THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2013 SKCA 003 Date: 2013-01-15

Between: Docket: CACV2194

Regina Qu'Appelle Regional Health Authority

Appellant

- and -

Dr. Leith Dewar

Respondent

Coram:
Lane, Richards and Caldwell JJ.A.

Counsel:
John Epp and Reginald Watson, Q.C., for the appellant
Bradley D. Hunter for the respondent

Appeal:

From:	2011 SKQB 392
Heard:	October 9, 2012
Disposition:	Appeal allowed
Written Reasons:	January 15, 2013
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Mr. Justice Caldwell
In Dissent:	The Honourable Mr. Justice Lane

Richards J.A.

I. INTRODUCTION

[1] The respondent, Dr. Leith Dewar, disrupted his workplace at the Regina General Hospital and, as a disciplinary consequence, entered an agreement with the appellant Regina Qu'Appelle Regional Health Authority (the "Authority"). The agreement provided that, in the event of any similar incident, the Authority could accept Dr. Dewar's resignation. The Authority did just that some time later when Dr. Dewar dealt angrily and disrespectfully with a colleague. Dr. Dewar then appealed to the Practitioner Staff Appeals Tribunal (the "Tribunal"). It set aside the Authority's decision to accept his resignation.

[2] The question in this appeal is whether the Tribunal's ruling should be overturned. There are two main issues: (a) did the Tribunal have jurisdiction to hear Dr. Dewar's appeal? and (b) did the Tribunal make a reviewable error with respect to the substance of the appeal?

[3] I have had the benefit of reading my colleague Lane J.A.'s reasons for decision but find myself unable to endorse his disposition of this appeal.

[4] I accept that the Tribunal had the jurisdiction to entertain Dr. Dewar's case. I do not agree that its decision can or should be sustained.

II. BACKGROUND

[5] Dr. Dewar is a cardiothoracic surgeon and, since 1996, he has been a member of the practitioner staff of the Authority.

[6] Dr. Dewar has a history of problems in the workplace. By his own admission, he has engaged in a "pattern of disruptive behaviour". He had been subject to three separate disciplinary measures prior to May of 2010. They involved two formal verbal reprimands and a written reprimand.

[7] On May 10, 2010, Dr. Dewar was both verbally and physically aggressive to a physician colleague. Both the Authority and Dr. Dewar recognized the seriousness of the event. Dr. Dewar acknowledged that it was grave enough to consider a "resignation" as an appropriate consequence of his actions.

[8] A meeting was held on June 14, 2010. It involved Dr. Dewar, the Head of the Department of Surgery at the Regina General Hospital (Dr. Mark Ogrady), the Senior Medical Officer of the Hospital (Dr. Christina Vuksic) and the Executive Director of the Practitioners' Staff Affairs Department. They considered three options for responding to the May 10 incident: (a) referring the matter to the Discipline Committee, (b) employing a type of alternative dispute resolution, and (c) a resignation. Dr. Dewar elected alternative dispute resolution.

[9] After Dr. Dewar had consulted with legal counsel, he and the Authority signed an "Alternative Resolution (*sic*) Agreement" (the "Agreement") on June 28, 2010. Its most relevant features read as follows:

> In consideration of the RQRHA providing me with written reprimand regarding my conduct on May 10, 2010, rather than referring the matter for hearing before the Discipline Committee, as well as providing me with further opportunity to address and correct my pattern of disruptive behaviour, I, Leith Dewar, undertake and agree as follows:

1. I acknowledge that my conduct on May 10, 2010 constituted disruptive behaviour on my part, and conduct subject to discipline pursuant to the RQRHA Practitioner Staff Bylaws, for which I accept the written reprimand administered.

2. I consent to and support the RQRHA in referring me to the Saskatchewan Physician Support Program ("SPSP"), and I undertake to promptly contact Brenda Senger of the SPSP to arrange for my assessment and resulting treatment and/or program.

3. I undertake to cooperate with the recommendations and treatment and/or programs arranged through the SPSP and will adhere to such treatment and/or program requirements.

4. I consent to the SPSP, and any of the treatment providers/programs arranged through the SPSP, providing information, including the results of my assessment, any recommendations, and my progress in the treatment and/or programs, to the RQRHA's Senior Medical Officer . . .

5. I further acknowledge the role of the SPSP in assisting me and request and authorize the RQRHA to communicate with the SPSP as may be required pursuant to this agreement.

6. Either through the SPSP, if such is recommended, or in addition to the recommendations of the SPSP, I will attend on a psychiatrist for assessment and treatment to address my disruptive behaviour and anger management. . . .

7. I recognize that my poor conduct has triggered concerns regarding my performance and that the RQRHA has an obligation to evaluate my performance with greater scrutiny, and to evaluate my progress in addressing my behavioural issues. . . .

8. I acknowledge that my disruptive behaviour has negatively impacted the work environment and engendered fear on the part of members of the multi-disciplinary health care team. I will, with the assistance of the Senior Medical Officer, have a meeting with those individuals impacted by my conduct on May 10, 2010 to apologize for my conduct and undertake that such will not occur again.

9. I acknowledge that my disruptive behaviour has heightened concerns on the part of the RQRHA regarding patient safety, staff safety and risk management. I recognize that I have previously received warnings and been reprimanded regarding such behaviour and that the RQRHA has extended this final opportunity to me to seek further assistance in overcoming my behaviour issues. I therefore agree that in the event that:

   a) I exhibit angry, disrespectful or otherwise disruptive behaviour in the workplace context;

b) I fail to attend for assessment by the SPSP and/or the psychiatrist;

c) I am uncooperative in any way with the SPSP, the psychiatrist, the recommendations and/or the treatment program(s) arising from my assessment(s);

d) the progress reports from the SPSP, the psychiatrist, and/or other treatment/program providers indicate poor progress on my part in relation to correcting my behavioural issues;

e) any of the performance evaluations focused on assessing my behaviour noted in paragraph 7 indicate poor results;

f) I in any way act in breach of this agreement;

as determined by consensus of the Senior Medical Officer, the Head of the Department of Surgery, and the Chief Executive Officer, I will immediately resign from the practitioner staff of the Regina Qu'Appelle Health Region. To this end, I have signed a form of resignation, attached as Schedule "A" to this Agreement and authorize the Senior Medical Officer to retain this on file and, in the event any one of the above occurs, to insert the date and notify the RQRHA board of my resignation.

In the absolute discretion of the Senior Medical Officer, in lieu of the acceptance of my immediate registration, I may be subject to other measures pursuant to the RQRHA Practitioner Staff Bylaws by agreement between the RQRHA and me at the time. Such does not constitute a waiver of any breach or other default under this Agreement and shall not be deemed a waiver of any subsequent breach or default of a similar nature.

[emphasis added]

[10] On September 27, 2010, Dr. Beukes Vorster telephoned Dr. Dewar about a patient who was recuperating in the Surgical Intensive Care Unit ("SICU") of the General Hospital under the care of a medical team which included Dr. Vorster. The patient was not responding to efforts to stabilize her condition. Dr. Vorster requested that Dr. Dewar attend the SICU to conduct a surgical assessment. Dr. Dewar refused and responded, according to Dr. Vorster, in a manner which was "aggressive, condescending, rude and intimidating." Dr. Dewar did book the operating room for immediate surgery. The patient was operated on and recuperated.

[11] Dr. Vorster was concerned about his conversation with Dr. Dewar and sent an e-mail to Dr. Vuksic indicating that, during the course of the conversation, Dr. Dewar had been "immediately aggressive" and had blamed him for the patient's deterioration. Dr. Vorster expressed his opinion that Dr. Dewar's failure to attend the SICU and assess the patient had raised "serious patient safety concerns".

[12] Dr. Vuksic then proceeded to investigate the incident. She spoke with Dr. Vorster by telephone and also called the SICU and spoke with a number of people who had been there at the relevant time. She sent a letter to Dr. Dewar and provided him with an opportunity to respond to Dr. Vorster's concerns.

[13] A meeting was held on October 22, 2010. It included Dr. Vuksic, the Chief Executive Officer of the Authority (Dwight Nelson), Dr. Ogrady, Dr. Dewar and legal counsel for both Dr. Dewar and the Authority. Mr. Nelson and Drs. Ogrady and Vuksic also held a further meeting with Dr. Vorster because Mr. Nelson and Dr. Ogrady wished to hear from him directly.

[14] Dr. Vuksic, Dr. Ogrady and Mr. Nelson then met to consider Dr. Dewar's situation in light of the Agreement. Their decision was not formally recorded but, according to the testimony of Dr. Vuksic, they reached a consensus that Dr. Dewar's conduct toward Dr. Vorster had been angry and disrespectful and therefore warranted the acceptance of his letter of resignation. She indicated that they were also concerned that Dr. Dewar had disrupted the SICU by refusing to attend to assess the patient and by failing to communicate his intention to return the patient to the operating room.

[15] The decision to accept Dr. Dewar's resignation was communicated to him at a meeting held on October 29, 2010.

III. THE TRIBUNAL'S DECISION

[16] Dr. Dewar appealed to the Tribunal. It conducted a two day hearing and rendered its decision on July 15, 2011.

[17] The Tribunal began its ruling by dealing with a jurisdictional argument made by the Authority. The argument was that it had no authority to hear the appeal because the proceedings had arisen out of the terms of the Agreement. That submission was rejected.

[18] The Tribunal then turned to the substance of the appeal. It concluded that the Authority's investigation into the May 2010 incident had been inadequate. In light of the testimony it had heard, the Tribunal held that the conclusion of Dr. Vuksic, Dr. Ogrady and Mr. Nelson to the effect that Dr. Dewar had disrupted the SICU by refusing to attend and examine the patient was not supported by the evidence. It also concluded the evidence did not support a finding that Dr. Dewar had failed to communicate to Dr. Vorster his intention to immediately return the patient to the operating room.

[19] That said, the Tribunal did not take issue with the determination made by Dr. Vuksic and her colleagues to the effect that Dr. Dewar's conduct during his conversation with Dr. Vorster had been angry and disrespectful. It added that Dr. Dewar himself had admitted to questioning Dr. Vorster in the fashion of a teacher examining a student.

[20] However, the Tribunal then went on to say that, notwithstanding Dr. Dewar's conduct, Dr. Vuksic and her colleagues had acted "unreasonably" in determining that the September 2010 incident should trigger the acceptance of Dr. Dewar's resignation. The Tribunal said this because, in its view, the Authority had not provided Dr. Dewar with "sufficient time and a conducive environment for rehabilitation". In the Tribunal's opinion, it had been unreasonable to accept the resignation when Dr. Dewar had not returned to "an environment conducive to improving his interactions with colleagues."

IV. THE APPEAL TO THE COURT OF QUEEN'S BENCH

[21] The Authority appealed the Tribunal's decision to the Court of Queen's Bench on questions of law and jurisdiction pursuant to s. 45(4) of *The Regional Health Services Act*, S.S. 2002, c. R-8.2 (the "*Act*"). The Queen's Bench Chambers judge, using a reasonableness standard of review, found that the Tribunal had properly assumed jurisdiction with respect to Dr. Dewar's appeal. He concluded, as had the Tribunal, that the Agreement had a "rehabilitative" as well as "disciplinary" dimension. He said the Tribunal's interpretation of the Agreement fell within the range of reasonable interpretations that could be placed on it and, indeed, that its interpretation had been correct.

V. ANALYSIS

[22] The Authority advances two main arguments in its effort to overturn the decision of the Court of Queen's Bench: (a) the Tribunal had no jurisdiction

to entertain Dr. Dewar's appeal, and (b) if it had jurisdiction, the Tribunal erred in allowing the appeal. I will deal with these two points in turn.

A. The Tribunal's Jurisdiction to Hear the Appeal

[23] I agree with my colleague that the Tribunal's decision concerning whether it had the authority to deal with Dr. Dewar's appeal is reviewable on the correctness standard. As he points out, *Prairie North Regional Health Authority v. Kutzner*, 2010 SKCA 132, 325 D.L.R. (4th) 401 does not stand for the proposition that the reasonableness standard automatically applies to the review of *every* decision of the Tribunal.

[24] The Supreme Court has said jurisdictional questions attract the correctness standard of review. See: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 59. The concept of jurisdiction in this context is to be narrowly construed but questions of "true jurisdiction" must be reviewed on the basis of "correctness", not on the basis of "reasonableness". See: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678 at paras. 33 and 34; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R 471 at para. 24 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R 654 at para. 39.

[25] In this case, the point in issue was whether the Tribunal had the authority to entertain Dr. Dewar's appeal. The Tribunal had to address that issue as a free-standing point before turning to the merits of Dr. Dewar's arguments. It would seem that, if the "true question of jurisdiction" concept

retains any meaning, it is engaged here. As a result, the correctness standard applies to the consideration of this aspect of the Tribunal's decision.

[26] What then of the substance of the jurisdictional issue? Like my colleague, I am of the view that the Tribunal had the authority to hear Dr. Dewar's appeal. The key in this regard is s. 45 of the *Act*. It provides a broad right of appeal in relation to the appointment, reappointment, suspension or termination of appointment to the practitioner staff and in relation to the discipline of practitioner staff:

> 45(1) A person who is aggrieved by a decision of a regional health authority or an affiliate made in relation to the following matters may, in accordance with the regulations, appeal the decision to a tribunal established by the regulations:
>
> (a) the appointment of the person to the practitioner staff or the reappointment, suspension or termination of appointment of the person;
>
> (b) the disciplining of the person as a member of the practitioner staff;
>
> (c) the granting of privileges to the person as a member of the practitioner staff, or the amending, suspending or revoking of privileges granted to the person.

[27] It is true that the decision to accept Dr. Dewar's resignation took place within the framework of the Agreement. However, it nonetheless fit within the scope of s. 45. This is because Dr. Vuksic, Dr. Ogrady and Mr. Nelson were not acting in any individual or private capacity when they triggered the resignation. The Authority had approved the Agreement and the decision of Dr. Vuksic and her colleagues was necessarily made on behalf of the Authority. Further, that decision self-evidentially related to both the termination of an appointment as *per* s. 45(1)(a) and to discipline as *per* s. 45(1)(b) of the *Act*. Accordingly, Dr. Dewar enjoyed a right of appeal by virtue of s. 45.

[28] The Bylaws of the Authority do not change any of this. They set out two main procedural tracks for discipline matters. One deals with disciplinary actions that proceed through the Discipline Committee to the Board of the Authority. See: Bylaws, ss. 75 - 85. The other track, dealing with situations where patient care is at risk, also ends at the Board for final determination. See: Bylaws, ss. 86 - 91. In both cases, the Bylaws expressly state that a member of the practitioner staff may appeal the Board's decision to the Tribunal.

[29] Accordingly, in light of those provisions, it might seem the Bylaws contemplate that only a decision of the Board itself may be appealed to the Tribunal. However, even assuming for the sake of argument that the Bylaws could limit a right of appeal granted by the *Act*, it is clear that they do not. Section 102 of the Bylaws preserves any right of appeal found in the *Act* by providing as follows:

> 102. Nothing in these Bylaws limits or restricts any right of appeal or other legal recourse, which is available to an individual pursuant to *The Regional Health Services Act* and regulations, or any other applicable law.

[30] This takes the analysis directly back to s. 45 of the *Act*. As indicated, it says an appeal lies to the Tribunal from "a decision of a regional health authority" in relation to matters of discipline and the termination of appointments. As indicated, the decision to trigger Dr. Dewar's resignation falls within the scope of that provision.

[31] Accordingly, in the end, I agree that the Tribunal had the jurisdiction to entertain Dr. Dewar's appeal. The Chambers judge made no bottom-line error on this issue.

B. The Substance of the Tribunal's Decision

[32] As noted above, the Authority's second line of attack is that the Chambers judge erred when he failed to overturn the substance of the Tribunal's ruling. Before turning to the meat of this submission, it is necessary to say a word about the approach the Tribunal took when it reviewed the decision of Dr. Vuksic and her colleagues.

[33] Section 11(1) of *The Practitioner Staff Appeals Regulations*, c. 8.2 Reg. 5 states that an appeal to the Tribunal shall be conducted as a "hearing *de novo*". In the ordinary course, this would suggest a proceeding in which an entirely new record is generated and in which the issues are decided solely on the basis of that record with no deference to what has gone before. See, for example, *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145 at para. 46.

[34] In this case, at least with respect to the question of whether Dr. Dewar had acted in a manner which was "angry, disrespectful or otherwise disruptive", the Tribunal dealt with the appeal by asking whether it had been *reasonable* for Dr. Vuksic and her colleagues to have seen the September 27, 2010 incident as triggering Dr. Dewar's resignation. This aspect of its analysis was not questioned in this Court by either Dr. Dewar or the Authority. Accordingly, I propose to proceed on the basis that the issue before the Tribunal on this wing of Dr. Dewar's appeal was whether, in light of the Agreement and the facts, Dr. Vuksic and her colleagues had acted reasonably when they accepted his resignation.

[35] I do not mean to suggest by this comment that the Tribunal was wrong to have come at Dr. Dewar's appeal in the way it did. His resignation was triggered pursuant to the specific terms of the Agreement, a contract between him and the Authority. There is obviously an argument to the effect that, in such a circumstance, the notion of a *de novo* hearing must take on something other than its standard meaning. In other words, there is an argument that it was appropriate for the Tribunal to have heard the evidence about the September 2010 incident and to have then decided, not if it agreed with Dr. Vuksic and her colleagues, but whether their decision was reasonable in light of the Agreement and the evidence it had heard. My point here is only to flag the fact that the question of how much deference, if any, the Tribunal should show to a decision made pursuant to an alternative dispute resolution agreement was not argued or contested before us. As a result, it is not something which this appeal should be taken to have finally resolved one way or the other.

[36] With that bit of clarification, I turn to the merits of the Tribunal's decision. Its root concerns appear to have been two-fold. First, that Dr. Dewar had not been given sufficient time to deal with his behavioural issues. Second, that the Authority had somehow failed to create an environment conducive to Dr. Dewar improving his relations with his colleagues. In my respectful opinion, it acted unreasonably on both fronts.

[37] I will deal first with the question of whether Dr. Dewar had been given enough time to deal with his situation. The analysis on this arm of the appeal begins with the fact that, in May of 2010, against a background of previous

disruptive behaviour, Dr. Dewar physically confronted a colleague. He and the Authority both recognized the seriousness of the situation. Dr. Vuksic believed the incident could have warranted Dr. Dewar's dismissal. Dr. Dewar himself put the possibility of a resignation on the table. As explained above, Dr. Dewar and the Authority ultimately decided to go forward with alternate dispute resolution but, on the basis of the evidence heard by the Tribunal, this was a "one last chance" type of arrangement.

[38] The terms of the Agreement imposed a clear duty on Dr. Dewar to address his anger management issues and to address them forthwith. The Agreement broke down as follows:

- para. 1 - Dr. Dewar acknowledged that his conduct had constituted disruptive behaviour subject to discipline;

- para. 2 - Dr. Dewar undertook to "promptly" contact Brenda Senger of the Saskatchewan Physician Support Program to arrange for an assessment and treatment;

- para. 3 - Dr. Dewar agreed to cooperate with recommendations for treatment;

- paras. 4 and 5 - Dr. Dewar agreed that treatment and counselling information could be shared with the Authority;

- para. 6 - Dr. Dewar agreed to see a psychiatrist for assessment and treatment;

- para. 7 - Dr. Dewar accepted the propriety of enhanced performance reviews;

- para. 8 - Dr. Dewar undertook, with the assistance of the senior Medical Officer, to apologize to the individuals affected by his behaviour;

- para. 9 - Dr. Dewar recognized that the Authority had extended "this final opportunity" for him to seek further assistance and overcome his behavioural issues and agreed that his undated letter of resignation could be accepted if, among other things, he exhibited "angry, disrespectful or other disruptive behaviour", failed to attend for assessment by the SPSP and/or the psychiatrist, or acted in breach of the Agreement.

[39] Notwithstanding his commitment to "promptly" contact Brenda Senger at SPSP, Dr. Dewar did not even attempt to reach her for over two months. After signing the Agreement at the end of June, 2010, he went on vacation for most of July. Dr. Dewar testified that he had been very busy in August and, apparently for this reason, did not take any steps to reach Ms. Senger during that time period. He said he sent Ms. Senger an email at the end of August and that she invited him to call her. According to his evidence, Dr. Dewar then spent the better part of a month trying from time to time to reach Ms. Senger by telephone. He explained the difficulty on this front as arising from the fact that he usually worked from 8:30 a.m. until about noon and then from about 1:00 p.m. until about 4:00 p.m. Ms. Senger apparently began work shortly after 8:30 a.m., was not in the office over lunch and was gone by 4:00. Dr.

Dewar did not indicate, and was not asked, how often he attempted to reach Ms. Senger by telephone, but he apparently decided "at the end of September" to take the rather obvious step of sending her another email. When he did, she responded promptly by suggesting an initial assessment with a particular Regina-based psychiatrist.

[40] For its part, the Tribunal said that, in light of his July vacation and August workload, it was not unreasonable for Dr. Dewar to have failed to have contacted the SPSP. I see no basis whatsoever for that conclusion. The May 2010 incident was serious. Dr. Dewar understood and acknowledged that fact. It was the fourth time he had been formally disciplined. He signed, with input from his lawyer, a contract whereby he agreed to "promptly" contact SPSP. All this required was a quick email or telephone call on his part but no such step was taken. Instead, Dr. Dewar went on vacation. Then he did nothing during the month of August. When he finally decided to contact SPSP, it apparently took him a full month of failed attempts to make telephone contact before he decided to send an email. These are not the actions of a physician who was acting with any sort of meaningful regard to his obligations under the Agreement and this was obviously not the sort of follow-up contemplated by the Agreement. In my view, the Tribunal acted unreasonably in concluding otherwise.

[41] A similar story played out in relation to Dr. Dewar's independent commitment, under para. 6 of the Agreement, to see a psychiatrist. He had indicated to Dr. Vuksic, at the June 14, 2010 meeting, that he preferred to consult a psychiatrist based in Saskatoon. Dr. Vuksic immediately made

inquiries in this regard and obtained the name of a psychiatrist. She passed on the name to Dr. Dewar at the end of June 2010. There was no follow-up on Dr. Dewar's part.

[42] In light of all of this, I am unable to see how the Tribunal could have interpreted the Agreement so as to conclude that the Authority had somehow failed to provide Dr. Dewar with "sufficient time" for rehabilitation. The central failure in this regard should surely have been placed at Dr. Dewar's feet. It was he who chose not to follow through with the very aspects of the Agreement that would have allowed him to manage his anger and behavioural issues. This was decidedly not a situation where a physician had sought treatment as contemplated by an alternative dispute resolution procedure and merely needed additional time to deal with his situation. Rather, Dr. Dewar did effectively nothing with the opportunity given to him under the Agreement.

[43] Let me turn, then, to the Tribunal's concern that the Authority had not created an environment conducive to Dr. Dewar improving his relations with his colleagues. The problem with this aspect of the Tribunal's decision is that it too is disconnected from, or disregards, the terms of the Agreement. There is no suggestion in the evidence that Dr. Dewar's problems were caused by inappropriate actions on the part of his colleagues. Rather, they arose directly from his own failure to control his anger. This, presumably, is why the Agreement did not impose any obligations on the Authority to make changes to the workplace or to otherwise address the conduct or behaviour of its staff. Simply put, no fault was to be found on that side of the line.

[44] As a result, it is unclear how or why the Tribunal found, at least implicitly, that the Authority had somehow fallen down by failing to offer an "environment conducive to improving [Dr. Dewar's] interactions with his colleagues". The Agreement did not contemplate the Authority doing anything on this front and, significantly, the Tribunal did not suggest or explain what it thought the Authority should have done.

[45] The only particular which attracted the Tribunal's comment in this regard was the apology session held between Dr. Dewar and certain of his colleagues. This was the meeting contemplated by para. 8 of the Agreement wherein Dr. Dewar had acknowledged the impact of his behaviour on his colleagues and had undertaken to "with the assistance of the Senior Medical Officer, have a meeting with those individuals impacted by my conduct on May 10, 2010 to apologize for my conduct and undertake that such will not occur again".

[46] Dr. Vuksic testified that she had hoped to have the session fairly shortly after the Agreement was in place, but that it had been postponed for various reasons including the fact that SICU nurses were too fearful to face Dr. Dewar and that Dr. Dewar himself had been away. The meeting was ultimately arranged for September 9, 2010. Dr. Vuksic had met previously with Dr. Dewar in a "coaching session". However, at the meeting, Dr. Dewar became angry and raised his voice in replying to a question from a colleague about how there could be an assurance that there would be no further incidents.

[47] The Tribunal concluded that Dr. Dewar's behaviour at the session demonstrated that "he was not prepared to address his behaviour issues with his colleagues". Nonetheless, it somehow turned the situation around so that the session became an illustration of the fact that Dr. Dewar had not returned to "an environment conducive to improving his relations with colleagues". Again, I am unable to see how this approach can be squared with any reasonable reading of the Agreement. Dr. Dewar undertook to apologize to his colleagues. The apology session was arranged and he was provided with coaching. Dr. Dewar's failure to maintain his composure at the meeting was surely his failure, not that of the Authority.

[48] In the end, I conclude that the Tribunal interpreted the Agreement, and applied it to the evidence, in an unreasonable fashion. True, as noted by the Chambers judge, the Agreement did have a "rehabilitative" and not just a "disciplinary" dimension. But that language describes only the general content of the Agreement. In its detail, the Agreement placed an onus on Dr. Dewar to take steps to deal with his situation. He failed to do that. The fact is that his behaviour toward Dr. Vorster on September 27, 2010 fell within the terms of para. 9 of the Agreement and was thus capable of triggering a resignation. No reasonable reading of the Agreement leads to a result that would overturn the decision of Dr. Vuksic and her colleagues to accept Dr. Dewar's resignation.

VI. CONCLUSION

[49] For the reasons outlined above, I would allow the Authority's appeal with costs in the usual way.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of January, 2013.

"Richards J.A."
Richards J.A.

I concur

"Caldwell J.A."
Caldwell J.A.

Lane J.A. (in dissent)

[50] This is an appeal from a Queen's Bench Chambers judge's decision and the resulting order which upheld, on appeal, a decision of the Practitioner Staff Appeals Tribunal (the "Tribunal"). The Tribunal overturned the joint decision of the Senior Medical Officer, the Head of the Department of Surgery and the Chief Executive Officer of the appellant, Regina Qu'Appelle Regional Health Authority (the "Authority" or "Hospital"), accepting the respondent's letter of resignation. These three were the designated decision-makers pursuant to a June 28, 2010 Alternate Resolution Agreement (the "Agreement" or the "ADR Agreement") executed between the appellant and the respondent.

I. BACKGROUND

[51] The facts are more completely set out in the Queen's Bench decision but a brief recitation is in order. The respondent is a cardiothoracic surgeon who was a member of the practitioner staff of the Hospital with hospital privileges as a fee-for-service physician. As a result of a history of disruptive behaviours, and in particular a disciplinary incident on May 10, 2010, the respondent provided a signed, undated letter of resignation as part of the ADR Agreement. The three designated members referred to above were authorized by the Agreement to accept the letter of resignation if the respondent breached the Agreement. The alternate dispute resolution process was agreed to rather than proceeding with the option of a formal disciplinary hearing.

[52] The parties agreed the May 2010 incident was of sufficient seriousness to consider the respondent's resignation as an appropriate consequence. The salient provisions of the Agreement read as follows:

> In consideration of the RQRHA providing me with written reprimand regarding my conduct on May 10, 2010, rather than referring the matter for hearing before the Discipline Committee, as well as providing me with further opportunity to address and correct my pattern of disruptive behaviour, **I, Leith Dewar, undertake and agree as follows**:
>
> 1. I acknowledge that my conduct on May 10, 2010 constituted disruptive behaviour on my part, and conduct subject to discipline pursuant to the RQRHA Practitioner Staff Bylaws, for which I accept the written reprimand administered.
>
> ...
>
> 7. I recognize that my poor conduct has triggered concerns regarding my performance and that the RQRHA has an obligation to evaluate my performance with greater scrutiny, and to evaluate my progress in addressing my behavioural issues. In this regard, a 360° performance evaluation will be done approximately 6 months from the date of this Alternate Resolution Agreement, with a particular focus on my behaviour. As well, within the discretion of the Senior Medical Officer, a similarly-focused 360° performance evaluation will be undertaken each year thereafter for as long as I remain on the Practitioner Staff of the Regina Qu'Appelle Health Region. Such evaluation may be in addition to any overall performance evaluation undertaken in connection with my reappointment application.
>
> 8. I acknowledge that my disruptive behaviour has negatively impacted the work environment and engendered fear on the part of members of the multi-disciplinary health care team. I will, with the assistance of the Senior Medical Officer, have a meeting with those individuals impacted by my conduct on May 10, 2010 to apologize for my conduct and undertake that such will not occur again.
>
> 9. I acknowledge that my disruptive behaviour has heightened concerns on the part of the RQRHA regarding patient safety, staff safety and risk management. I recognize that I have previously received warnings and been reprimanded regarding such behaviour and that the RQRHA has extended this final opportunity to me to seek further assistance in overcoming my behavioural issues. I therefore agree that in the event that:
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> a) I exhibit angry, disrespectful, or otherwise disruptive behaviour in the workplace context;
>
> b) I fail to attend for assessment by the SPSP and/or the psychiatrist;

c) I am uncooperative in any way with the SPSP, the psychiatrist, the recommendations and/or treatment program(s) arising from my assessment(s);

d) the progress reports from the SPSP, the psychiatrist, and/or other treatment/program providers indicate poor progress on my part in relation to correcting my behavioural issues;

e) any of the performance evaluations focused on assessing my behaviour noted in paragraph 7 indicate poor results;

f) I in any way act in breach of this Agreement;

as determined by consensus of the Senior Medical Officer, the Head of the Department of Surgery, and the Chief Executive Officer, I will immediately resign from the practitioner staff of the Regina Qu'Appelle Health Region. To this end, I have signed a form of resignation, attached as Schedule "A" to this Agreement and authorize the Senior Medical Officer to retain this on file and, in the event any one of the above occurs, to insert the date and notify the RQRHA board of my resignation.

In the absolute discretion of the Senior Medical Officer, in lieu of the acceptance of my immediate registration, I may be subject to other measures pursuant to the RQRHA Practitioner Staff Bylaws by agreement between the RQRHA and me at the time. Such does not constitute a waiver of any breach or other default under this Agreement and shall not be deemed a waiver of any subsequent breach or default of a similar nature.

Attached to the Agreement as Schedule "A" was the signed, undated letter of immediate resignation.

[53] An incident occurred on September 27, 2010 and the designated individuals accepted the letter of resignation on October 29, 2010.

[54] The respondent appealed the decision accepting his letter of resignation to the Tribunal. The Authority argued the Tribunal did not have jurisdiction to hear the appeal contending the negotiated Agreement established an alternative method to the disciplinary process which set out new rules governing the relationship of the parties. Because the Agreement removed the relationship from the disciplinary process, the issue is a pure and simple case

of breach of contract and the jurisdiction to decide such a matter rests with the Court of Queen's Bench.

[55] The Tribunal ruled it had jurisdiction, founding its jurisdiction in s. 45 of *The Regional Health Services Act*, S.S. 2002, c. R-8.2 (the "*Act*"). It then proceeded to find the Agreement had two components, one of which dealt with discipline and the other which was to provide the respondent "with further opportunity to address and correct [his] pattern of disruptive behaviour…".

[56] The Tribunal found the Authority's investigation into the September incident was inadequate given the serious consequences faced by the respondent. Briefly, one of the respondent's patients was in difficulty in the Surgical Intensive Care Unit ("SICU") and the respondent was telephoned and asked to attend at the unit. A heated verbal exchange ensued with the respondent refusing to attend but instead he directly booked the patient for surgery. The Tribunal found the respondent was disrespectful but the Authority acted unreasonably by accepting the resignation. Instead of acting precipitously it should have determined the specifics of the patient's condition to see if an onsite assessment was indeed necessary, and further, in making its decision, it ought to have compared the respondent's actions to the standard of that of a cardiothoracic surgeon. The Authority should also have consulted with other cardiothoracic surgeons before concluding the respondent acted inappropriately.

[57] The Tribunal found the respondent was not provided with an opportunity to address his disruptive behaviours nor was he given an opportunity to reform his behaviour and ruled it was unreasonable for the

Authority to have expected the respondent to change his behaviour in such a short period of time. The Tribunal found the respondent's failure to proceed with counseling was not unreasonable and did not demonstrate a lack of desire to reform his behaviour. The Hospital itself had allowed the respondent to return to the Surgical Intensive Care Unit before he began his counseling and before the required apology session. The workload in the period between the signing of the Agreement and the September incident was hectic with the respondent being away on holidays and the number of cardiothoracic surgeons reduced by half. It also found the rehabilitative environment was further undermined by an ill-timed and poorly executed apology session.

[58] On appeal to Queen's Bench, the judge ruled the standard of review on the jurisdiction issue was that of reasonableness. He found it was not necessary to consider a detailed review of the factors in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 because this Court had already decided reasonableness was the standard of review in these appeals in the recent case of *Prairie North Regional Health Authority v. Kutzner,* 2010 SKCA 132, 325 D.L.R. (4^{th}) 401. In rejecting the Authority's argument that the issue was contractual in nature, he found the Tribunal's interpretation of the Agreement reasonable and then went on to say that even if the correctness standard applied the result would be the same. The decisions taken by the Tribunal constituted reasonable interpretations of the legislative framework, including the *Act*, the *Regulations* and the Bylaws. He concluded the Tribunal's analysis and conclusions respecting the nature and scope of the Tribunal's jurisdiction, including its scope of appellate authority and responsibility, were correct conclusions.

[59] He then turned to the subject matter of the appeal and applied the reasonableness standard. As a result, the court was required to extend deference to the Tribunal's findings of fact. He agreed with the Tribunal the Agreement could not be read as allocating to the three designated individuals the absolute discretion to accept the undated resignation. He concluded the Tribunal's interpretation of the Agreement fell within the range of reasonable interpretations and also concluded it was, in fact, the correct interpretation.

II. THE PRESENT APPEAL

[60] Before us the Authority maintained its position the Tribunal did not have jurisdiction because the Agreement was a matter of a contract which removed the relationship from the discipline process, the standard of review on jurisdiction was correctness and the standard of review in interpreting the Agreement was also that of correctness.

[61] The respondent argues the Queen's Bench judge was correct in his legal analysis of both the standard of review of the Tribunal's jurisdiction and its interpretation of the Agreement.

[62] Several grounds of appeal were raised but the essential issues before us were: firstly, did the Queen's Bench judge apply the correct standard of review in his analysis of the jurisdictional issue; secondly, did he apply the correct standard of review in his analysis of the Tribunal's decision interpreting the contract; and, thirdly, if he was in error on either issue what are the consequences.

[63] I will deal firstly with the jurisdictional issue.

[64] As stated, the Queen's Bench judge found it was not necessary to repeat this Court's analysis of the *Dunsmuir* factors when it came to reviewing a decision of the Practitioner Staff Appeals Tribunal. He ruled this Court concluded the standard of review was already determined in *Kutzner* relying on para. 34 of that decision where in Richards J.A. said as follows:

> 34 Considering all three of the relevant factors together, I conclude that - at least in the context of this case - the appropriate standard of review is reasonableness, *i.e.* the root question in this appeal is whether the Tribunal reasonably concluded that the Authority's decision to change Drs. Kutzner and Blackwell's allocations of operating hours amounted to the amending, suspending or revoking of their privileges.

[65] I am of the view the Queen's Bench judge misinterpreted this Court's decision on the issue. It should be noted at para. 34 Richards J.A. specifically stated "at least in the context of this case" the appropriate standard of review was reasonableness. In other words, the reasonableness standard determination was limited to that particular case before this Court. This conclusion came after extensive analysis of the applicable standard of review. Richards J.A. noted jurisdiction was often an elusive notion (para. 26) and emphasized the Supreme Court ruled in *Dunsmuir* only "true" questions of jurisdiction would automatically attract the correctness standard (para. 27). He went on to refer to para. 59 of *Dunsmuir* wherein the majority wrote:

> 27 As a result, the Supreme Court was at pains in *Dunsmuir v. New Brunswick* to emphasize that only "true" questions of jurisdiction automatically attract the correctness standard of review. Bastarache and LeBel JJ., for the majority, wrote as follows at para. 59:
>
> > [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is

> important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [Emphasis added]

[66] Justice Richards again cautioned at para. 29 the "courts should not characterize as jurisdictional those issues which are only doubtfully or arguably so". I refer to the above authorities and comments to emphasize this Court did not say in *Kutzner* that in all cases the standard of review of the Practitioner Staff Appeals Tribunal decisions was the reasonableness standard. The Queen's Bench judge was in error in finding the question had been decided. The appropriate standard will depend on the circumstances of each case.

[67] It turns then to this Court to decide the issue.

[68] The Tribunal, as a first step, was required to confront the very question as to whether it had the authority to make the inquiry. The appellant's position was that the signing of the Agreement took the issue outside of the legislative framework. Obviously, the Tribunal had to decide whether that

was, in fact, the case – a question of pure jurisdiction, and thus the standard of review, is that of correctness. I refer again to *Dunsmuir* at para. 59 cited above and the caution therein about branding issues as jurisdictional when they are doubtfully so:

> 59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality [page226] and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[69] The appellant takes the position the issue is simply one of interpretation of a contract which takes the parties' relationship out of the legislative scheme. The respondent sees the issue as one of discipline within the jurisdiction grounded in s. 45 of the *Act* which reads as follows:

> 45(1) A person who is aggrieved by a decision of a regional health authority or an affiliate made in relation to the following matters may, in accordance with the regulations, appeal the decision to a tribunal established by the regulations:
>
> (a) the appointment of the person to the practitioner staff or the reappointment, suspension or termination of appointment of the person;
>
> (b) the disciplining of the person as a member of the practitioner staff;

> (c) the granting of privileges to the person as a member of the practitioner staff, or the amending, suspending or revoking of privileges granted to the person.
>
> (2) Subject to the regulations, a tribunal may determine its own procedures for the hearing of an appeal pursuant to subsection (1).
>
> (3) For the purposes of hearing an appeal pursuant to subsection (1), the members of a tribunal have the powers conferred on commissioners by *The Public Inquiries Act*.
>
> (4) A decision of a tribunal may be appealed to a judge of the Court of Queen's Bench on a question of law or jurisdiction within 30 days after the date of the tribunal's decision.

[70] Relevant in interpreting this legislation are the Bylaws which "can sometimes be quite useful in assessing the meaning of a statutory provision" (para. 45, *Kutzner*) and were so relied on in that decision.

[71] Part VIII of the Bylaws pertains to discipline of members and provides the option of alternative dispute resolution. Sections 75(5)(c) and (7) require Board approval of a resolution arrived at through this process, otherwise the matter is referred to the Discipline Committee.

> 75. Disciplinary Procedure
> (5) The Senior Medical Officer and the Department Head shall review any report with the member and may following discussions with the member:
> ...
> (c) with the consent of the member utilize the an [*sic*] alternative dispute resolution process(es) to deal with the matter; or
> ...
> (7) Where the matter is resolved through an alternative dispute resolution process, the matter and the proposed resolution shall be reported to the Board for its consideration. In the event the Board does not adopt the proposed resolution, the Senior Medical Officer shall refer the complaint to the Discipline Committee.

[72] Bylaw ss. 101 and 102 are also pertinent and read as follows:

> 101. Alternate Dispute Resolution Process

> With the consent of the parties, and without restricting the final authority and discretion of the Board on matters falling under Parts V, VI, VII, VIII, and IX of these Bylaws, the parties to proceedings under Parts V, VI, VII, VIII and IX may agree to an alternative dispute resolution process where the circumstances warrant.
>
> 102. Right of Appeal
> Nothing in these Bylaws limits or restricts any right of appeal or other legal recourse, which is available to an individual pursuant to *The Regional Health Services Act* and regulations, or any other applicable law.

[73] The interpretation of the legislation is guided by the principled approach to statutory interpretation adopted by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21:

> 21 Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This principle was restated in the recent decisions of *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at para. 64 and *Re: Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, 347 D.L.R. (4^{th}) 308, at paras. 32 and 33.

[74] The grammatical and ordinary meaning of the words in s. 45 would suggest the respondent's complaint could fall within any or all of the situations contemplated in that section. The Agreement references the consideration being a written reprimand. It deals with his appointment to the practitioner staff and also with the revoking of his hospital privileges. The disciplinary process set out in the Bylaws provides an option of alternative dispute resolution within the spectrum of options ranging from finding the complaint was unsubstantiated and thus not warranting further steps through to a direct referral to the Discipline Committee. Assuming the alternative

dispute resolution process results in agreement, the discipline process is not ended because the agreement still requires Board approval. If the Board does not adopt the resolution, the complaint must then be referred to the Discipline Committee. Thus the signing of the Agreement is still part of the disciplinary process at least until Board approval. After that stage I see no provision in the Bylaws which provides that Board approval changes the nature of the Agreement from one of being an option in the disciplinary process to one which stands alone divorced from the disciplinary process.

[75] I note, as an aside, this case is differentiated from *Kutzner* because here the Tribunal had to decide whether it had the authority to hear the appeal, whereas in *Kutzner* the true issue was whether or not the doctors' privileges were changed in a way which amounted to their amendment, suspension or revocation – clearly an issue to which jurisdiction had been granted to the Tribunal by s. 45 of the *Act*.

[76] The Tribunal analyzed the legislation and Bylaws and came to the conclusion s. 45(1) of the *Act* gave it jurisdiction and s. 102 of the Bylaws precluded a limiting by agreement of the respondent's right of appeal. It found the Board had approved the Agreement (s. 75 of the Bylaws) and thus it was a decision of the Authority – a prerequisite to the operation of s. 45(1).

[77] I am satisfied the Tribunal was correct in finding it had jurisdiction and thus, although the Chambers judge was in error in determining the standard of review on the jurisdictional issue to automatically be the reasonableness standard, in the end it is of no consequence on this issue as the result is the same as found by the Chambers judge.

examined the statutory scheme for its analysis of the first two factors. The *Act* does not contain a privative clause but as pointed out in *Kutzner* the fact the *Act* does not contain a privative clause does not necessarily lead to the application of the correctness standard (para. 31). The court then turned to consider the second factor and found on analysis the Tribunal had the specialized knowledge base and level of expertise with respect to issues falling within its mandate thus suggesting the reasonableness standard of review is appropriate. Thus the issue of the Tribunal's expertise has been decided. It went on to find in that case the issue to be decided fell within the scope of the Tribunal's mandate and engaged its expertise. As this case differs from *Kutzner*, an analysis regarding whether the issue in this case falls within the Tribunal's mandate is necessary.

[81] The appellant says the nature of the issue is the contractual interpretation of clause 9 of the Agreement which is outside the Tribunal's area of expertise. The respondent says the decision taken by the Authority to accept the letter of resignation, to terminate the respondent's appointment as a member of the Practitioner Staff and ultimately to revoke his privileges are disciplinary in nature clearly covered by the provisions of s. 45(1) and thus the issue is within the expertise of the Tribunal.

[82] The Chambers judge does not state which characterization he chooses but it must be assumed, because he chose the reasonableness standard, he preferred the characterization of the respondent and the matter is one within the expertise of the Tribunal.

III. DECISION ON THE ADR AGREEMENT

[78] Having determined the Tribunal had jurisdiction, I now turn to the appeal on the issue of the terms of the Agreement. The essential issue is whether the Agreement itself was carried out in a fair manner. The Tribunal found it was not and the Chambers judge found this decision not unreasonable. As set out above, the Tribunal's *de novo* decision was based firstly on its determination the September 27, 2010 triggering event was not a sufficient basis on which to accept the letter of resignation given the serious consequences facing the respondent; and secondly on its finding the Authority did not provide the respondent with adequate opportunity to both address and correct his patterns of disruptive behaviour.

[79] The Chambers judge did not conduct a standard of review analysis on this issue and simply applied the reasonableness standard. Given the appellant argued for a standard of correctness and the respondent argued for a standard of reasonableness, the *Dunsmuir* factors must be considered to determine the appropriate standard. The factors set out at para. 55 of that decision are as follows: the presence or absence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and, the nature of the question of law to be decided. The court in *Dunsmuir* also makes it clear an exhaustive review is not required in every case to determine the appropriate standard of review and one can rely on the existing jurisprudence (para. 57).

[80] The first two factors in *Dunsmuir* are specific to the statutory scheme and not the facts of the specific case. Thus, I again turn to *Kutzner* which

[83] I am satisfied the respondent's characterization is correct and thus the standard of review is reasonableness. The basis of the respondent's complaint was that the Authority should not have accepted his letter of resignation. The Tribunal at para. 2 of its decision states:

> Dr. Dewar asserts that the acceptance of his resignation was triggered inappropriately; the Authority inadequately investigated concerns with Dr. Dewar's behaviour; the Authority failed to provide Dr. Dewar with sufficient opportunity to comply with the Agreement; and, the Authority failed to consider relevant facts and criteria in deciding to accept his resignation.

[84] The appellant contends a plain reading of the Agreement grants the three designated individuals the absolute discretion to make the determination whether to accept the letter of resignation.

[85] The respondent responds the requirement to conduct an investigation was implied in the Agreement. Section 75(4) of the Bylaws refers to investigation and reads:

> 75(4) The Senior Medical Officer may consult with the appropriate Department Head and determine whether a further inquiry or investigation is necessary, and may make such initial inquiry and investigation as deemed necessary and may delegate to others, including external consultants, the conduct of such inquiry and investigation.

[86] The *Act* and the Bylaws clearly provide that the disciplinary process is a serious one with serious potential ramifications. The provisions in the Bylaws respecting discipline are extensive, including provisions: ensuring the complained of member has reasonable opportunity to respond to any complaint (s. 75); providing the option of an alternative dispute resolution process (s. 75); and, allowing the member to examine any written information or reports provided or obtained in relation to the complaint and allowing the

member to be represented by counsel with a right to call and cross-examine witnesses (s. 79). The Discipline Committee proceedings must be transcribed and a recording of the proceeding be kept in the minutes (s. 80), and finally, the Bylaws provide that nothing in the Bylaws limits or restricts any right of appeal or other legal recourse available to the individual pursuant to the *Act*, *Regulations* or any other applicable law (s. 102).

[87] In my view, the Tribunal's decision finding a proper investigation ought to have been carried out recognizes that a proper investigation fits within the scheme of protections set out by the *Act* and Bylaws and was not unreasonable.

[88] I find as well the finding the Tribunal acted not unreasonably when it determined the September 2010 incident was insufficient to trigger the resignation was reasonable. The respondent's past history of disruptive behaviour was not in issue. On cross examination the Senior Medical Officer testified:

> Q Okay. So the triggering incident is limited to just the Dr. Vorster incident, right?
>
> A Yes.

Had the respondent's past history of disruptive behaviours been before the Tribunal its finding may well have been unreasonable, but the decision to accept his resignation was based only on the September incident.

[89] With regard to the Tribunal's ruling on the investigation, the Tribunal had conflicting testimony as to whether the respondent needed to attend the SICU. It found the evidence did not support a finding the respondent did not

communicate his intention to return his patient to the operating room. Nor was the Tribunal prepared to attribute any confusion -- if there was any -- to the respondent. Given the serious consequences which could befall the respondent, and as it was only this incident in issue, the Tribunal's finding the incident was not properly investigated was not unreasonable.

[90] A stated purpose of the Agreement was to provide the respondent with further opportunity to address and correct his pattern of disruptive behaviour. There was testimony before the Tribunal from the Senior Medical Officer that she would not expect improvement overnight and rehabilitation takes time.

> Q And would you agree with me that it wouldn't be realistic to expect improvement immediately or, as my client has phrased it, overnight?
>
> A I would not expect improvement to occur overnight.
>
> Q You said in your examination-in-chief that the best -- one of the best practices, as far as dealing with disruptive behaviour of physicians is concerned, is to provide for rehabilitation, correct?
>
> A Yes.
>
> Q And that takes time?
>
> A Yes.
>
> Q Do you know what the typical time frame is for rehabilitation or behaviour modification in instances like this?
>
> A I think it varies.
>
> Q From what time to what time?
>
> A I do not have a span of time that I could give you. I could give you anecdotal examples from instruction I've taken where it can range from one month to 24 months to never. There is a potential for it never being rehabilitated, so it's quite a wide range.

[91] The findings by the Tribunal the respondent was not given a reasonable opportunity to correct his behaviours and that the September incident was not

properly investigated were not unreasonable and the Chambers judge was correct in so finding.

[92] The appeal therefore is dismissed with costs in the usual manner.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of January, 2013.

"Lane J.A."
Lane J.A.