IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *LABOUR RELATIONS CODE*, R.S.B.C. 1996, c. 244

BETWEEN:

BRITISH COLUMBIA NURSES' UNION

(the "Employer")

AND:

MOVEUP
C.O.P.E., LOCAL 378

(the "Union")

(J. Ford Grievance)

ARBITRATOR:	Christopher Sullivan
COUNSEL:	Ritu Mahil for Employer Allan E. Black, Q.C. and Rebecca L. Klass for Union
DATE AND PLACE OF HEARING:	August 1 and 2, and December 11 and 12, 2017
PUBLISHED:	March 16, 2018

17025

The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a grievance filed by the Union on behalf of Janice Ford, alleging unjust discharge. Ms. Ford was terminated from her employment on January 27, 2017 after the conclusion of an investigation into two complaints against her under the Employer's Respectful Workplace Policy.

The letter of discharge, signed by the Employer's Senior Director, Human Resources & Operation, Colleen McFadden, outlines the grounds upon which the Employer based its decision to discharge the Grievor:

> Dear Janice,
>
> As you know, you were suspended with pay on December 8th, 2016, pending investigation into allegations of a serious breach of the respectful workplace policy which included conduct during the labour dispute and your actions on July 4th, 2016 and August 9th, 2016.
>
> During your suspension, an independent review into your conduct was undertaken by investigator Marli Rusen. You met with Ms. Rusen on December 19th, 2016 with your Union representative.
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> We are now in receipt of the findings of the independent review. We are particularly troubled by the fact that during the investigation you did not express any remorse about the impact of your conduct on your colleagues or superiors, nor were you able to acknowledge the inappropriateness of your actions. It is also disturbing that you showed disregard for Employer policies, engaged in intimidating and harassing behaviour and demonstrated a lack of respect for your supervisor.
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> Taking all factors into consideration, including the fact that you had formal training regarding our respectful Workplace Policy on May 6th, 2015, we have no choice but to terminate your employment for cause effective Friday, January 27th, 2017.

The general background circumstances surrounding the grievance may be summarized as follows. The Union is certified as the bargaining agent for bargaining

unit members employed by the Employer. The Grievor was a full-time regular employee who worked in the Employer's membership department. The Grievor worked for the Employer and its predecessor, the Union of Psychiatric Nurses (UPN) since about June 2005 as a clerical worker. She commenced working for the Employer in 2015 following a merger with the UPN.

The parties' current collective agreement is for the term January 1, 2016 to December 31, 2022. Their previous collective agreement for the period January 1, 2011 to December 31, 2015. The Grievor was an active and engaged Union member, who as a shop steward and also sat on the Union's collective bargaining committee during the most recent round of bargaining.

It was during periods that the Grievor was actively engaged in supporting her Union's endeavours at collective bargaining with the Employer that she was alleged to have misconducted herself. The letter of discharge specifically mentions the Grievor's conduct during the labour dispute. The "actions on July 4" relate to the Grievor's conduct during a staff meeting convened by the Employer to address collective bargaining. The "actions on August 9" referred to in the discharge letter occurred while the Grievor, together with her husband, followed a manager in seeking to ascertain where the Employer was performing its work during the labour dispute, as it was not performing it at its offices, but rather at various locations, including a hotel on this particular day.

At these proceedings the parties called evidence in support of their respective positions. The Employer called Senior Director Ms. McFadden; Manager of Library, Records, Building Services and Membership, Melody McGowan; and Human Resources Manager Debbie Gee. The Union called the Grievor and her husband, Darryl Fleming, and also Union Representatives Ryan Stewart and Cindy Lee.

Ms. McFadden testified in support of the discharge letter she signed. Ms. McFadden described the circumstances relating to the July 4 and August 9 complaints against the Grievor, and also the investigation process utilized that led to the decision the Grievor's employment was not viable.

Ms. McFadden acknowledged it was her email to staff at 10:32am on July 4 that informed employees to attend a meeting that day for the Employer. The email, which did not include any reference about the subject matter and was not copied to the Union, provided as follows:

> To: MoveUp staff meeting today
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> Please note there will be a staff meeting for MoveUp staff today at 2:00 pm in Room 170/171. All MoveUp staff who are working today are to attend. For those on vacation or leave, you are not required to attend but may do so if you choose. For those of you in the Victoria and Kelowna offices we will send instructions on how to call into the meeting. Thank you.

Ms. McFadden recalled the purpose of the Employer's July 4 meeting was to inform employees what was going on at collective bargaining and a few other matters. Ms. McFadden noted staff was encouraged to ask questions at the meeting. The Grievor had a few questions, speaking about five or six times, and most of her comments were to the effect that the Employer was, in her view, engaging in an unfair labour practice. Ms. McFadden described the Grievor as rude, disrespectful and loud.

The July 4 Respectful Workplace complaint against the Grievor was filed by the Employer's then General Counsel and Director of Member Services, Umar Sheikh on July 7. The complaint provides in part:

> During a staff meeting with management and MoveUp staff, Ms. Ford frequently and consistently interjected and interrupted while I was

> explaining to the staff where we were at with bargaining. Ms. Ford's comments were loud, rude and disrespectful, often interrupting while I was speaking. I found the behaviour to be beyond acceptable and falling under the definition of personal harassment in our Respectful Workplace Policy (5.2.4)….
>
> As a result of the above incident(s), I experienced the following consequences:
>
> > I felt disrespected, challenged and personally attacked. I felt it was disrespectful not only to me in my position as a Director, but to me personally.

The witnesses named by Mr. Sheikh in his complaint were Ms. McFadden, and also the Employer's Manager of Human Resources, Debbie Gee. The complaint document noted no action had been taken against the Grievor as she "is on the bargaining team and will await third party investigation." Mr. Sheikh indicated he wished the matter to proceed with a "formal" resolution method, as opposed to an "informal" one.

At these proceedings Ms. McFadden testified she observed the Grievor's conduct at the July 4 meeting and agreed with the allegations contained in Mr. Sheikh's Respectful Workplace complaint, adding Mr. Sheikh at all times acted in a polite and respectful manner towards the Grievor and others.

The Respectful Workplace complaint against the Grievor in relation to conduct that occurred on August 9, 2016 was made on August 12 by the Employer's Manager of Library, Records, Building Services and Membership, Melody McGowan. Ms. McGowan was the Grievor's manager at the workplace. Ms. McGowan's complaint arose after the Grievor, with her husband, Darryl Fleming, followed Ms. McGowan in Mr. Fleming's vehicle to ascertain where the Employer was performing its work. Ms. McGowan was assigned by the Employer to pick up its mail at a postal outlet on Norland Avenue in Burnaby.

Ms. McGowan's Respectful Workplace complaint stated, in part, as follows:

> (Between 8:50 am to 9:15am) Janice began her watching of me and my activities. The vehicle in which Janice was in began following my car. The vehicle Janice was in made a very obvious attempt to watch me and wait for my car to continue on its way. She tried to hide her face from me so I wouldn't know who it was….
>
> Initially, I was very upset and shaken. It took several hours to calm down to normal. For the next couple of days every time I re-told or as I wrote down the events, I began to shake again. Since then I am very cautious and nervous of my surroundings when I drive. I constantly look around me and am worried that someone is following me or watching me.

The complaint form filed by Ms. McGowan also indicated she had contacted the police and had filed a report with them. The form noted Ms. McGowan sought to "be assured that this will not occur again. Need to consider how I will be able to work with this person as she is a direct report to me in my membership team." On the complaint form Ms. McGowan noted she had filed a report with the police and that she sought to proceed with her Respectful Workplace complaint in a "formal" dispute resolution manner, rather than an "informal". Ms. McGowan attached to the complaint form a two-page typed document that outlined the August 9 incident in greater detail.

Ms. McFadden testified she saw Ms. McGowan when the latter attended the hotel where the Employer was conducting its business on August 9, and she observed Ms. McGowan was "clearly upset and shaking" about the incident. Ms. McFadden stated she believed Ms. McGowan's Respectful Workplace complaint had merit because she saw the impact of the Grievor's behaviour on her.

On December 8, 2016 at the conclusion of the labour dispute, Ms. McFadden placed the Grievor under a paid suspension pending the outcome of the complaint

investigations. Due to the nature of the allegations Ms. McFadden contacted a third party to conduct an investigation of the complaints, and this occurred, with the investigator issuing a report to the Employer on January 25, 2017, which found the Grievor's conduct on July 4, 2016 to be "disrespectful" but did not constitute harassment, but that her conduct on August 9 did constitute harassment. Ms. McFadden recalled the report indicated the Grievor did not express remorse or an apology for her behaviour.

Ms. McFadden testified that given all of the circumstances, particularly the findings of the investigator, she felt discharge was appropriate. She added it would be difficult to return the Grievor to the workplace, particularly with Ms. McGowan as her supervisor. She accepted the Grievor had committed harassment and meant to intimidate, and that she showed no remorse for her conduct, nor any insight into her misbehaviour.

Ms. McFadden also testified that she had reviewed the Grievor's Facebook page during the strike whilst seeking to "get a pulse of what was going on and to hear what people were saying" and noted the Grievor was "antagonistic" in her entries, and also included a picture of the Employer's Provincial Executive and Regional Council that the Council found to be particularly distasteful.

Ms. McFadden also gave evidence regarding the Employer's investigatory process, which involved the hiring of a third party who conducted interviews and issued a report to the Employer. She noted she had written twice to the Grievor about the complaints while the labour dispute was occurring but had not received a timely response from her.

Ms. McGowan was called as a witness and she gave evidence consistent with the Respectful Workplace complaint she filed against the Grievor. Ms. McGowan testified she went to obtain the Employer's mail from the postal outlet on or near Norland at about 9:00am as per an established arrangement, but her contact at the postal outlet was not

around at that time. Ms. McGowan stated much of the Employer's mail contained time sensitive material such as that, for example, relating to its' members workers compensation claims. Ms. McGowan then left the postal outlet as her contact was not there at that time and she intended to return in an hour or so. Ms. McGowan noted a truck following her, driven by a man she did not recognize, and she remained in her vehicle and made a left turn onto Douglas Road, followed by a turn onto Laurel, then a right on Canada Way and another right on Beta Avenue, which dead ends.

Ms. McGowan testified she did not recognize the truck or the person following her and that she felt really stressed and scared. Ms. McGowan ultimately drove up and stopped beside the truck that was pursuing her when it had come to a stop, and Ms. McGowan viewed a man she had never seen before. Ms. McGowan also saw in the truck a pony-tail, and then the Grievor lifted her head up. Ms. McGowan recognized the Grievor and described this as shocking to her. She waved at the Grievor and the Grievor sheepishly waved back. Ms. McGowan then drove away and continued to be followed by the Grievor and her husband, until at some point they ceased doing so.

Ms. McGowan stated that when she finally arrived at the hotel where the Employer was operating from she was still shaken up. Ms. McGowan described what had occurred to about three or four of her management coworkers who were in attendance. Ms. McGowan testified her coworkers were in agreement that she "should probably" report the Grievor's behaviour to the police, and that she then phoned the police department and filed a full report and emailed a picture of the Grievor to the constable at the other end.

Ms. McGowan added in her evidence that she received a call one or two weeks later from the constable who said he spoke to the Grievor, and he also wanted to know if there was a recurrence, to which Ms. McGowan replied in the negative, and the complaint to the police was not pursued further. She stated that she only once performed

the task of picking up the Employer's mail during the labour dispute, and that was with her 37-year old son in attendance. Ms. McGowan added that to this day she conscientiously makes a point of checking to see if anyone is following her.

Ms. McGowan stated she has not seen the Grievor since August 9, 2016 and cannot imagine working with her again, given what occurred and the amount of time that has passed.

Under cross-examination Ms. McGowan acknowledged that prior to the August 9, 2016 incident the Grievor was a good and respectful and discipline-free employee. Both the Grievor and Ms. McGowan were members of an employee book club.

Ms. McGowan acknowledged she did not ask the Grievor when they encountered each other face to face what she was doing in following her. Ms. McGowan added that her pursuer did not engage in tailgating or speeding or turning too quickly or otherwise aggressive driving. There were no raised voices nor angry gestures such as fist waving.

Ms. McGowan stated she still has "emotional trauma" from her encounter with the Grievor on August 9, 2016 but she has not received medical attention or seen a counsellor to address such.

The Grievor gave evidence on her own behalf. She has been with the Employer and its predecessor, the UPN, since 2005 and has never previously received discipline. The Grievor is a union activist, who at the time in question was a shop steward and also on the Union bargaining committee during a very contentious round of collective bargaining with the Employer.

The Grievor described the circumstances surrounding her alleged misconduct during the labour dispute and particularly the incidents of July 4 and August 9, 2016. On

July 4 she was on a vacation day and was planning on spending the day at Cultus Lake but was notified by a coworker that the Employer was seeking to convene a meeting later that day with all MoveUp staff. The Grievor was particularly concerned because the Employer had given the Union's bargaining committee, of which she was a member, its "final offer" on June 30 and had committed to waiting until July 8 for the Union to meet with its membership and respond. It appeared to the Grievor that the Employer was reneging on its stated commitment, so she drove to the workplace and attended the meeting. On her way she telephoned her Union Representative, Brad Bastien, and informed him of the meeting.

The Grievor acknowledged she spoke forcefully against the Employer seeking to sell its "final offer" directly to employees without their Union present, and before the Union had an opportunity to meet and discuss the Employer's offer with its membership. At no time during this meeting was the Grievor asked to talk or conduct herself in a different manner. The Grievor did not call Mr. Sheikh a "liar" but made it clear she felt the Employer was crossing the line in trying to sell its "final offer" to the staff without allowing for the Union to discuss it as the Employer had committed to. The Grievor noted the Employer during this quickly convened staff meeting presented a "final offer" that was slightly enhanced from the one it had presented to the Union on June 30, and this caused her further concern.

Regarding the August 9 incident, the Grievor stated she and her husband, Darryl Fleming, sought to find out where the Employer was performing its business by waiting at the postal outlet and observing whether an Employer manager came and picked up the mail. Mr. Fleming was the driver and they were in his truck. The Grievor described having seen Ms. McGowan parked in her vehicle in front of the postal outlet, and then following her to ascertain the Employer's work location. The Grievor stated she was not purposely hiding from Ms. McGowan when Ms. McGowan pulled up to Mr. Fleming's vehicle, but was seeking to get her cel phone that was in her purse/backpack on the floor

in front of her. The Grievor stated Ms. McGowan showed no indication she was fearful. The Grievor added that neither she nor her husband were ever contacted by the police to discuss the incident.

The Grievor observed there was a collective bargaining session on August 12 and at this meeting the August 9 incident was not mentioned at all. The first time the Grievor ever heard about it was when she received Ms. McFadden's notice of a complaint regarding her conduct on September 2, 2016. The Grievor added she could have been notified earlier as she was readily accessible because she was on the picket line most days, nights and weekends for the period in question.

The Grievor also gave evidence to the effect that the discharge has impacted her negatively in a number of ways.

Mr. Fleming's evidence corroborated that of the Grievor regarding the August 9, 2016 event. Mr. Fleming stated he did not at all drive in a dangerous manner – no speeding, quick lane changes, tail gaiting – or make any untoward gestures. He supported the Grievor's claim that she was picking up her cel phone when Ms. McGowan pulled up to his vehicle while they were parked on Beta Avenue. Mr. Fleming added that he was available to be interviewed by the Respectful Workplace investigator but was not asked.

The relevant portions of the Employer's Respectful Workplace policy that define certain wrongful behaviour are as follows:

> Harassment may involve one or a series of incidents involving unwelcome comments or actions based on the legally protected characteristics under the BC *Human Rights Code* or on other factors which a person knows or reasonably ought to know would cause intimidation or humiliation to another individual or group.

> Personal harassment is workplace harassment based on factors, other than those set out in the BC *Human Rights Code*, consisting of: behaviours, non-verbal behaviour and communication (i.e.: gestures, facial expressions, gossip, comments, questions, representations, etc.) which the harasser knows or should reasonably be expected to know – may humiliate or intimidate the Employee, excluding behaviors that serve a legitimate work-related purpose and are carried out in a reasonable and respectable manner (e.g.: where a supervisor is engaged in legitimate, non-harassing behaviour when attempting in good faith to address or correct misconduct or poor performance).

SUMMARY OF ARGUMENTS

On behalf of the Employer, Ms. Mahil argued that the Grievor's conduct gave rise to just cause for termination from employment. She asserts that, in breach of the Employer's Respectful Workplace Policy, the Grievor sought to intimidate and harass Ms. McGowan, a member of the Employer's management staff. By ducking down and making it appear as though an unknown man was following Ms. McGowan in his vehicle, the Grievor caused Ms. McGowan to reasonably fear for her safety, causing lasting emotional distress. The Grievor knew or ought to have known her behaviour constituted intimidation and harassment.

The impact of the Grievor's actions on Ms. McGowan has made it impossible for the two to work together again. By participating in reckless behaviour and jeopardizing the safety and well-being of a member of the Employer's management staff, the Grievor has irreparably damaged the Employer's trust in her and the employment relationship cannot be salvaged.

Ms. Mahil points out that threats made in the workplace are generally regarded as serious misconduct and that threatening a supervisor in particular is grounds for discipline. The Grievor's conduct towards Ms. McGowan was threatening, intimidating and insubordinate; she created a threatening environment that caused Ms. McGowan to

reasonably fear for her safety. Ms. McGowan gave evidence that she drove in a dangerous manner to rid herself of her unknown follower creating a potentially harmful situation for herself and others.

Ms. Mahil states the Employer has an obligation to maintain a workplace free from harassment or the risk of harm. Additionally, the Employer has a right to expect that its employees follow the Respectful Workplace Policy, and to take disciplinary action when an employee is found in breach.

The Employer states the Grievor in the present case has been unrepentant, and that the employment relationship cannot be repaired. It is not a mitigating factor that the victim of assault suffers no injury where there was a significant risk. There is a presumption that discharge is the appropriate disciplinary response to an unprovoked attack, which clearly goes to the root of the employment relationship and it will only be on occasions where significant mitigating factors exist such that an employee will be spared from discharge.

Ms. Mahil notes the Grievor is an employee of only two years with this Employer, although her seniority dates back to 2005.

Ms. Mahil points out the Grievor has not showed any remorse for her behaviour. In the absence of an apology and any evidence there are promising prospects of reconciliation between the Grievor and Ms. McGowan, reinstatement would impose upon the Employer an unacceptable burden of ensuring the two are kept apart. Counsel adds this is an unworkable outcome given Ms. McGowan is the Grievor's direct supervisor and is "plainly above and beyond what BCNU management should be burdened with."

The Employer relies on the following authorities in support of its arguments: *Wm. Scott and Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1976]

B.C.L.R.B.D. No. 98; *Canadian National Railway Company v. C.A.W. (Gareau)*, [2004] C.L.A.D. No. 618 (Picher); *Doman Forest Products Ltd v. I.W.A. – Canada, Local 2171*, [1999] B.C.C.A.A.A. No. 330 (Kelleher); *Code Electric Products Ltd. v. International Brotherhood of Electrical Workers, Local 258*, (2009) 187 L.A.C. (4th) 315 (Laing); *BHP Billiton Diamonds Inc. v. Union of Northern Workers, PSAC*, (2007) 162 L.A.C. (4th) 237 (Gordon); *Fortis Energy Inc. v. I.B.E.W., Local 213*, (2015) 253 L.A.C. (4th) 342 (McDonald); *City of Kelowna v. C.U.P.E., Local 338*, (2014) L.A.C. (4th) 252 (Sullivan); *Ottawa Citizen v. G.C.I.U., Local 41M*, [1998] O.L.A.A. No. 251 (Mikus); *MacDonalds Consolidated Ltd. v. R.W.D.S.U., Local 580*, (1990) 14 L.A.C. (4th) 379 (McKee); Howe *Sound Forest Products Ltd v. I.W.A., Local 1-71*, (1996) 57 L.A.C. (4th) 100 (Fuller); *Vale Canada Ltd. v. U.S.W. Local 6500*, (2013) 116 C.L.A.S. 140 (Kaplan); *Canadian Union of Skilled Workers v. Hydro One Inc.*, [2012] O.L.R.D. No. 1548; *Chep Canada Inc. v. Teamsters Local 31*, May 7, 2014 (McConchie); *Hilton Vancouver Metrotown v. U.N.I.T.E. – H.E.R.E., Local 40*, [2010] B.C.W.L.D. 6513 (McEwan); *Rogers Cable TV (British Columbia) v. I.B.E.W., Local 213*, (1987) 16 C.L.R.B.R. (NS) 71; *Gates Rubber of Canada Ltd. v. U.R.W., Local 733*, (1978) 18 L.A.C. (2d) 412 (O'Shea); *Greater Victoria Public Library Board v. C.U.P.E., Local 410*, B.C.L.R.B. No. B10/2008; and *Telus Communications Inc. and Telecommunications Workers' Union*, [2006] L.V.I. 3683-1 (Sims).

On behalf of the Union, Mr. Black argues that none of the Grievor's conduct can be characterized as intimidating or harassing as alleged by the Employer, and that the Employer has recklessly applied those terms. Counsel states the Grievor at all material times was acting in her capacity as a Union official for legitimate labour relations purposes, and it is within this context her behaviour must be assessed. He adds the Grievor was legitimately concerned in her role as a Union official on the bargaining team, in light of the Employer holding a "captive audience" meeting with the staff inconsistent with what it had earlier expressed to the Union. Of note, at this meeting the Employer presented a slightly different offer to the staff than it had presented to the

Union at bargaining a few days earlier. The Grievor was not the only employee to speak out against the Employer and she was not asked to leave or cease expressing herself in the manner she was doing so.

Mr. Black states the Employer's actions against the Grievor were motivated by anti-union animus. But for the Grievor's involvement with the Union she would not have been discharged. The Employer sought to rely on the July 4 complaint in its discharge letter to the Grievor, but she had been found not to have committed harassment on that occasion by the Employer's investigator. Further, the Employer did not discipline other employees who spoke out against the Employer at that meeting. Also, the Employer delayed acting on this complaint until about two months after it was made.

Mr. Black noted the Employer did not comply with the Respectful Workplace Policy's own time lines, which states a referral to "must occur within five working days after the complaint has been received at Step #2". With regard to Mr. Sheikh's complaint that was signed on July 7, it was not brought to the Grievor's attention until August 30, some 59 days later. The strike did not commence until July 22, so the Employer had plenty of opportunity to at least notify the Grievor of the complaint against her when she was still at the workplace. After July 22 the Grievor was readily available as she was on the picket line. Despite Ms. McFadden's allegation that the Grievor did not reply to her in a timely manner, it is clear the Grievor had her Union Representative, Ryan Stewart, legitimately do so on her behalf, and he did in fact reply in a timely manner.

Mr. Black argues Ms. McGowan's testimony is not credible regarding the events of August 9, 2016 and in particular her allegation that she has suffered as a result of the Grievor's actions. Counsel notes that while Ms. McGowan complained to still be injured from the event, at the time in question she gave every indication she was not fearful or in shock as she pulled up beside Mr. Fleming's truck and smiled and waved at the Grievor and received a wave back. There is no basis upon which to conclude Ms. McGowan was

humiliated or embarrassed and these, Counsel asserts, are concepts the Respectful Workplace investigator accepted at face value without any critical assessment or consideration of information that might have suggested something different than what Ms. McGowan represented at that particular time. Counsel adds all Ms. McGowan had to do at the time was roll down her vehicle window, after seeing and waving at the Grievor, and ask words to the effect: "What are you doing following me?" Ms. McGowan could not explain why she did not make such an effort at the time, yet she expresses continued feelings of humiliation and intimidation, notwithstanding.

Mr. Black points out that the Grievor's actions were not premeditated and that she did not know who would be picking up the Employer's mail on August 9. Ms. McGowan knows full well the incident was not at all personal and it relates solely to the Union seeking to obtain information it is entitled at law to obtain.

In addition to a declaration that the Employer was not justified in terminating the Grievor's employment and an order for reinstatement and back wages, the Union seeks damages for violating its obligation act in a good faith and fair manner towards the Grievor, as made particularly evident by the Employer effectively dropping the matter of Mr. Sheikh's July 4 Respectful Workplace complaint from its allegations during Ms. McFadden's testimony under cross-examination at these arbitration proceedings in August 2017.

The Union cites the following authorities in support of its arguments: *Wm. Scott & Co.*, *supra*; *SSAB Swedish Steel Ltd.*, [2015] B.C.L.R.B.D. No. 12; *S v. M, G, Z*, [1995] B.C.C.A.A.A. No. 131 (Laing); *Burns Meats Ltd. and CFAW, Local P139*, [1980] O.L.A.A. No. 141 (Picher); *British Columbia (Workers' Compensation Board) v. Workers' Compensation Board Employees' Union (Hawkins)*, [1990] B.C.C.A.A.A. No. 205 (Ladner); *St. Boniface School Division No. 4*, [1991] M.G.A.D. No. 75 (Schulman); *Canada Post Corp. and Canadian Union of Postal Workers (Condon)*, [2013] C.L.A.D.

No. 316 (Ponak); *Cardinal Transportation BC Inc.*, [1996] B.C.L.R.B.D. No. 344; *Simple 'Q' Care Inc.*, [2007] B.C.L.R.B.D. No. 161; *Peter Ross 2008 Ltd.*, [2012] B.C.L.R.B.D. No. 59; *Canada Post Corp. v. CUPW (Hoult)*, [1994] C.L.A.D. No. 144 (Charney); *Sun-Rype Products v. Teamsters Local No. 213*, [2008] B.C.J. No. 210; *A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway*, [1959] SCR 271; *British Columbia Automobile Association*, [1999] B.C.L.R.B.D. No. 498; *Faryna v. Chorney*, [1951] B.C.J. No. 152; and *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 SCR 701.

DECISION

In *Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98, the British Columbia Labour Relations Board articulated a three-question inquiry for arbitrators hearing discipline and discharge grievances. The first question is whether the Grievor's conduct gave rise to just cause for the imposition of some form of disciplinary sanction. If the answer to this question is in the affirmative then, having regard to all of the circumstances surrounding the grievance, was the discipline imposed excessive? If excessive, what should be substituted as just and equitable?

Careful consideration of all of the evidence supports a conclusion that the answer to the first *Wm. Scott* question is negative. By all credible accounts the Grievor committed no misconduct in relation to the matters that gave rise to her termination.

The substantive allegations made by the Employer against the Grievor are contained in the discharge letter, and wrongdoing not been established on the evidence in relation to any of the matters raised. The preponderance of credible testimony supports a conclusion that the Grievor did not engage in intimidating and harassing behavior, she did not show a lack of respect for her supervisors, nor did she show disregard for

Employer policies. On balance, the evidence supports a conclusion that the Grievor, a senior employee with no prior discipline on file, was the subject of complaints without merit. Her conduct was not properly assessed within the real-life context within which it occurred, with the Grievor as a Union official during an acrimonious labour dispute.

The Employer's allegations against the Grievor include reference to her not responding to correspondence from the Employer regarding the Respectful Workplace complaints against her at the end of August and the beginning of September 2016, and also to some of her Facebook postings during the labour dispute. Suffice it to observe, the Employer's allegations of wrongdoing are not supported in relation to these topics. Of note, Mr. Sheikh's July 7 Respectful Workplace complaint was not brought to the Grievor's attention until about fifty-nine days after the July 4 incident occurred, contrary to the 5-day requirement in the Respectful Workplace policy. Of note, Ms. McFadden's correspondence to the Grievor on August 30 and September 2, 2016 notifying her of complaints regarding her conduct on July 4 and August 9, respectively, was replied to promptly by the Grievor's Union representative, Ryan Stewart, on September 7, 2016.

In *S v. M, G, Z*, [1995] B.C.C.A.A.A. No. 131, Arbitrator Heather Laing made the following observations about complaints of harassment:

> I do not think that every act of workplace foolishness was intended to be captured by the word harassment. This is a serious word, and to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish works, where the harm, by any objective standard, is fleeting. Nor should it be used where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can be fairly said "you should have known better."
>
> …

> There is one more dimension that should be addressed. As I stated earlier in this award, harassment is a serious subject and allegations of such an offence must be dealt with in a serious way, as was the case here. The reverse is also true. Not every employment bruise should be treated under this process. It would be unfortunate if the harassment process was used to vent feelings of minor discontent or general unhappiness with life in the workplace, so as to trivialize those cases where substantial workplace abuses have occurred. The first responsibility of people in the workplace is to work out their own differences for themselves, if they can. If they cannot, and the threshold test of serious action with significant consequences is met, this process can and should be invoked where harassment is legitimately believed to have occurred. Otherwise, the process could itself be used as a means of obtaining vengeance against petty irritants or trivial concerns. (at paras 231 and 248)

These words have application to the present case and give context to the allegation of harassment and intimidation filed by Ms. McGowan, and also to the complaint of Mr. Sheikh. It appears it was nothing particular that the Grievor did that caused concern for Ms. McGowan, over and above seeing her and then following her. Indeed, if Ms. McGowan was in fact in such an emotional and mental state where the Grievor's relatively benign actions caused her the relatively serious effects claimed, one must wonder why she was tasked with the duty of picking up the Employer's mail during a labour dispute to deliver it to the place, outside of its own offices where the Employer is conducting its business, including the performance of bargaining unit work such as mail handling and internal delivery.

Particularly given the prevailing circumstances involving a challenging labour dispute, the Grievor's actions cannot be viewed as inappropriate and she cannot therefore in any way be penalized for being unwilling to acknowledge as much, nor for not expressing remorse. Of note on this latter point the Grievor was never informed until Ms. McGowan gave evidence at these proceedings that she felt adversely affected by her encounter with the Grievor on August 9, 2016, as no particulars were previously provided in advance of the arbitration hearing to the Union or the Grievor on this point. It remains

open as to whether the Grievor would have apologized to Ms. McGowan if she knew the latter had in fact been disturbed by the event and had an opportunity to confirm it was not at all a personal matter but rather one that related solely to the labour dispute they were on opposite sides of.

Of significance, at all relevant times the Grievor was a member of the Union's negotiating team and she was also a shop steward. The Employer was aware of her Union involvement particularly as she was elected as one of three members of the Union to function on the Union's negotiating team, and in that capacity she attended all negotiating committee meetings as well as all bargaining sessions with the Employer.

The law recognizes a certain amount of protection for union officials acting in their official capacity for legitimate labour relations purposes, and I accept the Grievor in the present case is entitled to such protection in the present case.

In *Workers' Compensation Board v. Compensation Employees' Union (Hawkins)*, [1990] B.C.C.A.A.A. No. 205 (Ladner), the board canvassed the law regarding immunity for union officials acting in their official capacity. The board quoted from the leading authority in *Burns Meats Ltd. and Canadian Food & Allied Workers, Local P139,* [1980] O.L.A.A. No. 141 (Picher), which included the following observations that reflect on the reality of being at the front lines of often heated contentious issues between the Employer and the Union:

> A chief steward often operates within a political process. Elected by his fellow employees, he (she) may be required one day to speak harsh words to management to employees in an effort to inform or rally them. He may posture in his communication both with management and with the employees. In that he is not unlike other elected officials.
>
> While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make

> after working hours, it is clear that an employer cannot hold employees to a standard of unquestioning loyalty especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company and its officers, and do so in valid and unflattering terms. Being at the forward edge of encounters with management, the shop steward becomes particularly vulnerable in the area of discipline….
>
> If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer.
>
> The statements of union stewards must be protected, but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute license or an immunity from discipline in all cases. A steward who openly exhorts employees to participate in an unlawful strike obviously cannot expect that his union office will shield him from discipline for his part in engineering the breach of both a collective agreement and the *Labour Relations Act*…. Similarly, a steward may not use his union office and a union newsletter to recruit and direct employees in a deliberate campaign to harass a member of management…. Conduct so obviously illegal or malicious is outside the bounds of lawful union duty and can have no immunity or protection.

In *St. Boniface School Division No. 4*, [1991] M.G.A.D. No. 75 (Shulman), the arbitration board found the union official immunity extended to include members of the union's bargaining team.

This recognized protection certainly covers the Grievor's conduct at the July 4 meeting where she challenged the Employer's attempt to effectively go behind the Union and deal directly with its employees regarding collective bargaining matters. In context, the Employer called the meeting on July 4 after having told the Union on June 30 that it would give the Union until July 8 to meet with its membership and respond. At no time

between June 30 and July 4 did the Employer inform the Union that it was going to go back on its assurance.

Of particular significance is the fact the Employer presented something different to its employees on July 4 meeting than had been presented as a "final offer" to the Union at their June 30 bargaining session, specifically in relation to Article 5.04, a significant provision pertaining to Casual employees. The newer July 4 document included a subsection (e), which the June 30 document did not. Subsection (e) gives Casuals who work for more than six consecutive full-time months the option of receiving a variety of benefits, rather than 12% of gross earnings under Article 5.04(c).

It cannot be surprising that given this context the Grievor, as a member of the Union bargaining committee, would have been taken aback, and responded with some amount of force. The Employer appeared to be trying in a covert way to set up a meeting with MoveUp bargaining unit members. The Employer had not identified the purpose of the meeting on the email requiring attendance and it had not informed the Union it was effectively resiling from its June 30 commitment to allow the Union to discuss the matter with its membership before getting back to the Employer on July 8.

The Grievor's concern is clearly evident in the minutes of the July 4 meeting, which indicate the first time the Grievor spoke was after the Employer started to discuss its bargaining proposal with staff, contrary to what it had indicated to the Union on June 30. The Grievor commented: "This is starting to cross the line. We haven't met with our membership yet. You are trying to sell this to our membership." Her second statement at the meeting was: "In my opinion it is an unfair labour practice, don't try to sell it to people, let them make up their own mind."

In the context of what was actually taking place the Grievor committed no wrongdoing. She was certainly not committing harassment, and her message, if it was in

fact in a disrespectful tone, had some reasonable foundation to be such, given what was occurring.

To be clear, there is some reasonable basis for the Grievor, as a Union official in the circumstances, to have been upset at what was going on, and to have responded in a forceful manner as she did.

I pause to note the Respectful Workplace complaints investigator found Mr. Sheikh's complaint did not warrant a finding of harassment, but that the Grievor acted in a "disrespectful manner". Certainly, the evidence at these proceedings supports a finding that no harassment occurred. If she was in fact disrespectful, her response must be viewed in the specific context that it took place in, and notably at no time did the Grievor's conduct reach the point where Mr. Sheikh or Ms. McFadden felt it necessary to ask her to change her tone or to stop and/or leave the meeting.

Regarding the August 9 incident, the evidence discloses the Grievor, in her capacity as a Union steward/bargaining team member during a labour dispute, was not acting inappropriately in seeking to ascertain where the Employer was conducting its business away from its office. Suffice it to observe, prior to the strike, bargaining unit members with the Union performed the tasks of sorting, stamping and delivering mail within the Employer's operation, and at the time in question this work was being performed by management staff at a secret location. The Union had a legitimate right to seek to ascertain where its bargaining unit work was being performed during the labour dispute: See *Sun-Rype Products Ltd. v. Teamsters, Local Union 213, supra*.

By all accounts neither the Grievor, nor her husband for that matter who was driving on the day in question, acted inappropriately by sitting in wait for the Employer's representative (it turned out to be Ms. McGowan that day) to pick up mail from the postal outlet, nor when they pursued Ms. McGowan with a view to ascertaining where

bargaining unit work was being performed. There was no excessive speeding nor inappropriate lane changing nor dangerous driving nor gesturing at all in this encounter.

The evidence at these proceedings appears to contrast with that before the Respectful Workplace investigator, who did not have the luxury of cross-examination by Counsel, nor did the investigator receive information from Mr. Fleming, who was available to speak with her. The evidence led at these proceedings in relation to Ms. McGowan's complaint against the Grievor does not support a finding of harassment against the Grievor.

By all credible accounts, the Grievor had no intent whatsoever to humiliate or intimidate Ms. McGowan, and it was reasonable for the Grievor to have concluded her actions would not have such an effect. Plain and simple and apparent to all including, I believe, Manager McGowan, a labour dispute was going on and she was picking up mail from the postal outlet to deliver it to the hotel location the Employer was working out of on that day. It is reasonable to assume the Union would seek to find out where its bargaining unit work was being performed during the labour dispute, and I would be surprised if this all came to a surprise to Ms. McGowan at the time in question.

Certainly, if Ms. McGowan felt personally threatened or harassed she would likely have gone directly to the hotel where the Employer was performing its work or to a police station. Ms. McGowan testified that during the time in question she could not imagine why this incident occurred, and it never crossed her mind that it had anything to do with the labour dispute. It is telling, however, that Ms. McGowan took a circuitous route to ensure her pursuers could not locate where the Employer was performing the work, and she likely did so because she did in fact realize she was being followed due to the labour dispute. Ms. McGowan tried to suggest that the reason she did not proceed directly to the hotel because she was not thinking straight due to the duress she was under is not believable. Nor is her evidence to the effect that she felt the situation warranted

filing a police report, to the extent this statement conflicts with her written report on August 9 to the effect: "When I got to the meeting spot around 9:20 am and reported what had happened, I was advised to call the police, which I did…"

As noted above, to the extent Ms. McGowan may have been known to have a particular fragility to these types of encounters she perhaps should not have been tasked with picking up the mail and delivering it back to the Employer, without detection from the Union. In any event it appears that, at best, this witness suffered an extreme overreaction to legitimate and appropriate conduct.

At the time of both incidents the Grievor was acting in her capacity as a Union official. She did not act aggressively nor in an intimidating manner. By no means did her behavior exceed what might reasonably be considered a legitimate exercise of a union function.

The case warrants a determination that the Grievor did not commit a wrongdoing that warranted any disciplinary response, certainly not discharge. She is therefore entitled to a declaration that her discharge was unjust, and an order that she be reinstated back into employment and be made whole. In arriving at this conclusion, I do not accept this is an appropriate case for an award of damages over and above a make-whole order. As can be gleaned from much of the foregoing, a labour dispute was going on and it was one that was not very tea-party like. The parties' respective behaviours must be viewed in context and such an assessment supports a determination that no additional damages ought to be assessed against the Employer in the present case.

I remit the precise remedial calculations back to the parties for resolution and I shall retain jurisdiction to resolve any dispute that may arise out of the implementation of this award, including remedy.

It is so awarded.

Christopher Sullivan