IN THE MATTER OF:

GRIEVANCE NUMBER 2019-031 DATED MAY 21, 2021, ON BEHALF OF DARCY PEDERSON; AND

AN ARBITRATION OF THE SAID GRIEVANCE;

BETWEEN:

The Amalgamated Transit Union, Local No. 615,

UNION,

- and -

The City of Saskatoon,

EMPLOYER.

APPEARANCES:

For the Union: Gary L. Bainbridge, Q.C.
For the Employer: Tyson J. Bull

BEFORE:

T. F. (Ted) Koskie, B.Sc., J.D., Chair
Carolyn Jones, Union Nominee
Pam Haidenger-Bains, Q.C., Employer Nominee

AWARD DATE:

April 5, 2022

REASONS FOR AWARD:

T. F. (Ted) Koskie (Carolyn Jones concurring and Pam Haidenger-Bains, Q.C. abstaining)

AWARD

I. BACKGROUND, DISPUTE AND PRELIMINARY ISSUES

[1] By agreement of Amalgamated Transit Union, Local 615 (the "Union") and the City of Saskatoon (the "Employer"), this case was heard by video conference on August 20, 2021.

[2] The Union and Employer agreed the Board was properly constituted and had jurisdiction to hear and decide this matter.

[3] In Grievance Number 2019-031 (the "Grievance"),[1] the Union alleges the Employer violated Article A2(a) of the Collective Bargaining Agreement (the "CBA")[2] and "any other Article or Clause of the Collective Agreement, Dispatch Rules 2002, past practice, human rights, legislation or policy that may apply" by "dispatching driver trainer work outside of the established practice according to driver trainer seniority."

[4] The Union asks the Board to rule the Employer must dispatch driver training work according to seniority without requiring a minimum seventy-five percent (75%) availability (the "75% Rule").

[5] Section 6-50(2) of *The Saskatchewan Employment Act* (the "*Act*") provides the Board will render a decision within sixty (60) days of the hearing. As allowed by section 6-50(3) of the *Act*, the Union and Employer agreed to waive this requirement.

II. FACTS

[6] The Union represents approximately four hundred and twenty (420) employees within the Employer's Transit Services Branch. They comprise the following sections:

a) Maintenance and Stores;
b) Office/Information;
c) Operations; and
d) Access Transit.

[7] The Grievance focuses upon one employee classification–Driver Instructor ("DI"). That position falls within the Operations Section. It comprises a restricted number–approximately eight (8)–that are selected from the most senior qualified applicants from the Operators' classification.[3] The selection process is straight forward. The Employer posts DI vacancies. Operators apply and,

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[1]Exhibit G-2, Grievance dated May 21, 2019

[2]Exhibit G-1, CBA

[3]CBA, Article B2(a)

provided the applicant(s) is/are qualified, the Employer fills the vacancy(ies) based on seniority as an Operator.

[8] The DI position is not full time. When needed, the Employer calls upon DIs to assist with training new employees. The Union tendered evidence that the process prior to the Employer implementing the 75% Rule involved:

a) the Employer would first send a text message to all DIs asking about their availability for a certain time period;

b) DIs would reply;[4]

c) from those who replied, the Employer would assign individuals in order of seniority for the number of DIs needed;[5]

d) DIs did not have to be available for the entire time–if they were not, the Employer would assign someone junior to fill in for the block he or she was unavailable; and

e) the Employer would then post the schedule of DI assignments one (1) week at a time.[6]

[9] Though the need for DIs arose quite often in any given year, it did not always require the full complement of DIs.

[10] The training period is five (5) weeks in duration and broken into the following three (3) components:

a) weeks one (1), two (2) and three (3), where a DI will train individuals off route and in a

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[4]They were also entitled to decline.

[5]The Employer did not always assign a DI to train the same person every day of the week or every week.

[6]Exhibit U-1, Driver Training Schedule example

classroom ("Part 1");

b) week four (4), where trainees join a DI on his or her regular route/run ("Part 2"); and

c) week five (5), where trainees join volunteer mentors (not DIs) on their regular routes/runs ("Part 3").

[11] On April 10, 2019, the Employer sent a text[7] asking if DIs were "available to train new hires for the first 3 weeks of May starting April 30." The Grievor[8] replied in the affirmative, except for one period. He testified he expected the Employer to assign the training to him, with a junior DI to fill the period of his absence.

[12] The Employer deemed the Grievor "couldn't commit" and therefore bypassed him for the entire training period in favour of a junior DI.[9] On April 25, 2019, the Grievor asked the Employer why he was bypassed and was told it was so the trainer remains with the trainee "for consistency."[10] On or about April 30, 2019, the Grievor later met with the Employer to complain about his lost wages. The Employer then advised him of its 75% Rule. The Employer then confirmed same by e-mail.[11] The Union tendered evidence that this was the first it heard of the 75% Rule.

[13] The Employer tendered evidence that:

a) before 2018, DI assignments were "more ad hoc" with "fewer rules" and primarily based on availability;

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[7]Exhibit U-2, Text thread

[8]Darcy Pederson

[9]Exhibit U-3, Driver Training Schedule, April 28 - June 1, 2019

[10]Exhibit U-4, Text thread

[11]Exhibit U-5, E-mail thread, April 30, 2019

b) seniority was not a factor;[12]

c) at times, the Employer felt it necessary to give "juniors" an opportunity for experience;

d) its change to the 75% Rule came about because it was concerned about a lack of seniority and a need for consistency in training;

e) it was of the view that three (3) of four (4) weeks was sufficient to address same with "flexibility"; and

f) the 75% Rule came into effect in January 2018.

[14] The Employer tendered Schedules showing that it did not schedule DI work according to seniority[13] and said the Union did not grieve same. In cross-examination, the Employer's witness admitted the handwritten explanatory notes on the schedules were not posted, but remained private.

[15] The Union tendered evidence that:

a) all DIs do the same job, but to enhance the training experience:

   i) the Employer encouraged changing trainers for a trainee;

   ii) this was "done on the fly," meaning it was not on the schedule;

   iii) sometimes DIs would decide amongst themselves to "swap" trainees; and

   iv) sometime one DI would "cover" for another when he or she was unable to train due

[12]Exhibits E-1 and E-2, Driver Training Schedules

[13]Exhibits E-3 and E-4, Driver Trainer Schedules

to a reason such as illness or a family issue;[14]

b) the Union did not and would not agree to the 75% Rule–"it goes against seniority"; and

c) no DI had ever before been passed over due to the 75% rule and, if that had occurred, the Union would have grieved such action.

III. AWARD

[16] We find the 75% Rule to be arbitrary and not for legitimate business purposes.

[17] We allow the Grievance and strike down the 75% Rule.

[18] We will remain seized of the question of any matter that may arise out of implementing this decision. We will reconvene the hearing at the request of either party.

IV. DISPUTE

[19] The issues herein are as follows:

a) is the Employer obliged to assign DIs on the basis of seniority; and

b) is the 75% Rule discriminatory, arbitrary, in bad faith or for legitimate business purposes?

V. ANALYSIS

A. CBA

[20] In deciding this matter, we have had regard for the entire CBA. However, in particular, we

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[14]Exhibit U-6, Driver Training Schedules

considered the following provisions:

SECTION A - GENERAL

. . .

ARTICLE A2 COVERAGE

a) This Agreement will constitute the wages and working conditions of all employees of the City within the collective bargaining unit represented by the Union. The City recognizes the Amalgamated Transit Union (ATU) Local No. 615 as the sole and exclusive collective bargaining agent.

. . .

ARTICLE A14 VACANCIES OR NEW POSITIONS

. . .

b) i) In filling vacancies and/or new positions listed on Schedule 1, the applicant with the most system seniority, qualifications and ability being sufficient, shall fill the following positions. . . .

ii) In making promotions for positions which require competency testing, a candidate will be selected in order of the appropriate seniority as determined in Article 14 (b), above, provided the candidate is sufficiently competent. . . . .

. . .

e) i) When a temporary job or position is to last for a period in excess of sixty (60) days and permanent employees are applying for such temporary position, classification seniority will govern in filling the position.

. . .

ARTICLE A15 SENIORITY - LAYOFF AND RECALL

a) System seniority is the length of continuous service in Saskatoon Transit.

b) Classification seniority is the length of continuous service in the classification of employment in which the employee is engaged.

c) The parties in this Agreement agree to the principle of "last on, first off" and "last off, first on" in the event of a layoff in Saskatoon Transit.

Employees given notice of layoff shall have the right to exercise bumping rights in formerly-held classifications or alternatively to accept the layoff and exercise their right to recall by seniority. Employees who have worked and established seniority in previously-held classifications shall have the seniority earned in such classifications retained for the purpose of "bumping" to avoid layoff. . . .

. . .

Recall Rights - Following a layoff, employees affected shall have the right of recall, by

seniority, to the classification from which they were laid off. In the event a laid-off employee is not recalled to the classification from which they were laid off from and other classifications within Saskatoon Transit have vacancies or new positions, laid-off employees, if qualified, shall be recalled by seniority to fill those positions prior to the hiring of new employees.

. . .

e) Access Transit employees shall have part time or full time classification seniority from start date.
Classifications being:
- Full time Operator
- Part time Operator

. . .

ARTICLE A25 REPRESENTATIVE RIGHTS

. . .

b) When Union officers are relieved for Union business, they shall "book off." Where a relief is required, their reliefs shall be paid by the Department for the relief period.

. . .

ARTICLE A27 REPRESENTATION

. . .

D) All Transit Branch notices, bulletins, job postings, policies, transfers, successful applicants and rates of pay, which apply to bargaining unit employees shall be copied to the Union President on or before the date of issuance.

. . .

ARTICLE A32 SIGN UPS

a) All sign ups will be signed on in order of classification seniority, with the most senior in the classification signing first, with the exception of the Office Section, who will sign into their vacation sign ups in order of Section seniority.

. . .

SECTION B - OPERATING

ARTICLE B1 SELECTION OF RUNS

. . .

a) i) Each employee shall have the opportunity of selecting his run in accordance with seniority. . . . .

. . .

ARTICLE B2 APPOINTMENT TO VACANT POSITIONS IN OPERATIONS SECTIONS
This article does not apply to Access Transit employees.

a) The Driving Instructor shall be selected from the most senior qualified applicant from Operators Classification.

i) When vacancies occur, no Operator with less than five (5) years of service with the Branch shall be considered, or as agreed to by Transit Management and Union.

. . .

SECTION C - MAINTENANCE

. . .

ARTICLE C8 MAINTENANCE SECTION STANDARDS FOR PROMOTION

. . .

B) In filling vacancies and/or new positions within the scope of this Agreement, the applicant with the most classification seniority, qualifications and ability being sufficient, shall fill the vacancy or new position . . . .

. . .

SECTION D - OFFICE

. . .

ARTICLE D5 PROMOTION

. . .

b) In filling vacancies in Schedule 1 the applicant with the most Section seniority, qualifications being sufficient, shall fill the vacant position.

SECTION E - CUSTOMER SERVICE

ARTICLE E1 HOURS OF WORK

. . .

b) There is to be a shift sign up every three months, signed onto by seniority within the classification.

. . .

ARTICLE E6 PROMOTION

. . .

b) In filling vacancies in Schedule 1 the applicant with the most Section seniority, qualifications being sufficient, shall fill the vacant position.

. . .

SALARIES SCHEDULE A

. . .

Grade	A2				
Step		Hourly	Pay Period	Monthly	Annual
1	(1st 12 mo.)(CPBO)	$23.5255	$2,038.96	$4,077.92	$48,935.04
2	(2nd 12 mo.) (CPBO)	$25.4246	$2,203.55	$4,407.10	$52,885.20
3	(maximum)(CPBO) Operator - CPBO	$27.8353	$2,412.49	$4,824.98	$57,899.76

Grade A3					
Step		Hourly	Pay Period	Monthly	Annual
1	(1st 12 mo.) (CPBO)	$30.2613	$2,622.75	$5,245.50	$62,946.00
2	(maximum) (CPBO) Driver Instructor (CPBO)	$33.0226	$2,862.07	$5,724.14	$68,689.68

SCHEDULE B

SECTION CLASSIFICATION LIST

OPERATIONS

. . .

Inspector, Operator, Operator CPBO, Driving Instructor

MAINTENANCE

. . .

OFFICE

. . .

CUSTOMER SERVICE

. . .

(ALL CLASSIFICATIONS LISTED ON THE SAME LINE GAIN SENIORITY INTERCHANGEABLY)

Schedule B - Not applicable (Access Transit is a Stand Alone [non-integrated] unit)

B. ANALYSIS

[21] The importance of seniority rights was encapsulated in *U.E., Local 512* v *Tung-Sol of Canada Ltd.*:[15]

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's

[15] 1964 CarswellOnt 520, para 4

> seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

[22] While the importance of seniority rights to employees cannot be overstated, these rights are limited by the terms of the collective agreement. Concerning seniority rights, it was stipulated in *Re Sofina Foods Inc. and UFCW, Local 401 (Scheduling - Group Policy)*:[16]

> [There are] no inherent rights to seniority under a collective agreement but only those rights that are expressly stipulated in the collective agreement: *Whistler Transit Ltd. and Unifor, Local 114 (Holodryzuk), Re.*

[23] In this matter, the CBA expressly refers to seniority rights in relation to the filling of vacancies or new positions in specific roles,[17] promotions,[18] general shift sign up[19] and layoff and recall.[20] The CBA contains no specific provision assigning seniority rights to the allocation of DI training shifts.

[24] At the outset, the Employer's position is:

> The Collective Agreement does not directly set out how Driving Instructor work is to be assigned . . .
>
> . . .
>
> The Collective Agreement negotiated between the parties expressly states when and how seniority is to be applied. The parties made the choice to exempt temporary work under 60 days from the application of seniority, as well as the choice not to set out how Driving Instructor work is to be assigned.[21]

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[16] 2019 CarswellAlta 923, para 31

[17] Articles A14(b)(i) & (ii), A14(e)(i), B2(a)(i), C8(b)

[18] Articles D5, E6(b)

[19] Article E1

[20] Article A15

[21] Employer Brief, paras. 4 & 43

[25] Although the Union has not pointed us to any specific provision within the CBA that directly sets out how DI work is to be assigned, it does not agree with what it calls the Employer's "characterization" that there is no obligation under the CBA for the Employer to follow seniority in the scheduling of that work.[22]

[26] The Union argues the Employer has, in essence, conceded it had implemented seniority in DI scheduling at the time of the Grievance and, therefore, the point is moot as to the provision(s) for same within the CBA and exactly when that system began. The Employer did not take issue with that position.

[27] What appears germane is that seniority was in effect at the time of the Grievance.

[28] As already stated, the Employer argues there are no specific provisions within the CBA that limit its authority to schedule DI work. It argues it is free to implement same as it sees fit. Although it maintains it can act in that regard with "broad discretion," it does concede its "use of such rights must not be discriminatory, arbitrary, or in bad faith; they must be for legitimate business purposes."[23] The Employer described this "standard of review" as reasonableness. It argues it has acted reasonably. The Union disagrees.

[29] The general rule is that the onus initially resides with the grievor to prove that management has exercised its right to direct and order the workplace in an unreasonable manner. As stated in *Re Winnipeg (City) and CUPE, Local 500*:[24]

> . . . The Union bears the onus of proving that the City did not administer the Collective Agreement reasonably, fairly, in good faith, and in a manner consistent with the Collective Agreement as a whole
> . . . .

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[22]Union Brief, para 12

[23]Employer Brief, p. 61

[24]2015 CarswellMan 650, para 37

[30] *Brandon (City) et al* v *Brandon Professional Firefights'/Paramedics' Association*[25] noted that there are some exceptions to this rule:

> The arbitrator noted the general rule that the grievor bears the onus of proof, and that there are exceptions to this rule, including where it would be unfair for a grievor to attempt to prove facts in issue without evidence from the employer.

[31] If the grievor meets its burden, then the onus shifts to the employer to prove that it has a sound business reason to justify its policy.

[32] There are no exceptions to the above-stated rule that would apply in this case. The Union is required to establish that the new DI scheduling policy either violates a provision of the CBA or it is discriminatory, arbitrary or was made in bad faith. If the Union meets this burden, then the onus switches to the Employer to justify the policy.

[33] The Union does not appear to dispute the Employer's ability to enact DI seniority rules. However, it argues those rules must not only be reasonable, but must also be brought to the attention of the Union.

[34] Focusing upon reasonableness, the Union urges us to assess the:

a) extent to which the 75% Rule is necessary to protect the Employer's interests in protecting and preserving its property, and generally in carrying out its operations in a reasonably safe, efficient and orderly manner; and

b) impact of the 75% Rule upon the employees' interests;

and a balance be struck that gives an appropriate effect or proportional regard to each interest.

[35] The Union presented evidence that prior to the unilateral implementation of the new policy,

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[25] 2020 MBQB 73, para 13

it was not aware of issues or concerns with scheduling, training or safety and testified none were conveyed to it by the Employer.

[36] We are satisfied the Union has met its onus. The burden now shifts to the Employer to prove that it has a sound business reason to justify its policy.

[37] In *Sterling Pulp Chemicals (Sask) Ltd.* v *C.E.P., Local 609*,[26] the court laid out the rights of management to direct the workplace:

> Management has the right to direct the work place, its employees and resources, in the manner it sees fit, subject to the provisions of the collective bargaining agreement, provided it acts reasonably and in good faith in doing so. [*Re Windsor Public Utilities Commission* (1974), 7 L.A.C. (2d) 380.] This is so even if no specific management rights clause exists in the collective bargaining agreement because of management's function and responsibility to operate the business. [*Re Milk and Bread Drivers* (1969), 20 L.A.C. 315.] In order to conclude that management has given up such rights, very clear language to the contrary must be found to exist. *[Communications, Energy and Paperworkers Union of Canada, Local 1120* v *Weyerhaeuser Canada Ltd.* (unreported decision of Arbitrator Bob Pelton dated January 19, 1999 at pages 33 to 37). See also *Russel Steel Ltd.* (1966), 17 L.A.C. 253 (Arbitrator Arthurs).]

[38] *Lumber & Sawmill Workers' Union, Local 2537* v *KVP Co.*,[27] established a test (the "KVP Test") for assessing policies unilaterally enacted by employers. It said such policies must be reasonable and consistent with the provisions of the collective agreement. This determination is to be made by balancing the interests of the employer and employees–the "BOI Test." This test was confirmed by the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30* v *Irving Pulp & Paper Ltd.*[28] and *Association des juristes de justice* c *Canada (Procureur général)*.[29]

[39] While there is some lack of consensus of when the KVP test should be applied, the vast majority of adjudicators appear to be of the opinion that the KVP test only applies where the policy

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[26] 2001 SKQB 76, para 15

[27] [1965] 16 L.A.C. 73

[28] 2013 SCC 34

[29] 2017 SCC 55

affects matters specifically dealt with in the collective agreement, especially matters where disciplinary action is involved.[30]

[40] In *Brandon (City)*,[31] Grammond, J. reviewed the arbitrator's decision. He discussed the test to be applied to a management policy that did not involve disciplinary consequences:

> 24 The BOI Test was described in *Association des juristes de justice* as follows:
>
> > [24] .... The well-established approach to determining whether a policy that affects employees is a reasonable exercise of management rights is the 'balancing of interests' assessment, as set out in the leading arbitral decision *KVP*, and recently endorsed by this Court in *Irving* (para. 27, quoting the intervener the Alberta Federation of Labour):
> >
> > > Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.
>
> ...
>
> 26 The Union submitted, correctly, that *Association des juristes de justice* was decided more recently than the line of authorities on which the City relies in support of the use of the LBI [Legitimate Business Interest] Test. Having said that, and as argued by the City, the management decision at issue in *Association des juristes de justice* and the related line of cases involved policies to be followed by employees, and for which they could be disciplined in the event of a breach. I agree that the eight-day window is distinguishable because it does not, by its nature, impose a standard of behaviour or conduct upon employees. Instead, the eight-day window relates to how the City intends to conduct itself, so non-compliance would not give rise to disciplinary consequences for employees.
>
> 27 In addition, I accept that if the court in *Association des juristes de justice* had intended to expand the scope of the BOI Test to the review of management rules without potential disciplinary consequences, it would have articulated that change clearly. It did not do so. Instead, as set out above, the court referred to the BOI Test as a "well-established approach" that applies to "a policy that affects employees". On its face, this general language could apply to any employer policy, because arguably, every employer policy affects employees in some way. The court made this statement, however, in the context of a discussion of cases that involved random drug testing, or similar policies. This explains why the factors for assessment include whether there was "any less intrusive means available to address the employer's concerns". That line of inquiry simply does not apply to employees' access to banked time generally, or to the eight-day window specifically.

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[30] For example, see *CUPE, Local 38* v *Calgary (City)*, 2015 ABCA 280; *N.L.T.A.* v Weston School District, 213 L.A.C. (4th) 129; *UFCW, Local 175 and Olymel s.e.c/l.p. (Pandemic Pay), Re*, 2021 CarswellOnt 7272

[31] *Supra*, footnote 25

> 28 For all of these reasons, I have concluded that the LBI Test applied to the arbitrator's review of the eight-day window.

[41] The policy concerning the scheduling of DIs unilaterally enacted by the Employer does not deal with a matter specifically dealt with in the CBA and, therefore, the KVP Test–and the BOI Test–does not apply in this case.

[42] The Employer has a duty to conduct its business in a manner that is reasonable. Reasonableness is an inferred term of all collective agreements. As stated in *Re University Health Network and CUPE, Local 5001*:[32]

> While this Collective Agreement does not contain any explicit reference to reasonableness, arbitrators have to infer that the parties negotiated the concept of reasonableness into the terms of their collective agreement: see *International Nickel Co of Canada and USWA, Local 6500, supra*, at para 12. To interpret a collective agreement any other way would be to infer that management has retained a right to be unreasonable. That does not make labour relations sense anymore.

[43] In *Re Brookfield Management Services Co. and C.U.P.E.*,[33] the arbitrator explained what it meant for an employer to exercise its management rights reasonably:

> Arbitral jurisprudence also indicates, however, that management's rights are not unlimited, and must be exercised in the context of the entirety of the collective agreement. Moreover, although an employer may have a right or presumptive privilege to make changes in the organisation of its workforce, that right or privilege may not be exercised in a discriminatory, arbitrary or capricious manner, or in a manner motivated by bad faith. However, provided management exercises its rights in good faith, for purpose of business efficiency (as opposed to, for example, a desire to undermine the provisions of the collective agreement) and with due regard to the language and purpose of the collective agreement, its exercise of those rights will not be found to be unreasonable. Thus, even though the employer may determine to exercise its management's rights solely in its self interest, and in so doing may implement changes to work schedules, or job duties, in a manner which adversely affects individual employees, the exercise of those management rights will not be found to be unreasonable, provided that the reasons for implementing the management prerogatives relate to the betterment of the business, or other legitimate business reasons.

[44] In *United Parcel Service Canada Ltd.* v *I.B.T., Local 141*,[34] the arbitrator discussed how

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[32] 284 L.A.C. (4th) 399

[33] 1999 CarswellOnt 7375 (Ont. Arb.), para 63

[34] 29 L.A.C. (2d) 202 (Ont. Arb.) at 213

reasonableness was to be assessed:

> . . . [T]here can be little doubt that a company is required to exercise its discretion under a collective agreement in a manner that is reasonable and fair. However, in coming to this conclusion we are mindful of the difficulty inherent in applying such a test. Is an arbitrator to sit back and assess management's decision making in the light of some subjective concept of reasonableness or fairness? The result would be to substitute the arbitrator's judgement for that of management in areas where the parties have decided, given certain broad parameters, that management's judgment should govern. Rather, in our view, the duty is one which should be measured against more objective standards such as used by the Court in the *Metropolitan Toronto* transfer judgment, *supra*. In our view the employer's decision making should be assessed against the requirement to act for business reasons and the requirement not to single out any employee or group of employees for special treatment which cannot be justified in terms of real benefit to the employer. When the parties agree that such matters as classification, qualification, demotion, transfers and the scheduling of vacations are to be in the discretion of management, they may do so in the knowledge that management's decision making in these areas will be made in management's self interest, may adversely affect individual employees, and/or may not impact on all employees equally. However, it is not contemplated as part of the bargain that the employer will exercise his authority in this area for reasons unrelated to the betterment of his business or to single out employees for the type of special treatment described. If the employer acts in this manner, the results of his actions, as they affect the bargaining unit generally or individuals within the bargaining unit, may be found to be beyond the scope of his authority under the collective agreement.

[45] Thus, reasonableness means that the policy in question must be:

a) non-discriminatory;

b) non-arbitrary;

c) made for a legitimate business purpose;

d) made in good faith; and

e) in keeping with the entire terms of the CBA.

[46] In *Lennox & Addington County General Hospital* v *O.N.A.*,[35] the arbitrator dealt with how to determine whether a policy or rule implemented by management was, in fact, reasonable. The arbitrator quoted from *Re McKellar General Hospital and Ontario Nurses' Assoc.*:[36] "a test of reasonableness entails some element of proportionality between the objectives which are sought and the means by which those purposes are accomplished." He went on to state:[37]

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[35] 1986 CarswellOnt 3714

[36] 1986 CarswellOnt 3733, p. 361

[37] *Ibid*, para 16

> The balance struck by this notion of proportionality between the objective served and means used by a rule will fluctuate according to an objective view of the substance and fundamental importance to the collective bargaining relationship of the countervailing interests served and infringed by the particular rule or policy in question. Thus, the balance of the countervailing interests to meet the test of reasonableness will fluctuate depending on an objective perception of the fundamental importance of the interests infringed.

[47] *Toronto East General Hospital* v *O.N.A.*,[38] discussed constraints on management rights in regard to scheduling:

> Management's right to schedule shifts may be subject to various constraints. First, there may be language elsewhere in the collective agreement which creates a restriction on management's discretion to alter or impose particular work schedules. Second, the exercise of management's authority to schedule may not be arbitrary, discriminatory or in bad faith. Indeed, the collective agreement may well impose a higher standard of reasonableness against which the exercise of management's rights must be measured. Third, management's decision must be taken for a legitimate business or operational reason. Arbitrators have expressed caution in "second-guessing" management's decisions, although arbitrators clearly have the jurisdiction to evaluate those decisions in the context of specific wording in the collective agreement. While these constraints have been separately articulated, there is considerable interplay within most analyses as arbitrators review the relevant collective agreement provisions within the framework of the particular facts.

[48] There is no evidence that the new policy concerning the scheduling of bus driver trainers is discriminatory or was made in bad faith. This raises the question of whether the policy is arbitrary.

[49] Over the years, arbitrators have attempted to articulate what is meant when a policy is said to be arbitrary. The definitions applied have ranged from "grossly negligent" to "unsupported by a valid business purpose." This broad range of possible authorities led Arbitrator Hamilton in *Winnipeg (City)*[39] to conclude that "the meaning to be given the word is not absolute but rather contextual, depending both upon the factual context of any case and also the legal framework within which the word is used."

[50] There has been no suggestion that the Employer's new DI scheduling policy is negligent in any way. Rather, the Union has grieved that it is unreasonable. Thus, the meaning of arbitrary that is most suitable to this matter and will be applied in this decision is encompassed by the following:

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[38] 2006 CarswellOnt 10659, para 84

[39] *Supra*, footnote 24

a) an employer may be found to have acted arbitrarily where the action taken is unreasonable or unsupported by a valid business purpose;[40]

b) a failure ". . . to take a reasonable view of the problem and arrive at a thoughtful judgment about what to do after considering the various relevant conflicting considerations";[41] and

c) "the concept of arbitrary includes the absence of a rational connection between the decision and the factors cited as the basis for that decision or reliance on irrelevant factors. . . . [W]hat is encompassed by these concepts, as well as the notions of reasonableness or fairness - like beauty - often lies in the eye of the beholder. What is required of an arbitrator is an objective assessment of the evidence."[42]

[51] In *Brandon (City)*,[43] Grammond, J, reviewing the arbitrator's decision, stated that the test to be applied to a management policy that did not involve disciplinary consequences was the legitimate business interest test–the "LBI Test." That test was set out in *United Parcel Service Canada Ltd.* v *Teamsters, Local 141*:[44]

> . . . [T]here can be little doubt that a company is required to exercise its discretion under a collective agreement in a manner that is reasonable and fair. ... the employer's decision making should be assessed against the requirement to act for business reasons and the requirement not to single out any employee or group of employees for special treatment which cannot be justified in terms of real benefit to the employer.

[52] In *Re Children's Hospital of Eastern Ontario and O.N.A.*,[45] the arbitrator quoted from the interim award:

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[40] *Re Drakos and Ontario (Ministry of Community Safety and Correctional Services)*, 2013 CarswellOnt 18156

[41] *Re Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-2178*, [1975] 2 Can. L.R.B.R. 196

[42] *Re U.S. Steel - Hamilton Works and USWA*, [2012] 224 L.A.C. (4th) 150

[43] *Supra*, footnote 25

[44] (1981), 29 L.A.C. (2d) 202 (Ont. Arb.) at p. 213

[45] 1992 CarswellOnt 5620

> The means chosen to implement a legitimate business purpose should be rational and proportionate to the purpose served and interests infringed. (*McKeller General Hospital* (1984), 15 L.A.C. (3d) (Beatty)).

[53] In other words, the purported legitimate business purpose must be balanced with the affected interests of the employees.[46] In *Lennox & Addington*, the arbitrator states:[47]

> In *Re McKellar General Hospital and Ontario Nurses' Assoc.*, *supra*, a policy was promulgated prohibiting family members from working in the same department or unit. At p. 361, the board notes that the propriety of a general exercise of managerial discretion has been conventionally reviewed for consistency with the express terms of the collective agreement and a demonstration of a valid or legitimate business purpose is furthered. At p. 362, the board referred to the association's argument that the standard of reasonableness is more exacting than a standard of contractual competence.
>
> However, in the instant case the association has argued that to be valid the employer's initiative must meet not only a standard of contractual competence, but a more exacting standard of reasonableness as well. In its view it is not sufficient for the employer to advance any reason related to its legitimate interest in the organization of the work place, in support of its policy. Not any reason, even if relevant to the employer's business interests will do. Rather, in the association's view, it is incumbent on the employer to justify its policy on nepotism with reasons and rationale which are sufficiently substantial to warrant the infringement of an individual's opportunity to exercise her rights, as for example those in art. 10.06(a) under the agreement. The contrast with a standard of contractual competence, a test of reasonableness entails some element of proportionality between the objectives which are sought and the means by which those purposes are accomplished. Simply having some reason or rationale relevant to the employment relationship will not justify an employer's decision or policy if the competing claims and interest of the employee which it denies is, on some objective standard, more substantial and fundamental.

and continues:[48]

> The balance struck by this notion of proportionality between the objective served and means used by a rule will fluctuate according to an objective view of the substance and fundamental importance to the collective bargaining relationship of the countervailing interests served and infringed by the particular rule or policy in question. Thus, the balance of the countervailing interests to meet the test of reasonableness will fluctuate depending on an objective perception of the fundamental importance of the interests infringed . . . .

[54] The Employer must provide evidence not only to support the broad business interest underlining its policy, but also to support the specifics of the policy and how these relate to the

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[46] *Lennox & Addington*, *supra*, para 14

[47] *Ibid*, para. 15

[48] *Ibid*, para 16

furtherance of the broader business interest. *In Brandon (City)*,[49] Grammond, J., in reviewing the arbitrator's decision that the City's policy of an eight-day window for approving use of banked overtime was unreasonable, discussed these evidentiary requirements:

> 35 . . . I reject the City's argument that it needed to establish only the basic premise that a shorter time frame was in its legitimate business interests. There had to be some evidence to justify the time frame of eight days, to show that it was not arbitrary, unfair, or unreasonable. While the evidentiary threshold on this point may have been fairly low, some evidence had to be tendered. For example, a witness could have explained how and why the City selected the eight-day window. Otherwise, and taking the City's position to its extreme, it could have implemented an obviously unfair, unreasonable and arbitrary time frame, such as an eight minute window.
>
> . . .
>
> 42 The Union argued that the eight-day window was unjustifiable, unreasonable and arbitrary, because it was not grounded on any evidence or justification, except the general concepts of public safety and liability. . . .
>
> . . .
>
> 44 I do not have the full record of information and evidence presented to the arbitrator, but the record before me reflects no evidence of why the City implemented the eight-day window, as opposed to choosing a new window of some other length. The City argued that specific evidence of the selection of the eight-day window, as opposed to a seven or nine-day window, for example, would have served no valid purpose, because it would have led the arbitrator to conduct a subjective analysis of the City's exercise of discretion, which was not the proper test to apply.
>
> 45 I agree that the City was not required to prove that eight days, and only eight days, was a fair and reasonable time frame, but given the dearth of evidence on the record, the arbitrator could not have assessed the fairness and reasonableness of any new time frame, regardless of its length. Having reviewed the record before me, I can only guess at the City's reasons for implementing the eight-day window, as opposed to a window of some other length.
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> 46 While generally speaking, both cost and public safety are legitimate business interests, since the City did not advance any evidence of why eight days was selected, it did not establish that the eight-day window was fair, reasonable, and not arbitrary.

[55] The Employer argued:

> 64. . . . [T]he evidence of the City witnesses is that the availability requirement exists to ensure that trainees are given consistent training and their performance can be evaluated properly. Having a consistent trainer over the critical first three weeks helps achieve these objectives. Quality training and performance evaluation of trainees is essential before they take a bus on to public streets and start taking passengers. This is in the interest of public safety, the safety of the trainee, and the protection of public assets.
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> 65. The new practice for assigning Driving Instructor work is a legitimate exercise of

[49] *Supra*, footnote 25

> management rights. Assigning the work to the senior Driving Instructor available for at least 75% of the shifts ensures that new trainees are consistently trained and evaluated, while recognizing the seniority of Driving Instructors and allowing them some flexibility to take time off during a training block. This is a significant relaxation of the previous rule, which itself was also a legitimate exercise of management rights.[50]

[56] Here, the Employer contended that its policy of requiring 75% availability from DIs when scheduling shifts was based on its need for safety. However, the Employer failed to provide any evidence that there was a safety issue related to the former manner of scheduling, nor did it provide any evidence as to how greater consistency in trainers would improve safety. The Union, on the other hand, did advance evidence that there were no existing safety concerns prior to the unilateral implementation of this new policy. Thus, the Employer has failed to provide any evidence that its 75% rule was implemented for any legitimate business purpose. As such, it is not necessary to examine whether the threshold of 75% was justified, though it should be noted that no evidence regarding this was put forward by the Employer.

Dated on April 5, 2022.

T. F. (Ted) Koskie, B.Sc., J.D..
Chair

[50] Employer Brief