IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Association of Allied Health Professionals v. Eastern Regional Integrated Health Authority*, 2025 NLCA 1
Date: January 3, 2025
Docket Number: 202201H0012

BETWEEN:

ASSOCIATION OF ALLIED HEALTH PROFESSIONALS

APPELLANT

AND:

EASTERN REGIONAL INTEGRATED HEALTH AUTHORITY

FIRST RESPONDENT

AND:

THE LABOUR RELATIONS BOARD

SECOND RESPONDENT

Coram: D.E. Fry C.J.N.L., D.M. Boone and K.J. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, St. John's 202001G2931 (2022 NLSC 15)
Appeal Heard:	October 16, 2024
Judgment Rendered:	January 3, 2025

Reasons for Judgment by: K.J. O'Brien J.A.
Concurred in by: D.E. Fry C.J.N.L. and D.M. Boone J.A.

Counsel for the Appellant: Catherine D. Quinlan
Counsel for the First Respondent: Twila E. Reid and Dana R. Constantine
Counsel for the Second Respondent: Megan S. Reynolds

Authorities Cited:

CASES CITED: *Association of Allied Health Professionals v. Eastern Regional Integrated Health Authority*, 2020 NLLRB 5 (CanLII); *Eastern Regional Integrated Health Authority v. Association of Allied Health Professionals*, 2022 NLSC 15; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21; *Newfoundland and Labrador Association of Public and Private Employees v. Newfoundland and Labrador (Treasury Board)*, 2005 NLLRB 11 (CanLII); *Hibernia Management & Development Co. v. F.F.A.W.-C.A.W*, [2001] Nfld. L.R.B.D. No. 3, rev'd on other grounds 2002 CanLII 54076 (NLSC), aff'd in part 2003 NLCA 43; *Algoma Steel Inc. v. United Steelworkers of America*, 2006 CanLII 8874 (ONLA); *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Allied Constructors Inc.*, 2007 NLLRB 3 (CanLII); *Vancouver General Hospital v. British Columbia Nurses' Union*, [1993] B.C.L.R.B.D. No. 104; *Gainers Inc. v. U.F.C.W., Local 280-P*, 1982 CarswellAlta 1015; *Scarborough Hospital v. Ontario Public Service Employees Union, Local 581*, 2011 CanLII 23972 (ONLA); *Newfoundland and Labrador Association of Public and Private Employees v. Multi-Materials Stewardship Board*, [2006] Nfld. L.R.B.D. No. 14; *United Steelworkers of America v. Bannerman Enterprises Inc.*, 1994 CanLII 9879 (ONLRB).

STATUTES CONSIDERED: *Public Service Collective Bargaining Act*, RSNL 1990, c. P-42, section 2(1)(i).

TEXTS CONSIDERED: Ronald M. Snyder & Earl E. Palmer, *Collective Agreement Arbitration in Canada*, 4th ed (Markham, ON: LexisNexis Canada Inc, 2009).

K.J. O'Brien J.A.:

[1] This is an appeal of a judicial review of a Labour Relations Board decision about whether Disability Care Managers ("DCMs") at the Eastern Regional Integrated Health Authority ("Eastern Health") are "employees" for the purpose of the *Public Service Collective Bargaining Act*, RSNL 1990, c. P-42 (the "*Act*").

OVERVIEW

[2] As part of an organizational restructuring, Eastern Health created a new position, DCM, which was classified as a non-bargaining unit position. Four Occupational Therapist II positions were eliminated when the DCM positions were created and, as found by the Board, the core duties of the DCM positions were the same as those of the Occupational Therapist II positions that were eliminated. Occupational Therapist II is a bargaining unit position. The Association of Allied Health Professionals ("AAHP") applied under the *Act* to the Board to have the DCM positions included in AAHP's bargaining unit.

[3] The Board found that the DCM position met the definition of "employee" in the *Act* and thus belonged in a bargaining unit, although not necessarily that of the AAHP (*Association of Allied Health Professionals v. Eastern Regional Integrated Health Authority*, 2020 NLLRB 5 (CanLII), the "Board Decision").

[4] Eastern Health applied to the Supreme Court of Newfoundland and Labrador for judicial review of the Board Decision. The reviewing judge quashed the Board Decision because he found that the Board erred when it determined that DCMs did not exercise management or supervisory functions (*Eastern Regional Integrated Health Authority v. Association of Allied Health Professionals*, 2022 NLSC 15, the "Judicial Review Decision"). He found that the Board Decision was not internally coherent and did not follow a rational chain of analysis because it ignored a material fact that would have produced the opposite result, namely, that DCMs can terminate employees for innocent absenteeism (Judicial Review Decision, at paras. 61, 71). Innocent absenteeism, also known as non-culpable absence, is when an employee is unable to come to work due to illness or injury that is beyond their control.

[5] AAHP appealed the Judicial Review Decision to this Court. AAHP submits that the judge erred by incorrectly applying the reasonableness standard of review to the Board Decision. AAHP submits that although the judge identified reasonableness as the appropriate standard of review, he appeared to apply a

correctness standard in substituting his own conclusions from the evidence for those of the Board. AAHP further submits that upon a proper application of the standard of review, the Board Decision is reasonable and should be upheld.

[6] In its response to AAHP's appeal, Eastern Health submits that the judge properly applied the reasonableness standard of review and that the Judicial Review Decision should be upheld. Even applying the analysis anew, Eastern Health submits that this Court should conclude that the Board Decision is unreasonable and so the appeal should be dismissed.

STANDARD OF REVIEW

[7] On an appeal of a judicial review decision, this Court must decide if the reviewing judge chose the correct standard of review and applied it properly. To do this, the Court does not defer to the judge's selection or application of the standard of review, but rather performs a *de novo*, or new, review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 46-47; and *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107, at para. 10).

ISSUES

[8] There are two issues on appeal:

1. Did the judge err in applying the reasonableness standard of review?

2. If so, applying the analysis anew, is the Board Decision reasonable?

[9] For the following reasons, I would hold that the judge erred in applying the reasonableness standard of review by substituting his own conclusions for those of the Board without considering the reasonableness of the Board's analysis and conclusions. Conducting the review anew, I would find that the Board Decision is reasonable and so I would allow the appeal and reinstate the Board Decision.

RELEVANT PORTIONS OF THE *ACT*

[10] The central issue before the Board was whether the DCM position met the definition of "employee" in section 2(1)(i) of the *Act*. For this appeal, the relevant portions of that definition are:

> 2. (1) (i) "employee" means a person employed by […]
>
> (vii) the Provincial Health Authority established under the *Provincial Health Authority Act*,
>
> but does not include a person […]
>
> (xiii) who is employed as a manager or supervisor or who, in the opinion of the board, exercises management or supervisory functions, [or]
>
> (xiv) who, in the opinion of the board, is employed in a confidential capacity in matters relating to labour relations, […]

ISSUE 1: DID THE JUDGE ERR IN APPLYING THE REASONABLENESS STANDARD OF REVIEW?

[11] Relying on the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the judge identified the appropriate standard of review for the Board Decision as reasonableness. This is the correct standard of review. In *Vavilov*, the Supreme Court of Canada established a presumption that when a court reviews the merits of an administrative decision, the standard of review is reasonableness. This presumption is rebutted in a limited number of situations, none of which apply in the present case. The Supreme Court recently reaffirmed the *Vavilov* framework in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.

[12] Although the judge identified the appropriate standard, he erred in applying it. I will explain why.

[13] In conducting a reasonableness review of an administrative decision, the reviewing court should ask whether the decision bears the hallmarks of reasonableness — justification, transparency, and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear upon it (*Vavilov*, at para. 99). To be reasonable, a decision must be based on reasoning that is both rational and logical. Although a reasonableness review is not a "line-by-line treasure hunt for error", the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic (*Vavilov*, at para. 102). If the decision meets the requirements of reasonableness, the reviewing court must defer to it and cannot substitute its own view of the result (*Vavilov*, at paras. 83, 85).

[14] To explain how the judge erred, it is helpful to reproduce a portion of the Judicial Review Decision:

> [61] Most of the Board's reasoning is logical, rational and sensible. At one juncture, however, it is my opinion that the Board erred and this was in connection with the disability case manager's ability to terminate employees for innocent absenteeism.
>
> [62] The term innocent absenteeism refers to an employee's inability, through no fault of their own, to return to work on account of disability. The evidence before the Board was that disability case managers had the authority to terminate an employee's employment for innocent absenteeism – that is when it was no longer possible to provide accommodation to the employee to help their return to work in any capacity.
>
> [63] While it may be true that disability case managers are required to consult before they "pull the pin" on the employment relationship, that is not unusual in today's employment climate. Managers routinely consult with human resource officers, and get legal opinions, before taking action. It is a collaborative exercise.
>
> [64] The ability to terminate a fellow employee, even though it may be sparingly exercised, gives rise to a conflict of interest. Union members cannot be firing fellow union members.

[15] The judge's conclusions from the evidence are different from those of the Board. The judge concluded that DCMs had the authority to terminate an employee's employment for innocent absenteeism and that this ability to terminate, even though it may be used sparingly, gave rise to a conflict of interest that precluded DCMs from being "employees" under the *Act* pursuant to the managerial exclusion (*Act*, s. 2(1)(i)(xiii); Judicial Review Decision, at para. 64).

[16] The Board concluded that the evidence demonstrated that a number of management levels and departments were involved in making a decision to issue a termination for innocent absenteeism (Board Decision, at para. 77). The Board found that the DCMs' core duties were returning ill or injured employees back to work (Board Decision, at para. 125). It further found that management merely "sprinkling" or delegating powers and responsibilities to achieve a managerial exclusion under the *Act* restricts employees' ability to exercise their legislated rights (Board Decision, at para. 135). The Board continued:

> 136. While the Board agrees with [Eastern Health] that some of the "sprinkled" duties may be managerial in nature, the Board did not have sufficient information on the extent or percentage of time that Disability Case Managers spent on doing work other than the core duties of assisting employees back to work.

[17] Although the judge referred to the Board's finding about innocent absenteeism (Judicial Review Decision, at para. 49), he did not address the Board's reasoning on the issue or explain how that reasoning was logically flawed or otherwise unreasonable. Rather than analyze the Board's justification of its decision, the judge drew his own conclusions from the evidence and decided that there was a conflict of interest. In doing so, he made two errors, which I will explain.

[18] The first error relates to the Board's factual findings about the DCMs' core duties and how decisions for termination for innocent absenteeism are made. The Board was required to take the evidentiary record and the general factual matrix that bore on its decision into account, and its decision must be reasonable in light of them (*Vavilov*, at para. 126). However, on judicial review, a court must refrain from reweighing and reassessing the evidence and, absent exceptional circumstances, should not interfere with factual findings (*Vavilov*, at para. 125). This is particularly true in a case such as this, where the judge did not have all the evidence before him that the Board did. The Board heard testimony from eight witnesses over several days. This evidence was not transcribed. The judge had the Board's documentary record before him, and summaries of the oral evidence contained in the Board Decision, including the reasons of the dissenting Board member, but he did not have the advantage of the full of the witness testimony.

[19] Although the judge clearly disagreed with the Board's interpretation of the evidence, he did not identify any fundamental misapprehension of the evidence by the Board or any failure by it to account for relevant evidence. On a reasonableness review, the judge could not simply prefer his interpretation of the evidence to that of the Board to support a finding that the Board Decision was irrational or incoherent.

[20] The second error relates to the Board's interpretation of the applicable law. The judge concluded that the ability to terminate a fellow employee, even though it may be sparingly exercised, gives rise to a conflict of interest that triggers the managerial exclusion. The Board interpreted the *Act* differently. The Board concluded that a "sprinkling" of managerial duties was insufficient to trigger the managerial exclusion under the *Act*. The judge did not explain why that conclusion was not reasonable. Nor did he address the caselaw that the Board had cited in support of its conclusion. Instead, the judge simply stated what he considered to be the correct interpretation of the managerial exclusion in these circumstances without analyzing the Board's rationale for its interpretation.

[21] The judge supported his conclusions by reviewing the dissenting Board member's assessment of these issues (Judicial Review Decision, at paras. 68-69). The dissenting Board member also disagreed with the majority's treatment of innocent absenteeism and the role of DCMs in assigning work duties. However, the judge's recitation of the dissenting Board member's conclusions does not help explain why the Board's conclusions were unreasonable. The judge merely set out findings contrary to those of the Board's majority. He failed to focus on the Board's reasons to assess whether they met the hallmarks of reasonableness. This was an error.

[22] As such, I am satisfied that the judge erred in applying the reasonableness standard and so the Judicial Review Decision must be set aside. However, before moving to the next issue, I want to address another aspect of the Judicial Review Decision.

Paragraph 139 of the Board Decision

[23] The judge found that the Board erred in paragraph 139 of the Board Decision, which states:

> The conflict of interest sought to be avoided is one that exists between the work responsibilities owed to the employer and one owed to the union as an instrument of collective bargaining. This conflict can be avoided by reinstating the duties and responsibilities previously held by the bargaining unit prior to the establishment of a Disability Case Manager classification, to the bargaining unit.

[24] The judge quoted this paragraph in the Judicial Review Decision, and went on to explain why he considered it to be in error:

> [66] The Board recognized that there was an untenable conflict of interest because of the power vested in disability case managers to terminate employees who could no longer be accommodated. In the words of subsection 2(i)(xiii) of the *Act*, disability case managers were persons who exercised managerial or supervisory functions.
>
> [67] The majority of the Board erred in suggesting that the conflict could be resolved by reverting to the *status quo ante*. The Board has no authority to dictate how an employer should organize its place of employment. If disability case managers fall outside of the definition of employee because they fit into one of the recognized exceptions, then they cannot be members of any bargaining unit.

[25] The judge interpreted paragraph 139 as the Board recognizing that there was an untenable conflict of interest. With respect, I disagree with the judge's characterization. The paragraph cannot be read in isolation. On a fair and holistic reading of the Board Decision, it is evident the Board did not find any conflict of interest had been established. For example, the Board wrote: "[Eastern Health] has failed to establish that the type of labour relations input that Disability Case Managers have would have placed them in a conflict of interest with the bargaining unit" (at para. 128). Further, in considering DCM duties (that were additional to those previously done by Occupational Therapist II positions), the Board concluded that those additional duties had not been shown to have "never been considered to be bargaining unit work" (at para. 137). More specifically with respect to the issue of innocent absenteeism, the Board found that a mere sprinkling of such duties was not enough to trigger the managerial exclusion and that it did not have sufficient information on the extent or percentage of time that DCMs spent on such non-core duties to conclude that they were more than merely sprinkled (at paras. 135-136).

[26] I also respectfully disagree with the judge's suggestion that in paragraph 139 the Board was dictating how Eastern Health should organize its workplace. In context, paragraph 139 is a statement by the Board that if Eastern Health was concerned that the DCMs' non-core duties were of such a magnitude that a conflict of interest existed, which in its view had not been established, then Eastern Health could modify those duties to address the problem. Paragraph 139 can be likened to *obiter dictum* in a judicial decision, a statement said in passing that does not form part of the chain of analysis supporting the decision.

ISSUE 2: IS THE BOARD DECISION REASONABLE?

[27] Although I am satisfied that the judge erred in applying the reasonableness standard, it does not automatically follow that his conclusion that the Board Decision was unreasonable is wrong. This Court must assess the Board Decision anew. At this stage, although AAHP brought this appeal, Eastern Health has the burden to establish that the Board Decision is unreasonable, just as they did before the judicial review judge (*Vavilov*, at para. 100).

[28] Before this Court, Eastern Health raises several arguments supporting its submission that the Board Decision is unreasonable. I will address them in turn, beginning with those involving the managerial exclusion in section 2(1)(i)(xiii) of the *Act*.

The legal test applied by the Board

[29] Eastern Health submits that the Board wrongly treated this case as a "contracting out" case, instead of one involving the exclusions from the *Act*'s definition of "employee", and thus applied the wrong legal test in considering the managerial exclusion. "Contracting out" cases are ones in which the issue is whether the employer wrongfully transferred bargaining unit work to management. In support of its argument, Eastern Health points to paragraph 7 of the Board Decision, which states: "The issue at hand in this case is whether or not the position of Disability Case Manager belongs within the bargaining unit."

[30] Reading the decision as a whole, it is evident that the Board understood that its primary task was to decide if DCMs were "employees" within the definition of the *Act*. The Board identified and assessed the exclusions to that definition that Eastern Health said applied.

[31] The Board correctly identified that section 2(1)(i)(xiii) of the *Act* excludes both positions that include supervisory functions and those that include managerial functions. With respect to the supervisory aspect, the Board referred to the Board's decision in *Newfoundland and Labrador Association of Public and Private Employees v. Newfoundland and Labrador (Treasury Board)*, 2005 NLLRB 11 (CanLII), and the factors set out in that case to be considered when determining if a person is exercising supervisory functions. The Board concluded that the DCMs did not do supervisory work (Board Decision, at paras. 66-69).

[32] The Board also identified the law with respect to the managerial functions, which it summarized as follows:

> 72. … "Management functions are determined in part by examining the individual's duties and responsibilities to determine whether he or she exercises effective control and authority over employees supervised or whether he or she make decisions or effective recommendations that materially affect the economic lives of those employees."
>
> 73. As per the case above, the Board will consider the organizational structure of the employer and the proposed numbers of management and bargaining unit employees. The Board will also consider the extent to which the person does "hands on" work that would be considered bargaining unit work. With respect to decisions or effective recommendations in the areas that materially affect the economic lives of employees, the Board will consider the following areas of responsibility: (1) hiring, including participation in a selection committee and the extent of input into the decisions; (2)

> discipline and discharge, including the role played with respect to the various levels of disciplinary action including oral warning or counselling, written warning, suspension or discharge; (3) evaluation of performance, including an examination of the consequences of the evaluation on salary increases, promotion, training opportunities, and other advancement opportunities; (4) leave requests, including the ability to authorize absence from work for sick leave, bereavement or family responsibility; (5) promotion or transfer, including any involvement in a committee that recommends a decision; (6) overtime authorization, including the authority to direct an employee to work outside the regular hours of work; (7) directing the employees in the manner of performance of their duties, and (8) assignment of job duties.

[33] The enumerated areas of responsibility quoted above are known in this jurisdiction as the "*Hibernia* factors" as they were first articulated in *Hibernia Management & Development Co. v. F.F.A.W.-C.A.W*, [2001] Nfld. L.R.B.D. No. 3 (rev'd on other grounds 2002 CanLII 54076 (NLSC), aff'd in part 2003 NLCA 43).

[34] This was not the full extent of the Board's consideration of the law concerning the managerial exclusion. The Board also cited law relevant to the managerial exclusion in paragraphs 115 to 116. Further, in paragraphs 131 to 135, the Board cited law relevant to the notion that the mere fact that someone exercises some management functions is not a compelling reason to exclude the person from collective bargaining.

[35] The Board not only cited applicable law, it applied that law to the facts. Eastern Health submits that the Board treated this application as a "contracting out" application and simply applied the *Hibernia* factors formalistically without considering the purpose of the managerial exclusion. However, as is evident in the portions of the Board Decision already referenced, the Board was alive to the need to consider whether DCMs have effective control and authority over employees or whether they make decisions or recommendations that materially affect the economic lives of those employees. It was also alive to the underlying purpose of the exclusion, which is to avoid conflict of interest between responsibilities held to the employer, and loyalty to the union as an instrument of collective bargaining (Board Decision, at para. 100). As such, I am not persuaded that the Board applied the wrong legal test in considering the managerial exclusion.

The burden of proof

[36] Eastern Health submits that the Board improperly imposed upon it a "reverse onus" to tender specific evidence, thus making the Board Decision unreasonable. It

points to paragraphs in the Board Decision in which the Board noted that Eastern Health had not provided information to establish the extent or percentage of time that DCMs spend on duties that Eastern Health considered to be managerial.

[37] Eastern Health argues that because AAHP was the applicant before the Board, the onus properly rested with AAHP to establish all aspects of the application. In support of its position, Eastern Health cites *Algoma Steel Inc. v. United Steelworkers of America*, 2006 CanLII 8874 (ONLA), a case in which an arbitrator placed the onus on the union to prove the factual proposition of whether the bargaining unit functions of a former position had been assigned to a new managerial position.

[38] In the Board Decision, the Board cited *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Allied Constructors Inc.*, 2007 NLLRB 3 (CanLII), a previous decision of the Board, which concluded that the onus is on the person seeking to exclude a position from the bargaining unit to prove that it should be excluded. In *United Brotherhood*, at pages 18-19, the Board took a practical approach:

> … While clearly the proposition "he who asserts must prove" is a tenet of administrative procedures, the reality is that both parties in certification proceedings are making assertions as to the composition of the bargaining unit. … Ultimately, the Board must satisfy itself as to who should be included in the proposed unit. In so doing, the Board often relies upon the evidence of the employees themselves at a hearing. In the absence of such evidence and, if it is necessary to impose an onus in order to make the determination, the Board prefers to impose the onus on the party seeking to exclude a position from a bargaining unit. This rationale is in keeping with section 5(1) of the Act which states:
>
> > 5. (1) An employee has the right to be a member of a trade union and to participate in its activities.

[39] I cannot conclude that the Board's placing a practical, evidentiary onus on Eastern Health to establish facts that would support the exclusion of the DCMs from the definition of "employee" is unreasonable. It is in keeping with the Board's approach in *United Brotherhood*, and it is a logical approach given that Eastern Health was arguing for the exclusion to apply. That an arbitrator in Ontario took a different approach in *Algoma Steel* does not make the Board's approach in this case unreasonable. *Algoma Steel* was in a different context, one that did not consider the definition of "employee" or the managerial exclusion, and was not binding on the Board.

Innocent absenteeism

[40] Eastern Health submits that the DCMs' powers with respect to the termination of employees for innocent absenteeism means that the managerial exclusion applies, and that the Board's failure to recognize this renders its decision unreasonable. This issue was the primary focus of Eastern Health's submissions before this Court. It was also the issue on which the judicial review judge decided the case.

[41] I do not see the issue the same way and I will explain why. However, before addressing the Board's consideration of innocent absenteeism specifically, it is helpful to set out the Board's chain of analysis for finding that the managerial exclusion did not apply.

[42] The Board's assessment was that the core duties of DCMs involve assisting injured or ill employees with an early and safe return to work (Board Decision, at paras. 98, 106, 113, 123). The Board also found that these core duties were the same core duties as Occupational Therapist IIs (Board Decision, at paras. 114, 138).

[43] The Board found that returning employees to work was governed by several Eastern Health policies that showed "a clear pathway for decision making" and "that many people over and above the [DCMs] are involved with and work together to direct and support [an] employee's return to work" (Board Decision, at paras. 84, 122, 128). One of the DCM witnesses testified that she worked primarily with Newfoundland and Labrador Association of Public and Private Employees ("NAPE") employees. The Board found that the NAPE Collective Agreement clearly outlined the process to be followed in assisting employes on leave (Board Decision, at paras. 124, 128).

[44] The above summarizes the Board's rationale for finding that the core duties of DCMs are bargaining unit work. It is within the context of this overarching reasoning that the Board's approach to innocent absenteeism must be considered. Clearly, terminating an employee for innocent absenteeism is inconsistent with assisting an employee to return to work, so by the Board's rationale, the DCMs' duties dealing with innocent absenteeism are not part of their core duties. So, I will turn next to how the Board considered non-core duties.

[45] It is a key aspect of the Board's reasoning that it did not just consider the nature of non-core duties, but it also considered the extent of those duties. The Board reasoned that if non-core duties were managerial in nature but were only performed

by DCMs to such a limited extent that they could be said to be "sprinkled", then the managerial exclusion would not be triggered. The Board's reasoning in this regard is consistent with law the Board cited (see Board Decision, at paras. 6, 71, 73, 131, 133-135; and see law and authorities cited: *Vancouver General Hospital v. British Columbia Nurses' Union*, [1993] B.C.L.R.B.D. No. 104; Ronald M. Snyder & Earl E. Palmer, *Collective Agreement Arbitration in Canada*, 4th ed (Markham, ON: LexisNexis Canada Inc, 2009); *Gainers Inc. v. U.F.C.W., Local 280-P*, 1982 CarswellAlta 1015; and *Scarborough Hospital v. Ontario Public Service Employees Union, Local 581*, 2011 CanLII 23972 (ONLA)). The Board held that it did not have sufficient evidence to allow it to determine to what extent DCMs performed non-core duties (Board Decision, at paras. 107, 113, 125, 136). The Board summarized this conclusion as follows:

> 135. … It is the view of the Board that a mere sprinkling or delegation of powers and responsibilities to achieve a managerial exclusion restricts employees' ability to exercise their legislated rights. The Board is mindful of an employer's right to manage its organization, but any delegation of powers and responsibilities must be bona fide.
>
> 136. While the Board agrees with [Eastern Health] that some of the "sprinkled" duties may be managerial in nature, the Board did not have sufficient information on the extent or percentage of time that Disability Case Managers spent on doing work other than the core duties of assisting employees back to work.

[46] Specifically with respect to innocent absenteeism, the evidence before the Board was that one of the DCM witnesses had never completed a termination for innocent absenteeism and the other DCM witness had sent only one termination letter for innocent absenteeism. The Board found that DCMs would not act alone to terminate employees for innocent absenteeism, finding that the evidence demonstrated that a number of management levels and departments were involved in making a decision about issuing a termination for innocent absenteeism (Board Decision, at para. 77).

[47] Overall, the Board's reasoning with respect to innocent absenteeism is justified, transparent, and intelligible. It fits within the overarching logic of the Board Decision and it is rational. Furthermore, it is supported by the evidence and consistent with the legal framework of the managerial exclusion. It is noteworthy that in drafting sections 2(1)(i)(xiii) and (xiv) of the *Act*, the legislature included the words "in the opinion of the board", signaling the Board's expertise with respect to the employee exclusions. In conducting a reasonableness review, this Court must be attentive to the Board's application of this specialized knowledge and institutional

expertise, as demonstrated by its reasons (*Vavilov*, at para. 93). In short, I am not satisfied that the Board's treatment of the DCMs' role in terminations for innocent absenteeism is unreasonable.

The effect of other DCM duties on the Board's assessment

[48] Eastern Health further submits that the Board Decision is unreasonable because of the way it treated several other DCM duties. The Board found that some of these duties, such as the DCMs' administration of return-to-work plans, form part of the position's core duties. Others, such as the DCMs' participation in the grievance procedure or WorkplaceNL appeals, would be non-core duties in accordance with the Board's reasoning.

[49] Each of the core and non-core duties fit within the Board's rationale, which I have already reviewed. To summarize, the Board found that the core duties were not managerial or supervisory functions. The Board found that there was insufficient evidence before it to conclude that any non-core duties, which might be managerial in nature, were done by DCMs to an extent sufficient to trigger the managerial exclusion. Additionally, the Board found that many of the duties were carried out by DCMs working with a larger team, including many people "over and above" the DCMs, and guided by employer policies or collective agreement terms.

[50] Eastern Health does not agree with the Board's conclusions with respect to DCM duties related to administrating return-to-work plans, sick leaves, grievances, and WorkplaceNL, but the Board was alive to the nature of these duties as there was evidence with respect to all of them. Most of these duties were explicitly mentioned in the Board Decision. The duties with respect to WorkplaceNL appeals were not specifically mentioned by the Board, but those duties are captured within the Board's general analysis of non-core duties. An administrative decision maker is not required to discuss all aspects of the evidence for its decision to be reasonable. Before this Court, Eastern Health has not shown that the Board failed to consider any significant matters in its analysis or that its decision with respect to them is otherwise unreasonable.

[51] Before leaving the Board's consideration of the managerial exclusion, I want to address paragraph 89 of the Board Decision that Eastern Health suggests is incoherent and evidences the Board wrongly using the *Hibernia* factors as a self-contained test (Eastern Health factum, at paras. 86-92). The paragraph reads:

> From the testimony provided by the witnesses, it is the major decision of this Board that Disability Case Managers do not hire, fire, promote, transfer, authorize overtime, grant leave requests, excluding sick leave as outlined in Eastern Health policies, direct employees in the manner of performance of their duties, or assign job duties.

[52] Eastern Health submits that paragraph 89 is incoherent because the Board observed elsewhere in its reasons that DCMs have the authority to terminate for innocent absenteeism and assign job duties to employees as part of the return-to-work process.

[53] Administrative tribunal decisions must not be assessed against a standard of perfection (*Vavilov*, at para. 91). Time and resource constraints may mean that administrative decisions may not be as carefully edited or polished as a judicial decision might be. It is thus important to read administrative decisions in their full context. Reading paragraph 89 in the full context of the Board Decision, I am satisfied that in paragraph 89 the Board was not contradicting its findings with respect to DCM core duties of returning employees to work, or their non-core duties related to innocent absenteeism. Paragraph 89 is in a section of the Board Decision headed "Assignment of Job Duties" that discusses how DCMs alter job duties of employees they are assisting with returning to work. The sentence preceding paragraph 89 is: "Disability Case Managers do not assign job duties to non-injured employees or employees not on their caseload." Nor does the paragraph, read in light of the Board Decision as a whole, show that the Board misapplied the test for the managerial exclusion. Paragraph 89 can, and should, be read harmoniously with the rest of the Board Decision.

Labour relations exclusion

[54] Finally, Eastern Health submits that the Board Decision is unreasonable with respect to its consideration of the exclusion in section 2(1)(i)(xiv) of the *Act*. This subsection exempts from the definition of "employee" persons who, in the opinion of the Board, are employed in a confidential capacity in matters relating to labour relations. I will refer to section 2(1)(i)(xiv) as the labour relations exclusion. Eastern Health argues that the labour relations exclusion should apply to DCMs.

[55] The Board was unanimous in holding that the labour relations exclusion did not apply to DCMs.

[56] The Board cited several decisions that considered the labour relations exclusion and the test to be applied, including *Newfoundland and Labrador Association of Public and Private Employees v. Multi-Materials Stewardship Board*, [2006] Nfld. L.R.B.D. No. 14, ("*MMSB*"). It summarized the applicable test as follows:

> 98. Pursuant to that test, which was adopted by the Board in *MMSB, supra,* this Board must consider whether any of the incumbents have access to confidential information where disclosure of that information would materially jeopardize the employer's collective bargaining position and whether such access is at the "core" of the person's position. Each of the witnesses stated that as Disability Case Managers, their "core" work is the early and safe return of employees to work.

[57] Although it was undisputed that as part of their core duties DCMs have access to confidential information in relation to ill or injured employees, the Board cited *MMSB* and the law considered therein to highlight that the labour relations exclusion only applies where the confidential information at issue would materially jeopardize the employer's collective bargaining position (Board Decision, at para. 96).

[58] The Board further cited as being "applicable in this case", *United Steelworkers of America v. Bannerman Enterprises Inc.,* 1994 CanLII 9879 (ONLRB), and the cases cited therein, which distinguish between personal information and confidential labour relations information. The Board applied caselaw which states that if personal information is not involved with labour relations strategy or proposals, the impact on the employer's interest is not sufficient to deny an employee's access to statutory bargaining rights (Board Decision, at para. 104). The Board found that the type of information collected and used by DCMs does not warrant exclusion from the bargaining unit under the labour relations exclusion (Board Decision, at paras. 101, 113).

[59] The dissenting Board member agreed with the majority's reasoning on this point at paragraph 2 of the dissent:

> I also agree with the conclusion of the majority of the Board that Disability Case Managers are not "employed in a confidential capacity in matters relating to labour relations" as referenced in section 2(1)(xiv) of *Act*. Some of the job responsibilities associated with the Disability Case Manager position require the Disability Case Manager to have access to confidential information that is used in matters relating to labour relations. However, the Disability Case Manager's involvement in confidential labour relation matters is not a "core" function of the position. Consequently, the exclusion referenced in section 2(1)(xiv) of *Act* does not apply.

[60] The judicial review judge found the Board Decision to be reasonable with respect to the labour relations exclusion.

[61] I agree. The Board found that the confidential information the DCMs collect, which is primarily personal information of ill and injured employees, would not materially affect Eastern Health's bargaining position. It further found that access to confidential information used in matters related to labour relations was not part of the DCMs' core work. In light of the legal tests the Board cited, which have not been challenged, the Board held that the labour relations exclusion did not apply.

[62] The Board's reasoning is logical, rational and within the legal and factual constraints that applied to it. Eastern Health disagrees with the Board's decision with respect to the labour relations exclusion but has not established that it is unreasonable.

DISPOSITION AND COSTS

[63] For the foregoing reasons, I would allow the appeal. I would reinstate the Board Decision because it has not been shown to be unreasonable.

[64] I would further order that AAHP have its costs on column 3 of the scale of costs in this Court and in the court appealed from.

_____

K.J. O'Brien J.A.

I concur : _____

D.E. Fry C.J.N.L.

I concur : _____

D.M. Boone J.A.