

IN A MATTER OF AN ARBITRATION

BETWEEN

THE VILLAGE OF HARRISON HOT SPRINGS
(The Employer)

AND

**THE CANADIAN UNION OF PUBLIC
EMPLOYEES, LOCAL 458**
(The Union)

Mike deBrouwer,
Grievances 03/06, 04/06

Arbitrator:	Ronald S. Keras
Counsel For The Employer:	Mr. Christopher S. Murdy, Esq.
Counsel For The Union:	Ms. Susan Jansen
Hearing:	Harrison Hot Springs, B. C. July 27, 2006 August 14, 2006
Published:	September 1, 2006

I

The parties agreed that this Arbitration Board was properly constituted pursuant to the terms of the Collective Agreement to hear and decide the matters in dispute. There were two grievances filed by the Grievor, Mr. Mike deBrouwer. The parties agreed that both grievances should be heard together at this hearing. The first grievance, dated April 28, 2006, alleged verbal and written abuse and reads as follows:

The Collective Agreement has been violated, not limited to but including, Article 29; the Employer continued to treat Mike deBrouwer differently than other employees. This treatment includes suspensions, terminations and after an arbitration award returning me to the workplace with full redress the employer continues this harassing treatment. This verbal/written abuse is contrary to the collective agreement and the labour relations code. These continued actions have among other things, affected the health and well-being of me and my family & marred our reputation in the community.

The remedy sought included an investigation into the Employer's actions and that the Employer cease and desist from such action, and full redress "including damages for intentional infliction of emotional suffering".

The second grievance dated May 17, 2006 read, in part:

..... the Employer has terminated me without cause has verbally abused me in the work place and at home. These actions by the employer have among other things, affected the health and well-being of me and my family and marred our reputation in the community.

The remedy sought read:

The Employer cease and desist from these actions; that an investigation into the Employer's actions take place so that these actions do not reoccur, that I be reinstated to my position and receive full redress including but not limited to all lost wages, benefits and seniority and damages for intentional infliction of emotional suffering.

II

The first grievance arises, primarily, out of the following April 27, 2006, letter to the Grievor from Superintendent of Public Works, Mr. Glen Weber:

This is a written document that will be added to your personnel file about a few performance issues that came about over the last few days that we have talked about.

April 25, 2006; you were working at the Wastewater Treatment Plant without checking in and didn't take the cell phone with you. It is a WCB policy that a lone worker has to check in periodically. We have a policy to check in every hour and to take the cell phone with you. This procedure has been in since last year and you have performed this procedure before. We discussed this procedure on April 27, 2006 at 11:45 and the Village needs your cooperation in filling this Safe Working Procedure.

April 25, 2006. I assigned you your duties for the day and you asked for some keys for the systems. Since the Office was not open, I handed my key to you and said "You have to see Peggy and sign your keys out." I asked you later in the afternoon if you got your keys yet and you said no. On April 27 at 8:00 am, I asked you for my key back and told you again that you have to see Peggy and sign your key out. At the time of writing this letter at 9:45 am, you have not signed them out. Can you please sign the keys out so you can perform your duties when you need them?

April 27, 2006. The recording binders for all operations are required to be filed on the shelf after use. Chris came in to record the lake levels in the binder and noticed it was not on the shelf. He had to look for the binder. You entered the reading yesterday and didn't put the binder back into the place you got it from. It is very important for proper operations that all equipment and recording binders get put back into their proper spot for the next time somebody else needs it. Can you please make sure the binders and tools are put back into their appropriate spot.

April 25 and 26. The time you spend at the WWTP has taken considerable more amount of time compared to other operators performing the same duties. I ask you to coordinate your duties to reduce the hours you spend at the Plant. We have a huge work list that needs major attention.

I look forward to your cooperation to these matters and if you need to discuss anything, please feel (sic) free to do so.

Mr. Weber testified to the issues outlined in his April 27, 2006 letter to the Grievor. Mr. Weber oversees all outdoor operations of the Village and reports to Mr. van der Wolf, Chief Administrative Officer of the Village. He has the responsibility to ensure among other things the safety of the Village's water supply. Mr. Weber supervises six employees.

The Grievor returned to work having been reinstated as a result of an April 21, 2006 decision, (See *Village of Harrison Hot Springs v. C.U.P.E., Local 458 (deBrouwer grievance)* [2006] B.C.C.A.A.A. No. 76 (R.S. Keras). In that decision Mr. deBrouwer was reinstated, made whole and his employment record was expunged of the matter. Mr. Weber testified that on the Grievor's first day back to work he told the Grievor to go to the office and sign out keys and the Grievor replied that since Mr. Weber took them from him he should get them back. Mr. Weber refused and advised this Board that he told the Grievor it was his (the

Grievor's) responsibility. Mr. Weber's testimony continued with a brief description of the matters outlined in the April 27th letter.

The Grievor's April 28th grievance was filed and a grievance hearing was held May 15, 2006.

Mr. Gerry van der Wolf, Chief Administrative Officer of the Village testified about the recent rapid growth of the Village and associated problems and opportunities. He also testified to his difficulties with the former Mayor and advised that he was suing the former Mayor. He advised that he had the support of the new Mayor and Council. He also spoke of the serious responsibilities of the public works department of the Village, in particular the water system in a post Walkerton environment.

At the May 15th grievance hearing concerning the Grievance of April 28th Mr. van der Wolf testified that he met alone with the Union, that his solution was that he (the Grievor) seek employment elsewhere, and that the Employer pay him six weeks wages to do so. Mr. van der Wolf testified that the Union said they would like to see that in writing and Mr. van der Wolf faxed a letter to the Union. Mr. van der Wolf testified that May 15th was Council night and that he took the letter to the Grievor's house, his daughter was there but the Grievor was not. The letter was dated May 15, 2006 addressed to Ms. Susan Jansen and read as follows:

Dear Susan:

Further to our discussion May 15, 2006 regarding Mike's grievance dated April 28, 2006, I indicated in the hearing that the solution to Mike's persistent dissatisfaction with his supervisor is to seek

employment elsewhere. I offered Mike six weeks paid time during which he could seek employment full time, at the conclusion of which (June 26, 2006) he would no longer be employed here whether he had found work elsewhere or not. Your response was to request the response in writing.

The letter was signed by Gerry van der Wolf and copied to Mike deBrouwer, Vanessa DiMarco, Unit Chair, CUPE Local 458 and Glen Weber, Superintendent of Public Works.

Mr. van der Wolf testified that the Grievor was at work on May 16th and that he asked the Grievor to come to his office and that the Grievor refused. Mr. van der Wolf testified that in the afternoon of May 16th an employee told him that Mike deBrouwer said that if he had a gun he would shoot Mr. van der Wolf. Mr. van der Wolf took the matter seriously and reported it to the Royal Canadian Mounted Police (RCMP). On May 17th the Grievor came to work and Mr. van der Wolf told the Grievor that he had reported his threat to the RCMP, to which The Grievor said “good for you Gerry”. Mr. van der Wolf told the Grievor to leave or he would call the police and have him removed. Mr. van der Wolf called the RCMP. Mr. van der Wolf testified that the police told him that they had told the Grievor not to come on Village property. As well the police told Mr. van der Wolf not to go to the Grievor’s property.

Mr. van der Wolf advised that it is difficult to have labour relations problems in a small community however he was getting feed back from Council and the community “that we are on the right track”.

In cross-examination Mr. van der Wolf advised that the RCMP did not file charges and that they did not tell him if they talked to any witnesses.

Ms. Louise Piper, Local 458 President, testified to the current difficult relationship between the parties.

The Grievor, Mr. Mike deBrouwer advised that he was hired September 7, 2000 and became a permanent employee on December 13, 2000. He testified that he accepted an appointment of acting Public Works Supervisor from February 28, 2005 until June 6, 2005 at which time Mr. Weber had been hired as Superintendent of Public Works. Mr. deBrouwer advised that he was the Union's Unit Chair from 2002 and that he learned in the position as he had no previous experience in the Unit Chair position. In April of 2005 the Grievor filed a number of grievances which were "stalled" and in September 2005 the Grievor was suspended for a week. The suspension was subsequently settled and stricken from his record. Mr. deBrouwer described a number of exchanges which led to his conclusion that he was being "picked on". On February 15, 2006 the Grievor's employment was terminated. He was reinstated (*Harrison Hot Spring, supra*) and returned to work on April 25, 2006.

Mr. deBrouwer testified to the issues outlined in the April 27th letter from Glen Weber which led to the April 28, 2006 grievance.

The Grievor testified that the May 15, 2006 meeting was to deal with the April 28th grievance filed concerning the April 27th letter. Mr. deBrouwer said the May 15th meeting did not resolve the grievance and subsequent to the meeting he went home as it was his day off. The Grievor arrived at work on May 16th at about 7:50 a.m. Gerry (van der Wolf) asked him to meet in his office and the Grievor said "no, not without a Union rep". Gerry said "we will have the meeting here and now". "I said no and went back out". The Grievor said he later came back in and spoke to

the acting supervisor and told her “my guts were hurting” and that he was going to see his Doctor and took a sick day. The Grievor advised that he went to his Doctor that day, was sent for some tests and subsequently referred to a specialist.

The Grievor, after speaking to Ms. Piper, Local 458 President, on the evening of May 16th opened an envelope, which had been delivered to his home. The envelope contained a copy of the May 15th letter from Mr. van der Wolf. Mr. deBrouwer returned to work on the morning of May 17th. The Grievor testified that Gerry (van der Wolf) came into the lunchroom. There were a number of other employees present in the lunch room. The Grievor testified that Gerry wanted to start up the meeting again and that he said “not without a Union rep”. Gerry said he (Mr. deBrouwer) had to leave, that he was no longer an employee and that he had to go look for a job. Mr. deBrouwer said he gave Gerry his keys and went home. He said that when he got home he found a police officer talking to his wife. The police officer advised that there was a report that Mr. deBrouwer had made a threat. Mr. deBrouwer testified that he was upset and confused. He said the police officer asked him what was going on and he explained the situation. The police officer told him to stay off Village property and to stay away from Gerry. The Grievor said he did not threaten Gerry.

In cross-examination the Grievor testified that on May 17th he put the Village keys in Gerry’s hand and that as he was riding away on his bicycle Gerry said he had reported the threat and the Grievor responded “good for you”. The Grievor said he didn’t put the threat comment together until he spoke to the police officer later that morning.

Summoned witness Mr. Chris Wilson testified to what he described as a “toxic and unpredictable” work environment. He also testified to the exchanges between the Grievor and Mr. van der Wolf on the mornings of May 16th and May 17th as he was one of the employees in the lunch room on both mornings. In redirect Mr. Wilson said he believed he was the last to leave the lunchroom on May 17th, that Gerry had left and Mr. deBrouwer was calling the Local 458 Vice President.

Mr. van der Wolf was recalled and asked about the term “without cause” in a May 21, 2006 grievance response to the Union. The salient portion of the May 21st letter from Mr. van der Wolf reads as follows:

In response to grievance 04/06 shall we agree that the action being grieved was mine and that we are at step two. My response is to deny that the Collective Agreement has been violated. Mr. deBrouwer has been effectively terminated without cause and given six weeks to find employment elsewhere after which time he will no longer be employed with the Village.

Mr. van der Wolf, in reference to the term “without cause”, testified that he meant an accumulation as distinguished from a single incident. He said this was a response to his (the Grievor’s) grievance, to his overall dissatisfaction and our overall dissatisfaction with him. Mr. van der Wolf advised that he believed six weeks was an appropriate amount of time, a reasonable approach, to find another job and that it was based on one week per year of service. Mr. van der Wolf said he was not a labour relations expert.

III

Mr. Murdy pointed to much of the Union's evidence related to a number of ongoing issues of a broader nature and argued that such issues were not a matter for this Board. Counsel for the Employer pointed out that "The issues herein are connected with an earlier award before this Board published April 21, 2006 which provides factual background to this matter." The Employer's submission included reference to *Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162* (1976) 2 W.L.A.C. Paul C. Weiler, Chairman, Clarence Alcott and Angus MacDonald, Members as the "test" for employment termination. The Employer referred to *Pacific Press and Communications Energy and Paperworker's Union Local 15-M* as setting out the three part test with respect to intentional infliction of emotional harm.

The Employer's assertion was that the Grievor's dismissal was for cause but was postponed for six weeks for which period the Grievor received full pay and benefits. The Employer described by way of important background that the Employer is a small village municipality with a relatively constrained budget attempting to provide a full range of services; that there are only three exempt employees and that the bargaining unit consists of four inside workers and six public works employees.

The Employer argued that the evidence supports disciplinary action pursuant to the first *Wm. Scott* (supra) test and that if the Board accepts the evidence of the "firearms threat" the Grievor's termination was justified. The Employer advised that the Board should accept the Employer's witness's evidence over that of the Union witnesses based on a measure of credibility

to the *Faryna v. Chorny* (1952) 2 DLR 4 WWR (NS) 171 (BCCA) (O'Halloran) standards.

In terms of credibility the Employer contrasted the Grievor's testimony that he could "work with pretty much anyone" to what Mr. Murdy described as "telling" behaviour with respect to the incidents described by Mr. Weber in the April 27th letter, in particular the refusal of a direct order regarding the keys. The Employer's submission, concerning the key issue, in part read:

..... it is again telling that the employee on cross-examination said that he knew that Mr. Weber was his supervisor, he knew that he took direction from Mr. Weber and he declined to follow that direction, because in his mind, that would have taken too much time out of his busy day.

The Employer also pointed to the Grievor's testimony about which of Weber's orders he would follow, which "again, this is indicative of the attitude of the Employee towards direction and requests from his supervisor". The Employer's conclusion was that the Grievor refuses to recognize the position of the Superintendent of Public Works.

The Employer argued that while the evidence of the threat was hearsay it should be admissible in the context of what was in Mr. van der Wolf's mind subsequent to being advised of the threat as Mr. van der Wolf honestly believed the comment was made. The Employer's argument went further in an assertion that, on the balance of probabilities, the Board should accept that the threat was made on the basis of the "good for you Gerry" comment. The Employer argued that the Grievor had an opportunity to deny the threat when Mr. van der Wolf informed the Grievor

that he had reported the Grievor to the RCMP. The Employer argued that the Grievor's "good for you Gerry" comment instead of a denial was sufficient for the board to draw an adverse inference.

With respect to the Union's assertions concerning intentional infliction of emotional harm the Employer argued that the arbitral decision of April 21, 2006 found that the facts did not meet the appropriate test therefore any evidence concerning Employer action prior to that finding should be inadmissible as such evidence has been considered and decided. The Employer pointed to the three part test. The Employer argued that Mr. van der Wolf's conduct on May 17th was appropriate as he honestly held a belief that there had been a threat and that seeking police involvement was the reasonable and prudent course. The Employer argued that it was clear that the Employer did not intend to inflict emotional harm and that there was little if any evidence of actual harm.

Ms. Jansen began the Union's closing argument by saying the Employer had not met their burden; that there was no evidence which supports any disciplinary action and that the Union had established evidence of behavior by the Employer which supports the Union's claim of intentional infliction of emotional harm. The Union described the earlier relationship between the parties as okay until Mike filed his first grievance. The Union argued that at that point the relationship deteriorated and pointed to many examples of exchanges in which the Union says Mike was treated differently, essentially discriminated against because of his Union activity. In terms of the Employer's approach to discipline the Union referred to the May 5, 2006 consent award (*Village of Harrison Hot Springs and C.U.P.E., Loc. 458 (deBrouwer grievance), R.S. Keras*) which in part read:

The Employer will create a disciplinary procedure that is to be consistent with the “fairness” state of the law and consistent with the Current Collective Agreement.

The Union’s point was that the Employer had not created a disciplinary procedure and did not treat Mr. deBrouwer in a manner consistent with the “fairness” state of the law.

The Union argument with respect to the April 27th letter by Mr. Weber was that the letter was essentially a list of minor items that Mr. Weber testified was a problem with others but no one else received a disciplinary letter on file. In addition, the Union says Mr. Weber’s action was without regard to the May 5, 2006 consent award on discipline.

The Union outlined a chronology that they say is indicative of the Grievor’s view that he is being picked on: April 28th the grievance is filed; April 29th the Grievor’s shift is changed; May 2nd newspaper article in which Mr. van der Wolf sees no wrong in what he did (re: April 21st decision); May 8th Mike has his vacation denied; May 15th in the face of two arbitration awards Mr. van der Wolf attempts to meet with Mike at his home; May 16th and May 17th Mr. van der Wolf attempts to meet with the Grievor without a Union representative and in front of a number of co workers and advises Mike that he has six weeks to find another job and that he is no longer an employee of the Village.

The Union advised that they do not dispute the Employer’s right to “look for new direction” but it must be consistent with the Collective Agreement.

The Union pointed to the “proper cause” Collective Agreement provision of Article 8(f) and the “just cause” provision of Article 9(e).

The Union argued that there was no safety issue (cell phone). It is simply that the Employer does not want this employee but has shown no cause. Mr. deBrouwer has a clean file.

Ms. Jansen argued that the hearsay evidence of a threat is inadmissible pointing out that the employee who heard the alleged threat wasn’t named or called, there was no statement from the employee, and there was no evidence of an investigation. The Union concluded that it was simply a further attempt to discredit Mr. deBrouwer. In terms of the Employer’s reliance on the hearsay evidence to uphold termination the Union also questioned the credibility of Mr. van der Wolf pointing out that the threat was not mentioned by Mr. van der Wolf until the May 21st letter and that the decision to terminate was made on May 15th. The Union pointed to what they described as another issue of credibility, a further inconsistency in the Employer’s assertion that the termination was with cause in the face of the May 21st “without cause” letter.

The Union pointed to Mr. van der Wolf’s treatment by the former Mayor, which van der Wolf found unacceptable, as evidence of knowledge of what’s acceptable and what is not. In addition Mr. van der Wolf had over twenty years of employment in a Union environment and Mr. Weber had eleven years of employment in a Union environment.

The Union assertion was that the Employer had created an intimidating, humiliating and hostile work environment for the Grievor and that the Employer's actions were not in the context of legitimate work place matters, all of which the Union says require a deterrent in the form of damages.

In reply the Employer argued that Mr. van der Wolf's issues with the former Mayor were not on point with respect to the instant matter. The Employer says there was no evidence that the Grievor was singled out, advising of written discipline to another employee and asked that the Board uphold the termination.

Both counsel submitted case law and asked that the Board retain jurisdiction with respect to any implementation matters which may arise.

IV

This Board had no difficulty with the Employer's submission that the Grievor be held to a "higher standard" in particular when considering that a part of his responsibility is with respect to the safety of the Village's water supply. (see: *Coast Mountain Bus Co. v. Canadian Auto Workers Union, Local 111 (Lee Grievance)* B.C.C.A.A.A. No 182, August 2, 2005, M.I. Chertkow). I also accept the Employer's argument that not every workplace rule needs to be a formal written policy; that many, probably the majority, are based of verbal instruction from a supervisor or individual good sense. (See para 64 of *Northwest Hardwoods (Delat Division) v. I.W.A. Canada, Local 1-3567 (Sihota Grievance)* B.C.C.A.A.A. No. 203, July 20, 2004, J. Steeves).

Notwithstanding the “higher standard”, I am satisfied on a careful review of the evidence and the submissions of the parties, in particular Mr. Weber’s testimony, that the Grievor’s conduct as outlined in the Weber letter of April 27th did not warrant a letter on file. While the Employer argued that the Grievor refused a direct order with respect to the keys issue Mr. Weber’s letter includes a further request that the Grievor “see Peggy” to sign out keys. There was no further evidence about that issue except that the Grievor returned keys after his dismissal. I find leaving the letter on the Grievor’s personnel file would treat him differently than other employees whose conduct Mr. Weber advised was similar or the same. (See *K.V.P. Co. Ltd. & Lumber and Sawmill Workers Union, Local 2537, (1965) 16 L.A.C. 73 (Robison)* in particular, paragraph 18 and the requirement that a rule be “consistently enforced”).

In the result, the April 27, 2006 letter is to be removed from the Grievor’s personnel file.

Notwithstanding the decision to remove the letter from the Grievor’s file, it was also clear from the testimony of the Grievor that he did not have a complete understanding of what is often referred to as the “work now-grieve later” rule. The “work now-grieve later” principle, which I understand remains the current state of the law, requires employees to follow the direction / order of supervisors with few exceptions (one exception being an order to do something that is unlawful). In terms of an order which an employee believes violates the Collective Agreement or is not the best decision in the particular circumstances the employee is required to carry out the order or assignment and seek redress through the grievance procedure or other remedial processes subsequent to carrying out the ordered duties. On this point see *U. S. W. and Lake Ontario Steel Co. Ltd. (1968), 19 L.A.C. 103*

(Weiler). While the Village of Harrison Hot Springs is not the same type of industrial setting it is worth noting the arbitral view of the “work now-grieve later” rule as described in the oft quoted excerpt at p. 108 of the Weiler decision:

"... an industrial plant is not a debating society ... production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision."

In the Village of Harrison Hot Springs that authority is vested with management and, in particular with respect to the day to day operation, with the Superintendent of Public Works.

V

Turning to the termination, in discipline cases the Employer has the onus of proof to the balance of probabilities (civil) standard. At paragraph 7:2500, *Canadian Labour Arbitration*, Brown & Beatty, 3rd edition, the authors discuss the “variable” application of the standard of proof:

... in more recent decisions many arbitrators have recognized that a standard such as “the balance of probabilities” is a variable rather than a precise formula and one which will change with the circumstances of the case. On this view, the more serious or reprehensible the alleged misconduct, the more stringent the standard of proof that is

required to be satisfied. Thus, it is said that an allegation of criminal misconduct must be proven by “clear and cogent” or “convincing” evidence or on a standard of “reasonable probability”. In an effort to distinguish this analysis from the earlier awards, one arbitrator has suggested that in cases of this kind, what arbitrators are doing, rather than requiring the employer to meet a standard of proof which falls between the criminal and civil burdens, is applying the civil standard, but in a flexible way and in a way which requires a higher degree of probability to be met as the seriousness of the offence and the consequences of the employer’s proposed action increase.

I believe the authors have captured much of the current arbitral application of the civil standard. In the instant case where the discipline is discharge the civil standard must be applied in an exacting way.

Wm. Scott (supra), is the leading BC case with respect to an assessment of an Employer’s decision to dismiss an Employee. Paul Weiler’s panel, at page 10, commented on job security rights under a collective agreement in the following terms:

First of all, under the standard seniority clause an employer no longer retains the unilateral right to terminate a person’s employment simply with notice or pay in lieu of notice. (emphasis added) Employment under a collective agreement is severed only if the employee quits voluntarily, is discharged for cause, or under certain other defined conditions (e.g. absence without leave for five days; layoff without recall for one year, and so on). As a result, an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal. On that foundation, the collective agreement erects a number of significant benefits..... The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law,

especially of one who has worked under it for some time under the agreement, is a qualitatively more serious and detrimental event than it would be under the common law. At the same time, the standard collective agreement also provides the employer with a broad management right to discipline its employees. If an individual employee has caused problems in the work place, the employer is not legally limited to the one, irreversible response of discharge. Instead, a broad spectrum of lesser sanctions are available; verbal or written warnings, brief or lengthy suspensions, even demotion on occasion (see Cominco Ltd. (1974) 6 LAC (2d) 225). Because the employer is now entitled to escalate progressively its response to employee misconduct, there is a natural inclination to require that these lesser measures be tried out before the employer takes the ultimate step of dismissing the employee, and thus cutting him off from all of the benefits associated with the job and stemming from the collective agreement.

Mr. deBrouwer began his employment on September 7, 2000. The grievor had “tenure”.

At page 13 of their decision the *Wm. Scott* panel commented on the nature of arbitral review as follows:

..... arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

On the evidence it appears that the Grievor's employment ended at the meeting of May 15, 2006. While the Employer said Mr. deBrouwer's employment ended sometime later (June 26, 2006) it was clear from Mr. van der Wolf's actions and

comments at the meeting of May 15th and on the mornings of May 16th and May 17th that he did not want the Grievor working for the Village. He told him so. The reason Mr. van der Wolf did not want the Grievor working for the Village was the Grievor's "persistent dissatisfaction with his supervisor" (Mr. van der Wolf's May 15, 2006 letter to Ms. Jansen). The evidence of the culminating incident of employee dissatisfaction was the fact the Grievor didn't agree with the letter of April 27th from Mr. Weber which went on his personnel file and the Grievor therefore filed a grievance.

On a careful review of the evidence and submissions the Board's conclusion is that Mr. van der Wolf ended the employment of the Grievor because the Grievor did not accept the Weber letter. Essentially the Grievor was fired for filing a grievance.

The result is that the answer to the first Wm. Scott question is no, Mr. deBrouwer did not "give just and reasonable cause for some form of discipline by the employer" by the date of the grievance hearing, May 15, 2006.

The above conclusion gives rise to a number of questions. Was the Grievor still an employee during the "six weeks paid time" to find other employment? Can the hearsay evidence of a threat coupled with the Grievor's May 17th "good for you Gerry" comment be considered, or is it prohibited post discharge evidence? In addition, if the hearsay evidence is allowed what weight can it be given in the circumstances, in particular when coupled with the "good for you Gerry" comment?

If there is a finding that the hearsay evidence is admissible then it will be necessary to determine the date of dismissal in order to answer the question of whether the evidence is post-discharge evidence or not. If it is post-discharge evidence is it admissible post-discharge evidence (See *Fraser Lake Sawmills Ltd. and Industrial Wood and Allied Workers of Canada (I.W.A. Canada), Local 1-424*, BCLRB No. B405/2000)? In terms of process the Board will deal with the threat question first. The Employer says that the Grievor's comment "good for you Gerry" when advised by Mr. van der Wolf that he had spoken with the police allows the Board to draw an adverse inference as the Grievor had an opportunity to tell Mr. van der Wolf that he did not utter a threat but that the Grievor chose not to.

Both parties raised issues of credibility. The leading authority with respect to the process of assessing the credibility of a witness is the *Faryna v. Chorny* (1952) 2 DLR 4 WWR (NS) 171 (BCCA) (O'Halloran) decision. The following excerpt of the decision begins at page 356:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and *cf. Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I did not find any serious credibility issues on key points. There were slight differences in testimony which can be attributed to minor memory differences or perception differences.

On the key issue of the Grievor's comment, a review of the chronology of events is important. Mr. van der Wolf reported the alleged threat on the afternoon of May 16th subsequent to the Grievor taking a sick day and leaving the work site. On the morning of May 17th there was an exchange between Mr. van der Wolf and Mr. deBrouwer in the lunch room in front of a number of employees. The exchange concludes with Mr. deBrouwer leaving the site at which time Mr. van der Wolf testified that he told the Grievor that he reported his threat to the police and Mr. deBrouwer said "good for you" or "good for you Gerry". The Grievor said that when he got home he found the police talking to his wife and that in the subsequent discussion with the police he found out, for the first time, the allegation of a threat. On this point neither Mr. van der Wolf's nor Mr. deBrouwer's testimony was contradicted by other evidence and, in fact, they recounted the exchange of May 17th similarly. On this point their testimony was in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in

those conditions.” What that means is there is no “smoking gun” comment by the Grievor as he testified that he did not know what Mr. van der Wolf was referring to with his “reported to the police” comment. While there was no corroborative evidence called concerning the Grievor’s discussion with the police on May 17th there was no evidence proffered to refute his evidence. What the Board is left with is the Grievor’s undisputed testimony. There is simply no evidence to show that the Grievor knew of the allegation of a firearms threat prior to the Grievor’s discussion with the police after leaving the work site on May 17th. On the evidence there is no viable nexus between the “good for you Gerry” comment and the hearsay evidence of a threat on which to draw an adverse inference.

The result is that the Board is left with the hearsay evidence. It is of little or no value. In *KSAN House Society and British Columbia Government and Service Employees Union, Local 312, (Atrill Grievance) [1999] B.C.C.A.A. No.116 (R.S. Keras)* that Board reviewed the value of hearsay evidence as follows beginning at paragraph 93:

In the instant case on the narrow issue the proffered evidence is the hearsay evidence of Ms. Costain. There is no other corroborative evidence in support of it. The Grievor's response was to the effect "I didn't give them permission to sleep in their truck, no one was in the truck at the end of my shift". If the hearsay evidence is the Employer's case then the Grievor's response, given the circumstances, must be that he gave them permission or he didn't. As to why the four clients would say what they said to Ms. Costain the Grievor's testimony was that they wanted to correct that and sought him out for that purpose. The testimony of Mr. Haizimsque supports the Grievor's evidence that the four clients said there had been a misunderstanding, which they wanted to clear up. While I am not concluding that the Employer succeeded in establishing a prima facie case, Mr. Atrill has succeeded

in answering the Employer's case to the extent possible given the Employer's evidence.

In Re: B.C. Rail Ltd. and United Transportation Union, Locals 1778 and 1923 (1984) 17 L.A.C. (3d) 402 (D.R. Munroe) at page 414 Arbitrator Munroe outlines his conclusion when asked to arrive at a finding by the party who has the onus based on hearsay evidence alone:

In my view, to all intents and purposes, I am being asked to rely exclusively on hearsay evidence for the ascertainment of an essential and disputed fact. If I have misused the word "exclusively", it cannot be denied that hearsay is the principal basis upon which I am asked to decide a crucial factual issue in favour of the party on whom the burden of proof lies. That is a dangerous course for an adjudicator especially where, as here, the consequences on the other party would be so onerous - loss of employment. It is a course which I must reject.

In the instant case the employee who made the comment was not called as a witness. There was no statement from the employee entered into evidence. The employee was not identified. There was no opportunity for cross-examination of the employee. There was no Employer investigation into the alleged threat. There were no charges filed by the RCMP. The hearsay evidence alone can not be relied upon to uphold dismissal.

I will comment later in this decision on whether the hearsay evidence has value concerning the question of damages.

The resulting conclusion is two-fold. First, there is no need to determine when the Grievor was fired or whether the alleged threat was post-discharge evidence or not. Second, the Employer had no grounds to discipline the

Grievor therefore he is to be reinstated as soon as reasonably possible, made whole and this incident is to be expunged from all employment files.

VI

Turning to the question of damages, I am able to conclude that whatever may have been in Mr. van der Wolf's mind subsequent to his awareness of an alleged threat or however it may have affected his actions on May 17th would not have changed the outcome of this Board's deliberations. The Board took Mr. van der Wolf's testimony that he believed the threat as an honest concern and gave it due consideration with respect to his actions on May 17th as his belief that the threat was real may have coloured his comments. The result was that the Board's deliberations primary focus was on the Employer's conduct during the time between the Grievor's return to work on April 25, 2006 and his dismissal on May 15th or 16th; including the May 15, 2006 letter.

The case law concerning arbitral jurisdiction to award damages for torts committed in the workplace include: The Supreme Court of Canada decision in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929; *CVC Services and I.W.A. – Canada, Local 1-7*, 65 L.A.C. (4th) 54 (S. Lanyon); and *Pacific Press and Communications, Energy & Paperworkers Union, Local 115-M*, 73 L.A.C. (4th) 35 (C. Bruce).

In *Re CVC Services*, (supra), Arbitrator Lanyon described the elements of the “tort of intentional infliction of mental distress or suffering that evolved in common law” at page 72 as:

- a) flagrant and extreme conduct;
- b) it is reasonably foreseeable that the conduct would cause distress or suffering; and
- c) the conduct must have caused actual harm.

In *Pacific Press* at page 78 Arbitrator Bruce described the tort elements similarly using the following quote:

The elements of this tort, as described by McLachlin J. (as she then was) in *Rahemtulla v. Vanfed Credit Union*, supra, are:

1. flagrant and extreme conduct inflicting mental suffering.
2. foreseeable that the conduct of the Employer would cause distress or suffering.
3. the conduct of the Employer produced a visible and provable illness.

The first element of the tort requires proof of conduct that is either calculated to produce mental suffering or reckless in that regard. As summarized by Culliton J.A. in *Abrarnzik v. Brenner* (1967), 62 W.W.R. 332, 65 D.L.R. (3d) 651:

There can be no doubt but that an action will lie for the willful infliction of shock, or a reckless disregard as to whether or not shock will ensue from the act committed [p. 654].

Beginning at page 80 Ms. Bruce concluded:

This course of conduct, including the direct communication with the Grievor when advised against this by her physician, threatening discipline if she did not return to work, failure to disclose Dr.

Oakey's report to either the Grievor or London Life, and the continued refuse to recognize the obvious connection between the emotional and physical components of her disability, was either calculated to cause the Grievor mental suffering or reckless in that regard. The Employer knew the Grievor was seriously ill and yet it continued to act in a manner that would foreseeably inflict mental suffering. While the Employer argues there is no evidence of its state of mind, I find the Employer's actions sufficient evidence of a reckless disregard of the Grievor's emotional state. The Employer's conduct can be compared to the finance company who bombarded a debtor, who to its knowledge was ill, with offensive and threatening letters in *Clark v. Associated Retail credit* (1939), 105 Fed. 2d 62. (See, *Rahemtulla v. Vamfed Credit Union*, supra at p. 186.) Considering the evidence as a whole I am satisfied the Employer's conduct was flagrant and extreme.

Further, it was clearly foreseeable that the Employer's actions would cause the Grievor emotional suffering. The failure to approve the Grievor's claim for benefits placed her under severe financial stress and would continue to do so into the future while she struggled to have the merits of her claim for disability benefits recognized by the Employer. In addition, the Employer knew the Grievor was already in a fragile emotional state. The threat of discipline made directly to the Grievor, despite Dr. Hargrave's advice, as well as the additional financial stress, could only aggravate the Grievor's depressed emotional state of mind.

Finally, it must be established that the Employer's conduct produced actual harm or a provable illness. In this case I am satisfied the Employer's actions caused the Grievor severe emotional stress. The causal connection between the Employer's actions and the Grievor's distress is evident in the evidence of Ms. McBride, Mr. Velestuk, and the Grievor.

The particular circumstances of the instant case differ from the above case. The similarities however are on point with respect to the test. The following is the April 21, 2006 finding (*Village of Harrison*, supra) with respect to the Union's claim for damages:

In the instant case the Union's submission is that the firing of the Grievor in a small community causes distress and embarrassment; and two RCMP cars at the Grievor's home to pick up the keys compounded by the fact that the Grievor's daughter answered the door caused distress and embarrassment to the Grievor and his family.

I am certain that the circumstances of the Grievor as a result of management's actions caused significant stress for him and his family; however, based on a careful review of the evidence and the submissions of the parties I am unable to conclude that the Employer intended or caused "actual harm".

Counsel for the Employer argued that the arbitral review in terms of evidence of intentional infliction of emotional harm can only consider evidence subsequent to the evidence considered in the above decision (April 21, 2006). Employer Counsel also commented that "The issues herein are connected with an earlier award before this Board, published April 21, 2006, which provides factual background to this matter." In my view the deliberations of this Board need to take into account the history of the circumstances giving rise to the Union's claim, including the pre April 21, 2006 history. I do not see it as an issue of double jeopardy, as this board will not compound its considerations with prior incidents; however the history divulges the fact that if the Employer was unclear about the issues and consequences concerning the very similar previous case they were well educated by the previous arbitral process and by the April 21, 2006 decision. The result is that the Employer is fully responsible for its actions in the instant case. This Board is satisfied that those actions were taken with knowledge of potential consequences. The Employer had gone through an almost identical case a few months earlier. The newspaper article about the Grievor's reinstatement which quoted Mr. van der Wolf is dated May 2,

2006. The matter was fresh in the minds of the Employer. With respect to the instant case the Employer “should have known better” (see *Bear Creek Lodge v. Hospital Employees Union (Scott Grievance)* 106 L.A.C. (4th) 254 (J.I. McEwan) April 18, 2002).

I am unable to conclude that the Employer acted in a manner that was “calculated to cause the Grievor mental suffering” (*Pacific Press*) however, I am satisfied, from a careful review of the evidence, that the Employer was determined to get rid of the Grievor without consideration of the impact on the Grievor or his family. The decision to pay the Grievor an additional six weeks pay had more to do with an attempt to insulate the Village from liability than to consider the situation of the Grievor. The Employer’s actions were “reckless” (*Pacific Press*). The Employer acted in a manner which foreseeably would “inflict mental suffering” (*Pacific Press*).

The Grievor returned to work on April 25, 2006 having been found to have given no cause for discipline and therefore made whole. That Board also found:

I am certain that the circumstances of the Grievor as a result of management’s actions caused significant stress for him and his family;

The point is that this Employer was aware of the arbitral standard with respect to cause and with respect to the jurisprudence concerning the intentional infliction of emotional harm. Given such knowledge their actions were “flagrant and extreme”. That conduct began with the Weber letter being put on the Grievor’s file in face of other employees with similar

complained of conduct not being treated in the same manner. (The Employer's assertion was that there was at least one other letter on file for another employee, however it was not produced). The Employer knew or should have known or should have sought advice as they had no cause for dismissal of the Grievor. They did not care about the impact it would have on the Grievor or his family. The Employer went to the Grievor's house with the May 15th letter. The Employer confronted the Grievor on May 16th and May 17th in front of co-workers and attempted to continue those discussions after the Grievor said he wouldn't have a meeting without a Union representative. Based on Mr. van der Wolf's report of the alleged threat the RCMP went to the Grievor's house on May 17th.

There seems to be a consensus that what happens in the relatively small community of Harrison Hot Springs is widely known. If you are fired, much of the community knows. If the police visit your house, much of the community knows. If you are reinstated by an arbitrator, it results in a substantial article in the Voice (community) newspaper.

The Employer's actions were without regard to the impact on the Grievor. The Grievor went home sick on May 16th with his "guts hurting". His doctor carried out tests and subsequently referred him to a specialist. The "Employer's conduct was flagrant and extreme" (*Pacific Press*). The Employer's conduct caused "actual harm" (*CVC Services*) in terms of distress for the Grievor and his family as well as possible health problems for the Grievor. There was no evidence presented disputing his testimony concerning his Doctor's visit and the referral to a specialist.

I am satisfied, on a careful review of the evidence and the submissions of the parties, that the tort of intentional infliction of emotional harm has been proven by the cumulative conduct of the Employer as described above.

Arbitrator Lanyon in *CVC Services*, (supra) was adjudicating a case in which a female grievor who worked at a male dominated remote “camp” had her employment terminated in part on an unproven allegation of promiscuity. Arbitrator Lanyon found the Employer conduct to be “flagrant and extreme” and awarded damages for “the Employer’s tortuous conduct”. Arbitrator Lanyon at page 72 begins a review of the evolution of the law:

The decision that historically defined the elements of the tort of the intentional infliction of mental distress or suffering is *Wilkinson v. Downton*, supra. There, the plaintiff suffered nervous shock as a result of the defendant playing a practical joke. The defendant had stated to the plaintiff that her husband had had an accident. Although the court found that the defendant had no malicious purpose, the damage to the plaintiff was clearly foreseeable, and therefore compensable in tort. Thus, the elements of the tort of intentional infliction of mental distress or suffering that evolved at common law were the following:

- a) flagrant and extreme conduct;
- b) it is reasonably foreseeable that the conduct would cause distress or suffering; and
- c) the conduct must have caused actual harm.

Wilkinson v. Downton, supra, was relied upon in *Rahemtulla v. Vanfed Credit Union*, supra, where McLachlin J. (as she then was) awarded the sum of \$5,000 for mental distress to a teller, who had been terminated on an allegation of theft; an allegation which later proved false. Notwithstanding the absence of expert medical evidence, the court found that the plaintiff had suffered depression (and

accompanying symptoms of physical illness) as a result of these false allegations.

The defendant argued in *Rahemtulla, supra*, that they had had no intention to inflict shock or distress on the plaintiff; they simply had wanted to recover the missing funds and/or extract a confession from the plaintiff. However *McLachlin J.* found the defendants had been "reckless" in regard to whether or not the plaintiff would suffer shock as a result of such false allegations.

The defendant further argued that its manager was acting *bona fide* and in furtherance of the interests of the credit union in attempting to resolve the theft of the monies; therefore, his conduct could not be characterized as "flagrant or extreme". The court rejected this view, stating that allegations of theft cannot be made recklessly; and further that such allegations "will foreseeably inflict shock and mental suffering" (p. 215). Moreover, it was "equally foreseeable" that the allegations would continue to cause distress in the future. Finally the court concluded that the plaintiff's resulting depression constituted actual harm; it was a "visible and provable illness". (See also *Bogden, supra*; *Kalaman, supra*; and *Kopij, supra*.)

Being fired without cause in the particular circumstances of this case is akin to a false allegation. It is likely that much of the small community would believe that Mr. deBrouwer had done something seriously wrong especially considering the RCMP involvement. In *Re Tyee Village Hotel and Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40*, 81 L.A.C. (4th) 365, (K. Albertini) Arbitrator Albertini awarded the Grievor \$400.00. The Grievor was a chamber maid whom the Arbitrator had found was yelled at by her supervisor and became upset to the point of crying. Beginning at page 373 Arbitrator Albertini outlines his finding:

With regard to the tort, however, I am confining my considerations to the conduct of Harper in attempting to achieve an improvement. Specifically his admission of yelling at her to get his point across.

It is the Employer's submission that the success of a tort for mental stress is dependent upon the actions of the Employer being intentional. I do not agree and that submission is not supported by the law. In *Wilkinson v. Domzton*, [1897] 2 Q.B. 57 (Justice Wright), the plaintiff suffered nervous shock as a result of a practical joke. She was told her husband had been in an accident. The court found that there was no malicious intent but also held the damage to the plaintiff was foreseeable and compensable in tort.

The third element of the tort is met with Prudhomme's three weeks of stress leave immediately after the April 19 incident. Although Harper does not accept that the incident was the cause of her absence, I find that it was. Her evidence of going to the emergency ward of the hospital the evening of the 19th and receiving medication for her nerves and her family doctor's continuation of similar medication and his recommendation that she absent herself from the motel for three weeks was not contradicted.

It was or ought to have been foreseeable to Harper that his yelling at Prudhomme would cause her distress or suffering. He was aware that similar conduct by himself caused her to cry and become upset in February 1996. Her evidence is that there was an earlier incident but I cannot be certain Harper was aware of her reaction at that time. A further indication was Van Wieren's two weeks of stress leave in February 1996.

The final element has, in my view, also been established. Harper's own evidence is that he raised his voice to get the attention of his staff, at least, Prudhomme. He did it because he "felt he had to do something to get [his] point across -- raising [his] voice got her attention". Harper's actions were not a momentary aberration or slip of the tongue, they were deliberate actions to make a point. I find that the deliberateness of Harper's actions and the fact that it was not the first occasion he used that approach makes his conduct frequent and extreme.

In the instant case, on a careful review of the evidence, the submissions and the particular circumstances I find it appropriate to award damages for the

Employer's "tortuous conduct". Such conduct beginning with the April 27, 2006 disciplinary letter on the Grievor's personnel file and as amplified by the Employer's conduct subsequent to the letter. I find that the appropriate quantum of damages to be the equivalent of four weeks basic pay at Mr. deBrouwer's current pay rate.

All of which is so ordered.

A final comment is with respect to the parties desire to find a way to improve the relationship. My recommendation is that neither party comment to the media or the community at large (beyond the required reporting process) with respect to this decision. This decision is a public document which obviously the public and the media have access to. The recommendation is simply based on the reality that if an improved relationship is truly desired it seldom begins with unilateral media interviews and broad community discussion. Such action generally tends to breathe new life into the acrimony which both parties say they want to move away from.

This board will retain jurisdiction in the event of any implementation difficulties. I thank counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 1st Day of September 2006.

Ronald S. Keras
Arbitrator

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