intent of the sentence in the third paragraph of Article 16.2 was to confer an unfettered right on the City to terminate any employee at will, for any reason and regardless of how unfair or unjust it might be, simply by declaring that the termination was without cause. He also did not accept that it was intended to confer an option on one party to the Collective Agreement (the Employer) to alter an unjustly terminated employee's right to a fair and equitable remedy, including reinstatement as set out in the second paragraph of Article 16.2, simply by declaring the termination was "without cause".

[36] At paragraph 111, the Arbitrator held that the second sentence in Article 17 (a provision that deals with Grievance Procedure and not with the Employer's right to termination of employees) did nothing more than confirm the principle that employees dismissed for just and reasonable cause are not entitled to notice of termination or pay in lieu of notice.

[37] The Arbitrator provided three reasons for his conclusions regarding

interpretation of the collective agreement:

(i) A Letter of Understanding attached to the Collective Agreement which stated that nothing in the MOA (Memorandum of Agreement) "reduces or limits management's rights to direct the workplace and restructure the workplace to meet technological, organization and operational needs."

(ii) In Mr. Saric's evidence he referred to the decision to terminate Ms. Morley as having been an "operational decision to improve the culture and re-establish relationships aligned with corporate values"; and

(iii) The term "organizational change" is defined in s. 6-54(1) of *The Saskatchewan Employment Act,* SS 2013, c S-15.1, as "the removal or relocation, outside of the bargaining unit by an employer of any part of the employer's work, undertaking or business".

[38] There is nothing unreasonable in the Arbitrator's interpretation of the Collective Agreement. The Arbitrator's decision is internally coherent, there is a rational chain of analysis, and it is justified in relation to the facts and law.

[39] The City's position is that the Collective Agreement should interpreted in such a way that as long as they call a termination "without cause", the reasons for the termination do not matter and the arbitrator only has jurisdiction to determine whether the length of notice is appropriate. I agree with the Arbitrator that this does not accord with long-established principles of labour relations and collective agreements. What would be the point of a collective agreement if the employer had the right to terminate any employee for any reason, regardless how unfair or unjust, simply by declaring the termination was without cause?

[40] In the collective bargaining context, the process for termination and discipline is generally contained in the collective agreement. In their work, D.J.M. Brown, D.M. Beatty & A.J. Beatty, *Canadian Labour Arbitration*, 5th ed (Thomson Reuters, 2019) at vol 1, the authors note that most collective agreements alter an employer's ability to discipline an employee and require it "to show 'just or reasonable cause' for whatever sanction is imposed": *Canadian Labour Arbitration*, at s 7:2.

[41] The inclusion of a "without cause" termination in a collective agreement is rare. Indeed, the Association's brief of law acknowledges the unusual nature of such a provision: at para 18. In some Canadian jurisdictions, the applicable labour legislation requires the employer to have just cause to discipline and/or dismiss an employee (*Canadian Labour Arbitration*, at s 7:2); however, Saskatchewan is not one of those jurisdictions. There are two Saskatchewan cases involving collective agreements which contemplate both "with cause" termination and "without cause" termination on notice: *Canadian Union of Public Employees, Local 885 v Wakaw (Town)*, 2020 CanLII 47164 (SKLA) [*Wakaw*], quashed and remitted in 2021 SKQB 105 [*Wakaw QB*]; and *United Food And Commercial Workers, Local No. 1400 v POS Management Corp*., 2021 CanLII 39721 (SKLA) [*POS Management*].

[42] In *Wakaw*, the arbitrator observed Article 25 of the impugned collective agreement, which provided for notice periods for "without cause" termination. In her view, Article 25 could not represent the intention of the parties. She noted that, if she were wrong, then she found Article 25 was subject to a "good faith test" and she found the employer failed to terminate without cause in good faith: *Wakaw*, at paras 83-84.

[43] Clackson J. quashed the decision in *Wakaw* but did not provide any analysis on the meaning of a "without cause" termination clause in the collective agreement. Through conducting the *Vavilov* reasonableness review, Clackson J. held the arbitrator's reasons were disjunctive and they adopted the analysis from other

arbitral decisions despite distinguishing the case before the arbitrator from them: *Wakaw QB*, at paras 48-50. Similarly, the arbitrator's alternative reliance on the "good faith test" was not explained and was not made with reference to the collective agreement.

[44] In *POS Management*, the arbitrator considered the issue of whether the grievors had been terminated or laid off and whether the collective agreement had been violated by contracting out the work formerly performed by the greivors. The collective agreement provided for termination without cause on account of closure of facilities with a stipulated severance pay. Ultimately, the arbitrator dismissed the grievances, holding that they had been laid off subject to recall within 12 months and there was no violation of the provisions of the collective agreement.

[45] The facts in the *POS Management* case are distinguishable from this matter. The *POS Management* case involved the employer's elimination of a department and then the decision to contract out the work on an *ad hoc* basis. *POS Management* involved a management decision to restructure the workplace to meet organizational and operational needs. The Arbitrator in this matter found the decision to terminate Ms. Morley was because of her use of gender-neutral terms "human" or "my humans". The Arbitrator's interpretation of the "without cause" termination clause in the collective agreement would allow the management decision made in *POS Management* because it was an organizational and operational decision having nothing to do with discipline.

[46] This Court's role in reviewing the Arbitrator's decisions is to consider whether the decision fell within a range of possible outcomes and whether the reasoning process rationally and logically led to the result. It is not for this Court to conduct a fresh analysis of the issues to determine the "correct" outcome (*Wakaw QB*, at para 30). In the circumstances, the Arbitrator's application of the principles of collective

agreement interpretation was reasonable.

(b) Did the Arbitrator exceed his jurisdiction, act unreasonably or breach the duty of procedural fairness by finding the collective agreement only permitted termination without cause for organizational or technological change?

[47] At paragraph 109, the Arbitrator found the only reasonable interpretation of the provisions of the Collective Agreement was that:

> …they were intended to confirm an arbitrator's jurisdiction to award fair and equitable compensation, but not order reinstatement, to employees terminated or "laid off", not as a penalty for culpable behaviour, but as a result of organizational or technological changes introduced by the employer – that is for non-culpable reasons ("without cause").

[48] The City argues the Arbitrator failed to consider the authorities from the City regarding termination without cause; however, those authorities are distinguishable. The City cites *Wallace v United Grain Growers Ltd.*, 1997 CanLII 332, [1997] 3 SCR 701 (SCC), as affirming the mutual right of employers and employees to termination of an employment contract at any time provided there are no express provisions to the contrary, and provided an employer provides reasonable notice or pay in lieu. The City acknowledges that the collective bargaining relationship and collective bargaining agreement change the nature of the employment relationship for unionized employees and will displace the common law in many respects; however, it argues that where termination without cause is preserved in a collective agreement, it amounts to the traditional common law right, only subject to limitations or conditions set out in the agreement. They cite *International Association of Machinists and Aerospace Workers, Local 1579 v L-3 Communications Spar Aerospace Ltd.* (2010), 201 LAC (4th) 85, [2010] CLAD No 357 (Lexis) (CanLA) [*Spar Aerospace*], for this proposition.

[49] *Spar Aerospace* is a lengthy decision which considered the issue of

whether a collective agreement provided employees who were laid off and on the recall list with pay in lieu of reasonable advance notice of their last day of work. Arbitrator Wakeling (as he then was) conducted a thorough review of how labour legislation has supplanted the common law for unionized employees. I agree Arbitrator Wakeling noted anything not changed by legislation or a collective agreement continues to be subject to the common law. That is an accurate description of the interplay between labour law and employment law. I do not agree, however, that Arbitrator Wakeling found that where a collective agreement provides for "without cause" termination in the non-unionized context, the common law relating to "without cause" dismissal applies.

[50] The *Spar Aerospace* case did provide helpful guidance on the principles of collective agreement interpretation and "without cause" termination clauses generally. The City cites a portion of paragraph 97, but it is important to look at the whole paragraph in context as well as the following paragraphs. In those paragraphs, Arbitrator Wakeling opined that an employer only retains the common-law right to dismiss an employee without cause if there is an express provision in the collective agreement which recognizes this right or there are provisions which implicitly deliver this message. He cited *H. & S. Reliance Ltd. v Graphics Arts International Union, Local 211*, 1983 CanLII 4886, 8 LAC (3rd) 313 at pp 318-319 (ONLA), which held that:

> … Any collective agreement which desires to place employment at the will of the employer … must do so in the most clear, explicit and unambiguous language for it is the very antithesis of what is widely recognized as a fundamental purpose of a collective agreement in a modern society. …

He also cited Arbitrator Cromwell (as he then was) in *K-Line Maintenance & Construction Ltd. v International Brotherhood of Electrical Workers, Local 1928*, 1988 CanLII 9254, 35 LAC (3rd) 358 at p 365 (NSLA), which stated the notion that the

collective agreement allows the employer to "discharge … at will and without just cause … seems to me to be fundamentally at odds with the reasonable expectations of the parties".

[51] Interestingly, in *Spar Areospace*, Arbitrator Wakeling provided suggested wording for a collective agreement which would achieve the result that the City is arguing for in this case. He suggested the following:

> [97] … "The employer has the right to terminate the employment of an employee for any reason at any time by providing the employee with no more than the minimum termination notice or termination pay under the *Employment Standards Code*, R.S.A. c. E-9, ss. 56 and 57, as amended". …

[52] Arbitrator Wakeling goes on to cite Professor Bilson at paragraph 100:

> [100] … "The principle, almost universal in collective agreements, that an employer may only discharge…an employee for 'just cause', is one of the hallmarks of collective bargaining relationships, and one of the major achievements of unions in creating a procedural regime in the workplace to restrict unilateral action by employers". (Bilson, "Discipline and Discharge" in Collective Agreement Arbitration in Canada ¶10.1 (R. Snyder ed. 4th ed. 2009). …

[53] I agree with the City that the collective agreement in this case expressly contemplates termination without cause and limits the Arbitrator's jurisdiction to the issue of compensation. What it does not do is provide the employer the right to terminate an employee at will for any reason regardless of how unfair or unjust. To find otherwise would be a triumph of form over substance. The Arbitrator's conclusion in this regard is reasonable and accords with the case law and long-established norms of labour relations and collective agreements.

[54] I cannot accept the argument of the City that the Arbitrator ignored the authorities and based his interpretation on irrelevant considerations with no rational

chain of analysis. The Arbitrator came to his conclusions regarding the "without cause" termination clause by referencing long-established norms of labour relations and collective agreements, the wording to the Collective Agreement and the Memorandum of Agreement, the evidence at the hearing, and *The Saskatchewan Employment Act*, SS 2013, c S-15.1. It is a well-reasoned, rational chain of analysis, and it is readily apparent to this Court how he arrived at his interpretation of the collective agreement. Accordingly, the Arbitrator's findings that the collective agreement only permitted termination without cause for non-culpable reasons such as organizational or technological change was not unreasonable.

(c) Was the Arbitrator's finding that the termination was "with cause" unreasonable?

[55] The Arbitrator found the Collective Agreement was compatible with the concept of disguised discipline. He cited the case of *Peters v Treasury Board (Dept. of Indian Affairs & Northern Development)*, 2007 PSLRB 7, to explain the concept of disguised discipline. At paragraph 114, the Arbitrator found the evidence showed the City imposed two disciplinary penalties on Ms. Morley:

> 114. … The first was on August 10, 2023 when Goran Saric directed the Grievor to cease using the gender-neutral terms "human" or "my humans" and then placed a letter with that direction on her personnel file to be used for future disciplinary purposes. The second was on September 13, 2023 when, after having had no further communication with the Grievor, it summarily terminated her employment.

[56] The concept of disguised discipline is the notion that an employer cannot characterize decisions as non-disciplinary to avoid adjudication and the protections of the collective agreement. See *Bergey v Canada (Attorney General)*, 2017 FCA 30 at paras 34-39 [*Bergey*]. At paragraphs 37 and 38 of *Bergey*, the Court explained in determining whether an action is disciplinary in nature is a fact-driven inquiry involving considerations such as the nature of the conduct, the nature of the action taken by the

employer, the employer's stated intent, and the impact of the action on the employee. Put another way, one must look to the purpose and effect of the employer's action.

[57] The concept of disguised discipline originates from decisions involving the federal public service under the (now repealed) *Public Service Staff Relations Act*, RSC 1985, c P-35, which placed the burden on the grievor employee to establish that they had been the object of disciplinary action. The question was often one of jurisdiction. If it was found that there was discipline, the arbitrator had jurisdiction to deal with the matter on its merits and to ascertain the grievor's loss; otherwise, there was no jurisdiction: see, for example, *Canada (Attorney General) v Heyser*, 2017 FCA 113 at para 16.

[58] The City argues that the concept of disguised discipline has no application because under the Collective Agreement it is within their rights to impose lesser discipline if it is not confident in termination or to terminate without cause and give reasonable notice.

[59] In reviewing the cases which apply the concept of disguised discipline, I note that none involved a collective agreement which contained a clause allowing "without cause" termination. That said, I do not find it was unreasonable for the Arbitrator to draw guidance from the concept of disguised discipline. The Arbitrator had to determine whether the termination was a breach of the Collective Agreement provisions. Having found that the Collective Agreement did not provide an unfettered right on the City to terminate any employee at will for any reason by declaring that the termination was without cause, he examined the underlying reasons for the termination. The concept of disguised discipline provided a useful lens to view the evidence and make findings based on the evidence as to the real reasons for the termination.

[60] At paragraph 116, the Arbitrator explained that to determine whether a termination is for cause or without cause depends on the facts and surrounding

circumstances rather than how one party chooses to characterize it. The Arbitrator aptly stated, “It is a matter of putting substance over form.”

[61] He found the evidence established Ms. Morley was terminated because she refused to agree to the City’s demand that she cease using the gender-neutral words “human” and “my humans” when addressing others whose gender identity was unknown to her. After she was terminated, the City denied why it had terminated her, and in a press release to the Saskatoon StarPhoenix and a City manager’s email to all 4,000 employees, publicly the City said she was terminated “because her leadership style was incompatible with the City’s values, was causing extensive workplace strife, and she refused to change her approach despite numerous attempts by her supervisors.” (*Award*, at paragraphs 76-77). The Arbitrator found those words were designed to disguise why Ms. Morley was dismissed and based on the evidence were not credible.

[62] The Arbitrator reasoned that Ms. Morley could not be deprived of a fair and equitable remedy simply because the City would not acknowledge why she was terminated.

[63] The jurisprudence indicates that arbitrators often must ascertain the “true intention” of an employer when it purports to exercise its right under the collective agreement to terminate without cause.

[64] This was the issue in *Zeller’s (Western) Ltd. v Retail, Wholesale and Department Store Union, Local 955*, 1973 CanLII 190, [1975] 1 SCR 376 (SCC) [*Zeller’s*], where the Supreme Court had to determine whether a dismissal was for cause or without cause. Zeller’s had terminated an employee due to work performance concerns. The employee was given pay in lieu of notice. The collective agreement permitted Zeller’s to terminate an employee without just cause with notice or pay in lieu thereof. The employee filed a grievance. The employer argued that the arbitral board lacked jurisdiction since the collective agreement permitted dismissal on notice,

meaning cause was not an issue. The objection was dismissed, and the board ruled that the employee should be reinstated.

[65] Zeller's argued that the provisions of the collective bargaining agreement provided Zeller's with an unrestricted right to terminate any employee without cause on one week's notice or one week's salary. The Supreme Court held it was not necessary to determine whether the language of the collective agreement provided Zeller's with the unrestricted right terminate without cause because the evidence was clear that the employee was dismissed for cause: *Zeller's*, at p 380. In this regard the Court stated that their attention must be directed to what in fact was done. They went on to find that if the dismissal was for cause, then the decision of the arbitration board that no good cause was shown is conclusive against Zeller's: *Zeller's*, at p 380.

[66] There is no basis for this Court to interfere with the Arbitrator's findings of fact in relation to the reasons for the City's termination of Ms. Morley. Similarly, based on those findings it was reasonable for the Arbitrator to conclude that although the City might have called it a "without cause" termination, in actuality it was "with cause".

(d) Did the Arbitrator breach procedural fairness by drawing adverse inferences against the City?

[67] The City argues that the Arbitrator's decision to draw an adverse inference against the City for not calling as witnesses Ashlee Kaszas, the Human Resource Director, and Tracy Danielson, Ms. Morley's immediate manager, breached procedural fairness because the Association did not request an adverse inference be drawn, neither party made submissions on adverse inferences and the Arbitrator did not identify nor apply the legal test for an adverse inference.

[68] The Saskatchewan case of *Murray v Saskatoon (City)*, 1951 CanLII 202, [1952] 2 DLR 499 (SKCA) [*Murray*], is the leading authority in this province on

adverse inferences. In *Murray*, the Saskatchewan Court of Appeal explained the adverse inference rule as follows:

> [19] The subject is dealt with at length by the learned author in *Wigmore on Evidence*, 3rd ed., vol. II., pp. 162 *et seq*. On p. 16 it is stated in part:
>
> > " * * * The failure to bring before the tribunal some circumstance, document, or witness, when either the part himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, in brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."
>
> [20] The party affected by the inference may, of course, explain it away by showing circumstances which prevent the production of the witness; but, where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it. In the pages in Wigmore on Evidence following the above quotation many authorities are referred to which indicates that in the courts of the United States the rule is of wide application.

[69] The City cites the case of *Howard v Sandau*, 2008 ABQB 34 [*Howard*], for the proposition that the decision whether to draw an adverse inference is a discretionary, multi-factor test. At paragraph 44 of *Howard*, the Court cites the book A.W. Mewett & P. Sankoff, *Witnesses* (Thomson Reuters, 2007), in which the authors discuss the following relevant considerations:

- whether there is a legitimate explanation for the failure to call the witness;

- whether the witness has material evidence to provide;
- whether the witness is the only person or the best person who can provide the evidence; and
- whether the witness is within the "exclusive control" of the party and is not "equally available to both parties.

[70] The Arbitrator's reasons for drawing an adverse inference are explained at paragraphs 82 to 88 of the *Award*. Although the Arbitrator does not cite the *Murray* case, he does cite the prominent textbook *Canadian Labour Arbitration*, at s 3:86, and ultimately applies the correct legal test.

[71] The Arbitrator found Ashlee Kaszas was instrumental in initiating and directing the process culminating in Ms. Morley's termination. He also held that Tracy Danielson was Ms. Morley's direct manager and had the most knowledge of her work performance and the concerns relating to her work. The Arbitrator noted that Ms. Danielson was the "Tracy" referred to in Ms. Kaszas's email on August 9 which referred to needing a proactive response to address Ms. Morley's behaviour. He also noted that Ms. Kaszas was the only person who could have shed some light on the sweeping allegations contained in the August 9 email.

[72] The Arbitrator found Ms. Kaszas was the person who instructed Mr. Saric to hold the August 10 meeting where Mr. Saric directed Ms. Morely to immediately cease using the words "human" and "my humans", that she instructed Mr. Saric how to use the unsigned "Change in Communications letter" for future disciplinary purposes; that she was the person who first spoke to Mr. Letawsky about terminating Ms. Morely without cause; that she instructed Mr. Letawsky to speak to Mr. Saric about taking responsibility for making that decision; that she instructed Mr. Letawsky to prepare a letter of termination without cause; that she assured the General Manager, Terry

Schmidt, that no HRBP had approved Ms. Morley's use of the gender neutral word "human"; that she told the City Manager the reasons for termination were what he then told the Saskatoon StarPhoenix and all 4,000 City employees in his email; and that she supplied Mr. Saric with the "concerns and considerations" he recited at the arbitration as his own reasons for terminating Ms. Morley.

[73] There is no basis for me to interfere with the Arbitrator's findings of fact. Based on the findings made by the Arbitrator, it was entirely reasonable for the Arbitrator to draw an adverse inference against the City for failing to call Ms. Kazsas and Ms. Danielson as witnesses. While I appreciate the City took the position it was not necessary to call any other witnesses because the reasons for the termination were irrelevant, it was aware of what the Association would be arguing at the hearing. I agree with the Association that the City was aware the Association was arguing the termination was in fact a "with cause" termination. In the City's brief, it argued that because Ms. Kazsas no longer worked for the City at the time of the arbitration hearing, she was no longer under the exclusive control of the City, but it does not provide any reason why both Ms. Kazsas and Ms. Danielson could not be subpoenaed to testify at the hearing. The City made a strategic decision to call Mr. Saric and Mr. Letawsky as its only witnesses despite Ms. Kazsas and Ms. Danielson playing significant roles in the termination.

[74] It was not the adverse inference which resulted in the Arbitrator placing little, if any, weight on Mr. Saric's evidence regarding the reasons for the termination. The Arbitrator found that Mr. Saric's evidence about why the Grievor was terminated was largely hearsay and had little, if any, probative value. He also found Mr. Saric's evidence was contradicted by established facts and was at times virtually incoherent.

[75] Although I agree the Association did not ask for an adverse inference to be drawn and the parties did not make submissions on the issue, in light of the

Arbitrator's findings of fact it was entirely appropriate for him to draw an adverse inference. He found both Ms. Kazsas and Ms. Danielson had material evidence which could only be provided by them, and there was no explanation offered as to why those witnesses were not called. The City is not asking for a remedy which would include the ability to call Ms. Kazsas and Ms. Danielson. Instead, it argues the witnesses were not necessary because the Arbitrator had no jurisdiction to examine the reasons behind the termination. Having found that it was not unreasonable for the Arbitrator to find the termination was in reality a "with cause" termination, I also find it was not unreasonable for the Arbitrator to draw an adverse inference against the City for its failure to call witnesses with relevant and probative evidence on the issues. There was no breach of procedural fairness.

(e) Did the Arbitrator exceed his jurisdiction and act unreasonably by ordering reinstatement?

[76] The City takes the position that the Collective Agreement expressly restricted the Arbitrator's jurisdiction to compensation for terminations without cause, therefore the Arbitrator's order of reinstatement was made without jurisdiction and was unreasonable.

[77] I agree with both the City and the Association that this issue is determined by my decision on whether it was reasonable for the Arbitrator to find the termination was "with cause". Because I have held that the Arbitrator's findings that the termination was "with cause" were reasonable, it was also within his jurisdiction to order reinstatement.

[78] In considering what was a fair and equitable remedy, the Arbitrator correctly identified that the question was whether the relationship between the City and Ms. Morley had been so compromised by the dispute that the employment relationship was no longer viable. After considering the history of the employment relationship and

the circumstances of the termination, the Arbitrator ordered the City to reinstate Ms. Morley.

[79] Based on the Arbitrator's finding the termination was "with cause", the remedy of reinstatement was appropriate and reasonable.

3. Was the *Supplementary Award* decision reasonable?

[80] The issue in the *Supplementary Award* was whether Ms. Morley's termination violated the *Code* and, if so, what the appropriate remedy was. The Arbitrator considered two disciplinary penalties he found were imposed on Ms. Morley. The first was on August 10, 2023, when Mr. Saric directed her to cease using the inclusive words "humans" and "my humans", and the second was on September 12, 2023, when she was terminated.

[81] As stated earlier in *Parry Sound* and more recently in *Horrocks*, the Supreme Court confirmed that human rights protections are minimum standards that are incorporated into all collective agreements, therefore arbitrators have jurisdiction to apply human rights legislation.

(a) Did the Arbitrator fail to apply the correct test for breach of freedom of expression or conscience or fail to consider whether the City's request was a reasonable restriction?

[82] The City argues that the *Supplementary Award* does not mention nor apply any legal test and fails to make any allowance for reasonable restrictions by an employer. They argue that the Arbitrator's findings that an upper-level manager may not direct a middle manager on how to communicate with her staff is absurd and seriously undermines the ability of the employer to manage the workplace.

[83] I disagree that the Arbitrator's decision went as far as the City purports and prohibits employers from providing direction to their managers regarding

workplace communication with staff.

[84] The Arbitrator first cited ss. 4 and 5 of the *Code* which state:

> **Right to freedom of conscience**
> **4** Every person and every class of persons has the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.
>
> **Right to free expression**
> **5** Every person and every class of persons has the right to freedom of expression through all means of communication, including the arts, speech, the press or radio, television or any other broadcasting device.

[85] At paragraph 14 of the *Supplementary Award*, the Arbitrator held that the purpose and effect of the discipline imposed by the City on Ms. Morley was to infringe on her freedom of expression. He found the one gender-neutral and inclusive word the City chose to ban was the word Ms. Morley chose as the most respectful towards others, the one that she believed had been sanctioned by the City's Human Resources Department, and the one she had been using for a decade. He found that freedom of expression and conscience are rarely separate and distinct. In this case, infringement of one was infringement of the other as well.

[86] The Arbitrator found the City's demand that Ms. Morley immediately cease using the word "human" was ill-considered and insensitive. Ms. Morley's refusal to cease doing so was, to her, a matter of principle which she explained to her employer.

[87] He found Ms. Morley's refusal to comply with the City's demand was not insubordination; rather, it was the product of an understandable mixture of principle, personal pride and conscience. Because conscience was a factor in her failure to comply, it follows that the demand was an infringement upon her freedom of conscience.

[88] I disagree with the City that the *Supplementary Award* prohibits

employers from providing direction on workplace communication. The Arbitrator's *Supplementary Award* only found that there was an infringement on Ms. Morley's freedom of expression and conscience in the circumstances of this case – where Ms. Morley was prohibited from using a gender-neutral term which to her was a term of principle, personal pride and conscience. It was not unreasonable for the Arbitrator to find the discipline measures taken by the City for Ms. Morley's use of the gender-neutral word "human" were an infringement of her freedom of expression and conscience.

(b) Did the Arbitrator fail to apply the correct test for discrimination or base his findings on a more remote causal link than permitted?

[89] The City argues the Arbitrator failed to identify and apply the legal test for discrimination. It argues the Arbitrator erred because the protected characteristic was not a factor in the adverse impact which the case law requires. They cite *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 at paras 39-40 [*Stewart*], for the proposition that there must be a clear and direct link between the protected characteristic and the adverse impact. It argues the connection between the protected characteristic (Ms. Morley's sexual orientation and gender identity) and the adverse effect (being directed not to use the word "humans" when referring to staff) is too remote and indirect. The use of the word "humans" does not have the inextricable link with any prohibited grounds of discrimination necessary to support a finding of discrimination.

[90] The City submits that the test for *prima facie* discrimination was not met and, therefore, the burden never shifted to the City to meet the onus in s. 48(2) of the *Code*.

[91] The relevant provisions of the *Code* are:

> **Definitions**
> **2**(1) In this Act:

…

"**prohibited ground**" means one of the following prohibited grounds of discrimination:

…

(f) sexual orientation;

…

(o) gender identity;

Discrimination in employment prohibited

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

…

48(2) If, in a proceeding pursuant to this Act, it is established that the party complained against, directly or indirectly, alone or with another or by the interposition of another, refused to employ or continue to employ or otherwise discriminated against a person or class of persons with respect to employment or a term, condition or privilege of employment, the onus is on the party against whom the complaint is made to prove on a balance of probabilities that the refusal or discrimination was not because of discrimination against that person or class of persons contrary to this Act or any other Act administered by the commission.

[92] The Arbitrator framed the question to be determined as whether the City discriminated against Ms. Morley by unjustifiably banning her use of the word "human" or "humans" knowing that her sexual orientation and gender identity were important factors in choosing it. He found that the City did not meet the reverse onus in s. 48(2) of the *Code*.

[93] To make a claim for discrimination, an employee must establish a *prima facie* case of discrimination and then the onus shifts to the employer to show that it accommodated the employee to the point of undue hardship. In *Stewart*, the Supreme Court explained the legal test to prove *prima facie* discrimination as follows:

> [24] To make a case of *prima facie* discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [*Human Rights Code*, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": *Moore* [2012 SCC 61] at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate prima facie discrimination: *Bombardier*, at para. 40.
>
> [Emphasis added]

[94] This test has been codified in s. 48(2) of the *Code*.

[95] The Arbitrator agreed with the City that the use of the words "human" or "my humans" was not essential to Ms. Morley's gender identity; however, he found the question was not whether those particular words were essential to Ms. Morley's gender identity. Rather, the question he identified was whether the City discriminated against her by unjustifiably banning her use of those words knowing that her sexual orientation and gender identity were important factors in choosing it.

[96] The Arbitrator acknowledged there was direct evidence that Ms. Morley's gender identity was not discussed by managers in their meetings but found, whether or not it was discussed, the City was well aware of that reality. He noted Ms. Morley herself had explained the connection between her gender identity and her choice of the inclusive word's "human" or "my humans" to Mr. Saric at the August 10 discipline meeting.

[97] The City argues that there was no clear and direct link between the protected characteristic and the adverse impact. The Arbitrator found there was a link

because Ms. Morley identified as "queer" and a member of the LGBTQIA2S+ community, part of her identity was to use the word "human" as a sign of respect and inclusion, and she was terminated for disputing a direction from her director to stop using the word "human". On the evidence before him, the Arbitrator's finding that there was a clear link between Ms. Morley's sexual orientation or gender identity and her termination was entirely reasonable in the circumstances. This is precisely the type of clear and direct link needed to establish discrimination.

[98] The Arbitrator then found the City had not met the onus placed on it by s. 48(2) of the *Code*. Although the Arbitrator did not cite the Stewart case, he did cite the relevant sections of the *Code* and specifically s. 48(2) which is a codification of the case law.

Conclusion

[99] The Arbitrator's *Award* and *Supplementary Award* are not unreasonable. The decisions provide a detailed and rational chain of analysis. There is no basis for this Court's intervention.

[100] The application for judicial review is dismissed with costs on Column II payable by the City to the Association.

"R.C. Wempe" J.
R.C. WEMPE