

## **Arbitration Award Summary**

### **08-E—00744 – Termination Grievance**

#### **Case Outline:**

This grievance falls under the Collective Agreement expiring December 31, 2010.

The grievor was employed by the City of Yellowknife as a Lifeguard / Instructor at the Ruth Inch Memorial Pool from March 6 to November 25, 2008. His probation period expired in September 2008. He received a termination letter on November 25<sup>th</sup> referring to the Building Standards tests that he had failed as grounds for immediate dismissal.

The Building Standards test (BST) measures the skills required by the City of Yellowknife for Lifeguard / Instructors employed at the Ruth Inch Memorial Pool to ensure public safety within the facility. The grievor passed his initial test in March 2008 but failed a number of subsequent tests. On October 21<sup>st</sup>, the employer gave him a letter warning that he must pass the BST by October 31<sup>st</sup> or he might face termination. Though he managed to pass the test over the next three days, he failed additional tests on November 16<sup>th</sup> and 17<sup>th</sup>. On November 19<sup>th</sup> he was given another warning letter that his job was in jeopardy if he failed. He was failed again and terminated on November 25, 2008.

#### **Employer's Argument:**

The Employer provided the grievor with multiple chances to pass the BST in addition to an extra "last chance". They argued that the Union had never challenged the existence of the BST and that the tests were reasonable. There were no other positions available when the grievor was dismissed. Counsel asserted that the Edith Cavell tests were met.

#### **Union's Argument:**

The dismissal constituted discipline, it was unjust and progressive discipline was not followed. The first notice that the grievor received that his job might be in jeopardy was on October 21, 2008. He was also advised that even if he passed the final test, that he would be required to undergo further monthly evaluations for the following 6 months. This requirement was not made of any other employees. At no time, was there an indication that he might be considered for other jobs.

Counsel asserted that even if the determination was made that the termination was not disciplinary, the Edith Cavell tests were not met.

### **Arbitrator's Decision:**

The Arbitrator dismissed the grievance and found that the termination was not disciplinary.

In reviewing the evidence and testimony provided, the Arbitrator made a comparison to the requirements under the Edith Cavell test and found that the Employer had fulfilled all requirements. The BST had been in place since 2005 and the expected standard was communicated to the grievor multiple times between October and November 2008. The Employer extended an offer of assistance in meeting the skill levels; however, the grievor was not able to consistently meet the requirement. Additionally, the Employer testified that there were no other positions available and documented warnings were given to the grievor outlining how his failure to pass the BST would result in his termination.

The Edith Cavell tests were met.

### **Note**

The Edith Cavell test comes from the 1982 Arbitration "Edith Cavell Private Hospital & HEU". The Award outlined the criteria that must be met in order to dismiss an employee for non-culpable reasons:

- a) The employer must define the level of job performance required.
- b) The employer must establish that the standard expected was communicated to the employee.
- c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.
- d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders them incapable of performing the job and that reasonable effort were made to find alternate employment within the competence of the employee.
- e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

\*Cited – AUPE – Steward Notes – December 2008