

**IN THE MATTER OF AN EXPEDITED ARBITRATION
UNDER THE LABOUR RELATIONS CODE SECTION 104(4)**

BETWEEN:

OVERWAITEA FOOD GROUP

(the "Employer")

AND:

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 1518

(the "Union")

Re: **[REDACTED]** *Grievance*

ARBITRATOR:

Elaine Doyle

COUNSEL:

Michael Korbin
for the Employer

Brett Matthews
for the Union

DATE & PLACE OF HEARING:

December 5, 2013
Commenced by
teleconference
January 16 & 17, 2014
Kamloops, BC

DATE OF AWARD:

February 7, 2014

On December 2, 2013, I was appointed by the Collective Agreement Arbitration Bureau pursuant to Section 104(4) of the *Labour Relations Code* as an expedited arbitrator to hear and determine the matter arising out of the difference between the parties. The hearing was commenced by conference call on December 5, 2013.

This is a discipline case involving the termination of [REDACTED] (the "Grievor"). In brief, the Employer alleges that he was abusive and insubordinate to [REDACTED] the Assistant Store Manager; that he was a "no show" for his scheduled shift on October 25, 2013; and that he was dishonest during the investigation into these events.

At hearing, the Employer called the following witnesses to testify: Dave Blackmore, the Store Manager; Zeljko Ratkaj, the Deli Manager; and [REDACTED] the second backup Deli Manager. Mr. Ratkaj and Ms. [REDACTED] are bargaining unit members and gave evidence under summons. The Union called the Grievor.

Mr. [REDACTED] is a Deli Clerk at the Sahali Save-On-Foods store in Kamloops, BC (the "Store"). He has been employed by Overwaita Foods in various capacities in the Deli department since 1985. Certain elements of the events that gave rise to Mr. [REDACTED]'s termination were not in dispute. On Monday, October 21, 2013, he was coming down with a cold. He worked that shift and the following day, but the cold was getting the better of him. At the end of his shift on Tuesday, he told the backup Deli Manager, Darren Rowat, that he would not be at work on Wednesday, October 23 and, "knowing his body," he would not be in on Thursday, October 24 either. There was no dispute that Mr. [REDACTED] was genuinely ill.

Mr. [REDACTED] let the Deli Manager, Mr. Ratkaj, know that the Grievor would be away Wednesday and Thursday. Mr. Ratkaj reviewed the Deli work schedule to ensure there was

coverage for the next two days. He spoke to Mr. [REDACTED] about the schedule and they decided to move the shifts of some other Deli staff around and to cancel an accumulated day off (the "ATO") the Grievor had scheduled for Friday. Mr. [REDACTED] asked Mr. Ratkaj to ensure that the Grievor was notified of the change to his schedule. As he would not be working on Wednesday, Mr. Ratkaj said he would make sure that Ms. [REDACTED] contacted the Grievor to let him know that his ATO for Friday was cancelled and he was scheduled to work 6:00 a.m. to 2:30 p.m. Mr. [REDACTED] revised the work schedule and at 7:30 p.m. on Tuesday, October 22, he posted it online.

Mr. Ratkaj made for Ms. [REDACTED] a list of things to do on Wednesday. One item on the list was for her to contact the Grievor to let him know that his ATO for Friday was cancelled. Mr. Ratkaj then called Ms. [REDACTED] to let her know that her shift for the following day had been changed in order to cover the Grievor's absence. He also let her know that she was to call the Grievor on Wednesday to tell him his ATO was cancelled.

Ms. [REDACTED] has been at the Store since 2002. She and the Grievor are friends and have been since 2002; they socialize together outside of work. Ms. [REDACTED] testified that she called the Grievor at home on Tuesday night to give him a heads up that his ATO for Friday would be cancelled. She said that he told her he would not be in on Friday. It was her evidence that the following morning, she again called the Grievor and she got his answering machine. After placing that call, she went to see Mr. [REDACTED] and told him that the Grievor would not be in on Friday. Mr. [REDACTED] told her to tell him that if he was not going to be in on Friday, he would have to provide a doctor's note for the third sick day. Ms. [REDACTED] placed a second call to the Grievor on Wednesday morning. This time he answered.

According to Ms. [REDACTED] she told the Grievor that "[REDACTED] would like a doctor's note if you don't make it in on Friday". She said that the Grievor told her that "they can go fuck themselves" and they should "quit fucking harassing me." She told him not to get mad at her, she was just the messenger, and she would put him through to [REDACTED]. About 10 minutes later, Ms. [REDACTED] went back upstairs to see about the schedule. She said that [REDACTED] was sitting there and he looked like he was "upset, agitated, in disbelief". She asked him what was wrong and he said "you are not going to believe what just happened" and he showed her the notes of his conversation with the Grievor.

It is a tragic fact of this case that Mr. [REDACTED] was not able to give evidence at hearing. On October 25, 2013, he suffered a massive stroke and died. Under the circumstances, the handwritten notes of his conversation with the Grievor were relied upon as his evidence of what the Grievor said to him on the call. Those notes read as follows:

"[REDACTED] called me at 10:10 to discuss with me his shift that we had changed. He had an ATO & we had changed it (Friday 23) [stet] to 6-2:30. [REDACTED] was very agitated & very abusive. He called me a piece of shit & that I was fucking harassing him. I calmly explained to him that I did not appreciate being talked to in that manner and that I wanted him to calm down. I tried to tell him that he had informed us that he was going to be sick Wed. & Thursday as well. We needed to have that shift (6-2:30) covered off. I told him that I had talked to [REDACTED] (Deli Asst) & she had said that he wasn't going to come in for that shift due to sickness. So I had said to [REDACTED] that because [REDACTED] was going to be sick for 3 days he needed to bring in a doctor's note. [REDACTED] relayed this message to [REDACTED]. I told [REDACTED] that is why we needed a doctor's note from him. [REDACTED] called me a fucking piece of shit & to stop fucking harassing him on his day off. He said he was not going to be sick on Friday & that he had things to do on his days off. I told him again that his language was not appreciated & that we had the ability to change a team members schedule with more than 24 hours notice. [REDACTED] again called me a fucking piece of shit & that he was not going to come in Friday. He said that he had courteously let us know in advance that he would be sick Wed. & Thursday & that he guessed he would just wait till the last minute to notify of sickness next time. He again said to stop fucking harassing him on his day off.

I told him that I wanted him to calm down & we would talk about this later to which he replied you bet we'll talk about this later."

The Grievor did not come into work on Friday, October 25, 2013. Ms. [REDACTED]'s evidence was that she called his home on Friday morning at and left a message saying, "Hi, [REDACTED] it's me.

Wondering where you are? You are scheduled 6:00-2:30. Give me a call back." The Grievor did not call her back.

The Grievor attended work on Monday, October 28, 2013. The following day he was called in to an investigation meeting with Mr. Blackmore. Two members of management from Head Office were also present, Shane Trafton and Heidi Ferriman. Ms. Ferriman took notes of the interview on her laptop. At hearing, Mr. Blackmore reviewed the notes of that meeting.

It was Mr. Blackmore's evidence that during that meeting the Grievor denied that he was angry and abusive when he phoned Mr. [REDACTED]. He denied calling Mr. [REDACTED] a "piece of shit" and a "fucking piece of shit". Mr. Blackmore thought that the Grievor was "brazen"; that he did not tell the truth because Mr. [REDACTED] was not able to tell his side of the story. The Grievor also denied that Ms. [REDACTED] had told him he was scheduled to work on Friday, October 25. Mr. Blackmore testified that he and the other management members caucused and he told them that he had to give the Grievor another opportunity to tell the truth; but when they returned, the Grievor continued to lie and not tell the truth. He said he also found the Grievor cavalier in his attitude.

Mr. Blackmore's evidence on cross examination was that the Employer was not blaming the Grievor for Mr. [REDACTED]'s death and he conveyed that message to him at the investigation meeting. He acknowledged that the Grievor thought they were blaming him for the death and that it was an emotional time.

The Grievor's evidence in chief conflicted with the testimony of the Employer's witnesses on a number of key points starting with the call he received on Tuesday night from Ms. [REDACTED]. He maintained that Ms. [REDACTED] did not tell him that his ATO for Friday was cancelled; he

claimed that she said she was calling to give him "a heads up that they wanted to take away my ATO on Friday." His evidence was that he responded that he had no idea how he would be feeling on Friday. If it was like how he felt at the time, there was no way he could make it in; if he was better, his wife was going to Calgary and he had made plans with his daughter to drive her to Whitecroft for a party.

The Grievor admitted that he was not happy about what he heard from Ms. [REDACTED]. He said it was not the fact they wanted him to work on Friday, he had no issue with going in on short notice, or that they wanted to take away an ATO. He felt they were telling him they did not believe he was sick and "I am not a person who calls in for no reason." The Grievor claimed that he knew he was angry when he talked to Ms. [REDACTED] but he did not recall saying the inappropriate things that she repeated in her testimony. He was also very certain that Ms. [REDACTED] did not tell him what shift he was scheduled to work on Friday.

It was the Grievor's evidence that he slept poorly on Tuesday night. He was angry that he had left work sick and they were trying to take his away his ATO for Friday. He said on Wednesday morning he was angry, agitated and exhausted; he was "letting his emotions run away with his thoughts." He felt they did not believe he was sick.

The Grievor clearly recalled the conversation he had with Ms. [REDACTED] when she called him a second time on Wednesday morning. He said that she now was saying that they wanted a doctor's note and that he told her, "You kind of messed up. I told you I did not know how I would be feeling on Friday and I have plans." He asked her to patch him through to [REDACTED] which she did. He maintained he was sure that Ms. [REDACTED] did not tell him when he was to work on Friday. The Grievor claimed that he could not remember much of the conversation and that he

did not recall saying "any of those very nasty things" Mr. [REDACTED] recorded in his notes. He did remember that he was very angry when he got off the phone.

The Grievor's handwritten notes which he made Wednesday morning after the call state: "I said some things to [REDACTED] that I would like to take back, but I can't. So I apologize now for being extremely incensed and saying some of those things." His testimony was that when he got off the phone with Mr. [REDACTED], he had a feeling inside that he had had a conversation that was not good, but "it was like I blanked out, I lost my cool and I don't remember what I said but I knew in my heart that whatever I said it wasn't good. I was angry." He claimed that it was not like him to swear at someone and it certainly was not like him to berate.

It was the Grievor's evidence that in his mind he still had an ATO on Friday. He said that he never thought that they changed the schedule, because he thought he was "pretty forward" with what he had to do on Friday. When he received the call from Ms. [REDACTED] telling him he was late for his shift, he called his shop steward and the steward said he would deal with it on Monday. He carried on with his planned trip to Whitecroft and then slept.

The Grievor maintained that he would have apologized to [REDACTED] on the Monday if he could have. He acknowledged that he should have apologized sooner, but claimed that he did not think it would matter, he thought the Company was going to carry through regardless of how he was feeling. He admitted that he should have been more forthcoming in the investigation meeting but said, "I was scared, scared for my job." He also declared that, "I am not a no show. It hurts. I did not want to call [REDACTED] and talk about a no show. I had told you up and down I could not work for you." The Grievor claimed that this type of misconduct had never happened in his career and that he could say with assuredness that it would never happen again. Finally, the

Grievor insisted that he did not know that management could cancel an ATO with 24 hours' notice. He said that he had just found that out.

On cross examination, the Grievor continued to insist that he could not recall telling Ms. [REDACTED] on Tuesday night that "management could go fuck themselves" and to stop harassing him. He recalled the conversation with her except the parts that constituted misconduct. Counsel for the Employer took the Grievor through his handwritten notes. The Grievor had a clear recollection of the call with Ms. [REDACTED] on Wednesday morning. While he acknowledged that when he talked to Mr. [REDACTED] he knew after the call that he had been angry during the call, he maintained that he did not recall calling Mr. [REDACTED] a "piece of shit" or a "fucking piece of shit." When asked if he accepted that he said these things, he answered that he accepted that Mr. [REDACTED] took detailed notes of their conversation and that what he wrote in his notes was true, but he did not recall saying these things.

The Grievor testified that he did not call Mr. [REDACTED] back because in his mind he "thought it was too late; that he thought something bad was going to happen." He maintained that he was sick, confused and exhausted. The Grievor admitted that when he was asked during the investigation meeting if Mr. [REDACTED]'s notes were a fabrication, he answered "yes." He denied that he agreed the notes were a fabrication because he knew Mr. [REDACTED] could not contradict him. He said that he was scared during the meeting and he should have answered that he did not remember.

The Grievor also denied that he knew they had filled the shift on Friday by assigning it to him and that he told Ms. [REDACTED] that management "could go fuck themselves." His evidence was that he assumed that if he told them he couldn't work Friday, they would not schedule him to work Friday and that was why "he did not understand that whole doctor's note thing." The

Grievor testified that when he received the call from Ms. [REDACTED] on Friday morning he called his shop steward. When it was put to him that he did not phone Ms. [REDACTED] to say he had an ATO because he knew he did not have an ATO, the Grievor said, "I understand your conclusion, but that is not how I felt. I would not do that to them. I thought I had an ATO; I would not say 'screw it' to Zeljko, he is good to me. I would not do that. I felt bad enough about being off sick."

When it was put to him, the Grievor agreed that in the time since his termination he never phoned or wrote to apologize. He said that he was not allowed to go into the Store and he kept any dealings with staff to a minimum because he was worried about staff morale. He admitted that the first time he apologized was at hearing.

Positions of the Parties

The Employer argues that the Grievor's first serious offence occurred Wednesday, October 23 when he engaged in extremely abusive, insolent, insubordinate, and offensive behaviour directed at Mr. [REDACTED]. According to Ms. [REDACTED] the Grievor told her that morning that "they can go fuck themselves" and "they can quit fucking harassing me." The Employer points out that this evidence was not challenged on cross examination. The Employer submits that from the Grievor's own handwritten notes, he knew that he had done something seriously wrong, yet he did nothing about it. He could have picked up the phone to apologize for his attack but, the Employer maintains, he lacked the necessary remorse to do so.

The Employer argues that between Ms. [REDACTED]'s version of what she told the Grievor on Tuesday night and the Grievor's version, Ms. [REDACTED]'s evidence should be preferred because the Grievor has admitted to being deliberately dishonest with the Employer to try to save his job. It is the Employer's position that the Grievor's evidence that he did not know he was scheduled to work Friday is internally inconsistent with the actions he took in his calls the

following day with Ms. [REDACTED] and Mr. [REDACTED] and with what he wrote in his notes. Further, it says, his conduct on Friday was consistent with a decision not to show up for his scheduled shift; therefore his decision to not show up for his shift was deliberate. The Employer submits that this Board should draw a negative inference from the fact that the steward the Grievor called when he learned that he was a no show on Friday did not testify.

The Employer argues that the Grievor engaged in premeditated and serial dishonesty which fundamentally breached the employment relationship. The Grievor made a calculated and premeditated decision to lie about the conversation with Mr. [REDACTED] during the investigation on Tuesday, and he was driven to do that because the only person who could have contradicted him had passed away on Friday. His misconduct was serial the Employer alleges because he was dishonest about what he said to Mr. [REDACTED] and how he said it; he was dishonest about what he said to Ms. [REDACTED] and he was dishonest about not knowing that his ATO was cancelled. The Employer submits that while the Grievor's insolence and insubordination happened when he was sick, his dishonesty happened when he was back at work and in a clear state of mind.

The Employer submits that the Grievor's dishonesty extended to the hearing where he continued to lie about not knowing his ATO was cancelled and by his story that he does not remember the conversation with Mr. [REDACTED]. He remembers all sorts of other details but he does not remember the key detail of the conversation when he verbally abused Mr. [REDACTED]. The Employer argues that the Grievor is not genuinely remorseful. If he was, he could have offered an apology any time up to the hearing and he did not. The Employer further argues that the Grievor's notes reflect that he was angry at management, and did not take responsibility for his actions.

The Employer relies on *BC Railway and Canadian Union of Transportation Employees, Local 6*, 8 L.A.C. (3d) 233; *Re Durham Region Roman Catholic Separate School Board and CUPE, Local 218*, [1995] O.L.A.A. No. 398; *Caradon Indalex (Re)*, [1996] B.C.C.A.A.A. No. 219; *Highland Valley Copper and United Steel and Auto Workers of America, Local 7619*, [1999] B.C.C.A.A.A. No. 271; *Northwest Waste System Inc. v. Transport, Construction and General Employees' Assn., Local No. 66*, [2007] B.C.C.A.A.A. No. 158; *McRae Waste Management Ltd. (Re)*, [2000] BCLRBD No. 34; *PTPC Corrugated Co. v. Communications, Energy and Paperworkers Union of Canada, Local 433* [2006] B.C.C.A.A.A. No. 153; *Coast Mountain Buslink Co. and Independent Canadian Transit Union, Local 2*, [1999] B.C.C.A.A.A. No. 318; *Royal Columbian Hospital v. Hospital Employees' Union*, [2001] B.C.C.A.A.A. No. 39; *University of British Columbia v. International Union of Operating Engineers, Local 882*, [1982] B.C.C.A.A.A. No. 347; and *Langley (Township) and CUPE, Local 403, Re*, [1991] B.C.C.A.A.A. No. 502; and, *Surrey (City) v. Canadian Union of Public Employees, Local 402*, [2007] B.C.C.A.A.A. No. 8.

For its part, the Union concedes that the Grievor's conduct constituted serious misconduct. It points however to his long service and relatively discipline-free history as mitigating factors to be considered. The Union submits that the events of the approximately week and a half which gave rise to the Grievor's termination occurred during a period of illness. It argues that the behaviour was bizarre for the Grievor; that it was the Grievor's evidence that it was out of character and that Ms. [REDACTED] testified that it was out of character. The Union maintains that the Grievor regretted his actions, admitted that he probably said what he is alleged to have said to Mr. [REDACTED] and accepts responsibility for his actions.

The Union acknowledges that the Grievor was not forthright at the investigation meeting but maintains that he was called into a meeting with no time to prepare himself; he should have told the truth, but he was scared and made bad choices. The Union maintains, however, that

there was nothing premeditated about the Grievor's decision. The Union asserts that the Grievor was never told he needed to show up for the Friday shift; he did not know he was expected for that shift, and he did not commit an offence by not showing up for the shift.

The Union relies on *Sears Canada Inc. and I.B.E.W., Local 213 (Abolis)(Re)*, 173 L.A.C. (4th) 209; *Cadbury Adams Canada Inc. and UFCW, Local 175, (Brayall)* 90 C.L.A.S. 71; *United Automobile, Aircraft and Agricultural Implement Workers, Local 28*, 5 L.A.C. 1883; and, *Eden v. Treasury Board (Canada Border Services Agency)*, 207 L.A.C. (4th) 173.

Decision

In a discipline matter, the arbitrator must consider the three questions posed by the British Columbia Labour Relations Board in *Wm. Scott and Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1. These questions are: has the Grievor given just and reasonable cause for some form of discipline by the Employer? If so, was the discipline imposed an excessive response in all of the circumstances of the case? And, finally, if the discipline is considered excessive, what alternative measure should be substituted as just and equitable? The Union concedes that the Grievor's conduct was worthy of some form of discipline; therefore, the key question in this case is whether dismissal was an excessive response to his misconduct.

The assessment of whether discharge was an excessive response requires a thorough review of all of the circumstances surrounding the misconduct. In *Wm. Scott*, the Board offered the following guidance:

...(U)sually it is in connection with the second question - is the misconduct of the employee serious enough to justify the heavy penalty of discharge? - that the arbitrator's evaluation of management's decision must be especially searching:

1. How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
2. Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
3. Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively disciplinary free history?
4. Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?
5. Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

Having carefully reviewed the evidence and the Parties' submissions and authorities, I have concluded that discharge was an excessive response to the Grievor's misconduct. Put succinctly, there are three main incidents at issue in this dispute: whether the Grievor was a deliberate no show for his shift on Friday; whether the Grievor was abusive to Ms. [REDACTED] and Mr. [REDACTED] when he talked to them by phone on Wednesday; and whether the Grievor was dishonest during the investigation meeting on October 29, 2013.

On the totality of the evidence, I have accepted the Grievor's claim that he did not know he was scheduled to work on Friday for the following reasons. Ms. [REDACTED] said that when she called the Grievor at home on Tuesday she told him "as a friend, not a manager" that he had to work Friday 6:30 a.m. to 2:30 p.m. and that she would call him the next day when she was on shift. Her evidence was that she was calling to give him a "heads up." I regard a "heads up" as a warning that something is going to happen, not that it has happened.

The Grievor's evidence was not challenged that it was his understanding that if one had plans in advance, the Employer had to take them into consideration before changing a schedule. His understanding is reflected in his repeatedly telling Ms. [REDACTED] and Mr. [REDACTED]

that he could not come in on Friday; hardly the conduct of someone who is setting out to pretend he does not know he is scheduled to work a shift. While the Grievor's understanding may not be consistent with the Collective Agreement, I note Mr. Ratkaj's evidence that when he was attempting to backfill the shifts the Grievor was going to miss on Wednesday and Thursday, he asked Jason Howard to work those shifts. Mr. Howard told him that he was not sure he could work because of his kids and wife, but would let him know. Later, he told Mr. Ratkaj that he could not work Wednesday, but could work Thursday. This exchange appears to be consistent with the Grievor's understanding of how schedule changes are managed.

Based on all of the evidence, I am persuaded that the Grievor had a genuinely-held belief that if he informed the Employer that he had other plans, his ATO would not be cancelled. This belief, however mistakenly held, combined with the confused communication about him bringing in a doctor's note, led him to conclude that he was not scheduled to work on Friday. Finally, I did not hear anything to suggest either Ms. [REDACTED] or Mr. [REDACTED] warned the Grievor of a consequence if he did not attend work as he was telling them he intended to do. I find that the Grievor was not a deliberate no show on Friday and that he was not dishonest on this point during the investigation meeting.

On the issue of the Grievor's abusive conduct when he talked to Ms. [REDACTED] and Mr. [REDACTED], I have accepted Ms. [REDACTED]'s evidence that the Grievor told her that "they can go fuck themselves" and they should "quit fucking harassing me." Ms. [REDACTED] is a long-time friend of the Grievor's; she had nothing to gain and a friendship to lose by giving her evidence. Mr. Blackmore's and Ms. [REDACTED]'s account of Mr. [REDACTED]'s demeanor immediately following the Grievor's call support the conclusion that Mr. [REDACTED]'s notes accurately reflect what the Grievor said to him. On a preponderance of the probabilities, I find it is not believable that Grievor has a clear recall of what was said during the telephone calls except his own

misconduct. I find that, on this point, the Grievor was not forthright during the investigation meeting and he was not forthright at hearing.

It was clear from the Employer's evidence that when the Grievor was called in on Tuesday, October 29, he was not facing termination. Mr. Blackmore's said that the Grievor's misconduct on the telephone call with Mr. [REDACTED] was serious, as was his failure to show up for his shift on Friday, October 25. However, he was prepared to take into account that the Grievor was a long-serving member of the team with little discipline on his file. What tipped the balance was, in the Employer's view, the Grievor's complete lack of candour during the interview and his unwillingness to admit to his misconduct and take responsibility for it.

The Employer concluded that the Grievor's dishonesty during the investigation meeting had irreparably breached the employment relationship. I do not agree. It is trite law that honesty is the touchstone of the employment relationship: *Phillips Cables Ltd.* (1974), 6 LAC (2nd) 35. It is also the case that dishonesty, including dishonesty during an arbitration hearing, does not automatically preclude reinstatement. In *Brewers' Distributors Ltd. and Brewery, Winery and Distillery Workers' Union, Local 300 (Jim Huxley Grievance)*, [2002] B.C.C.A.A.A. No. 260, July 30, 2002, Arbitrator McPhillips observed as follows:

"The next matter is the seriousness of the offense. It has often been stated that dishonesty is a critical factor in the employment relationship: *Phillips Cables Ltd.*, 6 L.A.C. (2d) 35 (Adams); *MacMillan Bloedel*, 9 L.A.C. (4th) 410, (Williams). However, arbitral jurisprudence has indicated this does not automatically lead to termination and the entire context of the dishonesty must be taken into consideration: *Re C.B.C.*, 23 L.A.C. (2d) 227, (Arthurs); *Insurance Corporation of British Columbia*, No. A-170/01, [2001] B.C.C.A.A.A. No. 273, August 23, 2001 (Burke). That position has now been adopted at common law with the Supreme Court of Canada's decision in *McKinley v. B.C. Tel*, 2001 S.C.C. 38, in which Mr. Justice Iacobucci stated, at para. 48:

In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the

employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

In *McKinley*, the Court found that the jurisprudence which suggests that dishonesty must always result in dismissal was most often based on cases which involved "dishonesty that was symptomatic of an overarching, and very serious misconduct." In my view, the Grievor's dishonesty is not of that type.

What distinguishes the Grievor's misconduct from the kind which always results in dismissal is that he is a 28-year employee with a virtually discipline-free record. Eleven years have passed since he received a written warning for insubordination, longer than the employee's length of service in a number of the cases relied on by the Employer. Unlike the situation in *BC Railway*, the facts in this case do not disclose a failure of corrective discipline. The Grievor was not engaging in theft of time from the Employer as in the *Coast Mountain* and *Royal Columbian Hospital* cases. The Grievor was not stealing the Employer's property as was the finding in the *University of British Columbia*. I accept the Grievor's evidence that he denied his misconduct during the investigation meeting because he was afraid he would lose his job; and I expect that he continued to dissemble about his misconduct during the hearing for the same reason. The Grievor has certainly been guilty of bad judgement in this matter but, in the unique circumstances of Mr. [REDACTED]'s death following the Grievor's nasty tirade, his fears are perhaps understandable. On the evidence, I cannot find that his dishonesty reflects an overarching attitude to his job or the Employer.

I have taken a number of factors into consideration in finding that the employment relationship can be restored. The Grievor's evidence that he is a good Deli Clerk who serves his customers well was not contradicted. Mr. Ratkaj testified that he had changed the Grievor's shifts in the past, and asked him to stay late, without any problem. There was no evidence that the Grievor was a problem employee or that he had failed to respond to corrective discipline. I am satisfied that what occurred in this case is closer to the momentary aberration in that the Grievor's misbehaviour spanned a one-week period in a 28-year career. The fact that he was at home ill, an event that he and Mr. Ratkaj testified was unusual in and of itself, I am convinced contributed to his irrational response to being told that his ATO was going to be cancelled and the request for a doctor's note. The Grievor's evidence that it was not like him to berate someone was uncontested.

I am satisfied that the Grievor is genuinely remorseful for his abusive conduct, even though he claims not to recall the exact words he used. I am also satisfied that he means it when he says this behaviour will never happen again.

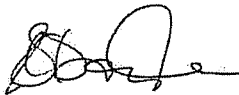
The finding that dismissal was an excessive disciplinary response does not, however, diminish the seriousness of the Grievor's misconduct. It was accepted at hearing that in his 25 years with the Company, Mr. [REDACTED] had not encountered anything like the abuse the Grievor unleashed on him. The Grievor must understand that, regardless of the circumstances, no manager or employee should be subjected to such abuse.

While I have found that the Grievor's dishonesty was not fatal to the employment relationship, it is very serious misconduct nonetheless. In *Surrey (City)*, *supra*, Arbitrator Foley relied on Arbitrator Kelleher in *Cominco Metals and United Steelworkers of America*, Award No. A-22/88, January 15, 1988 for the following proposition: "... arbitrators are unanimous in holding

that the denial of dishonest conduct when confronted by management is a factor which exacerbates the misconduct." The Grievor's unwillingness to admit to calling Mr. [REDACTED] a "piece of shit" and a "fucking piece of shit" meant that his apology was conditional. He accepted that Mr. [REDACTED]'s record of the call must be accurate, but he claimed he did not recall saying those things. It is also noteworthy that Mr. Blackmore gave the Grievor a chance to come clean and tell the truth during the investigation and the Grievor ignored that chance. The absence of an early and unconditional apology demands sanction, too. In answer to the third question in *Wm. Scott*, I have concluded that a suspension from the date of termination to the date of reinstatement shall be imposed as the just and equitable response to the Grievor's misconduct.

In the result, the grievance is allowed in part. The Grievor shall be reinstated as soon as practicable. I leave it to the Parties to resolve the issue of back pay and benefits but reserve jurisdiction to address those issues should a resolution not be achieved.

Dated at this 7th day of February, 2014 in Vancouver, British Columbia.



Elaine Doyle, Arbitrator