IN THE MATTER OF THE BRITISH COLUMBIA LABOUR RELATIONS CODE
AND IN THE MATTER OF AN ARBITRATION

BETWEEN:
XYZ COMPANY

(THE "EMPLOYER")

AND:
U

(THE "UNION")

AND:

Z

(THE "GRIEVOR")

("DAMAGES IN LIEU OF REINSTATEMENT")

ARBITRATION AWARD

Counsel for the Employer	Israel Chafetz, Q.C.
Counsel for the Union	David Tarasoff
Dates of Hearing	April 10, 2014
Date of Decision:	May 28, 2014
Arbitrator:	John L. McConchie

I. INTRODUCTION

In my recent decision between these parties in XYZ Co. v. U. (Z. Grievance) [2013] B.C.C.A.A.A. No. 149, LAX/2014-042, I concluded that the Employer's dismissal of the Grievor was excessive in all of the circumstances of the case. This conclusion was not a judgment on the seriousness of the Grievor's actions. It was instead a consequence of certain actions taken by supervisors of the Employer which affected the Employer's entitlement to take dismissal action against the Grievor based on the "double jeopardy" doctrine. In short, by the time the Employer had issued its termination letter to the Grievor, it had already disciplined him for the misconduct by giving him a written reprimand. For this reason, I concluded that dismissal was excessive in all of the circumstances of the case.

However, that was not the end of the matter. In considering the appropriate remedy, I determined on the evidence and arguments of the parties at the hearing that the case had "rare and unusual circumstances" which led me to the conclusion that reinstatement was not an appropriate remedy. Therefore, I instead declared that the Grievor was entitled to damages in lieu of an award of reinstatement and left it to the parties to attempt to work out the details.

The parties were not able to settle the quantum of the damages as they have very different conceptions of how the damages should be calculated. Accordingly, I held a hearing into this matter. The parties called no further evidence but made extensive oral arguments buttressed with supporting authorities.

II. SUBMISSIONS

Union Submissions

The Union seeks a damages order on behalf of the Grievor with the following components:

1. 1.5 months' pay for each of the Grievor's 5 years of service equaling 7.5 months' pay;
2. An additional 20% of the above pay award as compensation for loss of collective agreement benefits;
3. The severance entitlement under the collective agreement;
4. Interest on the amounts payable as per the Court Order Interest Act (BC).

The Union begins its submission by noting that the most important element of the just cause concept in collective bargaining law is the in-kind remedy of reinstatement to employment. (See *Westmin Resources Ltd. and Canadian Autoworkers, Local 3019* [1997] B.C.C.A.A.A. No. 291; 63 L.A.C. (4th) 134 (Germaine)). The Union submits that my decision as to damages should be informed by this principle.

The Union bases its damages request on what it asserts is a "framework" for calculating such damages contained in the jurisprudence which has built up since the seminal case of *Re DeHavilland Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 112* (1999), 83 L.A.C. (4th) 157 (Rayner) ("*DeHavilland*") in 1999. It is the Union's assertion that arbitrators in these circumstances typically award between one and two months' salary per year of the employee's service, plus between 15% and 25% of the salary amount for lost benefits (Union counsel concedes that 15% is the most common award in this category); and an award of interest. Other grounds for damages, such as amounts under severance pay provisions in collective agreements, may be awarded where they exist.

The Union relies on a number of cases in supporting its damages claims in this case.

The case of *Cameco Corp. v. United Steel Workers of America, Local 8914* [2008] S.J. No. 775; 2008 SKQB 499; 327 Sask.R. 257; 179 L.A.C. (4th) 97 (Rayner) ("*Cameco*") involved an employee who was dismissed from his employment with the company after some six years of service. In that case, the arbitrator had held that while dismissal was too severe a disciplinary response, reinstatement was not an appropriate remedy. The arbitrator issued an award of damages of two months' pay per year of service plus 25% of that sum for loss of collective agreement benefits, plus interest. The employer appealed and the matter came before the Saskatchewan Court of Queen's Bench. The court upheld the award, stating that the damages were not unreasonably high in view of the range of such damages in the wrongful dismissal jurisprudence.

Among other passages, the Union relies upon the "framework" which is described by Arbitrator Rayner in his award as follows:

> 95. The calculation of compensatory damages is a difficult one. My research would indicate that Arbitrators have generally used an employee's length of service as a starting point and then topped that up to account for the loss by the employee of his seniority rights and his tenure of employment, i.e. his right to be reinstated if discharged for other than just cause. Arbitrators have varied between 1.25 and 1.75 months of pay for each year of service in their awards. In my opinion, the loss of an employee's Collective Bargaining benefits is significant and the compensatory damages ought to reflect that. I believe that an award of two months' salary for every year of service, together with an award of 25 percent of the salary representing Collective Bargaining Agreement benefits (included in that figure is a factor representing overtime the Grievor might have been expected to work), the benefits payable under Section 235 of the Canada Labour Code, together with interest at 5 percent per annum, compounded from February 13, 2006 to the date of payment, would be an appropriate award.

It is the Union's position that the award which it seeks in this hearing falls well within the range considered to be appropriate in *Cameco* and other cases which have used the same or a similar framework for assessing damages. Other cases to which the Union refers in seeking to establish that its request on behalf of the Grievor in this case is within the appropriate range for such

awards are: *DeHavilland (supra)*; *Canvil v. I.A.M.A.W., Lodge 1547* (Stone) (2006), 152 L.A.C. (4th) 378 (Marcotte) ("*Canvil*"); *Canadian Blood Services v. HEU (Bagley Grievance)*, [2004] B.C.C.A.A.A. No. 308 (Jackson) ("*Canadian Blood Services*"); *NAV Canada and I.B.E.W.* (2001), 131 L.A.C. (4th) 429 (Kuttner) ("*Nav Canada*"); and *Re Hendrickson Spring Stratford Operations and United Steelworkers of America, Local 8773 (Ewaniuk)* (2009), 191 L.A.C. (4th) 116 (Solomatenko) ("*Hendrickson Spring*").

In *DeHavilland*, the arbitrator noted that previous cases, among which was included one of his own cases, did not discuss the basis on which an award of damages ought to be made and had to be considered to have made inadequate awards in the circumstances. This was because they did not focus on the purpose of the payment of compensation in lieu of reinstatement. That purpose was to compensate the employee for losing his rights under the collective agreement. The following passages from the award flesh out this viewpoint:

> 14 At the outset of this award I pointed out that the payment of compensation in lieu of reinstatement is to compensate the employee for losing his rights under the collective agreement. Again as stated earlier, the employee's conduct that resulted in the decision not to reinstate should not be a factor in assessing compensation. (Although in some of the cases one suspects that the behavior of the employee has not been divorced from the issue of compensation.) Finally the compensation is not merely to replicate any notice period, or payment of monies in lieu thereof under Employment Standards legislation. In my view to base compensation on what would have been received under that legislation ignores the economic value of being a member of a bargaining unit and the recipient of all the benefits and protection that a collective agreement brings. It is for loss of that protection and those benefits that compensation is awarded. To set compensation at Employment Standards legislation levels is to virtually discount the very basis on which compensation is to be paid, i.e., the loss of the benefit of the collective agreement. Since in most of the cases referred to, including Shaver and the present case, employees of the grievor's seniority would receive about 5 months' wages under Employment Standards legislation, to award 6 months' wages would be to place a minimal, and in my view an unrealistic, value on the benefits of working under a collective bargaining regime.
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> 15 A better, albeit not totally analogous, comparison would be to early retirement severance packages that are given to unionized employees. Although there was no evidence led as to the amounts awarded under those packages, I believe that an amount equal to one month's wages for every year of seniority, together with a 15% payment for loss of fringe benefits, would be an appropriate payment to reflect the loss of coverage under the collective agreement. In the grievor's case that would be 12 months.

The Union points to *Canvil* – a decision which post-dates *DeHavilland* by several years – for its checklist of considerations which arbitrators now find appropriate in calculating damages awards in these kinds of cases. There, Arbitrator Marcotte said the following:

> 39 ... I find that an appropriate approach to determination of the amount of damages awarded to the grievor in the instant case includes consideration of the following, in no particular order:

* The remedy is to compensate the grievor for his loss of employment and loss of rights, benefits and privileges under the collective agreement.
* The remedy does not represent on-going loss of wages from the time of termination of employment; accordingly mitigation is not a factor in determining the amount of damages.
* The common law regime in cases of unjust dismissal under a collective agreement does not apply.
* The grievor's conduct leading to the decision to discharge and the decision not to reinstate him to his employment is not a relevant factor.
* The remedy is not to replicate any notice period or monies in lieu of notice under the Employment Standards Act.
* The grievor is entitled to monies that he would receive under the relevant provisions of the Employment Standards Act.
* The remedy includes a percentage factor related to loss of fringe benefits available under the collective agreement.
* The grievor's personal circumstances including, but not limited to, his years of service and age at the time of dismissal, education, and, employment prospects are relevant factors to be considered.

Having these principles in mind, the Union made the following further submissions regarding the points set out in its damages award request.

First, with respect to base damages, it noted that 1.5 months' pay is $6,588. Multiplying that by 5 years equals a total of $32,940 in base pay. It is the Union's submission that the appropriate amount must take into account the fact that the Grievor worked overtime and received shift premiums, all of which serves to increase the amount of his true loss for the five month period and which should be readily calculable from a review of company records.

Second, as referenced by Arbitrator Marcotte in *Canvil*, the Grievor's conduct should not be used to reduce his entitlement to damages in lieu of reinstatement. His conduct has already been considered by this arbitration board when it decided not to reinstate. This point, says the Union, was also accepted in *DeHavilland* (para. 1), *Cameco* (para. 9 in the court decision and paras. 25 and 185 in the arbitration award) and *Canadian Blood Services* (paras. 30-31).

Third, with respect to the value of benefits, this is not a value which is based only on the hard-cost benefits under the collective agreement but also on intangible benefits. In this situation, 20% on account of benefits is well within the reasonable range awarded for this head of damages: see *Canadian Blood Services* (paras. 29 & 32) and *DeHavilland* (para. 14).

Fourth, with respect to interest, the Union concedes that an award of interest may not be universal in the cases but submits that it is a usual head of damages in these kinds of cases. The Union specifies that it is seeking pre-judgment and post-judgment interest on behalf of the Grievor.

Fifth, with respect to the request for an award of severance pay under the collective agreement, the Union notes that some of the cases have awarded severance pay, some have not and, to the point, Arbitrator Jackson in *Canadian Blood Services* would have ordered severance pay in addition to 1.75 months' pay per year of service but the collective agreement in that case did not have such a provision (see paras. 34-35).

In this case, says the Union, there is such a provision in Article 13 of the parties' collective agreement. It calculates the Grievor's entitlement under that provision as being in the amount of $5,400.

Sixth, and finally, the Union submits that mitigation does not apply in a case involving damages in lieu of reinstatement and hence no calculation is required.

Employer Submissions

It is the Employer's position that the Grievor is entitled to severance pay under the Collective Agreement with an appropriate deduction based on his misconduct. In the Employer's submission, the appropriate deduction is 50%.

Severance pay under the Collective Agreement is one (1) weeks' pay per year of seniority. The applicable provision is Article 13 which, in its material part, reads as follows:

> ARTICLE 13 - SEPARATION ALLOWANCE
>
> Section I - Separation Allowance Conditions
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> Should it become necessary to close the plant or a portion of the plant and it is not expected that those affected will be re-employed, a separation allowance will be paid to employees subject to the following:
>
> a) They have one (1) or more years' seniority
> b) They are actively employed with the Company and accumulating seniority. Employees on leave of absence up to one (1) year, and employees receiving Workers' compensation or off sick will be eligible.
> c) They have not been granted retirement pension.
> d) The closing is not brought about by war, strike, walkout, work stoppage, slowdown or other cessation of work, fire, government action or act of God.
> e) In order to qualify for separation allowance employees will continue to work in a satisfactory manner as long as required.
> f) Effective the date of ratification the separation allowance shall be one (1) weeks pay per year of seniority.
> g) In the event of a whole or partial plant reduction, all employees affected shall receive six (6) weeks notice or receive pay in lieu of notice.

The conduct to which the Employer refers in asserting that a deduction is in order is that which led to his dismissal as well as his conduct at the hearing. The Employer submits that the Grievor

demonstrated a consistent pattern of not telling the truth under oath, concocting excuses which were "beyond belief." His other noteworthy misconduct included allegations of racism against his co-workers made at the hearing and his inhumane treatment of animals in the workplace.

None of the factors leading to the arbitrator's decision not to reinstate the Grievor arose from the Employer's conduct, the Employer says. The only thing that saved the Grievor from achieving nothing from his grievance was the arbitrator's conclusion of "double jeopardy", i.e., that the Employer had already disciplined the Grievor for his misconduct by providing him with a written reprimand (Employer counsel noted that while the Employer was not in agreement with this decision, it was proceeding on the footing that it had to live with it – but the Grievor's conduct, it says, would have easily justified termination without the "double jeopardy" issue.).

The Employer states that there appear to be two different "avenues" in which arbitrators consider damages assessments in the context of a case involving damages in lieu of reinstatement. One is the "Ontario way", as Employer counsel describes it. The other is the "British Columbia way". The Employer submits that the "B.C. way" is the correct approach, and that even Ontario arbitrators appear to have departed from the "Ontario way" in certain instances. The only British Columbia case to use the Ontario methodology for assessing damages, says the Employer, is *Canadian Blood Services*, and that case has not been followed.

The Employer submits that in this province, arbitrators ask: does the parties' collective agreement provide a basis for determining the value of the loss, something which the parties have themselves agreed to? If the parties themselves have identified the amount which employees are entitled to for the loss of a job which would otherwise enjoy full seniority protection and the right to seek reinstatement in dismissal cases, i.e. the type of job the Grievor lost through his own misconduct, then that is the parties' own valuation of what a union job with this employer, with its attendant seniority benefits and right to reinstatement, is worth. The arbitrator need not go further, other than to perhaps make an award on account of interest if that appears appropriate. The basic starting point for an assessment of these damages is thus the value placed on the loss of a job by the Collective Agreement.

To support its position, the Employer relies first on *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) ("*B.C. Ferries*"). In that case, the arbitrator rejected other formulas and turned to the parties' collective agreement. In the collective agreement, the arbitrator found that the determination of the appropriate level of severance pay for the loss of a job had been "established by the parties themselves." (para. 95). He awarded severance pay as per the collective agreement and interest from the date of discharge.

The Employer asks me to note that the severance pay provisions involve no fault on the part of the employee. They are simply a reflection of what a job is worth without culpability on the part of the employee. Hence the need for a discount in the Grievor's situation mentioned earlier in its submissions.

The Employer also relies on *Vantel/Safeway Credit Union v. Canadian Office and Professional Employees' Union, Local 15 (Anderson Grievance)*, [2006] B.C.C.A.A.A. No. 113 (Blasina)

("*Vantel*"). There, the employee was what the arbitrator termed a "problem employee" whose conduct had been tolerated by management before she was abruptly dismissed. As there could be no restoration of the employment relationship, the arbitrator ordered damages rather than the usual order of reinstatement. In establishing the quantum of damages, he applied the severance pay provisions of the collective agreement in addition to a sum of 8 weeks' pay already provided by the employer to the dismissed employee, making together a total of 23 weeks of pay. He did not award interest, making no comment about it.

The Employer relies as well on *British Columbia (Ministry of Public Safety) v. British Columbia Government and Service Employees' Union (Kambo Grievance)* [2009] B.C.C.A.A.A. No. 92; 186 L.A.C. (4th) 168; LAX/2009-343 (Steeves) ("*B.C., Ministry of Public Safety*"). In this case, the arbitrator concluded that the grievor had engaged in a serious act of dishonesty. After a review of the mitigating and aggravating factors, the arbitrator decided that the employment relationship could not be restored and that as an exceptional matter he would award damages. Following the *B.C. Ferries* decision, among others, he concluded that the severance pay entitlement found under the layoff provisions of the collective agreement represented what the parties had established as "the level of payment for circumstances analogous to the circumstances in this case." The applicable rate under that provision was three weeks' pay for every year of service, amounting to 24 weeks' pay plus interest in the case of the employee in that case.

B.C., Ministry of Public Safety was taken on appeal to the British Columbia Labour Relations Board in *British Columbia (Ministry of Public Safety) (Re)* [2009] B.C.L.R.B.D. No. 225; 2009 CanLII 67580. Among other grounds, the union argued in the appeal that the arbitrator had relied on a severance provision that dealt with layoff from employment, which was not comparable to dismissal, and which the parties did not contemplate using in this context and which had never been applied this way in practice. The employer replied that the arbitrator's decision was the result of a proper and reasoned application of the correct legal principles and the arbitrator's decision to apply one line of authority over another was not subject to review.

The Labour Relations Board dismissed the appeal. With respect to the issue of the calculation of severance pay, the Board Vice-Chair said the following:

> 33 I reject the Union's contention that the Arbitrator committed a reviewable error by finding that the lack of trust justified damages in lieu of reinstatement. The issue of whether a lack of trust puts the present case into an exceptional category involves a judgment of degree, given the Arbitrator's assessment of all circumstances of the case. It is a judgment that falls within the broad scope of an arbitrator's remedial discretion under Section 89 of the Code. I have reached the same conclusion regarding the Union's argument concerning the amount of damages awarded to the Grievor. The Board's established policy is not to second-guess the weight an arbitrator assigns to sub-factors under the three-step Wm. Scott analysis: British Columbia Transit, BCLRB No. B54/97. As noted in Argo, the Arbitrator is in the best position to decide on the evidence before him whether the present case qualifies as an exception. Similarly, the Arbitrator is in the best position to choose a method for calculating an award of damages. I defer to the Arbitrator's judgment those respects, in accordance with the Board's established policy. I find the Arbitrator

reached his conclusions by applying proper principles of the Code to the facts and circumstances of the case.

A further application for leave and reconsideration of this decision was rejected by the Labour Relations Board in *British Columbia (Ministry of Public Safety) (Re)* [2010] B.C.L.R.B.D. No. 2.

The point to be taken from these cases, says the Employer, is that in British Columbia, you look to the collective agreement to determine what value the parties themselves have placed on the loss of a job in a circumstance where the employee is not at fault, and apply that measure to determine damages in a case such as the instant one. Where arbitrators award severance pay in these kinds of cases by looking to the collective agreement, says the Employer, they are, as the Labour Relations Board itself said, " applying proper principles of the Code to the facts and circumstances of the case ".

The Employer also refers to *Hendrickson Spring*, not for the formula used by the arbitrator in that Ontario decision but instead for the proposition that it is a fallacy that damages ought to be awarded on the premise that they are intended to remedy the employer's breach of the collective agreement, a proposition supported in some of the earlier cases. The arbitrator in *Hendrickson Spring* emphatically rejected that proposition, noting that while the employer was in breach of the collective agreement when it was found that dismissal was excessive, the decision not to reinstate but to instead grant a measure of damages was all on the employee's shoulders based on his or her misconduct. But for the employee's misconduct, there would have been no need to consider damages in lieu of reinstatement. That, says the Employer, is the case here and establishes why the severance pay award to be made to the employee should be discounted by 50% to properly recognize the role played by the employee in bringing the employment relationship to an end.

Finally, the Employer refers to *Cadbury Adams Canada Inc. v. United Food and Commercial Workers Canada Local 175 (Litwin Grievance)* [2012] O.L.A.A. No. 53 (Marcotte)("*Cadbury*") In that case, the arbitrator had declared the employer's discipline of the affected employee to be void ab initio for failure to comply with a union representation clause in the collective agreement. However, in view of the grievor's egregious and dishonest conduct, the arbitrator declined to reinstate and awarded damages instead. Noting that this was not a case in which the employer had been found to have issued excessive discipline, the arbitrator distinguished earlier decisions and based his award on the minimum standards of the Employment Standards Act of Ontario, which totaled 34 weeks in the grievor's case. The arbitrator also awarded interest from the date of the discharge.

It was the Employer's position here that the *Cadbury* case reflected a reason for electing a damages award which was analogous to the reason in our own case. In *Cadbury*, as here, it was a process issue that led to the conclusion that the dismissal could not be initially sustained, not a conclusion that the Grievor's conduct did not justify dismissal. In short, while in *Cadbury* a

union representation blunder saved the grievor from being removed from her employment with no damages, it was a "double jeopardy" situation that had the same result here. In neither case could the misconduct of the grievor be seen as anything but the driving force behind the termination of the employment relationship.

In summary, the Employer states that Article 13 of the instant Collective Agreement provides the parties' valuation of the loss of a bargaining unit job and so ought to be used as the measure of damages in this case. In view of the Grievor's misconduct, a 50% discount should be applied. The Employer takes no position with respect to interest.

Union Reply Submissions

The Union says that the Employer argues its case as if the Grievor is a lucky man seeking a windfall. The Grievor is a man who is not at all lucky. He has lost his job and he is seeking a reasonable damages award in compensation for what he has lost.

The Employer, says the Union, has relied on the Grievor's conduct, which did cost him his job ultimately, and now would like to do so again to deny him reasonable damages for its loss. This, on the authorities, which the Employer erroneously divides into Ontario and BC authorities, is wrong. The Grievor's misconduct did get him into the predicament in which he lost his job. But it is simply not relevant when determining the value of the job he lost. The cases which say otherwise should not be followed.

The Union distinguishes the Employer's cases on various grounds. In *B.C. Ferries*, the employee in question was never going to return to work regardless of whether she was validly terminated or reinstated. The damages were ordered with that in mind. In *Vantel*, the arbitrator did not consider this key feature of *B.C. Ferries*, a fact that leaves his conclusions not entirely sound. As for the *B.C., Ministry of Public Safety* case, the Union notes that this decision observes that granting interest is a trend in the arbitration decisions, and something that the Union has asked this Arbitration Board to do in the instant case.

III. DECISION

My jurisdiction in this aspect of the Union's grievance is described in Section 89 of the B.C. Labour Relations Code which reads as follows:

> For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
>
> ...
>
> (d) determine that a dismissal or discipline is excessive in all circumstances of the case and substitute other measures that appear just and equitable,

The Code does not define "other measures" and so leaves it to the discretion of arbitrators to

determine what is "just and equitable" in the circumstances of each case.

The case authorities relied on by the parties provide a comprehensive review of the factors arbitrators consider to be relevant to an assessment of what is just and equitable. Acknowledging that arbitrators are simply not in agreement on this issue, there are certain themes that are struck that I consider to be sensible ones and which will inform my award here.

Firstly, arbitrators have invariably concluded that an award of money damages is a just and equitable measure in lieu of a grievor's reinstatement.

Secondly, most arbitrators have concluded that the calculation of money damages should reflect, in some way, the fact that the grievor is not only losing employment but employment with a "right to reinstatement" which provides an enhanced form of job security when contrasted with employment agreements at the common law. Essentially, when most arbitrators make an assessment of damages, it is a dominant factor in the analysis that the employment the employee is losing is not just any employment but involves the loss of a good union job.

To this point in the analysis, I do not think that the Employer and Union are in disagreement and I certainly have concluded myself that these factors are appropriate ones.

The agreement between the parties ends there. They have several areas of disagreement with respect to various aspects of the jurisprudence and I have considered their full submissions. However, the only disagreements I will deal with in this award are those which I have concluded are material to the outcome. The first area of disagreement is: by what method should an arbitrator assess the value of the loss of a bargaining unit job? The second area of disagreement is: what role, if any, should the Grievor's misconduct (which led to the need for a damages award in the first place) play in assessing the proper measure of damages?

Dealing with the first concern, if I put the arguments of the parties in a nutshell, I arrive at the following. The Employer says that the answer is straight-forward. If, as here, the parties have negotiated a provision which places a specific value on the loss of a bargaining unit job, that is the value that the arbitrator should use in the calculation of damages. The Union says that collective agreement provisions that provide for severance pay on layoff or other events do not measure the value of union jobs, they have other purposes and are irrelevant to a consideration of the true value of the lost job in the circumstances present here. The Union favours a structure in which the arbitrator awards the employee a certain number of months of pay per year of service.

Damages awards can have a number of different components. The most important of them is the calculation of how much "pay" will be represented in the damages award. Less important but worthy of careful consideration is the value of lost benefits under the collective agreement. There is also the question of whether interest ought to be awarded, and in respect of what periods. An issue that arises frequently is whether it is appropriate for the arbitrator to include in the award an employee's notice or severance pay under the applicable provincial employment standards legislation, either in substitution for the "pay" component or in addition to it.

I will walk through each factor and determine what I believe to be fair and equitable in the

circumstances of this particular case.

The first issue is whether I should look to the Collective Agreement for the measure of damages that should be awarded to the Grievor (subject to consideration of whether his conduct ought to reduce the damages).

Article 13 provides for a "Separation Allowance" and contains a formula which provides a specified amount of pay for each year of service. Separation allowance is paid in the event that it becomes necessary to close the plant or a portion of the plant. The Article contains a list of causes of closure which will not qualify an employee for the benefit. It also sets out an amount of notice or payment in the event of a "whole or partial plant reduction", which I take without deciding means a reduction in the absence of a plant closure.

As I would expect would be true of most arbitrators, I am inclined to pay a lot of attention to the parties' agreements, even when they are not directly on point. However, I cannot conclude that a notice provision establishing severance pay in the event of a plant closure is in any way representative of the value of a union job. It more likely represents the best efforts of the parties to arrive at a measure of protection, however adequate or inadequate that might be, in a context in which both the Employer and the employees are catastrophically affected by an event beyond the Employer's control. I am not convinced that Article 13 has anything to do with the value of a bargaining unit job.

I am mindful that several highly regarded British Columbia arbitrators (setting aside the highly regarded non-British Columbia arbitrators for a moment) have elected in their own cases to use severance pay provisions in the collective agreement in assessing damages. It is of course true that I am not bound to follow these decisions as I am directed by the legislation to determine on the facts and circumstances of this case what is just and equitable. That aside, I do not conclude on a close reading of these awards that they reflect anything other than the arbitrator's best assessment of what was just and equitable on the particular facts before each arbitrator.

B.C. Ferries is cited by the Employer as having established that the appropriate measure of damages is that found in the applicable collective agreement if the parties have agreed to a particular level of severance pay. I do not agree that this is what the case stands for.

In *B.C. Ferries*, Arbitrator McPhillips treated the issue of money damages as having two components. The first component involved damages in the nature of "severance pay" which would be owing simply on account of the fact that the employee had been dismissed without just cause. Indeed, in respect of that component, Arbitrator McPhillips awarded damages to the grievor on the basis of the severance pay formula in the collective agreement. The next component addressed by the arbitrator was one he called "compensation for loss of collective agreement rights" (para. 96) which included the right of reinstatement unless dismissed for cause. In assessing the merits of the union's claim on behalf of the grievor there, the arbitrator canvassed the jurisprudence, including the *DeHavilland* and *Nav Canada* cases, and declared that nothing was owing to the grievor on this account. The reason for this was that the grievor had no intention of returning to work and therefore damages for the loss of collective bargaining rights were "not appropriate in the circumstances of this case" (para. 100). As the arbitrator said

in closing: "In this situation it would be completely inequitable to award compensation for the loss of collective bargaining rights (para. 104).

In *Vantel*, although the arbitrator purported to follow *B.C. Ferries*, it does not appear to have been pointed out to him in that case that the severance payment made to the grievor in *B.C. Ferries* was not for the loss of the right to reinstatement – the loss of what makes a bargaining unit job special – but rather was for the more generic severance pay for dismissal without cause component. The *Vantel* case conflated the two and may in that sense be less supportive of the notion of looking to the agreement of the parties on severance pay matters than it would otherwise appear. It remains to be said that the arbitrator in that case was in any event not purporting to blindly follow precedent as he considered it appropriate to leave in place without deduction a payment of 8 weeks' pay that had been made to the grievor previously. I conclude that he was doing what he felt was just and equitable in the circumstances of that case.

The third in the trilogy of cases cited by the Employer for the proposition that arbitrators ought to look to the collective agreement to determine the value of the loss of bargaining unit jobs is *B.C., Ministry of Public Safety*. It is true that Arbitrator Steeves adopted the formula in the collective agreement before him in constructing a damages award, but it must be noted that he found the collective agreement represented what the parties had established as "the level of payment for circumstances analogous to the circumstances in this case." I have no quarrel with the result in that decision but it is not persuasive authority in the case before me because it is clear from what I have already said that I do not see that the level of payment in Article 13 has having been established by the parties for circumstances which are analogous to the Grievor's circumstances. In my opinion, they do not relate at all.

I do not know whether there is any perfect formula for measuring the value of a job lost in these circumstances. I certainly will not be suggesting one. However, I do think that when a person loses a job without notice or payment in lieu of notice, and without just cause for summary dismissal, it is just and equitable for that person to receive severance pay as a consequence. I think that when the job is a bargaining unit job, it is just and equitable to consider what further value that has to the affected individual and attempt to compensate the individual for that lost value. There is nothing unique about this formula. It was the formula in the original *B.C. Ferries* case and, as I see it, it drove the results in many of the other cases such as *Canadian Blood Services, Canvil,* and *DeHavilland*, among others. In each of these cases, the arbitrators identified a fair solution, not on identical grounds nor with identical considerations.

In this case, I conclude that the Union's general valuation, for the most part, falls within a range which produce a fair and appropriate alternative to reinstatement: 1.5 months' pay per completed year of service, equaling 7.5 months of pay. I also accept that 20% on account of lost collective agreement benefits falls within an appropriate range and is fair. I reject the Union's request for an award of severance pay under the Collective Agreement as I have found that it is irrelevant to the valuation of the Grievor's entitlement to damages in lieu of reinstatement. I would also award interest (see below).

That leaves the question of whether I should be discounting this award for the Grievor's misconduct. I have carefully considered the Employer's arguments in this respect. In the end, I conclude that it would be inequitable in the circumstances of this case to take the Grievor's misconduct into account in reducing the damages award. When I made my decision that the Employer had already disciplined the Grievor by issuing a written reprimand and could not simply retract it and terminate him within a short space of time, the Employer was facing the prospect that the Grievor would be returned to his employment with only that written reprimand on his employment record, and a claim for significant back pay. As it turned out, in view of his conduct on the job and at the hearing, I decided that this was one of those rare cases where the Grievor's reinstatement would not be ordered. I concluded that the Grievor's misconduct had regrettably cost him his bargaining unit job by making it impossible for me to order his reinstatement. I did not consider that the Grievor's misconduct would cost him not only his bargaining unit job but the damages in lieu of that reinstatement which would be given to him to compensate him for the loss. None of the well-articulated arguments made by Employer counsel in this case have persuaded me that I should re-visit the Grievor's misconduct for the purposes of reducing the damages assessment, and I decline to do so.

My consideration of the submissions of counsel and a careful reading of the case authorities they have provided to me have led me to the conclusion that an appropriate order for compensation of the Grievor in lieu of reinstatement is as follows:

- 1.5 months' regular pay (basic pay) for each of the Grievor's 5 years of service equaling 7.5 months' regular pay;

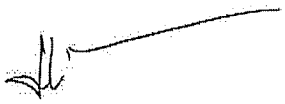
- 20% of the pay award as compensation for loss of benefits;

- Interest on the amounts payable from the date of the Grievor's termination as per the Court Order Interest Act (BC).

I will leave the parties to work out the precise amount of these damages and will remain seized to deal with any difficulties they may have in that respect or in respect of the implementation of this Award generally.

It is so awarded.

DATED AT North Vancouver, British Columbia, this 28th day of May, 2014.



John L. McConchie, Arbitrator