AH 696

IN THE MATTER OF AN ARBITRATION

BETWEEN: VIA RAIL CANADA INC.

AND UNIFOR NATIONAL COUNCIL 4000

AND IN THE MATTER OF THE GRIEVANCE OF A. NITZSCHE-MacFADYEN

ARBITRATOR: J.F.W. Weatherill

By agreement, written submissions from each party were received by the arbitrator on February 21, 2020.

B. Kennedy, for the union.

A. Baril, for the employer.

SUPPLEMENTARY AWARD

In the award in this matter dated December 20, 2019, it was concluded that the grievor did abuse such authority as she had over the complainant, that she was guilty of harassment in violation of the company's policy, and that there was just cause for the imposition of discipline. It was also found, however, that a number of the allegations against the grievor had not been established, and notice was taken of certain shortcomings in the actions or inactions of the complainant and of the company. Thus, while the grievor was subject to discipline, the extent of such discipline remains an outstanding matter. As the award concluded:

> *Apart from the union request for full relief and compensation, the matter of remedy was not the subject of any substantial submissions at the hearing of this matter, although it is clear from the company's brief that it considered a future employment relationship to be untenable. Accordingly, while I consider the grievor is entitled to some significant relief, not excluding reinstatement, I make no award in that respect at this time, remitting the matter to the parties for consideration and negotiations, while retaining jurisdiction to receive submissions and determine that matter, to complete the award.*

The parties have not resolved the matter and, as noted, written submissions were made and this Supplementary Award will determine the issue of remedy, given that the grievance has succeeded in part.

I will deal first with the question of reinstatement in employment, typically an element of relief where a discharge grievance succeeds in whole or, as here, in part. In exceptional circumstances, an arbitrator has authority not to reinstate a grievor even though just cause for discharge was not established. No issue has been raised in this case with respect to my authority in that regard.

In the circumstances of the instant case, it is my conclusion that it would not be appropriate to reinstate the grievor to her previous position (being apparently the only one available to her in the area), and that an award of damages in lieu of reinstatement should be made. Criteria applicable to a decision of this sort are set out in a number of cases, including *De Havilland Inc. v. CAW-Canada Local 1121 (1999) 83 L.A.C. (4th) 157 (Rayner)*, where they are set out as follows:

1. *The refusal of co-workers to work with the grievor.*

2. *Lack of trust between the grievor and the employer*.

3. The inability or refusal of the grievor to accept responsibility for any wrongdoing.

4. The demeanour and attitude of the grievor at the hearing.

5. Animosity on the part of the grievor towards management or co-workers.

6. The risk of a "poisoned" atmosphere in the workplace.

It was also stated that it was not necessary for all of these criteria to be expressly met, and that in addition to these criteria the size of the workplace must also be taken into account. A small workplace is less favourable to reinstatement. In the instant case, all of these criteria, with the exception of (4), (since the grievor did not testify before me) are met. There are, as noted, only two employees regularly working at Truro, and the second employee, the complainant, found to have been the object of harassment by the grievor, has written to indicate she would quit her job if the grievor were reinstated. That there is a lack of trust has been made very clear, as has the grievor's animosity toward management. There is indeed a strong risk of a poisoned atmosphere continuing or developing. For all of these reasons, I shall not order the reinstatement of the grievor and will substitute an award of damages in lieu of reinstatement.

A number of factors have been found to affect the quantum of damages where these are awarded in lieu of reinstatement. The company is in violation of the collective agreement in that, while there was just cause for some discipline, there was not just cause for discharge. Since this is a case in which reinstatement in employment is not appropriate, the grievor is entitled to damages in lieu of reinstatement. However, such damages are to be reduced in this case because the grievor's own conduct has contributed significantly to the creation of a situation where reinstatement is not appropriate. The nature of damages in such circumstances is discussed at length in *Hay River Health and Social Services Authority v. PSAC 201LAC (4th) 345*, and I am, with respect, in agreement with that approach.

As well, as has been noted, the company following its article 24 investigation, put the grievor on leave (reasonably) but without pay, although no discipline was then imposed. In my view the company was not entitled to withhold pay, which the grievor was entitled to earn, where no discipline was imposed. On this head, the grievor is entitled to payment for loss of earnings and benefits for the period of June 20 to June 28, 2018. In my view, it would be unreasonable to require the grievor to mitigate this particular loss in these circumstances.

As to damages in lieu of reinstatement, these are to be assessed having regard to the whole period of work the grievor may be said to have lost, recognizing the particular value of a unionized job with its benefits, pension and relative security. These are not capable of precise calculation, and arbitrators have awarded an average of about 15 per cent as a "top up" to the lost wages to reflect the benefits of a unionized job. The material does not suggest that some other rate should be applied in this case.

The total amount that may be said to have been lost is also somewhat conjectural. Various contingencies including illness, layoff, overtime opportunities or lack thereof, changes in wage rates and even the closing of the company's operations in Truro, must be considered. These contingencies are largely imponderable, but must nevertheless be taken into account to the extent possible. For example, the company quite properly points out that the Truro station is more prone to closure than its primary or mid-level stations. As well, it appears that a number of tasks relating to ticketing now performed by employees will be computerized "in the near future". Contingencies aside, given the grievor's age and

service, the maximum period of potential work between the grievor's discharge and her retirement in nineteen years.

The company has calculated the maximum income, including estimated overtime, that the grievor could have received until her retirement as $ 786,135.45. The union does not contest that figure. The 15 per cent fringe benefits factor noted above is to be added, for a total of $ 904,055.76. This is of course a purely notional figure, on the basis of which a more or less realistic estimation of actual loss may begin.

The company states that case law "establishes" that the contingencies and responsibility discount generally range between seventy and ninety per cent. Again, there is necessarily a significant degree of arbitrariness in such a determination. The company recognizes this in citing the remarks of Lord Justice Megaw in *Edwards v. Society of Graphical and Allied Trades, [1970] 3 All E.R. 689 (C.A.)* as follows:

> *Where there are so many incalculables, it would not be right to seek to give an aura of scientific respectability to the assessment of future damages by purporting to apply arithmetical or actuarial formulae to the*

assessment, or to any individual factor on which the assessment partly depends. One must try to assess. One cannot calculate.

The award of damages in lieu of reinstatement is a final disposition and, particularly when a substantial discount for contingencies is taken into account, that discount should include a factor covering any duties of mitigation and include any statutory entitlement. The even partially successful grievor should not be required, over the rest of his or her working life, to account for subsequent earnings and thus reduce yet further the value of the damage award.

Having regard to the contingencies mentioned above, and in all of the circumstances of the instant case, I assess the contingency and mitigation discount at seventy-five per cent. This reduces the grievor's loss of future earnings, based on the estimated figure noted above, to $ 226,014.18, which I consider a relatively realistic assessment.

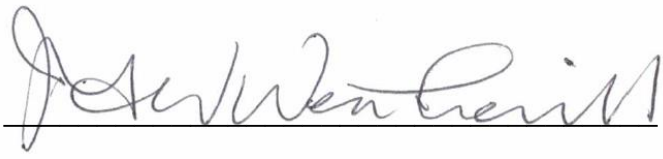
Finally, adjustment must be made for the grievor's "self-imposed" loss as a result of the misconduct which has been found. Again, the amount is imponderable. The assessment of forty demerits under the Brown system which I have indicated

would be within the range of reasonable disciplinary responses to the situation does not translate into a specific equivalent in terms of suspension or other loss. Bearing in mind all the circumstances of this particular case it is my assessment that damages should be reduced by fifty per cent on this account.

For all of the foregoing reasons it is my award that the grievance be allowed in part. The grievor's discharge is upheld, but she is to be paid forthwith, as damages in lieu of reinstatement and in final settlement of the matter, the sum of $ 113,007.29, together with interest from the date of discharge until the date of payment, and subject to any deductions required by law.

I remain seized of the matter to deal with any problems relating to the application of this award.

DATED AT OTTAWA, this 25th day of March 2020,



Arbitrator.