

IN THE MATTER OF THE GRIEVANCE ARBITRATION
PURSUANT TO S 26.2 OF THE TRADE UNION ACT

BETWEEN:

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL
295 ("IATSE") (DEBBIE COURCHENE GRIEVANCE)

UNION /GRIEVOR

AND:

THE GLOBE THEATRE SOCIETY

EMPLOYER/THEATRE

AWARD

Sole Arbitrator: Kenneth A. Stevenson, Q.C.

Appearing for the Union: Heather Robertson, Counsel
Barry Haines, International Representative

Appearing for the Employer: Jana Linner, Counsel
Andrew North, Executive Director

Heard: Regina, Saskatchewan
February 9, 10 & 13, 2012.

Award Date: April 12, 2012.

AWARD

INTRODUCTION

1. This matter arises out of a grievance dated November 9, 2011 alleging that the Theatre unjustly terminated the employment of Debbie Courchene on October 19, 2011. It also alleges that the termination is double jeopardy in light of the Grievor's suspension with pay on October 12 for the same incident. The grievance seeks a full reinstatement, full compensation and interest.

2. The parties agree that I have jurisdiction to hear and determine the matters arising from the grievance which is filed pursuant to Section 26.2(1) *The Trade Union Act*. A Certification Order was issued by the Saskatchewan Labour Relations Board on October 12, 2011 certifying the Union as the bargaining agent. No collective agreement has been negotiated by the parties.

3. The Employer characterizes the incident which occurred on October 11, 2011 as a culminating incident. The termination letter dated October 19, 2011 sets out the grounds for termination:

The Globe Theatre held meetings with you on September 14th, 28th and October 11th 2011 to discuss concerns we had with your behaviour in the work environment. Letters outlining these concerns dated September 14th and October 11th 2011 were issued to you.

Behaviours that the Company observed include:

1. Disparaging comments made at the AGM in regards to the choice of plays, the quality of productions, the age of patrons, budgets, and marketing goals, which were made in front of the theatre's major stakeholders;
2. Negative comments and attitudes that are disruptive and destructive to the Globe Theatre's ecology, such as how lighting hangs are being run, the mainstage space, challenging the need to work a 35 hour work week, when that that [sic] is what you are paid for, and grumbling about having to set up a microphone in the lobby for the AGM;
3. Inability on October 11th 2011 to control yourself or your emotions, as witnessed in the meeting that was attempted to be held.

The culminating incident took place on October 11th 2011 when you arrived at a meeting shouting, abruptly left, sat on your hands and knees in the third floor production office screaming, and when asked, refused to give the password for the audio computer owned by the Globe Theatre. While you attended work for that evening's performance, you still would not provide the password for the computer

and did not provide the password until the afternoon of October 12th 2011. Your conduct was entirely unacceptable and your refusal to provide the password to the audio computer put that evening's performance and the Globe Theatre's reputation in jeopardy.

Based on the culmination [sic] incident cited above, previous discipline and today's meeting, you have irreparably damaged the relationship between yourself and the Globe Theatre and we have decided to terminate your employment with cause effective immediately. ...

BACKGROUND

4. The Theatre is a not-for-profit which operates a regional, professional theatre and theatre school. It annually presents approximately six productions on its main stage and five to seven on its second stage.

5. The Grievor is 24 years of age; she commenced her employment with the Theatre during the 2010-2011 production season. Her employment was renewed pursuant to an agreement covering the period August 20, 2011 to June 17, 2012. At the material time she held the position of Head of Sound. Prior to September 2011 she had no disciplinary record.

6. In reaching its decision to terminate the Grievor's employment, the Theatre relied on a number of events which occurred during September/October, 2011. The material aspects of the evidence given at the hearing are summarized below. Crystal Spicer, Director of Production; Ruth Smillie, Artistic Director and CEO; and Andrew North, Executive Director testified for the Theatre. Evidence was given on behalf of the Union by: Debra Sawarin, Business Representative Local 295 IATSE; Barny Haines, International Representative IATSE; Josh McGill, Head of Lighting, and the Grievor, Debbie Courchene.

7. The Annual General Meeting (AGM) for the Theatre was held on September 7, 2011. The AGM is open to the public and attended by staff members, members of the Theatre, stakeholders, sponsors, donors; there is the potential for media to be in attendance. In addition to conducting the business of the Theatre, the AGM is designed to review the upcoming season, present the Theatre in a positive and truthful light and to present the Theatre's strategic plan.

8. At the AGM Ms. Smillie had responded to a question of whether or not there were any concerns about the aging audience and what steps the Theatre was taking to involve younger artists and members of the public. Subsequent to this, the Grievor expressed her concerns that the audiences were old, bored by and falling asleep during productions which failed to meet their potential and that nothing was being done by the Theatre to attract a younger audience.

9. The management of the Theatre was very concerned about the critical, abrasive and attacking tone and substance of the Grievor's remarks. Ms. Smillie considered these to be inappropriate in the AGM forum. She considered them to be undermining of her as Artistic Director and CEO as well as undermining other members of the staff. Management believed such concerns of a staff member were more appropriate to be raised at a staff meeting.

10. As a result of management's concerns, Ms. Spicer met with the Grievor on September 8 to discuss the Grievor's conduct at the AGM having regard to the purpose of the AGM and those who would be in attendance. This meeting was held at the Green Spot coffee shop. The Grievor accepted full responsibility for the inappropriateness of her actions at the AGM. The Grievor advised Ms. Spicer of upheaval in her life due to ending of her personal relationship. At Ms. Spicer's suggestion, the Grievor went home for the day. There was no discussion of disciplinary action at this meeting.

11. A follow-up meeting between the Grievor and Ms. Spicer was held at the same coffee shop on September 14. Ms. Spicer raised with the Grievor the Theatre's concerns about her observed behaviour in the workplace. They discussed personal issues the Grievor was experiencing and the Theatre's expectations. Following this meeting Ms. Spicer wrote the following letter to the Grievor which was reviewed with and signed by the Grievor:

14 September 2011

Re: Employee Performance

Dear Debbie,

This letter is to recap our conversations which took place on Thursday, September 8th 2011 and Wednesday, September 14th 2011.

The Company has observed the following behaviours which it has deemed inappropriate in the workplace:

1. Negative and inappropriate comments as evidenced during the AGM and on other occasions with staff members,
2. Lateness,
3. Unhappy/negative attitude, as evidenced during your work on maintenance week,
4. Negative remarks in regards to maintenance and other job duties, and
5. Your work ethic and attitude are not meeting expectations of the Company.

The Company's expectations of you are:

1. That you have a positive attitude,
2. You are hard working,
3. You are reliable,
4. You are punctual, and
5. You are a team member who puts the Globe Theatre first.

As part of our conversation you indicated that you are willing to work on meeting the Company's expectation and correcting the observed behaviors. During the following two (2) weeks I expect that you will be able to meet all of the Company's expectation and that on Wednesday, September 28th 2011 we will meet to review your progress and discuss how your job performance is or is not meeting expectations.

If you have any questions or concerns please feel free to bring them to my attention.

Respectfully,

Crystal L. Spicer \ Director of Production

12. Following receipt of this letter the Grievor sent the following email to Ms. Smillie and Mr. North:

Hello Ruth and Andrew:

I wanted to forward you my apologize [sic] for my actions in the AGM meeting last Thursday. I realize that expressing my opinions [sic] the AGM meeting was not the proper forum. And as valid as points may have been, others were not and were expressed crudely. I regret my actions and would like to an apologize for crossing the line.

I am truly sorry. And I hope that we can maintain our relationship to be open, clear and respectful.

Yours Sincerely,
Debbie Courchene

The Grievor's stated intention was to change her actions; to accept responsibility for and to not repeat such inappropriate actions.

13. On September 28 Ms. Spicer and the Grievor met at the coffee shop to discuss the Grievor's progress in meeting the Theatre's job performance expectations as outlined in the September 14 letter. The Grievor understood this to be a formal follow-up meeting. Ms. Spicer noted the Grievor's efforts and great progress, but the Theatre continued to have concerns with the Grievor's work-related communication skills, including discussions of matters in a timely fashion. The Grievor expressed concerns as to her relationship with Ms. Smillie and Mr. North. She said she did not feel "wanted" by them. Ms. Spicer tried to reassure her that all at the Theatre wanted her and wanted the relationship to work.

14. On October 5 after the opening of *"The Black Bonspiel of Wullie MacCrimmon"*, a post-mortem was held to review the good/bad of the production. There was an expectation that those attending would have prepared their issues and present these and solutions, or be prepared to discuss the issues and solutions. The Grievor presented a number of her concerns. Management considered that this forum was appropriate for the Grievor to express her concerns and opinions, however, Ms. Spicer considered that the tone and the manner of presentation, including the rapid presentation without an opportunity to discuss individual issues, to be inappropriate. Further, most of the concerns raised were not within the Grievor's area of responsibility. Ms. Spicer felt attacked, shaky, upset, and disrespected. The Grievor says that she came to the meeting with some concerns but added others during the meeting; she was nervous but not emotional in going too fast in presenting her concerns. The Grievor does not think these comments were critical of Ms. Spicer and were not intended to be critical; rather, she felt the comments would help the relationship with the Production Department. She acknowledges that because of the rambling nature of her presentation, the comments could be perceived as being critical of Ms. Spicer.

15. On October 7, the Theatre held a Globe Experience Day at which all staff, including full-time, part-time and casual, as well as management and volunteers come together in a team-building session with the support of a leadership coach to talk about the Theatre's mission, values, culture and how each could contribute to the Theatre. During the discussions, the Grievor raised issues similar to those raised at the AGM including the age of

the patrons, boring productions, failure to market to and to provide shows that appeal to younger audiences. Ms. Spicer perceived the Grievor's tone to be attacking and disrespectful to her colleagues including those in marketing. Ms. Smillie considered the Grievor's comments to be off topic, not part of the agenda, unfounded and undermining the work of the Theatre and individual employees. Management considered the Grievor's comments to be inappropriate in the presence of part-time and casual employees who would be distressed by the apparent rift between permanent employees and an attack on other employees. Mr. North considered the comments to be subversive and destructive to the Theatre's policy.

16. The Grievor says that she believed the Globe Experience Day was an appropriate forum to raise her concerns and to ask questions about the growth and future plans having regard to her belief that Production was struggling and needed more help. She acknowledges that the tone in which these matters were raised may have been perceived as being critical of others but that her intention was only to find out more about the Theatre's operation and plans. The Grievor says that after the meeting, she apologized to Ms. Smillie for things getting tense in the meeting and said that she would "try not to do these things again". Ms. Spicer says the Grievor said she was really sorry for making her comments and that she would try not to do it again.

17. On Sunday, October 9 Ms. Spicer sent an email to the Grievor, copied to Mr. North, requesting that the Grievor meet her in her office at 5:00 p.m. on Tuesday, October 11. The Grievor was not advised as to the reason for this meeting nor that it might be disciplinary. Because Ms. Spicer's email was copied to Mr. North, it appeared to the Grievor that the meeting could be disciplinary which she believed would relate to the Globe Experience Day events. The Grievor says she prepared herself for such a meeting but was on edge when she attended. This meeting was held in Ms. Spicer's office and attended by Ms. Spicer, Mr. North and the Grievor. Other employees worked in the area just outside Ms. Spicer's office and were wrapping up their work day. The meeting did not go well.

18. Ms. Spicer and Mr. North describe the Grievor as coming to the meeting in an upset, angry, emotional state, speaking in a raised voice. Her first words were to the effect of "can't

I even ask a question”? Mr. North observed the Grievor to be very upset and he saw the need to de-escalate the tone. He closed the door and tried to talk the Grievor “down” by telling her that they wanted to have a “conversation” about what happened. He says the Grievor “calmed down” but remained tense. Ms. Spicer then brought up and referred to a letter headed “Final Written Reprimand”. Ms. Spicer commenced to review the letter’s contents concerning the Theatre’s concerns as to the Grievor’s observed negative behaviours and attitude. As Ms. Spicer reviewed the letter, the Grievor became visibly upset, raising her voice to yell at Ms. Spicer and Mr. North, grabbed the letter, stating that she would not sign the letter. She threw the letter on the desk and then grabbed the letter which caught and was ripped. The Grievor started to cry and left the office. During this encounter, the Grievor did not swear or threaten violence. The meeting lasted 5-10 minutes.

19. The Grievor says that she became angry and defensive when the letter was turned over and she observed “Final Notice”. She then yelled “can’t I ask questions”; Ms. Spicer tried to calm her and advised her that this was about “something else”. During Ms. Spicer’s review of the letter’s concerns about the Grievor’s attitude and negative behaviours, the Grievor became angered by the reference to her lying on the ground at the post-mortem. The Grievor says she began to tear up, got extremely emotional and frustrated as she felt she had accepted the Theatre’s criticism of her conduct and did her job. She knew she couldn’t continue the meeting so she grabbed the letter and stormed out of the room. She assumes the letter ripped when she grabbed it. She acknowledges that she was very emotional, spoke loudly, was unable to express herself comprehensibly due to the stress and upset coming from the events of the meeting and her fear of being fired. She acknowledges that her conduct was unprofessional, rude and disrespectful of Ms. Spicer and Mr. North.

20. Ms. Smillie heard part of this meeting. After speaking to Ms. Spicer and Mr. North, she followed the Grievor down to the Prop Office where the Grievor was observed on her hands and knees on the floor apparently trying to find something. Ms. Smillie asked the Grievor if she was okay. The Grievor told her to go away as she didn’t want to talk to her saying that she was “not alright, no state to talk”. Ms. Smillie noted the Grievor to be very

upset and very distraught. Ms. Smillie observed the Grievor go down the stairwell and heard her crying by the front door. The Grievor left the building at approximately 5:20 to 5:25 p.m.

21. The Grievor says that after leaving the meeting she went down to the Production Assistant's Office where she does her paperwork, including emails. She began looking for the first notice from the Theatre. When Ms. Smillie arrived, she got defensive; she replied to Ms. Smillie that she was "not okay" and that she was in no state to talk to her at that time. She says that she was very emotional and tried to contact her friends with concerns that management was trying to fire her. The Grievor then left the building.

22. After these events, management became concerned as to how it was going to put on the show at 7:30 when the Head of Sound had left the building upset and apparently not in any condition to run the show. Management contacted Brian Maxwell to run Sound for the performance. Sound was critical to the presentation of this production. Mr. Maxwell and Josh McGill were sent to prepare Light and Sound for the show. Shortly thereafter management was advised that these employees were unable to access the audio computer because the password had been changed. Ms. Spicer became aware that Josh McGill was in text communication with the Grievor and that the Grievor had advised Josh that she would not give him her password. During the exchange with Josh McGill, the Grievor advised that she would come in to work if she was not harassed by or did not have to speak to management. Management representatives agreed that this was the quickest and easiest way to ensure that the show proceed so they agreed they would not talk to the Grievor but they wanted Brian Maxwell to be in the Sound Booth during the show to see that it was run in a professional manner. Mr. Maxwell reported that everything was up and running in the Sound; he did not remain in the Sound Booth during the performance. The show came off without any issues related to Sound.

23. The relevant portions of the text communications between the Grievor and Josh McGill are as follows:

5:50 p.m.	JM	Hey. what's up? your last message made me think I was gonna get in here when I got here
5:53 p.m.	JM	I also might need the password to your computer.
	DC	Why?
		I'm not giving that to you. Sorry.
	JM	Are you coming in tonight?
	DC	Only if I'm not harassed by management
	JM	Well they won't be down here and I won't tell them you're here. I can talk to Brian and see what he'll say.
	DC	If he's there tell them to stay away from me.
6:06 p.m.	JM	They want to talk to you about whatever is going on
	DC	No
		I'm not talking to them anymore.
	JM	If I go in and negotiate saying to give you a couple of days to gather your thoughts – will you come in tonight?
	DC	Tell them I will email them after the show
	JM	That you will come in for?
	DC	I will email them
6:12 p.m.	JM	Is that a yes or no that you're coming in?
	DC	I'm here but I'm not talking to them
	JM	Sounds good. Andrew, Ruth and crystal are good with that. Is it ok if Brian is here?
	DC	Yup.
	JM	Ok. I'll see you in a second

24. Management was greatly concerned that it would sustain a significant financial loss if the show was cancelled. This would require it to refund tickets or try to accommodate the patrons at any of the remaining shows. The Theatre subsequently estimated this financial loss at approximately \$13,000.00. It also had serious concerns as to the impact that cancellation of the show would have on its reputation in the community.

25. The Grievor says that when she left the building, she intended to return to work the show but she hoped to calm down and to contact Union members. She did speak to a Union member who advised her to tell management that she wished only to speak to them with a Union representative involved and after getting advice and help from the Union to assist her to communicate clearly to management.

26. The Grievor says that she was never asked by any member of management to provide a password to the audio computer on October 11. When replying to Josh McGill's note that

he might need the password to her computer, the Grievor's response that she thought he was requesting the password to her personal computer which she would be share. Her evidence is that the password was affixed to the tower of the audio computer.

27. The Grievor says that her advice that she would only come in to work if not harassed by management was given as a result of her concern that Ruth Smillie might come to her office and there would be a confrontation when she was unable to talk. She felt she would be unable to deal with management given her emotional state and the feeling that she was being attacked; she needed the help and support of her Union. When she returned to the Theatre, she did her usual pre-show checks, put on pre-show music and at 6:31 and sent the following email to Ms. Spicer, copied to Ms. Smillie and Mr. North:

Please bring all and any additional issues you have with Mr. Barny Haines. I am sure he is more than happy to hear your complaints.
Respectfully yours,
Debbie Courchene

The Grievor then performed her Sound duties for the show.

28. On October 12, after management met with its lawyer, it decided to suspend the Grievor with pay until it could meet with her and a Union representative to address its outstanding issues. Mr. North contacted the Grievor by telephone. He thanked her for running the show and advised her of her suspension pending a meeting with Union representation as requested. He obtained the audio password from the Grievor. Mr. North advised that management hoped to arrange a meeting with Barny Haines present for later in the week. That afternoon the Grievor sent the following email to Ms. Smillie:

Hi Ruth,
I am feeling better today, after some food and sleep. I am currently talking with Josh to get thoughts in order in a calm setting.

Josh told me of your support to give me the time to calm down to talk. Thank you for that. I am going to take this suspension to take a [sic] from work and relax from the stresses of work.

I look forward to calmer future conversations.

Ms. Smillie replied with the following email:

Hello Debbie:

I am relieved to hear you are feeling better. It is good to know that Josh is spending time with you – he's a wise man and I know the two of you have a strong friendship.

Best wishes,
Ruth

On October 12 the Grievor sent the following text to Ms. Spicer:

I want to apologize to you for my actions yesterday. I hope you are alright today.

The Grievor sent this text to apologize for her actions after she was advised by one of her friends that when Ms. Spicer left the Theatre on October 11 she appeared visibly upset.

29. On October 19 a meeting was held with the Grievor, Ms. Sawarin, Barny Haines attending for the Union; Ms. Spicer, Ms. Smillie and Mr. North represented the Theatre. Management wanted to discuss the meeting which they tried to have on October 11, to review the October 11 letter and to discuss the events of October 11.

30. Ms. Spicer reviewed the reasons for the meeting. Ms. Spicer says that after she read the October 11 letter the Grievor did not provide any requested feedback. Mr. Haines asked management to remove the letter from the Grievor's file and to start anew. The Grievor's conduct and refusal to provide the password on October 11 was then reviewed. Ms. Spicer says that the Grievor provided no response.

31. Ms. Smillie recalls the review of the October 11 letter and Mr. Haines' comments that the Grievor has had time to think and calm down. She recalls that the Grievor did apologize, saying she was sorry for what happened and expressed her desire to work at the Theatre. She did not hear anything from the Grievor about the broken trust and her taking responsibility for her actions, nor that she was prepared to change and move forward in new ways.

32. According to Mr. North, the Grievor did not respond to the review of the October 11 letter. Because of Mr. Haines' comments regarding the Grievor's personal workplace stress and his request that they remove the letter from her file, Mr. North was of the opinion that Mr. Haines did not fully understand what occurred on October 11. These events were then reviewed by Ms. Smillie. Mr. North says that when the Grievor was asked if she had anything to say, she did not respond.

33. Ms. Sawarin recalls Mr. Haines asking to start with a clean slate and move forward. She could not recall any details or specific issues discussed, but recalls the Grievor saying she enjoyed working at the Theatre and hoped to continue. She recalls the Grievor apologizing for her actions, but does not know when in the meeting this occurred.

34. Mr. Haines believes the October 11 letter resulted in a suspension which had been a reasonable penalty. He says that at his request the Grievor spoke to her desire to work at the Theatre, acknowledged her improper behaviour and her intent to change. Mr. Haines says the Grievor apologized for her behaviour.

35. The Grievor says that on review of the October 11 letter she asked Ms. Spicer for particulars of each event or cause to be written up and for examples of negative behaviour and attitudes and when and where these occurred. Mr. Haines suggested that she should start with a clean slate. She says that she was quiet and trying to be respectful, giving others the opportunity to speak. She says that before the break for management to consider its position she expressed her enjoyment in working at the Theatre; she had apologized in the past by text to Ms. Spicer and email to Ms. Smillie. She says that she again apologized and noted that she wanted to work at the Theatre and was grateful for the opportunity. The Grievor recalls after her termination Ms. Smillie saying she was sorry that it had come to this and Debbie replied that she was sorry too.

36. After the review of the events of October 11 management broke to consider its position in light of the events and what had occurred at the meeting. The management representatives each expressed their conclusion that notwithstanding their efforts and work

with the Grievor, her behaviour had not changed and they did not hear from the Grievor an acceptance of responsibility for her conduct, nor a desire to change or that her behaviour would change. Each was of the opinion that the relationship was damaged beyond repair. Ms. Smillie noted that the Grievor never took ownership for the events of October 11 nor did she commit to change and to move forward. As a result of management's conclusion it gave the Grievor the termination letter and reviewed its provisions.

POSITIONS OF THE PARTIES

Position of the Theatre

37. The Theatre argues that it had just cause to discipline the Grievor for her insolent and disrespectful behaviour during the October 11 meeting with Ms. Spicer and Mr. North and for her volatile behaviour in the workplace, including screaming and yelling from her hands and knees in front of another employee in the Prop Shop. It says that such conduct and her refusal to provide her password to the audio computer or to come to work for the evening performance, only if management did not speak to her, constitutes insubordination. All of this conduct resulted in a complete breakdown of the employment relationship. The Theatre's termination letter alleges that a culminating incident occurred October 11. It argues that the discipline imposed was reasonable having regard to the Grievor's conduct on October 11, her employment record including prior disciplinary record, length of employment as well as her lack of remorse for her conduct.

38. It submits that termination was the appropriate discipline having regard to the Grievor's insubordinate and disrespectful conduct being incompatible with the Grievor's duties and prejudicial to the Theatre's business. The conduct is argued to be a severe breach of the employment relationship and an intentional and purposeful defiance of and challenge to management's authority. The Theatre relies on the following decisions and references to support this position: *Wm. Scott & Co. Ltd. and Canadian Food & Allied Workers Union*, Loc. P-162, [1977] 1 Can. L.R.B.R. 1; *Re Highland Valley Copper and U.S.W.A.* 7619 (Marcus) (1999), 82 L.A.C. (4th) 310; *Re Squamish Terminals Ltd. and International Longshoremen Workers' Union, Local 514 (Punchmayr)* (1998), 72 L.A.C. (4th) 5; *Re Prairie Malt Ltd. and CEP, Local 270* (2010), 195 L.A.C. (4th) 308 (Hood); *Re British*

Columbia Railway and C.U.T.E. Loc. 6 (1982), 8 L.A.C. (3d) 233 (Hope); *Northwest Waste Systems Inc. v. Transport, Construction and General Employees' Assn., Local No. 66 (Brickland Grievance)*, [2007] B.C.C.A.A.A. No. 158 (Blasina); *Metropolitan Toronto and Metropolitan Toronto Civic Employees Union (Re)* (1989), 15 C.L.A.S. 4; *Canvil and I.A.M.A.W., Lodge 1547 (Stone)(Re)* (2006), 84 C.L.A.S. 300; *Canadian Labour Arbitration*, 4th ed., looseleaf (Aurora: Canada Law Book, 2009) at 7:3660.

39. The Theatre argues that the termination of the Grievor's employment is consistent with its Personnel Policy which deems insubordination or dishonest conduct to be just cause for summary dismissal. It asserts that termination is consistent with its progressive discipline policy. With respect to progressive discipline the Theatre relies on its September 8 meeting wherein the Grievor was advised that her conduct at the AGM was inappropriate and of the Theatre's expectations. It relies on the September 14 meeting and follow-up letter wherein Ms. Spicer identified and discussed a number of inappropriate workplace behaviours and its expectations. It relies on the October 11 letter with its warning that failure to improve work performance and attitude may result in termination.

40. The Theatre argues that relevant factors which illustrate that discharge was appropriate on the basis that the employment relationship has been irreparably breached include the Grievor's short length of employment; her failure to recognize, accept responsibility for, or to show remorse for, the inappropriate nature of her conduct; her failure to provide a meaningful apology prior to the hearing. The events of October 11 are properly considered as a culminating incident having regard to the Grievor's previous pattern of behaviour. The Theatre relies on the following decisions and references: Palmer's *Collective Agreement Arbitration in Canada*, 4th ed. (Ontario: LexisNexis, 2009) at page 472; *Discharge and Discipline* (Toronto: Lancaster House, 1989) at page 8; *Hendrickson Spring (Stratford Operations) v. United Steelworkers, Local 8773 (Czapor Grievance)* (2008), 175 L.A.C. (4th) 376; *Canadian Labour Arbitration* (supra) at paragraph 7:4310; *IPSCO Inc. and United Steelworkers of America, Local 5890* (September 12, 1985, unreported, Dalton L. Larson); *The Construction and General Workers, Local Union No. 180 and Shaw Pipe*

Protection Limited (August 25, 2000, unreported, Bob Mitchell); *Labatt Breweries*, March 26, 1991 (Alcock); and *Ukrainian Canadian Care Centre*, [2011] O.L.R.B. No. 4603.

41. The Theatre submits that the Grievor's workplace behaviour showed an ongoing, persistent and escalating defiance of authority and disrespect for management. The conduct jeopardized the evening's performance with the potential to cause serious harm both financial and to the reputation to the Theatre. There was a severe and significant breach of the employment relationship and there are no mitigating factors to modify the penalty.

42. In response to the Union's argument that the Grievor is being subjected to double jeopardy, the Theatre says that the Grievor's suspension with pay pending a meeting with Union representation present is akin to a "suspension pending an investigation" and does not amount to double jeopardy. It argues that the suspension was necessary as a result of the Grievor's misconduct. The suspension was for the benefit of both parties so that all of the relevant facts could be considered and available for discussion prior to the imposition of discipline. The Theatre relies on: *Canadian Labour Arbitration* (supra) at 7:4240; *Calgary Co-operative Assn. Ltd. v. Union of Calgary Co-operative Employees (Kuban Grievance)*, [2005] A.G.A.A. No. 43 at para. 27; *Canada Safeway Ltd. v. United Food and Commercial Workers, Local 401 (Lund Grievance)*, [2004] A.G.A.A. No. 30 at para. 90; and *Newfoundland and Labrador Assn. of Public and Private Employees v. The Salvation Army Wiseman Centre (Reddy Grievance)*, [2004] N.L.L.A.A. No. 45 at paras. 76 and 78.

43. Finally, the Theatre submits that in the event it is determined that the Theatre did not have just cause to discharge the Grievor, then reinstatement should be refused and the Grievor awarded compensation in lieu of reinstatement. It relies on the following decisions: *BC Ferries Services Inc. v. BC Ferry and Marine Workers' Union (Rayner Grievance)*, [2005] B.C.C.A.A.A. No. 68 (McPhillips); *USWA, Local 129988 v. Liquid Carbonic Inc.*, [1995] O.L.A.A. No. 548 upheld on judicial review at (1996), 135 D.L.R. (4th) 493 (Ont. Gen. Div.); *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); and

Canadian Niagara Hotels Inc. v. Union of Needletrades, Industrial and Textile Employees (Ontario Council), Local 2327 (Cosoletto Grievance), [2008] O.L.A.A. No. 605 (Murray).

Position of the Union

44. The Union argues that the Theatre has failed to establish those facts necessary to show that discharge was just and reasonable. It submits that the Grievor's conduct on October 11 does not, either on its own or as a culminating incident, justify termination. It argues that in order for the Theatre to rely on the Grievor's disciplinary record prior to the Union certification, the Theatre must prove each component of the record which must be carefully scrutinized in the absence of a formal grievance procedure to challenge the record. The Union relies on: *Saskatchewan Association of Health Organizations v. C.U.P.E., Local 3967*, 2011 CanLII 20279; *Metropol Security v. United Steelworkers of America (Matthews Grievance)*, [1994] 44 L.A.C. (4th) 378, [1994] O.L.A.A. No. 11 [M.G. Mitchnick]; *Kalesnikoff Lumber Co. and Industrial Wood and Allied Workers of Canada Local 1-405 (Trubetskoff Grievance)*, [1998] B.C.A.A.A. No. 387.

45. The Union submits that the Grievor was subjected to double discipline. Her suspension with pay on October 12 was a disciplinary response to her conduct on October 11. The discharge was the imposition of a second discipline for the same conduct. The Union relies on: *Canadian Labour Arbitration* (supra) at 7:4210 at p. 7-155; *The Government of Saskatchewan v. Saskatchewan Government and General Employees Union and Kenneth A. Stevenson, Q.C. sitting as the Board of Arbitration, Constituted Pursuant to The Trade Union Act, To Hear the March 2, 2006 Grievance of Irene McGunigal*, 2012 SK QB 35; *Re Long Manufacturing Division, Borg-Warner (Canada) Ltd. and United Automobile Workers, Local 1256*, [1976] O.L.A.A. No. 41 at para. 14; *Babineau v. Canada (Correctional Service)*, [2005] F.C.J. No. 1609; *Canadian Labour Arbitration* (supra) at 7:4210 at p. 7-150; and *Calgary Co-operative Ass'n. Ltd. v. Calco Club*, [1991] A.G.A.A. No. 1.

46. The Union submits that the Grievor's termination was unjust and excessive having regard to the conduct claimed in the October 19 termination letter to be the culminating incident. While some of the Grievor's conduct was inappropriate, it was not premeditated,

but rather a momentary flare-up which occurred, as acknowledged by the Grievor, when she became frustrated and lost control of her emotions. She was crying and upset; she did not use profanity or swear. Such conduct was not insubordination, nor did it challenge management's authority. It asserts that management never requested the password to the audio computer. The Grievor's belief that the request made by Josh McGill for her password was for her personal computer was reasonable. The Theatre has not established misconduct in relation to the password. The Union submits that the Grievor intended to work the show; she was never advised by management that she was not to, nor that they didn't expect that she would run the show or was fit to run the show. It is not reasonable to conclude that the Grievor put the show in jeopardy; rather she worked the show and performed her duties as required. The Grievor's inability to speak to management after the October 11 meeting was due to her intense emotional reaction.

47. The Grievor apologized twice to management prior to her termination: by text message to Ms. Spicer on October 12 and at the October 19 meeting where she expressed her desire to continue to work at the Theatre. This is submitted as evidence of her ability to return to the workplace and of her rehabilitative potential. The Union relies on: *The Canadian Labour Arbitration* (supra), 7:3660 at p.7-141 and 7:4422; *Wm Scott (Re)* (supra); and *Steel Equipment Co. Ltd. and U.S.W.A., Local 3257* (1964), 14 L.A.C. 356 (Reveille).

48. The Union says that the following decisions show that termination in these circumstances is unduly harsh having regard to the Grievor's conduct and work record: *Smurfit-MBI v. Independent Paperworkers of Canada, 949 Local*, [2009] O.L.A.A. No. 40 (Stout), *Maple Leaf Sports & Entertainment Inc. v. Teamsters Local Union 847*, 2001 CanLII 67893, *Greater Victoria Public Library v. C.U.P.E., Local 410* (Migliorini Grievance), [2004] B.C.A.A.A. No. 275, *International Assn. of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 805 v. Canam Steel Works (Nguyen Grievance)*, [1998] A.G.A.A. No. 93, 76 L.A.C. (4th) No. 93, *Caradon Indalex (Re)*, [1996] B.C.C.A.A.A. No. 219, *TransAlta Generation Partnership v. Local Union 254 of I.B.E.W.*, [2011] A.G.A.A. No. 65 [Beattie], and *Hendrickson Spring, Stratford Operations v. United Steelworkers of America, Local 8773*, [2005] O.L.A.A. No. 644.

49. The Union further argues that, if I conclude that the Grievor's conduct was worthy of discipline and there was no double jeopardy. I ought to exercise my discretion to substitute a lesser penalty; the penalty ought to be a short suspension.

ANALYSIS AND DECISION

Re: Double Jeopardy

50. It is my conclusion that the Grievor's discharge was not a second discipline for the events of October 11. A suspension with pay may be disciplinary. However, I find in these circumstances it was not disciplinary. The Grievor's suspension on October 12 was not, nor was it intended to be, the Theatre's disciplinary response to the Grievor's October 11 misconduct.

51. I agree with the Theatre's submission that the suspension was akin to a "suspension pending an investigation". As an interim measure the Theatre decided that in light of the Grievor's actions on October 11 and its concerns about her inability to control herself if she returned to the workplace, the appropriate response was to suspend her pending a meeting with the Union present. The Grievor made it clear to the Theatre that she was not prepared to meet with management without Union representation. The meeting held on October 19 served as an opportunity for the Theatre to present its evidence as to the Grievor's inappropriate conduct and to provide her with an opportunity to address this and provide her input and response prior to the Theatre making a final decision as to the appropriate discipline. This meeting was investigative and scheduled to accommodate the Grievor and the Union. The Theatre did not make a decision on discipline and then reverse itself. The Grievor was advised by Mr. North that the suspension with pay was until a meeting with the Union representation could be scheduled as requested by the Grievor.

Just Cause for Discipline

52. The parties are in agreement that in reaching my conclusions I ought to apply the three-part test set out in the *Wm Scott* (supra) decision: (1) Was there just cause for

discipline? (2) Was dismissal an excessive response in the circumstances? (3) If it was, what alternative measures should be substituted?

53. In respect of the first question, I conclude that the Theatre had just cause to discipline the Grievor for her misconduct on October 11. The Union does not seriously argue otherwise.

54. I conclude that during the October 11 meeting, the Grievor engaged in a type of insubordination. She lost control of her emotions and displayed volatile behaviour; she shouted at management, was disruptive, disrespectful and was challenging to management in the exercise of its authority: management was addressing issues of her employment, her behaviour and while it was in the process of delivering a written reprimand. In reaching this conclusion I have had regard to the *Canadian Labour Arbitration 4th Ed.* (supra) at 7:3660

Conduct that is threatening, insolent or contemptuous of management may be found to be insubordinate even if there is no explicit refusal to comply with a directive, where such behaviour involves a resistance to or defiance of the employer's authority.

I agree with the comments of Arbitrator Hood in *Prairie Malt* (supra) at paragraph 58 where he stated:

... The root of insubordination is the intentional and purposeful defiance of the exercise of proper authority...

In *Canvil* (supra) an employee who swore, screamed at management and struck the desk during a meeting was given a thirty-day disciplinary suspension; the arbitrator considered the misconduct and insolent language tantamount to a verbal assault on the supervisor.

55. It is my conclusion that the Grievor did not refuse a request by management to provide the password to the audio computer on October 11. She was not asked by a representative of management to provide the password. Josh McGill sent this text message to her "*I also might need the password to your computer.*" The Grievor's response was "*Why?*" Before receiving a reply, she said that she was not giving it to Josh. The Grievor was unaware of management's concerns over whether the show would proceed or that Josh

and Brian could not access the audio computer. The request from Josh McGill was not a request made on behalf of management nor at its direction. The Grievor had no reason to believe that the request was for the audio computer which would be operated by her during the evening show. I accept her assertion that she believed it was a request for access to her personal computer. I am not persuaded that the Grievor's failure to tell Ms. Spicer at the October 19 disciplinary meeting that she thought the request was for her personal computer detracts from the Grievor's credibility in this regard. Counsel argues that it is reasonable to expect that such a reply would have been given. Having regard to the Grievor's non-responsiveness during the October 19 meeting, I do not draw an adverse inference against her in this regard. Even if this was not my conclusion, I would still be of the opinion that there was no insubordination on behalf of the Grievor in not providing the password.

56. There is no evidence that the Grievor was aware of all of the circumstances which were occurring or management's concerns that the show may not be able to go forward. I accept the Grievor's evidence that she intended to perform her duties that evening. Although she had left the building in order to compose herself and to contact her friends, she had not abandoned her position. Josh McGill's first text contact with the Grievor occurred at 5:53. It was during this first text message that he said he might need the Grievor's password. By 5:53 Josh McGill and Brian Maxwell had been to the audio computer and determined that they needed a password for it. While management was justifiably concerned about the show going forward, I have to keep in mind that show call was not until 6:00 p.m. The Theatre was mistaken in relying on what it concluded was a refusal by the Grievor to provide the password for the audio computer. This appears to have been a significant factor in its decision to terminate the Grievor's employment and its concerns regarding trust.

57. It is my conclusion that the Grievor's imposition of conditions to her coming in to work the show was a form of insubordination. In response to Josh McGill's inquiry as to whether she was coming to work, she replied "*only if I'm not harassed by management.*" In response to Josh's suggestion that he can talk to Brian Maxwell, the Grievor replied "*...tell them to stay away from me*". At 6:06 p.m., Josh advised the Grievor that management wanted to talk to her about what was going on. She replied "*no, I'm not talking to them*".

anymore.” At 6:15 p.m. the Grievor texted *“I’m here but I’m not talking to them.”* Josh McGill replied that Andrew, Ruth and Crystal *“...are good with that”*. The imposition of such conditions on her return to work is insubordinate and in defiance of her obligations to attend work and to perform her duties and responsibilities. Such conduct is clearly inappropriate and unacceptable in the workplace.

58. In my opinion the Grievor’s actions in the encounter with Ms. Smillie after she left the meeting with Ms. Spicer and Mr. North was not misconduct worthy of discipline. Ms. Smillie is a caring individual; she went to speak to the Grievor because of her concerns for her and as a result of her observed emotional state. Ms. Smillie engaged with the Grievor personally and was not exercising any direction or authority over the Grievor. The Grievor’s reply to this concern that she was *“not alright, no state to talk”*. The Grievor was very distraught, but her telling Ms. Smillie to *“go away”* and her crying was not disciplinable conduct in the circumstances.

59. In summary, I conclude that on October 11 the Grievor engaged in inappropriate conduct which was worthy of discipline: insubordination during the meeting with Ms. Spicer and Mr. North; insubordination in the imposition of conditions for her return to work.

Was Discharge Excessive?

60. Having concluded that the Grievor engaged in misconduct, the issue becomes whether the penalty of discharge was excessive. I conclude that the Grievor’s actions on October 11 were not of such a nature as to justify discharge. I am satisfied that the Grievor’s conduct occurred as a result of her emotional state and her inability to control her emotions in the presence of her concern that her employment might be in jeopardy. I find that there was no swearing, abuse, nor threat to management. Although the Grievor’s misconduct is serious in that it demonstrates a lack of respect or regard for management and a defiance of its authority, it is my conclusion that her conduct, in all the circumstances, is not serious enough to warrant a penalty of discharge.

Culminating Incident – Reliance on Pre-Collective Agreement Record

61. In its October 19 discharge letter, the Theatre claims that the events of October 11 were a culminating incident giving it just cause to discharge the Grievor. In such a case the appropriateness of the penalty is not to be judged solely on the final incidents. The Theatre says that the doctrine permitted it to review the Grievor's entire employment record in making its determination that discharge was the appropriate penalty. As stated above, I have concluded that the Grievor's conduct was not serious enough to warrant a penalty of discharge. I further conclude that the Grievor's employment record and established pattern of behaviour was not such that the events of October 11 warrant the penalty of discharge.

62. The employment record referenced in the termination letter includes meetings with the Grievor on September 14, 28 and October 11 to discuss concerns with her behaviour in the work environment, and references letters dated September 14 and October 11. Additionally, the Employer refers to a number of observed behaviours and cites the events of October 11 as the culminating incident. I will now review this employment record.

63. The disparaging comments at the AGM were addressed in what I find to be a non-disciplinary coaching or mentoring meeting held on September 8 concerning this inappropriate behaviour. The September 14 meeting and letter addressed once again the inappropriate behaviours of the AGM and other behaviours and set forth the Theatre's work expectations. It is my conclusion that this letter is not a Step 2 written reprimand in the Theatre's disciplinary procedure. The letter was not noted as a reprimand, rather as an employee performance letter with expectations that the parties would meet again to see if the Grievor was meeting expectations. The letter did not contain any warning in respect of further conduct. However, even if it was considered to be disciplinary, it would not alter the ultimate conclusion which I have reached.

64. Management met with the Grievor on September 28 to review her performance and its expectations. Considerable improvement and Grievor effort was noted; management also noted the need for the improvement in the area of communications. This meeting was not

disciplinary, rather it was intended to provide a performance review and to provide an opportunity for the Grievor to discuss her issues and/or concerns.

65. The October 11 letter headed “Final Written Reprimand” refers to the meeting and discussions of September 14 and the Theatre’s expectations. This letter is a written reprimand for conduct subsequent to September 14. It refers to the post-mortem and inferentially to Globe Experience Day. It emphasizes the seriousness of the Grievor’s misconduct and encourages her to decide and to commit to improvement of her relationship with the Theatre. The Theatre wishes to hear from the Grievor as to what she is willing to commit to and to actively work towards in repairing the relationship. It contains a warning that failure to do so may result in the termination of her employment. Ms. Spicer advises that she wishes to meet with the Grievor on Sunday, October 16 to discuss her continued relationship with the Theatre. Due to the events of October 11, no follow-up meeting was held on October 16. A meeting was held on October 19. The Grievor did not have an opportunity to grieve or to challenge the October 11 reprimand and the reasons therefore.

66. I agree with the Union’s submission that when the Theatre seeks to rely on a pre-collective agreement record, it must prove each component of the record. In coming to this conclusion, I have accepted the reasoning and logic of Arbitrator Mitchnick in *Metropol* (supra) at paragraph 3 where with reference to two decided cases he wrote:

“... Lincoln Place Nursing Home, 13 L.A.C. (2d) 379 (Beck), and Paintplas Inc., an unreported decision of Professor Rayner dated June 12th, 1990. The essence of the former’s finding, set out at page 392, was:

...it is our view that a pre-collective agreement record ought to be very carefully scrutinized given the fact that there was no formal grievance procedure available. But once it has been carefully scrutinized, and once a Board is satisfied that it is a legitimate record, fairly kept, and particularly, as the evidence here showed, has been discussed with the employee and the employee given a chance to make a written comment, there is no reason not to accept that record and we so hold ...

In Paintplas Mr. Krashinsky made exactly the same alternative submissions as here, and Professor Rayner commented on all of that, including the above-stated passage from Lincoln Place, as follows, commencing at page 5:

The concept of culminating incident and past record serves various purposes. Obviously, any system of progressive discipline has as its major goal the

correction of unacceptable behaviour. However, the doctrine also serves the interests of finality in that an established record cannot be challenged, explained away or amplified (i.e., made to appear worse than what it is). The goal of finality serves many purposes, all of which are self-apparent. However, the doctrine also determines the employee's status in a very real sense; the worse the record the closer the employee is to unemployment. This fact alone supports the Union's view that before an employee be hamstrung by his past record he must have had an opportunity to challenge the record.

At the same time, Mr. Kenny's point cannot go unrecognized. Surely it makes no sense to disregard totally the employee's past performance simply because a first Collective Agreement has been interposed. I believe it was to meet this consideration that the reasoning in the Lincoln Place Nursing Home case was developed. However, given the far reaching effects of the use of the past record I believe that the Lincoln Place Nursing Home approach does not go far enough. The words "very carefully scrutinized" leave too much open. In my view, in the general case, if the Company seeks to rely on a pre-collective agreement record it may do so but must be prepared to prove each component of the record. In other words, I agree with the Union's second submission.

This approach meets, in my view, the concerns expressed by both counsel. The past record is not excluded, but must be proved.

The Theatre presented evidence surrounding the matters of the Grievor's disciplinary record and the Grievor was given an opportunity to challenge the record.

67. The Grievor says that during the October 19 meeting she did ask for particulars of each of the events or causes for which she was written up. She gave a general reply in respect of some of these. The Theatre presented no evidence in respect of the Grievor questioning the need to work a 35 hour week or to particulars of challenging the scope of the duties assigned to her by the Director of Production. While not all of these negative behaviours and attitudes identified by the Theatre in the October 11 letter were established, I am satisfied that the Grievor had engaged in negative conduct, behaviours and attitudes in the workplace sufficient to justify the Theatre's written reprimand on October 11. As such, I am entitled to consider this reprimand as part of the Grievor's disciplinary record in determining whether or not the Grievor's conduct on October 11 satisfies the requirements to be a culminating incident.

68. Was Grievor's misconduct on October 11, having regard to her employment record and previous patterns of behaviour, such that discharge was appropriate? The following passage from *Canadian Labour Arbitration* (supra) at 7:4310 cited by the Theatre discusses the doctrine of culminating incident as follows:

The doctrine of the culminating incident delineates those circumstances in which it is proper for an employer to rely on an employee's poor employment record in order to justify taking more serious action than might otherwise be warranted by the other circumstances of the case. It is the logical corollary of the proposition that an employee's long and blameless employment record may properly be relied on by an arbitrator to ameliorate a disciplinary penalty. In the standard case, the doctrine says that where an employee has engaged in some final, culminating act of misconduct or behaviour for which some disciplinary sanction may be imposed, it is entirely proper for the employer to consider a checkered and blameworthy employment record in determining the appropriate sanction for that final incident. Just as in criminal law, arbitrators recognize that the penalties for a second, third and fourth offence may increase with each succeeding offence. A consistently bad employment record shows that an employee has been unable or unwilling to learn from his or her mistakes. The doctrine responds to an employer's legitimate interest in being able to terminate the employment of someone who, but for such a doctrine, could with impunity commit repeated infractions of a variety of different rules and policies, and generally perform in an unsatisfactory manner, without fear of being discharged so long as he or she did not commit a very serious offence or did not engage in the same kind of misconduct over and over again ...

I have accepted and applied this view of the doctrine of culminating incident in reaching my conclusions herein.

69. It is my conclusion that the Grievor's employment record and established pattern of behaviour does not establish such a checkered and blameworthy pattern of conduct, repeated infractions or misconduct such that it can be said that she had reached the pinnacle of progressive discipline such that the events of October 11 warrant the penalty of discharge. It is unusual to jump from a final written warning to discharge.

70. While the Grievor has displayed recurring incidents of disrespectful behaviour and inappropriate conduct, including the conduct at the AGM, the post-mortem and the Globe Experience Day, I am unable to conclude that her employment record is of such a nature that it, coupled with the events of October 11 have caused irreparable harm to the employment relationship such as to justify discharge.

71. I have considered a number of other factors in concluding that the penalty was excessive. The events on October 11 were as a result of an emotional outburst and flare-up. The Grievor displays an unfortunate tendency to act or react in an inappropriate manner and then later have regrets. Her conduct at the AGM was clearly inappropriate and she subsequently acknowledged this to management and apologized for her conduct. I have taken into account the fact that the Grievor did on October 11 recognize that she had acted precipitously during the meeting with Ms. Spicer and Mr. North and that because of her inability to properly communicate and control herself, she needed to have Union representation at subsequent meetings in dealing with management. I have also taken into account the fact that the Grievor did apologize to Ms. Spicer on October 12 for her conduct on October 11.

72. The Grievor is relatively young and at the material time was undergoing some personal problems giving rise to an emotional situation which she did not control. It is clear that the Grievor will have to learn to exercise self-control; to speak and act properly in an appropriate forum with proper respect of management. She must conduct herself appropriately with a positive attitude which will contribute to the benefit of the Theatre. I do not see that the Grievor is incapable of this; it is her express desire to work at the Theatre and she has apologized at the hearing for her conduct. In my opinion a significant suspension is sufficient to bring home to the Grievor the seriousness of her misconduct and to direct her to the correction of her unacceptable behaviour.

Is Compensation in Lieu of Reinstatement the Appropriate Remedy?

73. I have fully reviewed and considered the Theatre's position and the authorities submitted in support of its submission that rather than the Grievor being reinstated, I ought to make an order for compensation in lieu of reinstatement. I accept that I have the power to make such an order, however, such an order should only be made in exceptional or extraordinary circumstances.

74. In *BC Ferries Services Inc.* (supra), Arbitrator McPhillips, after a review of a number of related decisions wrote:

90. In those cases, factors such as a grievor's lack of respect for management, the employee having a perception of a management conspiracy, the feeling on the part of the grievor of being persecuted, the existence of rudeness and insolence, rampant distrust on the part of the grievor, the grievor's failure to accept any responsibility for her actions and the likelihood of a confrontational and uncooperative approach continuing were factors pointing to the conclusion that a resumption of the particular employment relationship would not be viable.

91. Each of those factors is present in abundance in this case with Ms. Rayner. The Grievor's previous disciplinary record with respect to insubordination, specifically the 3-day suspension on March 21, 2001 for threatening to go to the media, and "exaggerated and derogatory comments about the management team and the consultant involved" indicate that the events of 2003 were not a momentary lapse on the part of Ms. Rayner. Indeed, her behaviour in the fall of 2003 is virtually a repeat of her actions in 2001. It is clear from her general behaviour toward management since 2001 and even her testimony before this Board that Ms. Rayner has lost any sense of what is appropriate behaviour with respect to her supervisor and her Employer generally. There has been no acknowledgement, whatsoever, that her actions have been inappropriate in any way. Ms. Rayner's view is that the Company made an incorrect decision in 1999 concerning the business plan with respect to the Reservation Centre and that has entitled her to behave toward the Company and its managers in any manner she feels is appropriate.

In this matter, the union sought an order for compensation in lieu of reinstatement.

75. In *Re Liquid Carbonic* (supra) an award of compensation in lieu of reinstatement was made by Arbitrator Hinnegan who concluded:

42. On all of the evidence, the conclusion that the grievor's employment difficulties stem essentially from an unusually uncooperative and confrontational attitude generally was unavoidable. He simply had difficulties with too many people in various capacities and situations, including, but not limited to, supervisory personnel, not to accept that as a fact. As indicated, if any confirmation of that was needed following the Employer's evidence, it became abundantly [sic] clear during the grievor's testimony at the hearing. The manner in which he gave his evidence and his responses to questions exhibited the same uncooperativeness and defiance and refusal to accept any responsibility for his conduct as alleged by the various witnesses.

43. For all of the foregoing reasons, it is my considered view that it would serve no useful purpose to return the grievor to this work environment, which even he appears to consider an unsatisfactory fit for him. In my view, the only viable option here is a remedy along the lines of that made in *re Lily Cups Ltd. and Printing Specialties and Paper Products Union, Local 466* (1981) 3 L.A.C. (3d) 6 (H.D. Brown, Chairman) and the cases which have followed that decision.

44. At page 17 of that decision, the chairman stated:

“Where such lack of cooperation has manifested in animosities to the extent of altercations, it can be concluded that there is little likelihood of a future acceptable employment relationship with the grievor should he be returned to his former position These factors raise considerable doubt in our minds that reinstatement to employment is the appropriate relief in the particular circumstances referred to in this case from which we conclude that such a remedy would not be in the future best interests of either the grievor or the Company.”

76. Arbitrator Blasina concluded in *Vantel/Safeway Credit Union* (supra) that the employment relationship was incapable of restoration. In reaching this conclusion he found:

162. The Grievor has a long history of being a negative and intimidating element at the workplace. When others were critical of her conduct, she dismissed it as being their “perception”. The Grievor testified that she could work with anyone at the Royal Oak Branch – that was “her” perception. It was not that other employees were hard on her; she was hard on them. The Grievor showed no remorse, and continues to believe that she was improperly suspended in August, 2005.

164. The Grievor has been found to have had some connection to the first anonymous letter, but the extent of that connection is ambiguous. Even had it been concluded that the Grievor had nothing to do with it, the first anonymous letter is still weighty evidence with respect to the issue of reinstatement. The Grievor embraced its contents. In this one document are reflected the beliefs and the attitude of the Grievor, preceding her discharge and continuing unabated to the present. The letter cannot reasonably be characterized as “whistleblowing”. The letter was sent to the Board of Directors and to FICOM. It is for the VTSCU to select its management team, and as an employee of the VTSCU the Grievor has a duty of fidelity to her employer; and, when there are breaches of the collective agreement, she has the right to protest via the grievance procedure. According to the evidence, the contents of the letter are erroneous or skewed. The letter reflects malevolence and profound disdain for management. The Grievor saw nothing wrong with avoiding the grievance procedure in exceptional cases, as she would perceive them. She has no sense of fidelity to her employer; and, it would be unrealistic to think that a reinstatement at this time would have any restorative effect.

165. The VTSCU’s attitude toward the Grievor is also a concern. It is the belief of the VTSCU that the Grievor was responsible for all three anonymous letters; and, more significantly, it is the belief of the VTSCU that there was damage intentionally done to the tires of a number of managers, and that the Grievor is blameworthy with respect to what would amount to criminal mischief. The veracity of these beliefs has not been proven; but, one would be naïve to think that these beliefs have now been dispelled.

77. In *Canadian Niagara Hotels Inc.* (supra), Arbitrator Murray came to a conclusion that compensation in lieu was appropriate where the employment relationship was no longer viable but damaged beyond repair in the following circumstances:

53. ... Simply put, and in consideration of all that has occurred, reemployment is not a viable option here. Were Cosoletto to be reinstated it would be under such a cloud and intense supervision as to make the kitchen dysfunctional. It is reasonable to expect that management would be watching his every move given his propensity to cause discomfort amongst his co-workers, to seek revenge rather than accept an apology, to falsify (the 1999 c.v.), and on at least one occasion participate in a drug transaction, albeit off-site. Additionally, he is still under the cloud of the accusation contained in the anonymous phone call. While Hamelin denied making the phone call, someone did. Given that the employer pursued a vigorous investigation that was, effectively, public information within the workplace it is reasonable to suppose that Cosoletto will still be under suspicion from some managers and co-workers about the accusations contained in the phone call. And that is despite the lack of evidence to this arbitration to convict him per 9.03. Given everything that came to light in this case that is hardly the sort of environment in which a proud individual in a busy medium to upper scale establishment could work diligently or effectively. Team work and trust are essential ingredients in a kitchen/restaurant workplace. With what came out at arbitration the employer/employee trust would be absent and the employee/employee team work at risk. He admits his chances for promotion to a sous-chef will be stymied forever and that he will be slotted to the evening shift forever. Therefore it is concluded that there would be a poisoned work environment were he to return and that the employment relationship is no longer viable but is damaged beyond repair. ...

78. I am of the opinion that the Theatre has not established exceptional or extraordinary circumstances such as to justify an order of compensation in lieu of reinstatement. The Theatre alleges that the Grievor's conduct has irreparably damaged the employment relationship to the extent that it cannot be restored. In reaching its conclusion to discharge the Grievor, the management team expressed a number of concerns: notwithstanding their efforts and work with the Grievor, her behaviour had not changed; they did not hear the Grievor accept responsibility for her conduct or take ownership of events of the events of October 11; they did not hear the Grievor express a desire to change or that her behaviour would change and they felt they could not trust the Grievor.

79. None of the authorities referred to by the Theatre support a conclusion that the Grievor's conduct or the effect of her return to the workplace are of such a nature as to require that she not return to the workplace but be provided with damages in lieu of

reinstatement. The Theatre has not established that the Grievor had a lack of respect for management, a perception of a management conspiracy against her, a feeling of being persecuted, rampant distrust on the part of the Grievor such as found in *BC Ferries Services Inc.* (supra). I have found that the Grievor did exhibit rudeness and insolence on October 11. There is evidence of a bad attitude at the AGM and at the Globe Experience Day. However, I cannot conclude that the Grievor has lost a sense of what constitutes appropriate behaviour with respect to supervision and management generally. The Grievor has accepted responsibility for her actions; she has apologized and on October 12, along with her apology to Ms. Spicer, expressed the hope that Spicer was alright. There was evidence that in September in the face of coaching and mentoring the Grievor did change her behaviours and conduct. While there was a significant reversion in her conduct on October 11, I do not see that as part of the Grievor's essential makeup where there will be ongoing confrontation or uncooperative approach in the future if she is restored to the workplace. There is not present here the problems noted in *Re Liquid Carbonic* (supra) where the problems arose from an unusually uncooperative and confrontational attitude which manifest itself in animosities with co-workers which lead to altercations.

80. The Grievor has not been demonstrated to be a long-term problem employee, nor has it been shown that she is hard on her co-workers through being discourteous, intimidating or making threats such as was demonstrated in *Vantel/Safeway Credit Union* (supra). The Theatre has not established that the Grievor is a negative and demoralizing influence in the workplace. Her comments at the AGM and at the Globe Experience Day did reflect on the work and performance of other employees but I am not satisfied that these comments have been shown to have such a negative and demoralizing effect in the workplace on other employees so as to make re-instatement impractical.

81. While management has expressed its reservations as to whether or not it can trust the Grievor, or whether her attitude would change, there is not present any of the highly negative attitude, suspicion and distrust of the grievor as was present in *Vantel/Safeway Credit Union* (supra) where management continued to have a belief that the grievor was responsible for

three anonymous letters, damage to the tires of a number of managers and where the arbitrator concluded that it would be naïve to think that these beliefs had been dispelled.

82. There is nothing in the evidence which would lead me to the conclusion that the Grievor's return to the workplace would result in a dysfunctional workplace such as was established in *Canadian Niagara Hotels Inc.* (supra): required intense supervision with resulting discomfort to others; concerns about the grievor seeking revenge and falsifying information; ongoing suspicion of other conduct by that grievor and the likely impact on the teamwork and trust required in the kitchen of a high-end restaurant. Re-employment is a viable option.

What is the Appropriate Discipline

83. Having decided that discharge was excessive, the third *Wm Scott* (supra) question requires that I substitute an appropriate penalty, one which is just and equitable and resolves the dispute in a way that is appropriate in all the circumstances.

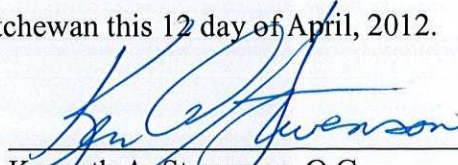
84. I conclude that the Theatre had just cause to discipline the Grievor, however, discharge was excessive. It is appropriate to substitute a lesser penalty. The grievance is allowed. The discharge is set aside and replaced by a 21-day suspension. The Grievor shall be reinstated with her full seniority and service-related benefits restored to her, subject to the said 21-day suspension for which the Grievor shall receive no wages or payment.

85. The Grievor must understand the serious nature of her misconduct and its challenges to management's authority. Her conduct has been significantly detrimental to the employment relationship. While I have concluded that this relationship has not been irreparably damaged, and that it can be restored, this will require a very serious commitment and effort by the Grievor working co-operatively and maturely with management and co-workers. With the co-operation of the Grievor and management, I believe my decision will provide a lasting solution to these past problems. However, the Grievor must clearly

understand that any recurrence of misconduct may well provide the Theatre with just cause to terminate her employment.

86. I reserve my jurisdiction to address any issues the parties may have regarding implementation of this Award.

DATED at Saskatoon, Saskatchewan this 12 day of April, 2012.



Kenneth A. Stevenson, Q.C.
Arbitrator.