

LEGAL CODEPENDENCY: JUST CAUSE AND THE REMEDY OF REINSTATEMENT

David W. Tarasoff, with assistance from Rachel Iscove
Hastings Labour Law Office
Vancouver, B.C.

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I. Introduction

A. Prefatory Remarks

When an arbitrator concludes that an employer's decision to discharge an employee was excessive, when is an award of damages in lieu of reinstatement warranted and appropriate? Since this question was recently considered by the Supreme Court of Canada in *Alberta Union of Public Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 ("*Lethbridge*") now seems an opportune time to revisit the issue.

The remedy of reinstatement is an essential corollary of the just cause concept, and the Labour Relations Code (the "Code"), therefore, mandates its protection and continued vitality. As was said in *Westmin Resources Ltd.* (1997), 63 L.A.C. 134 (Germaine):

The forces which stimulated this transition from the common law of contract to the concept of just cause in collective bargaining law are many. They included the inadequacies of the narrow contractual basis of the common law of master and servant: see the references to Adams, Grievance Arbitration of Discharge Cases (Kingston: Queens University, 1978) in *B.C. Central Credit Union*, BCLRB Decision No. 7/80, at 35 to 38. The negotiation of seniority rights and other benefits in collective agreements also contributed. See *Wm. Scott*, supra, at 3 where the Board characterizes the effect as a form of 'tenure.' But the most important element of the distinctive legal character of the just cause concept in collective bargaining law was the in-kind remedy of reinstatement to employment. See *B.C. Central Credit Union*, at 41 to 43. (at 157)

At the same time, it is widely accepted that arbitrators have the jurisdiction to order damages in lieu of reinstatement where an employee has provided the employer with cause for discipline but where discharge is an excessive response. This has been settled law in B.C. for some 25 years.

It is also widely accepted that damages in lieu of reinstatement is an appropriate arbitral response when an employee is discharged without just cause only in very exceptional circumstances.

B. Issues

The first question addressed in this paper, therefore, is what kind of "exceptional" circumstances warrant an award of damages in lieu of reinstatement. Then, having identified what kind of exceptional circumstances might warrant an award of damages in lieu of reinstatement, the second question is whether arbitrators have indeed awarded

damages in lieu of reinstatement only in these circumstances or whether they have ordered this remedy in a broader set of circumstances and have thus expanded the application of the remedy.

C. Conclusions

The conclusions drawn in this paper are these.

First, it is quite seldom that B.C. arbitrators fashion an award of damages in lieu of reinstatement, and that is in keeping with the exceptional nature of the remedy.

But when they do, it is (with respect) too often the case that the award is based on circumstances which are not exceptional in the sense contemplated by the Labour Relations Board in *B.C. Central Credit Union*, B.C.L.R.B. No. 7/80, [1981] 2 W.L.A.C. 132 (upheld on reconsideration, B.C.L.R.B. No. 299/84). The “exceptional circumstances” contemplated by the Labour Relations Board are in the nature of extraordinary intervening events such as a plant closure or the grievor’s retirement. The “exceptional circumstances” envisioned by the Labour Relations Board that might warrant such an award do not include acrimonious workplace relationships or the probability that the grievor will again engage in misconduct in the future. Factors of that type either support the decision to dismiss or they do not. If they do not, then reinstatement is appropriate.

The award fashioned in *Lethbridge* is based upon facts and circumstances which *B.C. Central Credit Union* says are exceptional and support such an award. The decision of the Supreme Court of Canada upholding the arbitration award does not mandate a more expansive or liberal application of the remedy in this province.

The law and policy articulated in *B.C. Central Credit Union* is the law in B.C.

And yet, as we will see, many awards in which damages are awarded in lieu of reinstatement are based upon factors of that sort. It is submitted that these awards are not consistent with the principles expressed or implied in the Code.

II. What Kind of “Exceptional Circumstances” Warrant Damages in Lieu of Reinstatement?

This question is answered with reference to the decisions of the Labour Relations Board in *B.C. Central Credit Union* and the judgment of the Supreme Court of Canada in *Lethbridge*.

A. Decision of the Original Panel in B.C. Central Credit Union

The original panel was asked to review an arbitration award concerning an employee who was discharged for insubordination. Arbitrator McColl concluded that discharge was excessive in the circumstances, but he declined to order reinstatement. According to a

summary of the award published at [1979] 1 W.L.A.C. 518, the arbitrator concluded as follows:

With the exception of dismissal, discipline is normally administered where there is an indication that an employee will benefit from it. While discharge was excessive, reinstatement would not be appropriate in this case. The grievor did not have a record of long service and it appeared that he would ultimately have been dismissed due to his work performance.

The grievor had lost an income of \$1,125. It was determined that his employment would not have continued beyond three months and he was awarded \$3,300 (at 520).

(The award is also summarized at some length by the original panel in B.C.L.R.B. No. 7/80.)

On review under s. 108 of the Code, the original panel remitted the case back to the arbitrator on these terms:

In addition, however, we have concluded that the award is inconsistent with the principles of the Code in its approach to the determination of the appropriate measures to be substituted for a discharge which was an excessive response by the employer to the grievor's conduct. While the arbitrator is to be commended for attempting a creative solution intended to provide for a final and conclusive settlement of the difference between the parties arising out of Kraemer's discharge, his award addresses this issue in a manner which fails to recognize the full impact of the just cause concept in collective bargaining law, the concept which is incorporated into the Code by virtue of s. 93(1).

A fundamental feature of the just cause concept is its recognition of the expectation of continued employment and its preservation of the employment relationship if that is a result compatible with the interests of both the employer and the employee. It is well settled that, having determined that the grievor provided the employer with just cause for some form of discipline, the arbitrator must then determine whether, in all of the circumstances of the grievor's employment relationship, the decision to discharge was an excessive response on the part of the employer. The determination that the discharge was excessive means that, having regard to the interests of all of the parties, the employment relationship should not be terminated. Having reached such a conclusion, and if the relationship is capable of being restored, it is then the arbitrator's further obligation to devise and substitute for the discharge such other alternative measures which are appropriate in light of the grievor's conduct and which are consistent with the finding that the discharge was excessive. In order to be consistent, the alternative measures substituted by the arbitrator should include an order for reinstatement. The terms upon which that reinstatement is to be effected are, of course, for the arbitrator to decide. Thus, the award under review is remitted to the arbitrator for his further deliberation and further award premised upon these principles of the Code.

Nonetheless, the original panel concluded that arbitrators do indeed have jurisdiction to order damages in lieu of reinstatement in some limited circumstances:

We are obliged to conclude that in some circumstances the authority to award monetary compensation as an alternative to a discharge which was excessive is indispensable if an arbitrator is to finally and conclusively settle a difference arising out of that discharge. Although other examples can be identified and we will attempt to do so in the next part of this decision, it is necessary to refer to only one set of hypothetical circumstances in order to illustrate the reasons for our conclusion. Consider, for example, a grievor whose job has been eliminated since the date upon which he was discharged. Assume, in addition, that the job has disappeared permanently due to the closure of the employer's operations. It is the union's contention that in such circumstances, even though there is no work for the grievor to perform for the employer, an arbitrator who

concludes that the grievor's dismissal was excessive is obliged to substitute a lesser penalty, the terms of which would include reinstatement. The union says that upon reinstatement the employer could then sever the grievor in accordance with the relevant terms of the collective agreement.

We cannot accept the union's position in this regard. The notion that an arbitrator is obliged to reinstate a grievor despite the absence of any work for the grievor involves too great a measure of artificiality. Furthermore, the suggestion that an arbitrator must reinstate in such circumstances creates a substantial prospect that the dispute will not be finally and conclusively settled by the arbitrator's award. There is a real risk that the implementation of the award could lead to disputes over the application of the severance clauses of the collective agreement and the further possibility of another grievance being launched on behalf of the grievor.

The original panel continued to discuss the jurisdiction of arbitrators to make such an award at 167:

The union's submission, then, is that even though in all probability the arbitrator will find it necessary to reach a conclusion about whether the grievor would have ceased to be an employee at some point in the interim between the grievor's discharge and the arbitration hearing, the arbitrator is nevertheless obliged to include in his award an order that the employer reinstate the grievor. That submission, it seems to us, is wholly at odds with the arbitrator's mandate in s. 92 of the Code. Clearly, in order to discharge that mandate in such circumstances, the arbitrator should have regard to the necessary consequences of the events which would have intervened and should address the manner in which the collective agreement would have governed those events.

Having concluded that boards of arbitration have the jurisdiction to order damages in lieu of reinstatement, the original panel turned to the question of whether or not there are "principles implicit in the Code governing the use of that power." The original panel answered this question in the affirmative and said this:

Implicit in the just cause concept and consistent with the basic theme of the several concepts of industrial discipline which have been employed to give effect to the just cause concept is the notion that, to the extent that the employer's interest in a 'productive workplace' permits it, the employment relationship is to be preserved. Because this notion is implicit in the just cause concept, it is now a principle implicit in the Code.

...

It also follows that, having determined that a discharge was excessive, the arbitrator has implicitly found the employee's interests should prevail. The only form of an alternative measure which will give effect to those interests is one which involves the preservation of the relationship upon terms which constitute a lesser penalty.

...

If there are no factors which would render an order of reinstatement an empty and artificial result, then the arbitrator must decide the terms upon which it should be ordered which will comprise the appropriate penalty less severe than discharge.

It is for these reasons that the conclusion that a discharge was excessive but that a monetary sum of damages is the appropriate measure to replace the discharge, is obviously inconsistent with the just cause concept. There is, moreover, in any such award a striking resemblance to the common law regime permitting dismissal without cause and without notice but with a continuation of salary for the requisite period of notice.

Thus, the Labour Relations Board concluded that although arbitrators have jurisdiction to award damages in lieu of reinstatement, that power ought to be used where the remedy of reinstatement is "empty and artificial" (at 184) by reason of "events which would have intervened" (at 167).

Clearly, the reference to an “intervening event” is a reference to an event in the nature of a plant closure and not some future event which would result in the grievor’s discharge. After all, in *B.C. Central Credit Union*, the arbitrator declined to order reinstatement on the basis that the grievor would be fired in three months time anyway, but the original panel concluded that this was contrary to principles expressed or implied in the Code. So, the original panel quite clearly had something other than future employee misconduct in mind when it said that “intervening events” might render an order to reinstate “empty and artificial.”

Parenthetically, it is worth noting that in affirming that the preservation of the employment relationship is a value inherent in the just cause concept, the original panel cited a study by George Adams showing that reinstated employees enjoy a high rate of success upon their return to work (at 185-87). Similarly, in an article entitled “How Effective is Reinstatement? Evidence from Union Officials,” *Labour Arbitration Yearbook 1998*, Terry H. Wagar concludes that reinstatement is a successful remedy, particularly in unionized workplaces where the return to work is monitored and supervised.

B. Decision of the Reconsideration Panel in B.C. Central Credit Union

As noted above, the decision of the original panel was upheld on reconsideration. The Employer filed an application for review on the remedial issue:

The Employers application is an attack on the conclusions of the panel concerning the limitation on the arbitrator’s remedial authority

... counsel for the Employer argues that the panel’s analysis fails to take into account a sufficient range of interests in coming to this conclusion: (a) the fact that it is the arbitrator, not the Board, who observes the demeanour of the grievor as a witness; (b) the interests of the employees who would have to work alongside the discharged employee when he is reinstated; and (c) the Employer’s legitimate interest in having a competent workforce (at 3)

With respect to the interests of other employees, the Employer apparently cited safety concerns as a factor that might warrant damages in lieu of reinstatement:

The hypothetical example cited by counsel for the Employer concerns an employee who demonstrates that he works in a manner that endangers fellow workers. But if the employee is not capable of working safely, that surely is a case where the arbitration board is entitled to conclude that reinstatement is not appropriate. In that circumstance, it may not be possible to restore the employment relationship.

Although this passage could be taken to mean that evidence of safety concerns might warrant an award of damages in lieu of reinstatement, it is not entirely clear. In fact, given that the review panel rather emphatically upheld the decision of the original panel, this passage could well be taken to mean that safety concerns will result in a finding that discharge is not excessive, not that damages in lieu of reinstatement are appropriate. In any event, an inability to work safely might well result in a non-culpable discharge and that gives rise to certain issues, including reinstatement to an alternative position if the inability to work safely is proved by the employer.

In fact, an award of damages in lieu of reinstatement in the context of a non-culpable discharge was also at issue in *Lethbridge* and we will now turn to that case.

C. Decision in Lethbridge

The Supreme Court of Canada considered the issue of damages in lieu of reinstatement in the *Lethbridge* case. Has this judgment altered the law in B.C. as spelled out in *B.C. Central Credit Union*? Does *Lethbridge* expand the range of circumstances that might attract an award of damages in lieu of reinstatement? It is submitted that the answers to both questions is “no.”

1. Decision of the Board of Arbitration

In *Lethbridge*, the grievor was discharged from her employment as a scheduling coordinator as a result of a non-culpable inability to perform her duties to the standard set by the employer. The board of arbitration concluded that she was indeed not competent to perform her duties by reason of non-culpable inability. However, the board of arbitration also concluded that the employer did not adequately warn her that continued poor performance would result in discharge and did not endeavour to reassign her to a more suitable position before terminating her.

Generally, these deficiencies would (and should) result in an order reinstating the grievor. In *Lethbridge*, however, the board of arbitration declined to make that order. Instead, the board awarded damages in lieu of reinstatement, having found that it had jurisdiction under Alberta labour legislation to substitute other measures for discharge in a non-culpable discharge case.

Although the board concluded that the employer did not adequately warn the grievor that continued non-performance would result in loss of employment, the board also concluded that “... no amount of warning would have improved the grievor’s performance”; see para. 85 of the award at [1999] A.G.A.A. No. 103.

With respect, this is a somewhat curious finding. When a grievor continues to perform below the standard expected of her after being warned that continued non-performance will result in discharge, an arbitrator may then confidently conclude that she simply cannot (or will not) perform. That is why the employer must give the warnings in the first place. But in the absence of clear and unequivocal warnings, a finding that the grievor’s performance will certainly continue to be substandard is rather doubtful. Essentially, this approach obviates the requirement to give warnings and ignores the purpose of the warnings, namely, to ascertain if the grievor truly cannot or will not perform.

It is submitted, therefore, that this reason for declining to reinstate (i.e., that no amount of warnings would benefit the grievor) is by itself not particularly convincing and is not consistent with the B.C. approach as spelled out in *B.C. Central Credit Union*.

The board of arbitration also declined to reinstate because although the employer did not attempt to identify an alternative position for her, “... such a remedy would not provide a

lasting solution to the parties and would likely lead to further disputes in its implementation and prolong the ultimate resolution of this matter”; para. 97.

Again, it is submitted with respect that this is a somewhat problematic finding. If in non-culpable discharge cases, the employer may dispense with the search for a suitable alternative position simply because implementation may be awkward or inconvenient, the requirement is rendered meaningless. Even if the grievor’s stint in the new position is short lived, she or he may be entitled to layoff and recall rights or other rights under the collective agreement. So again, on its own, this is not a particularly convincing rationale for the decision to decline to order reinstatement and is not consistent with the B.C. approach as spelled out in *B.C. Central Credit Union*.

But there is another factor that caused the board of arbitration to order damages instead of reinstatement. The board of arbitration made the following finding:

In the months following the grievor’s termination the scheduling function was reorganized. Responsibility for scheduling was transferred to the Manager of Scheduling and Registration and the duties formerly performed by the grievor and her assistant were divided between the Manager, a Scheduling Technician, and a Facilities and Course File Technician. The college has not again attempted to have students register for both the fall and winter terms at the same time (para. 51)

This factor expressly influenced the decision to order damages in lieu of reinstatement:

The fact that the college reorganized the scheduling function and assigned the grievor’s former duties to a number of positions within the Registrar’s office is a factor which affects both our ability to order her reinstatement and our inclination to do so. We are satisfied that the reorganization of the Registrar’s office was bona fide and not simply a ploy to defeat the Union’s demands for the grievor’s reinstatement (para. 93).

It is submitted that this subsequent reorganization is much more in keeping with the kind of exceptional circumstances that might warrant an award of damages in lieu of reinstatement. The finding that the grievor’s department was significantly reorganized and that the reorganization entailed the elimination of her position is arguably the kind of “intervening event” discussed in *B.C. Central Credit Union* that might well warrant an award of that type in some cases.

2. Decision of the Supreme Court of Canada

The Union sought judicial review of the arbitration award but was not successful in the Court of Queen’s Bench. The Union was, however, successful in the Alberta Court of Appeal. The Employer then took the case to the Supreme Court of Canada.

The Supreme Court of Canada reviewed the decisions made by the board of arbitration against the standard of reasonableness.

The Court decided that the board of arbitration’s conclusion that it had jurisdiction to substitute other measures for discharge in non-culpable discharge cases was reasonable.

As for the measures that were substituted (damages instead of reinstatement), the Court noted that the authorities that were cited wherein "... jurisdiction to substitute an award of damages in lieu of reinstatement was exercised in what have been termed 'exceptional' or 'extraordinary circumstances'; para. 50. Similarly, the Court noted that:

The parties do not question the development of arbitral consensus in requiring a finding of exceptional circumstances before substituting damages in lieu of reinstatement. Rather, their focus is on the nature and scope of such circumstances (para. 52)

The Court concluded that the board's decision to award damages in lieu of reinstatement was reasonable.

A careful reading of the judgment suggests that the Court concluded that the arbitrator's decision on remedy was reasonable principally because that decision was based upon the finding that the grievor's department was reorganized and her position was eliminated. It is submitted that this is (more or less) the kind of intervening event that *B.C. Central Credit Union* says might well warrant an award of damages in lieu of reinstatement. *Lethbridge* does not, therefore, alter the law as it is articulated by the B.C. Board.

Iacobucci J. summarizes the board's decision on remedy in para. 6:

In fashioning a remedy, the board concluded that it could substitute a financial award under s. 142(2) of the Code against the appellant. Owing to a bona fide reorganization of the workplace, the grievor's previous position no longer existed. The board rejected the possibility of ordering the employer to make efforts to find another position because that would neither guarantee the grievor employment nor provide a lasting solution. The board awarded damages in the amount of four months salary, having taken into consideration common law principles such as age, length of service and the nature of her position. The board also reasoned that she was unable to handle the duties and responsibilities of her position, and would not have been able to improve her performance or lengthen her employment to any significant extent even with prior warnings (emphasis added).

Then, he concluded as follows:

I am convinced that the arbitration board properly considered the whole of the circumstances in concluding that an award of damages was more appropriate than reinstatement of the grievor. The arbitrator considered, among other factors, the bona fide reorganization of the grievor's former position, the difficulty with which an alternative position may be found for her, and the likelihood that reinstatement would prolong the ultimate resolution of the issue and present further disputes in implementation (emphasis added) (para. 55)

Based on these passages, it is submitted that a particular factor—the reorganization of the workplace—enjoys a certain prominence in the Court's reasoning and was key to its conclusion that the remedy decision was reasonable. In my view, absent that factor, it is unlikely that a decision to award damages instead of reinstatement in these circumstances is a reasonable one because the circumstances are simply not exceptional or extraordinary.

Given the above, the final result in the *Lethbridge* case is not out of step with *B.C. Central Credit Union* and the former does not mandate a change in the approach in this Province.

It is true that Iacobucci J. does suggest that the extraordinary circumstances that might attract an award of damages in lieu of reinstatement would include those in which the employment relationship is “totally destroyed”; para. 52. These were not the facts in *Lethbridge*, but arguably, this dicta is not in keeping with the law in B.C. as it is articulated in *B.C. Central Credit Union*. Where the employment relationship is “totally destroyed,” a B.C. arbitrator might be expected conclude that discharge is not excessive in all the circumstances even where the offence in question is not too serious but represents a culminating incident.

On the other hand, it is important to note that the Court affirms that damages in lieu of reinstatement is an exceptional remedy and at no point does the Court suggest that arbitrators should take a more expansive or liberal approach in making such awards.

Finally, it is interesting to note that in *Lethbridge*, it does not appear that the Court had the benefit of the lengthy and thoughtful analysis of this issue in the decisions of the Labour Relations Board in *B.C. Central Credit Union*. It may be that the analysis in those cases is so firmly rooted in s. 84 of the Code and the “law of the statute” in this Province that the decisions would be of limited value in the analysis of an Alberta award. If that is the case, then *Lethbridge* is distinguishable in any event, and the law in B.C. is as discussed in *B.C. Central Credit Union*.

In any case, it is submitted that arbitrators in B.C. are bound by *B.C. Central Credit Union* and that *Lethbridge* has not altered the course for the labour relations community in this province. The next question is, have arbitrators adhered to that approach?

III. British Columbia Arbitration Awards

In these awards, in keeping with the framework for analysis mandated in *Wm. Scott*, [1977] 1 Can. L.R.B.R. 1, the arbitrators first ask if some discipline was warranted. In this line of cases, the answer to this question is generally “yes.”

The arbitrators then turn to the issue of whether or not discharge was excessive in all the circumstances of the case. Again, in this line of cases, the answer to this question is generally “yes.”

It is at the next stage of the analysis in these awards, when suitable alternate measures are considered, that the arbitrators conclude that damages in lieu of reinstatement are appropriate.

We are not aware of any B.C. cases where damages are awarded following a finding that the employer had no cause to impose any discipline, or where a suspension or some other measure short of discharge was imposed. It is (to say the least) doubtful that arbitrators have jurisdiction to make such an order, in this province at least.

If there is no cause for discipline at all, the arbitrator does not proceed to an examination of the employment relationship at the second step of *Wm. Scott* and is in no position to

make judgments about the ongoing viability of the relationship or consider any intervening factors.

If (say) a suspension was imposed, the arbitrator might well find that the employer had some cause to impose discipline and proceed to decide if the suspension was excessive in all the circumstances. But to then effectively terminate the employment relationship and award damages would be a jurisdictional error and a fairly egregious one at that.

We will now turn to our review of B.C. awards involving damages in lieu of reinstatement.

A. Douglas College Technical and Vocational Institute -and- B.C. Government Employees' Union, Local 62 (1977), 16 L.A.C. (2d) 139 (Munroe)

It must be noted that this case was decided prior to *B.C. Central Credit Union*. The grievor was discharged for taking an unauthorized leave of absence. The arbitrator found that discharge was an excessive disciplinary response in all the circumstances but declined to order reinstatement and instead ordered monetary compensation because the employment relationship "would be rocky at best" as the grievor's priorities and goals caused considerable tension in her department.

This is simply not consistent with the *B.C. Central Credit Union* analysis. Recall that in that case, the arbitrator declined to order reinstatement in circumstances where the grievor had a very rocky relationship with his employer and co-workers. He was discharged for insubordination and verbal abuse of others. As the Board found on review, that was not the kind of exceptional circumstance that attracts the remedy.

B. B.C. Ferry Corp., [1981] 1 W.L.A.C. 425 (Hope)

This award also predates *B.C. Central Credit Union*, but the board strongly affirmed the vitality of the just cause concept and anticipated the analysis in *B.C. Central Credit Union*.

C. Vancouver General Hospital -and- B.C. Nurses' Union (1989) 7 L.A.C. (4th) 106 (Munroe)

The grievor was discharged for an alleged misappropriation of a mass of work-related materials of a co-worker and for working elsewhere on days that the grievor was believed to be away on hospital business. The board found there was just or proper cause for the imposition of discipline but not a dismissal. Although all the members of the board wanted to award damages to the grievor instead of reinstatement, they were bound by *B.C. Central Credit Union* to order reinstatement: "The decision of the Labour Relations Board in *B.C. Central Credit Union* (decision No. 7/80; affirmed at 299/84) makes it clear that except in very unusual circumstances, which are not present here, an employee whose dismissal has been found to be excessive is entitled to an award of reinstatement." This award evinces a significant degree of fidelity to *B.C. Central Credit Union* and shows that the "exceptional circumstances" that might warrant damages in lieu of reinstatement is a very narrow category of circumstances.

D. Argo Road Maintenance v. British Columbia Government & Service Employees' Union (Schneider Grievance), [1995] B.C.C.A.A.A. No. 144 (Ready)

In this case the grievor was discharged for potential conflict of interest by virtue of the grievor's personal relationship with the President of a competitor of the company. The arbitrator agreed that the employer had just cause to discipline the grievor but found that "this case justifies an exception to the well-established principle set out in *B.C. Central Credit Union*. Discharge is not warranted in this case, yet neither is a remedy of reinstatement." The arbitrator explained that since the grievor's employment could not be continued elsewhere in the company, by means of a transfer, without putting her in the same position of potential conflict, the appropriate remedy is an award of damages. The facts in this case are somewhat exceptional, the intervening event being the development of a personal relationship between the grievor and the employer's rival.

E. Argo Road Maintenance, B.C.L.R.B. No. B85/97

The Labour Relations Board upheld the arbitrator's conclusion that this case ought to be treated as an exception to the general rule the reinstatement is the appropriate remedy where the initial act of discharge is deemed excessive. The Board found that the arbitrator considered the appropriate principles and jurisprudence and was not prepared to interfere with the remedy.

F. Boundary Senior Citizens Housing Society v. Canadian Union of Public Employees Local 2254 (Strukoff Grievance), [1993] B.C.C.A.A.A. No. 166 (Larson)

The grievor, a casual Care Aide, was discharged for alleged inappropriate touching of a male resident under his care. The arbitrator found that discharge was excessive (and that a six month suspension would have been appropriate) since the act was not calculated to demean or cause harm to the resident. However, the arbitrator awarded damages rather than reinstatement due to the "fear and antipathy held by the female employees with whom the grievor worked" and the fact that the grievor's past behaviour indicates that reinstatement would involve serious risk to the physical safety of female employees.

These facts would seem to warrant a conclusion that the decision to dismiss was not excessive in all the circumstances of the case.

G. Gina McCloy -and- Hospital Employees' Staff Union -and- Hospital Employees' Union, Local 180, I.R.C. No. C39/89

The grievor was suspended indefinitely and ultimately terminated from her secretarial job at the HEU. The grievor sought damages rather than reinstatement. The Industrial Relations Council agreed that reinstatement was neither practical nor appropriate in this case, since the grievor "left the HEU over a year and a half ago under rather acrimonious circumstances" and has returned to her former job. It should be noted that neither the Employer nor the Union participated in these proceedings and did not make submission about remedy. This case is, therefore, of limited value.

H. Hertz Canada Ltd. v. Office and Technical Employees' Union, Local 378 (McKechnie Grievance), [1994] B.C.C.A.A.A. No. 416 (Hope)

The grievor was dismissed from his service attendant position as a result of minor damage to his Employer's vehicle that he was attempting to manoeuvre out of a tight parking spot. Following his termination, the grievor found alternate employment as a taxi driver and was later murdered while operating a taxi. As a result of his dismissal, his participation in a group life insurance policy was allowed to lapse, so that his estate failed to receive death benefits of \$40,000. The Union acknowledged that reinstatement was not practical and would be artificial. The arbitrator found the dismissal to be excessive and ruled that, had the grievor lived, he would have been entitled to reinstatement and compensation for lost wages, subject to a deduction for a three-day suspension and an accounting of monies earned from his alternate employment. The union's request for damages equivalent to the wage loss incurred by the grievor from the date of his dismissal to the date of his death, together with insurance proceeds of \$40,000, plus interest on both amounts was granted.

The circumstances here are quite clearly exceptional, with the intervening event being the murder of the grievor.

I. Slocan Forest Products -and- IWA-Canada, Local 1-417 (Wallace Grievance), [1996] B.C.C.A.A.A. No. 275 (Devine)

The grievor was terminated as a result of five lock-out violations. The arbitrator found that there was cause for some form of discipline as the failure to follow correct lock-out procedures is extremely dangerous. On the facts, however, the grievor was improperly exposed to double jeopardy and, as such, the Employer could not raise the discipline from a suspension to a termination. The arbitrator stated that the maximum penalty that normally follows a finding of double jeopardy is to apply the original discipline and that the usual remedy for unjust termination is to order reinstatement (as per *B.C. Central Credit Union*) unless the employment relationship cannot be restored. The arbitrator concluded that the grievor's inability to work safely is a circumstance that destroys the employment relationship by endangering himself and his fellow employees and awarded damages in lieu of reinstatement.

Recall that although it is not entirely clear, the reconsideration panel in *B.C. Central Credit Union* may have suggested that damages in lieu of reinstatement are appropriate in at least some cases where the grievor cannot work safely. Assuming that is the case, from that point of view, this award is in keeping with the Board's law and policy.

But on the other hand, this case raises a concern. The arbitrator was seemingly of the view that discharge was not excessive but could not make that finding by reason of the double jeopardy rule. It is submitted that damages in lieu of reinstatement should not be applied in a manner that undermines "due process" in the discipline process.

J. St. Michael's Centre, [1997] B.C.C.A.A.A. No. 567 (Germaine)

The grievor was discharged for alleged theft, breach of trust, breach of ethical standards, insubordination, etc. after he acquired a television and walker from a resident of the facility. The arbitrator found that the grievor gave the employer just cause for discipline by violating a number of employer policies and procedures regarding transactions with residents, conflict of interest, and confidentiality and privacy by being insubordinate and in breach of trust. The arbitrator ruled that discharge was excessive and declined to follow Mr. Justice Adams' damages award in *Liquid Carbonic Inc.*, since the exceptions contemplated by the decisions in *B.C. Credit Union* are much narrower and confined to circumstances where the employment relationship is incapable of being restored. It is interesting to note that the arbitrator seemed to be somewhat sceptical that the broader approach in that Ontario case might be explained on the basis of the differences in legislation between B.C. and that province. In the end, the arbitrator found that the grievor recognized his capacity to make mistakes and could respond to corrective discipline such that reinstatement was appropriate.

K. Hospitality Industrial Relations -and- British Columbia Government and Service Employees' Union (Chicoine Grievance), [1998] B.C.C.A.A.A. No. 336 (Korbin)

The grievor was terminated for refusing two shifts without explanation. The arbitrator found that although the grievor's conduct bordered on insubordination and reflected a greater attitudinal problem warranting discipline, termination was an excessive response. The arbitrator awarded monetary damages in lieu of reinstatement "given the grievor's continuing attitude with respect to her unwillingness to accept any responsibility for her own actions as displayed during these proceedings, about her place of work." (para. 50) The arbitrator concluded that this is in line with *B.C. Credit Union*, as it is impossible to restore the employment relationship.

With respect, it is submitted that this is not in keeping with *B.C. Credit Union*. This award takes a more expansive view of the remedy.

L. Ocean Construction Supplies Ltd. v. Canadian Brotherhood of Railway, Local 400 (Breen Grievance), [1992] B.C.C.A.A.A. No. 93 (Thorne)

Note that this case was decided under the Canada Labour Code but contains an analysis of the B.C. approach. The grievor was discharged for alleged incompetence. The Board found that discharge was excessive. To determine the appropriate remedy, the Board relied on *B.C. Central Credit Union* to determine whether the employment relationship was capable of being restored. The Board concluded that because the grievor was both incompetent and a safety hazard, it was doubtful whether he would receive a fair opportunity to succeed were he to be reinstated. However, the Board found that damages would be inadequate and, therefore, ordered damages as well as reinstatement to his employment, as if he were a new employee.

This is an attempt to restore the employment relationship by reinstating the grievor to more suitable circumstances if not a different position altogether. It is one of the few non-

culpable cases in B.C. containing a discussion of damages in lieu of reinstatement remedy that can now be measured against *Lethbridge*.

This award also brings to mind the observation about safety made by the reconsideration panel in *B.C. Central Credit Union*. Assuming that the reconsideration panel endorsed damages in lieu of reinstatement in some cases where the grievor cannot work safely, this award shows that even then, reinstatement should prevail except in a truly notorious case.

M. Vancouver Community College v. Vancouver Municipal & Regional Employees' Union, [1994] B.C.C.A.A.A. No. 511 (Keras)

The grievor was discharged for insubordination. The parties agreed that the employment relationship was damaged beyond repair, and the Union sought monetary compensation for the excessive discipline. The arbitrator found that some form of discipline was warranted but that discharge was excessive. The arbitrator awarded damages (one and one half months pay). Note that there was no dispute that damages in lieu of reinstatement were appropriate in this case and this award is of limited guidance for that reason.

N. B.C. Ferries Services Inc. v. B.C. Ferry and Marine Workers' Union (Rayner Grievance), [2005] B.C.C.A.A.A. No. 68 (McPhillips)

The grievor was terminated for failing to report to work and for her insubordinate attitude. The union sought damages in lieu of reinstatement. The Board found that the employer was precipitous in discharging the grievor in light of the medical opinions and advice that she should not return to work. The Board further found that there was cause for some form of discipline but that discharge was excessive. In terms of remedy, the Board agreed with the union, the employer and the grievor that this was one of the exceptional circumstances where monetary damages instead of reinstatement is appropriate because of the following factors: the "grievor's lack of respect for management, the employee having a perception of management conspiracy, the feeling on the part of the grievor of being persecuted, the existence of rudeness and insolence, rampant distrust on the part of the grievor, the grievor's failure to accept any responsibility for her actions and the likelihood of a confrontational and uncooperative approach continuing"; paras. 90 and 91.

This case was decided after *Lethbridge*, which is cited in para. 89. There is a brief discussion but since the parties all agreed that damages in lieu of reinstatement should be ordered, there is understandably not much in the way of analysis. However, with respect, the finding that the factors listed in para. 90 attract an award of damages in lieu of reinstatement is not consistent with *B.C. Central Credit Union* where the grievor was awarded damages in lieu of reinstatement in circumstances similar to these and where the Labour Relations Board determined that this was not appropriate.

O. Health Employers Assn. of British Columbia -and- Hospital Employees' Union (Fleming Grievance), [1999] B.C.C.A.A.A. No. 14 (Larson)

The grievor was discharged for allegedly being deliberately insubordinate in refusing to attend a scheduled meeting and for her continuing refusal to accept reasonable direction from the employer. The arbitrator found that discipline was justified but that discharge was excessive. The arbitrator awarded monetary damages in lieu of reinstatement, because the grievor was incapable of conforming to the workplace standards, was the source of constant tension amongst the hospital employees and never accepted any responsibility for the stressful work environment.

Again, with respect, this is not consistent with *B.C. Central Credit Union* where the grievor was awarded damages in lieu of reinstatement in circumstances similar to these and where the Labour Relations Board determined that this was not appropriate.

P. British Columbia Institute of Technology v. British Columbia Institute of Technology Faculty and Staff Association, [2000] B.C.C.A.A.A. No. 93 (Ready)

The grievor was improperly laid off. Arbitrator Ready declared that the layoff was void but ordered monetary damages representing the grievor's losses arising out of the layoff in lieu of reinstatement, since the grievor would have selected early retirement effective December 31, 1999.

Arguably, the grievor's decision to accept early retirement is the kind of exceptional intervening event contemplated in *B.C. Central Credit Union*.

Q. Health Employers Association of British Columbia on behalf of Tofino Hospital - and- Health Sciences Association of B.C., [1996] B.C.C.A.A.A. No. 494

In this case the grievor was dismissed for dishonesty but the employer violated the union representation provision in the collective agreement by failing to advise the grievor of his contractual right to union representation. The arbitrator noted that this may be one of the exceptional circumstances in *B.C. Credit Union* where damages rather than reinstatement is the proper remedial outcome. Without determining the reasonableness of the termination itself, the arbitrator found that the grievor's employment was effectively terminated and ordered the hospital to pay damages to the grievor.

This is of some concern because as noted above, due process requirements should in my view be applied with full vigour and not undermined by declining to reinstate where they have been violated.

R. NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213, [2005] B.C.C.A.A.A. No. 62 (Kinzie)

The grievor was dismissed for violating security policy and procedure by bringing an unauthorized person into an automated bank machine room while he was performing a service call. However, the employer breached the union representation clause. Citing *Tofino General Hospital*, the arbitrator found that the employer did not fully comply with its obligations to advise the grievor of his right to union representation but ruled the evidence of what was said at the meeting admissible since neither the union nor the

grievor suffered prejudice from the breach. The arbitrator then found that while there was cause for discipline, dismissal was excessive. The arbitrator substituted a thirty day suspension without pay and ordered reinstatement.

Note that the arbitrator did not decline to order reinstatement in spite of the reference to *Tofino General Hospital*.

S. Canadian Blood Services v. Hospital Employees' Union (Bagley Grievance), [2004] B.C.C.A.A.A. No. 158 (Jackson)

The grievor was dismissed for allegedly having entered the employer's premises in off-hours without authorization. The arbitrator found that the misconduct justified some form of discipline but that discharge was excessive. The arbitrator concluded that this is one of the rare cases where reinstatement is not a realistic remedy because the nature of the workplace requires a high degree of trust and confidence, and the grievor's lack of acknowledgement of her misconduct has destroyed the employment relationship. The arbitrator awarded damages.

It is respectfully submitted that there is nothing extraordinary about the circumstances upon which the arbitrator bases her decision to award damages in lieu of reinstatement and this was not an appropriate case for that outcome.

T. Westburne Electric Supply v. International Brotherhood of Electrical Workers, Local 213, [2002] B.C.C.A.A.A. No. 40 (McDonald)

The grievor was discharged for fighting in the warehouse. The arbitrator found that discipline was warranted but, given the mitigating factors, termination was excessive. The arbitrator found that the grievor was "the author of his own misfortune in his misconduct and in lying about his role in the fight, in his making very serious and false statements as to racism being the basis of his termination, and in his not being candid at the hearing." In the circumstances, the arbitrator found that the employment relationship was incapable of restoration and ordered damages in lieu of reinstatement.

Again, with respect, there is nothing extraordinary about the circumstances upon which the arbitrator awards damages in lieu of reinstatement and this was not an appropriate case for that outcome. Reinstatement or discharge were the appropriate options or choices available in the circumstances.

U. Wilson Place Ltd. Partnership -and- Hospital Employees' Union, [1998] B.C.D.L.A. A-159/98 (Dorsey)

The grievor was terminated for alleged insubordination and for creating a negative and less productive work environment. The arbitrator found no cause for any discipline and ordered reinstatement. Since the employer is no longer in business, the arbitrator ordered the employer to reinstate all benefits and to pay her lost wages up to the date the facility was closed. After that date, the grievor was granted whatever benefits she would be entitled to as a laid-off employee under the collective agreement.

Closure of an operation is exactly the kind of extraordinary intervening event that is contemplated in *B.C. Central Credit Union*.

V. Loomis Armored Car Service Ltd. -and- Teamsters, Local 213 (Forrester Grievance), [1999] B.C.D.L.A. A-64/99 (Kelleher)

The grievor was terminated for using the company car without authorization and failing to maintain custody of his firearm. The employer also had a petition of fellow employees refusing to work with the grievor. The arbitrator found the grievor's misconduct warranted substantial discipline but that discharge was excessive. The arbitrator ordered a severance pay in lieu of reinstatement as the grievor engaged in conduct that was not in keeping with a relationship based on trust and he did not seek to restore that trust during the proceedings.

With respect, the only appropriate options available to the arbitrator in this case were reinstatement (with other measures substituted for the discharge) or discharge, not damages in lieu of reinstatement.

W. Braddan Private Hospital Ltd. -and- C.U.P.E., Local 2209, [1988] B.C.D.L.A. A-351/87 (Arsenault)

The grievor was discharged as a probationary employee for unsatisfactory work performance. The union argued that the grievor had been working a regular part-time schedule prior to joining the full-time staff and was not a probationary employee at the time of her discharge. The arbitrator agreed with the union. The arbitrator further found that although there was cause for discipline, discharge was excessive as there was no record of progressive discipline or attempts to bring shortcomings to the grievor's attention. The arbitrator concluded that a two-week suspension was appropriate, but because the grievor did not wish to be reinstated, had immediately found work elsewhere and had violated the employer's "moonlighting policy," neither reinstatement nor damages were awarded.

This is a curious case in which a finding that discharge was excessive is in effect followed by a finding upholding the dismissal. The arbitrator apparently declined to award damages because the grievor mitigated his loss, but that is not why damages are awarded in lieu of reinstatement. Note too that the grievor did not want to return to work. Query whether unions are obliged to take a grievance to arbitration if the grievor does not want reinstatement.

IV. Conclusion

It is quite seldom that B.C. arbitrators fashion an award of damages in lieu of reinstatement, but when they do, it is too often the case that the award is based on circumstances which are not exceptional in the sense contemplated in *B.C. Central Credit Union*.

It is submitted that this arbitral drift is neither desirable nor consistent with principles expressed or implied in the Code. As an essential corollary of the just cause concept, the right of reinstatement is fundamental. Arbitrators must be mindful that the refusal to reinstate an employee discharged without just cause amounts to an erosion of the just cause concept unless the circumstances are extraordinary.

B.C. Central Credit Union contemplates that the exceptional circumstances are in the nature of an intervening plant closure and not future misconduct by the grievor or an apparent inability of the employee to get along with others. Either these problems warrant discharge or they do not, and if they do not, then reinstatement is appropriate and mandated by s. 84 of the Code.

The award fashioned in *Lethbridge* is based upon facts and circumstances which *B.C. Central Credit Union* says are exceptional and support such an award. The decision of the Supreme Court of Canada upholding the arbitration award does not mandate a more expansive or liberal application of the remedy in this province.

The law of the statute as outlined in *B.C. Central Credit Union* is the law in B.C. and arbitrators are bound to follow it.

However, it is acknowledged that in obiter, Iacobucci J. might have described a more expansive application of the remedy than is contemplated in *B.C. Central Credit Union* and that may result in a greater willingness to embrace the remedy by boards of arbitration, even here in B.C. The recent award in *B.C. Ferry Corp (Raynor)* may be a case in point, but since the parties all agreed that damages should be awarded in that case, it is difficult to know if the result would be the same in the absence of the agreement.

As said by Iacobucci J., arbitrators are “labour relations gatekeepers”; para. 17. To fulfill this role, arbitrators in B.C. must, in the final analysis, have due regard for the sanctity of the just cause concept and the concomitant right of reinstatement and not throw open the gates to incursions upon this fundamental principle.