IN THE MATTER OF AN ARBITRATION

BETWEEN:

VEIDT ENTERPRISES INC.,
AN AFFILIATE OF WARNER BROS. PICTURES

(the "Employer")

AND:

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE U.S. AND CANADA, LOCAL 891 AS A MEMBER OF THE BRITISH COLUMBIA COUNCIL OF FILM UNIONS

(the "Union" or "IATSE 891")

(Amanda Bronswyk Grievance)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Barry Dong for the Employer
	Bruce Laughton, Q.C. for the Union
HEARING DATES:	August 12 and 13 and December 9, 2010 Richmond, BC
DECISION:	March 4, 2011

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The parties have agreed that I am properly constituted with jurisdiction to determine the issues in dispute subject only to the preliminary issue addressed below.

The parties are governed by a Master Agreement (the "Master Agreement") between the Council and the Canadian Affiliates of the Alliance of Motion Picture and Television Producers ("AMPTP") and the British Columbia Branch of the Canadian Film and Television Production Association ("CFTPA"). The term of the current Master Agreement is March 29, 2009 to March 31, 2012. The term of the Master Agreement in effect at the relevant time was April 2, 2006 to March 28, 2009.

Veidt is a production company affiliated with Warner Bros., an American studio. Veidt produced the feature film "Watchmen" in and around Vancouver during 2007 and 2008. Warner Bros. distributed "Watchmen"; it was released in 2009. Veidt is a signatory to the Master Agreement.

Amanda Bronswyk, the grievor, is an IATSE 891 member who performed work as a 1st Assistant Accountant between July 3, 2007 and April 18, 2008 on the film "Watchmen" through her company and was paid a flat rate of $2,600.00 per week, according to the normal practice. Sonny Ritscher was the Head Production Accountant for "Watchmen" was responsible for hiring and administering the accounting department during the relevant time period. Mr. Ritscher lives in the United States and is not an IATSE member.

The events giving rise to this arbitration began with Ms. Kelly Moon, Senior Steward, IATSE 891, pursuing a claim for payment to a group of riggers for work performed on the 6th and 7th day across various dates in November 2007, December 2007 and January 2008. The Union's claim resulted in a March 25, 2008 email from Stephen C. Carroll, Vice President, Senior Labor Relations Counsel, Warner Bros. Pictures, to the accounting department

including the grievor. Mr. Carroll believed that the grievor leaked his email to the Union.

This matter emanates from the Employer's letter of April 16, 2009 issued by Mr. Carroll addressed to Ken Anderson, President of IATSE 891 which read:

> Please be advised that we consider Amanda Bronswyk, an accountant employed on [sic] by Veidt Enterprises Inc., an affiliate of Warner Bros. Pictures, on "Watchmen" to have been terminated for just and reasonable cause upon the conclusion of her employment. Ms. Bronswyk's breached her duty of loyalty, honesty and/or her fiduciary duties to her employer and in doing so irrevocably damaged any prospect of continuing employment relationship.
>
> By providing to the union privileged, confidential and proprietary information without the approval or consent of the Company, Bronswyk violated item #11 of the "Employee Rules and regulations" set forth in the deal memo agreement, a copy of which was forwarded to the Union. This violation of the deal memo agreement terms constitutes a violation of the Employer's rights under Article 1.08 and 1.09 of the Master Agreement.
>
> The Company also hereby demands the return from the Union and Bronswyk all documents and material in their possession and in its direction and control that was not provided as authorized by the collective agreement and that it or its agents retain no copies of such documents.

In response, Ms. Moon filed a grievance dated May 11, 2009 which read:

> With this letter the Union hereby initiates the grievance procedure at Article 11.03 (a) of the British Columbia and Yukon Film Council Master Agreement (the "Collective Agreement").
>
> We grieve the Employer's April 16, 2009 decision to issue a no-hire letter with respect to the Grievor as discharge without just and reasonable cause, contrary to Article 10.06 of the Collective Agreement and/or any other applicable provision of the Collective Agreement.

> We also grieve the Employer's actions in tort, including, but not limited to, defamation, negligence, intentional and/or negligent infliction of mental distress, intentional and/or negligent infliction of emotional distress and interference with economic relations.
>
> The Union seeks a "make whole" remedy which includes, but is not limited to, a publically distributed rescission of the no-hire letter, as well as general, aggravated and punitive damages.
>
> Please forward all correspondence and particulars related to this matter to IATSE Local 891 and the BC Council of Film Unions.

On June 18, 2009, the Union referred the matter to expedited arbitration pursuant to Article 11.05 of the Collective Agreement which reads:

> **Article 11.05 Expedited Arbitration**: Expedited Arbitration is available in cases in which it is specifically permitted under this Master Agreement, or upon mutual consent of the parties to the arbitration. Within five (5) business days of receipt of a written demand for an expedited arbitration in cases that permit expedited arbitration under this Master Agreement, or within five (5) business days of a written agreement to proceed to an expedited arbitration, an Arbitrator named on the list of Arbitrators of the BC Arbitrator's Association will be selected by the parties. Any arbitrator may, by mutual agreement, be bypassed or removed from consideration and another arbitrator substituted. The date of the arbitration hearing will be within fourteen (14) calendar days from the date the Arbitrator is selected. The Arbitrator shall render a decision on the evidence and arguments presented which shall be final and binding on the parties, including the grievant, and fully enforceable in a Court of competent jurisdiction. The Arbitrator shall present a written decision, unless the parties to the arbitration mutually agree that a written decision is not necessary. Arbitration briefs, if any, must be submitted no later than noon on the day after the arbitration hearing. The Arbitrator's written decision shall be issued within five (5) calendar days from the last day of the arbitration hearing or the date final arbitration briefs, if any, are submitted, whichever is later.

Article 11.06 of the Master Agreement reads:

> **11.06 Arbitrator's Authority**: The Arbitrator shall have the power to determine and resolve the issue(s) and only award wages, benefits and/or protections consistent with the contract, which are necessary to ensure the Employee or Employer receives the benefit of the bargained wages, benefits and/or protections. The Arbitrator shall not have the power to amend, modify or effect a change in any of the provisions of this Master Agreement, award punitive damages, award money damages to the Council, its member Unions or the Producers, or to determine jurisdictional disputes.

Also relevant, is Article 10.06 of the Master Agreement:

> **10.06 Discharge**: No Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. If the Council-member Union believes the action to be unjustified, the Council may file a grievance which shall be handled in accordance with Article Eleven. Any party to the grievance under this Article may make a written demand for expedited arbitration pursuant to Article 11.05. The Arbitrator shall have the power to reinstate the Employee with or without full compensation, to award damages in lieu of reinstatement, or to sustain the discharge. Refusal to comply with an order, directive, or assignment that is unlawful, unsafe, or, which is known by the Employee to be in violation of a location permit shall not result in discipline or discharge. An Employer will not be required to re-employ an Employee previously discharged by such Employer under this Article.

POSITION OF THE EMPLOYER

The Employer argues that this arbitration board is without jurisdiction because the grievor was not an employee at the time the April 16, 2009 letter was written and, as such, the only effect of the letter is to invoke Article 10.07 of the Master Agreement, ensuring that the grievor would not be dispatched to future Warner Bros. projects, placing one strike against her and eliminating any potential Employer obligations pursuant to Articles A1.09(7) and A1.09(8).

The Employer acknowledges that the grievor was in the bargaining unit but points to the grievor's role as an accountant and relies on the definition of "employee" in the *Labour Relations Code* of British Columbia, RSBC 2006 c. 244 (the "Code") which excludes persons who are employed in a confidential capacity. The *Code* definition reads:

> "employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion
>
> (a) performs the functions of a manager or superintendent, or
> (b) is employed in a confidential capacity in matters relating to labour relations or personnel.

In addition, the Employer relies on the use of the term "employee" in the Master Agreement and claims this manner of usage distinguishes individuals, including union members, who are referred to employment with signatory employers. According to the Employer, an "employee" is different than a "worker" or a "qualified person" and this distinction is supported by the language of the Master Agreement.

The grievor's employment on "Watchmen" ceased on April 18, 2008. The Employer argues that the grievor was not employed by the Employer at the time of the April 16, 2009 letter or at the time the grievance was filed and therefore, has no standing to file a grievance. The Employer maintains that the grievance should be dismissed on this preliminary basis due to a lack of jurisdiction. The Employer relies on *North American Mining Inc. and International Union of Operating Engineers, Local 955,* (2010) 196 LAC (4th) 181 (Power); and *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 212 (Motion Picture and Stage Technicians)* [1999], A.G.A.A. No. 87 (Tettensor).

In the alternative, the Employer argues that the grievance should be dismissed on its merits.

The Employer maintains that the advice from Mr. Carroll constituted legal advice from an in-house counsel and therefore was covered by privilege consistent with the Supreme Court of Canada's criteria in *Pritchard v. Ontario (Human Rights Commission)*, (2004) S.C.C. 31. According to the Employer, Mr. Carroll was providing legal advice as to how to calculate pay on the 6th and 7th days of work in response to a pay claim, and ultimately a grievance, by riggers working on "Watchmen". The Employer maintains that the communication was clearly protected by solicitor-client privilege and should not have been disclosed to any third parties, including the Union without consent.

The Employer argues that confidentiality is crucial and it was justified in creating strict rules addressing confidentiality. Employees are expected to keep information confidential. The Employer points out that this obligation is clearly explained and described in relevant employment documents. Employees, including the grievor, were required to sign a Deal Memo which further outlines their terms and conditions of employment in combination with the terms and conditions contained in the Master Agreement. The Employer relies on the language of the Deal Memo including the heading "Conditions of Employment":

> Employees shall comply with all rules and regulations of the Company including but not limited to those set forth below…
>
> Employee Rules and Regulations read:
>
> 11. Employee shall not disclose any information concerning the Picture to individuals outside the production without prior written consent.

The Employer argues that employees were required to review and sign a confidentiality agreement, a rider to the Deal Memo, which read, in part:

> Employment brings with it an obligation to keep the Company's business strictly confidential. Employee is expected to and agrees to adhere to this obligation. Any and all information acquired by Employee with respect to the Picture is privileged and shall not be discussed with or disclosed to anyone working outside the production…
>
> If Employee is in violation of the obligation of confidentiality, Employee will be in breach of Employee's employment contract.

The Employer strongly argues that it is important to ensure that employees respect and follow their commitment to refrain from disclosing confidential information. The Employer relies on *Vancouver Island Health Authority v. British Columbia Nurses' Union*, (2004) 132 L.A.C. (4th) 102 (Munroe) in support of its position that confidentiality agreements and rules outside collective agreements have been upheld as being reasonable.

The Employer relies on Articles 1.08 and 1.09 of the Master Agreement which allow the Employer to create rules and regulations providing they are consistent with the Master Agreement. The Employer argues that the confidentiality rules in the Deal Memo and the Confidentiality Agreement are not inconsistent with the Master Agreement and therefore are reasonable and valid.

The Employer claims Mr. Carroll was convinced by Ms. Moon that she had received a copy of privileged communication from the grievor. Specifically, the Employer argues Mr. Carroll was led to believe that his March 25, 2008 internal email to the accounting department regarding payment to the riggers for the 6th and 7th days had been provided to the Union by the grievor, contrary to the Deal Memo and especially its addendum, the Confidentiality Statement.

The Employer argues that Mr. Carroll's understanding was reasonable and merited his response particularly since the Union furthered the perception when Ms. Moon blocked out the header on the copy of the email. The Employer asserts that Ms. Moon had every opportunity to correct Mr. Carroll's perception but deliberately chose not to do so, purposely misleading Mr. Carroll and, under the circumstances before him, the no-hire letter of April 16, 2009 was entirely justified. The Employer argues that since the Union acted in bad faith by only revealing the manner in which it obtained the email at the commencement of the arbitration hearing on August 12, 2010, the Union should be liable for any resulting claim by Ms. Bronswyk.

The Employer also argues that the Union has consistently ignored Mr. Carroll's request to return all Employer documents including copies of the privileged communication. The Employer relies on an April 17, 2009 commitment from Counsel for the Union to delete or destroy the privileged communication and points out that, as of the date of the hearing, neither the Union nor the grievor had deleted copies of any confidential documents or material belonging to the Employer including any electronic copies of the privileged email.

In the further alternative, the Employer argues that even if I conclude the response was excessive, damages are not an appropriate response and the Union's demand for a "make whole" remedy should not include general, aggravated or punitive damages (including damages for mental distress) or compensation for lost opportunity to work on Warner Bros. productions.

The Employer relies on Article 11.06 of the Master Agreement to support its argument that the ability of an arbitration board is fettered. The Employer argues that Article 11.06 demonstrates the intentions of the parties to restrict the liability of an employer with respect to the award of damages by an

arbitrator. The Employer cites *Supernatural Films Inc. v. British Columbia and Yukon Council of Films*, unreported, October 28, 2009, (Lanyon) in which Arbitrator Lanyon addressed the language of 11.06 and held that, while the parties could not contract out of the general authority of an arbitration board pursuant to section 89(a) of the *Code*, Article 11.06 should be taken into account in determining whether it is appropriate to award damages. The Employer relies on Arbitrator Lanyon's decision to decline to award damages.

The Employer argues that since the grievor was not an employee at the time of the April 16, 2009 letter, the only remedy open to her is a retraction of the letter and removal of the letter from her industry record because the Master Agreement does not extend any additional rights or remedies to non-employees. The Employer relies on the alternative conclusion in *North American Mining, supra,* in which the arbitration board held that if the grievance was a union grievance, the only appropriate remedy was a declaration and an order to adhere to the agreement in the future.

The Employer argues that the intentions of the parties must be a factor and should defeat the grievor's claim for damages since she did not suffer any loss because she has been working for the Union and declined work on a subsequent project ("Final Destination 5").

The Employer argues that the Master Agreement does not contain any recall rights or preferential hiring rights and nothing in the Master Agreement provides any guarantee of work beyond one day or one week. The Employer relies on Articles 10.01 and 10.05 of the Master Agreement. Article 10.01 reads:

> **10.05 Written Guarantee**: The guaranteed length of employment shall be daily or weekly. A guarantee for a longer term shall be

> specifically set forth in writing. An employee may be replaced following completion of the guaranteed period of employment.

The Employer also relies on the grievor's Conditions of Employment as contained in the Deal Memo which reads, in part:

> Services are for a minimum period of one day if Employee is hired on a daily basis or one week if Employee is hired on a weekly basis. There is no other guarantee of the period of services unless otherwise specified and nothing herein contained shall constitute a "run-of-the-show" guarantee. Oral understandings of any kind are not binding.

Based on this language, the Employer maintains that the grievor cannot provide any reliable evidence to support a claim to any preferential hiring for future projects.

In the further alternative, the Employer argues that if I determine damages are appropriate, which it strongly opposes, the grievor cannot prove that she suffered any loss as a result of the April 16, 2009 letter and there is no indication that the letter has caused any loss of employment. The Employer relies on the Internet Movie database which shows the grievor has obtained subsequent employment on at least two other productions.

The Employer maintains that the grievor did not suffer any loss because the letter only applies to Warner Bros. productions and was not publicized by Mr. Carroll. Additionally, the Employer points out that there are no recall rights in the Master Agreement and, as such, the grievor had no right to be re-employed by Warner Bros. or any of its affiliates on any subsequent productions. According to the Employer, employment is obtained by name request so Warner Bros. and its affiliates were entitled not to name request the grievor.

The Employer further claims that the grievor has not suffered a loss because she has been working for IATSE 891 on a continuous basis earning an hourly equivalent rate to the Assistant Accountant classification with the same minimum as the Master Agreement with benefits and a car allowance.

The Employer relies on *Grand Yellowhead Regional Division No. 35 v Canadian Union of Public Employees, Local 1357* [2010], AGAA No. 47 (Tettensor) in which an arbitration board discounted damages awarded in a situation where there was no certainty that a grievor would have been selected for employment. The Employer points out that the arbitration board in *Grand Yellowhead, supra*, discounted the damages from $50,000.00 to $10,000.00 based on an assessment of the chances of securing the employment. The Employer claims that this principle should be applied to the grievor under the current circumstances as there was no certainty that she would have obtained employment on any other production; that she would have been employed for the duration of the production; or that she would have received overscale rates for her work.

The Employer also argues that any damages must be nominal due to the bad faith actions of the Union, such as misleading the Employer into believing that the grievor had breached confidentiality right up to the penultimate moment. The Employer maintains that the Union's lack of clean hands means it is responsible and should bear the burden and consequences of its silence as to the true source of the disclosure. In addition, the Employer claims that the Union should bear the liability because the Union is at fault for any delay and associated loss to the grievor. The Employer relies on *Revera Retirement LP v Service Employees International Union, Local 1, Canada* [2010], O.L.A.A. No. 448 (Reilly) in support of its position since the arbitration board in *Revera, supra*, limited the Employer's liability for wage loss because of delay on the part of the Union in responding to a settlement offer. For these reasons, the

Employer argues that even if I accept that the actions of the Employer were not justified, the grievor is not entitled to any damages.

In the alternative, if I determine that the grievor is entitled to damages for loss of opportunity, the Employer argues the damages must be limited by Articles 10.01 and 10.05 of the Master Agreement which limits the contractual guarantee of employment to one week. In addition, the Employer maintains that the damages must be limited to the negotiated wage rate for an Assistant Accountant minus the amount earned from IATSE 891.

Mental Distress

The Employer argues there was no reasonable expectation that damages for mental distress would flow from a breach of the collective agreement. The Employer maintains there was no reasonable expectation either within or outside the collective agreement upon which to found a claim for damages for mental distress on the part of the grievor.

The Employer relies on *Fidler v Sun Life Assurance Co. of Canada* [2006], 2 S.C.R. 3 and *B.C. Public School Employers' Association v. B.C. Teachers' Federation (Wyndham)* [2007], B.C.C.A.A.A. No. 229 (Taylor) and particularly Arbitrator Taylor's observation that policy reasons require a high standard of proven mental stress in order to attract compensation. The Employer points out that the situation before Arbitrator Taylor involved an application of the collective agreement but damages did not flow automatically from the breach and ultimately Arbitrator Taylor concluded that there was no evidence to support the claim for mental distress. The Employer argues that the same is true of the facts before me and I should reach the same conclusion.

The Employer also relies on *B.C. Public School Employers' Association v. B.C. Teachers' Federation (Bonfield)* [2010], B.C.C.A.A.A. No. 85 (Korbin) in

which Arbitrator Korbin affirmed that arbitrators do have the jurisdiction to award remedial damages for mental distress but held that there was no evidence before her to support such a claim. The Employer argues that I should reach the same conclusion because the Union has not established a mental distress claim since there is no evidence the grievor suffered some significant harm or actual mental distress as a result of the Employer's conduct.

The Employer argues that the Union has failed to demonstrate there was specific bad faith conduct on the part of the Employer which caused the grievor to suffer mental distress. The Employer relies on *Health Employers' Association of B.C. v. B.C. Nurses' Union (Hope)* [2008], B.C.C.A.A.A. No. 196 (Sullivan). In that *HEABC* decision, Arbitrator Sullivan, citing *Honda Canada Inc. v Keays* [2008], S.C.R. 362 and *Wallace v. United Grain Growers* [1997], 3 S.C.R. 701, upheld a claim for wage loss and benefits but declined to award damages for mental distress because the evidence before him did not suggest the type of bad faith or unfair dealings that would warrant damages of that nature. The Employer argues that I should reach the same conclusion because, in the circumstances before me, Mr. Carroll acted in good faith and reasonably, based on the information in his possession in that the issuance of the April 16, 2009 letter was based on the facts known to the Employer at the time and assumed to be true. The Employer argues that it is apparent Mr. Carroll's actions were not intentionally malicious or intended to cause suffering. The Employer maintains the fact the truth has only just become known, is due to the misconduct and delay on the part of the Union and those circumstances do not warrant remedial damages for mental distress.

The Employer relies on *Okanagan College v. Okanagan College Faculty Association (Fu)* [2007], B.C.C.A.A.A. No. 255, 171 L.A.C. (4th) 310 (Hall); a case which also involved a dismissal and reinstatement. The Employer specifically

points to Arbitrator Hall's conclusion that there was no basis for damages because the evidence did not establish that the employer's actions caused or added mental or emotional distress beyond the stress experienced by any dismissed employee. The Employer argues that I should also decline to award damages for mental distress for similar reasons since the grievor has not experienced any unique stress beyond the stress appropriate to the circumstances of any dismissed employee because it did not make any misrepresentation about her and did not deliberately attack her reputation. The Employer argues that Warner Bros. did not share or disseminate information to any potential employer and there is insufficient evidence before me of any concrete loss of opportunity upon which to base an award for mental distress damages.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues that the grievance should be dismissed for want of jurisdiction. Alternatively, if I conclude that I have jurisdiction, the Employer argues the grievance should be dismissed because it is without merit but seeks a ruling as to the March 25, 2008 email and the bona fides of its rules regarding confidentiality. In the further alternative, if I uphold the grievance, the Employer argues that any damage claim based on the effect of Article 10.07 must be limited by the guaranteed periods of employment and wage rates set out in the Master Agreement and this is not a situation that merits any additional damages.

The Employer also seeks an Order compelling the Union and the grievor to return all of the Employer's document and material in their possession and confirmation that no copies of the returned documents or materials have been retained.

POSITION OF THE UNION

The Union argues that the *Code* establishes two basic principles:

1. an employer must have just and reasonable cause to fire an employee;

2. an arbitration board has full authority to determine if cause exists and to craft an appropriate remedy.

In applying these two basic principles, the Union argues I am to adapt a reasonable approach which addresses the real substance in dispute and I am not bound by the strict legal interpretation of the issue in dispute. While common law decisions are relevant and can provide guidance with respect to the development of arbitral law, they do not govern arbitral law but instead provide a basis for development of arbitral jurisprudence where an arbitration board believes such development is appropriate. The Union relies on the seminal case of *Canadian Johns Manville Co. v. International Chemical Workers, Local 346* [1971], O.L.A.A. No. 1; and on the decision in *Eurocan Pulp & Paper Co.* (B.C.L.R.B. No. B203/2010 (Leave for Reconsideration of B.C.L.R.B. No. B136/2010)).

The Union further relies on section 89 (a) of the *Code* which specifically endows an arbitration board with the authority necessary to make an order setting the monetary value of a loss suffered by an employer, trade union or other person. Therefore, according to the Union, I have the necessary authority to provide damages to the grievor even if I conclude she was not an employee. However, the Union maintains that she was an employee and the *Code* principles and authority must be applied in interpreting the actions of the Employer.

The Union argues that the real substance of this matter is Warner Bros.' desire to discipline the grievor for a breach of employment terms. The Union maintains that the grievor was not an employee who was looking for work; instead, what happened was simply that Warner Bros. thought she had breached the confidentiality terms of her employment so they fired her in 2009 long after the end of the "Watchmen" project. Under those circumstances, even if she was no longer an employee, the facts and circumstances flow from the employment relationship, which allows the Union to invoke the provisions of the *Code* requiring just cause for termination.

The Union argues that the real substance is further revealed by the language of the letter of April 16, 2009 which, it claims, is a classic example of employer discipline and sets out reasons for the termination.

The Union also relies on the language used by Mr. Carroll in the April 15, 2009 emails and argues that this no-hire language based on Article 10.07, demonstrates that the grievor was discharged. As such, the Union argues the matter falls within the purview of an arbitration board consistent with section 84 of the *Code*.

The Union also relies on the language of Article 10.06 (as opposed to Article 11.06) and argues that Article 10.06 patently permits an arbitration board to reinstate an employee with full compensation award including damages in lieu of reinstatement. The Union claims that this language is purposely broad and open-ended, consistent with the authority described in section 89 of the *Code*.

The Union relies on *Vancouver Shipyards Co. v. Construction, Maintenance and Allied Workers Bargaining Council, Marine & Shipbuilders, Local 506* [2008], B.C.C.A.A.A. No. 63 (Taylor). In *Vancouver Shipyards, supra,*

Arbitrator Taylor addressed a situation involving the exercise of an employer's discretion to reject an employee dispatched from a union hiring hall on the basis of suitability and concluded the grievor had been terminated without just cause. The Union maintains that the Employer's actions in issuing the April 16, 2009 letter amount to a similar type of termination and were similarly without just cause.

The Union argues that *Vancouver Shipyards, supra*, is on point because the parties also have language addressing dispatch of Union members, Article A1.09, and the Employer's actions also constitute an unreasonable refusal to accept the grievor for work, when the Employer must not act unreasonably in refusing to accept Union members dispatched by IATSE 891. According to the Union, this language is stronger than the language before Arbitrator Taylor because it does not contain any subjective "suitability" assessment.

The Union argues that the April 16, 2009 letter is clearly the imposition of discipline not supported by any evidence and since it has been issued, the Employer has been attempting to create a factual basis to support the discharge; claiming that Ms. Moon and Mr. Ritscher led Mr. Carroll to believe that the grievor had breached confidentiality. The Union points out that Mr. Ritscher's evidence shows he did not agree that the grievor had provided confidential information to the Union.

The Union argues that the Employer's decision to continue to treat the grievor as fired in these circumstances, even after Mr. Carroll knew better, was bad faith. The Union claims that Mr. Carroll rushed to judgment, never changed his position and now the Employer is attempting ex post facto justification of that decision. The Union strongly asserts that claims by the Employer that Ms. Moon should have set the record straight are simply nonsense because Mr. Carroll had already made up his mind by the time of his initial reply at 7:04 p.m. According to the Union, the email chain shows that

Mr. Carroll made up his mind between the 5:31 p.m. email from Ms. Moon and his 7:04 p.m. email, without any further information from Ms. Moon or the grievor.

The Union argues that the evidence clearly establishes that the Employer imposed discipline without just cause and therefore, the first question in *Wm. Scott and Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can.L.R.B.R. 1 must be answered with a "no" and the grievance must be allowed.

The Union's Position Re Loss Of Opportunity

The Union relies on *BCPSEA (Bonfield), supra, and BCPSEA (Wyndham), supra,* to demonstrate that arbitration boards clearly have the authority pursuant to section 89 (a) of the *Code*, to award monetary remedies beyond lost wages.

The Union further argues that the basic principle to be applied in determining a remedy is simply to place the grievor in the same position she would have enjoyed but for the breach. The Union maintains that since the breach involved a termination, the continuing consequence of the breach was that the grievor was precluded from working for Warner Bros. The Union does not claim ongoing production work but instead bases its claim in damages from the date of dismissal to the time of the arbitration. The Union's argues that the claim for damages should involve the next two productions because, but for the actions of the Employer, the grievor would have been eligible and likely to obtain that work.

According to the Union, the claim is consistent with the traditional legal framework which places a grievor in the same position but for the breach.

In support of its claim, the Union relies on *Johns Mansville, supra*, for the principle that an employee must be placed in a monetary position as near as possible as to that which she would have been had the breach not occurred. In *Mansville, supra,* it was assumed that if additional work had been offered it would have been accepted; the Union maintains that the same would have been true for the grievor. The Union argues that under the circumstances before me, I should assume the grievor would have worked on the next two productions and since *Mansville, supra*, requires a grievor to be placed in the same financial position; the grievor should be indemnified for the earnings she would otherwise have received.

The Union maintains that in this type of situation, a claim in damages can be more subtle and does not require concrete proof that the grievor would have absolutely worked on those productions. In support of its position, the Union relies on Mr. Justice Kelleher's analysis in *Michelle Marie Danicek v. Alexander Holburn Beaudin & Lang and Jeremy Poole* 20101 B.C.S.C. 1111 including his conclusion that the balance of probabilities is not the governing test when a past wage loss claim depends on hypothetical events but instead there must be an assessment of the actual likelihood of the event. The Union argues that but for the Employer's improper actions, there was strong possibility that the grievor would have continued to work for Warner Bros. and a real likelihood of continuing work. The Union contends that this likelihood will become apparent if I consider that:

1. the grievor had a long history of working as an accountant in the film industry;

2. the Day Count document demonstrates that the grievor worked regularly and steadily on big budget shows where she was paid over the scale

rates and that situation does not occur without a good reputation since reputation is everything in the film industry;

3. the letters of reference also demonstrate the grievor's good reputation; and

4. the excellent letter of reference from Ritscher who was the Head Production Accountant on the "Watchmen" production.

The Union also argues it is not surprising that Renee Czarapata, who worked with Mr. Ritscher and the grievor on the "Watchmen" production, recommended the grievor to Jan Dennehy when Dennehy was crewing up for a film called "Sucker Punch". The Union points out that the grievor never received a response from Dennehy after an initial inquiry and claims that Dennehy instead used a more junior person, Alex Skrepnik, instead of the grievor. The Union relies on Day Count and payroll documents. The Union maintains that the grievor's lost work on "Sucker Punch" totals $22,296.29.

The Union further maintains that the grievor would have secured the work on the following project, "Red Riding Hood", because Skrepnik secured that work after her work on the production entitled "Sucker Punch". The Union maintains that the grievor's lost work on "Red Riding Hood" totals $5,830.20.

In other words, the Union claims the grievor lost a total of $28,126.49 when she was not given the work on both projects as a result of the actions of Mr. Carroll on behalf of Warner Bros. and maintains there is a strong likelihood, based on her prior reputation, that but for those actions she would have secured the work.

The Union's Position Re Mental Distress

The Union argues that the grievor is entitled to damages for mental distress as a result of the actions of the Employer. The Union acknowledges that the *Code* does not deal directly with this type of damages and relies on the principles outlined in *Eurocan, supra,* which states that common law decisions and principles can be used to develop the arbitral jurisprudence where the arbitrator feels that is appropriate.

The Union maintains that the damages for mental distress flow from the manner in which the termination occurred and the bad faith conduct during the cause of dismissal. The Union relies on *Nishina v. Azuma Foods (Canada) Co. Ltd.* 2010 B.C.S.C. 502 and specifically the B.C. Supreme Court's decision to award punitive damages as a result of the employer's failure to uphold its implied obligation of good faith and fair dealing in the manner of the dismissal. The Union points out that Ms. Nishina was awarded $20,000.00.

The Union also relies on *Nishina, supra*, for the Court's reference to the Supreme Court of Canada's decision in *Honda v. Keays* [2008], S.C.R. 362 indicating bad faith dismissal is capable of grounding a cause of action in damages and the requirement for an employer to: investigate allegations of misconduct, give employees the opportunity to respond, not fabricate grounds for cause, not maintain unfounded allegations of cause or treat an employee in a humiliating manner. The Union argues that these requirements provide guidance and can be used to analyze the Employer's actions vis-a-vis the grievor: Mr. Carroll decided to fire the grievor within 1.5 hours after receiving the email from Ms. Moon and is now fabricating reasons to support the discharge.

The Union also points to the Court's conclusion in *Nishina, supra,* that the employer, Azuma Foods (Canada) Co. Ltd. failed to adequately investigate

each of the incidents it relied on to establish cause; rarely asked their employee about the allegations of misconduct; responded with a sanction that was out of proportion and exhibited conduct at the point of termination that revealed a shocking disregard for Ms. Nishina's vulnerability as an employee. The Union claims that this situation is on point with the actions of the Employer and the vulnerability of the grievor. The Union argues that the grievor was vulnerable because: she has no tenure under the terms of the Master Agreement; is employed for short periods of time; can be displaced without cause and depends on her reputation to secure work.

The Union claims that the grievor was extremely shocked when she received the April 16, 2009 letter and the situation is particularly egregious because the grievor's work requires trust yet she was accused of violating all elements of the Employer's trust. The Union argues that prior to the April 16, 2009 letter, the grievor's entire future lay before her and the April 16, 2009 letter cut her off at the knees.

The Union also relies on *Greater Toronto Airports Authority and Public Service Alliance Canada, Local 0004*, 191 L.A.C. (4th) 277 (Shime) in which Arbitrator Shime concluded that the employer's conduct was unreasonable and in bad faith when, for example, the employer labeled the grievor in writing as being dishonest and accused her of not being truthful. The Union points to Arbitrator Shime's conclusion that, since the employer's conduct was unreasonable and in bad faith both in the investigation and in its decision to terminate, an appropriate remedy included damages. The arbitration board cited common law and arbitral authority pursuant to the statutory regime and concluded there are implied reciprocal duties of trust shared by both an employer and employees in the employment relationship.

The Union argues that, similar to the employer in *Greater Toronto Airports Authority, supra,* the actions of Mr. Carroll on behalf of the Employer,

were high-handed, arbitrary and capricious and had such a destructive impact on the grievor that if reinstated she would not be treated respectfully and with the dignity to which she is entitled as a result of her honest and diligent service. As a result of the Employer's breach of trust, the grievor is unable to continue her relationship with the Employer and is entitled to damages for loss caused to her future employment prospects rather than reinstatement. The grievor in *Greater Toronto Airports Authority, supra,* was awarded $50,000.00.

The Union argues that, based on the evidence, the appropriate amount should be between $20,000.00 and $50,000.00 over and above the grievor's other remedies.

In response to the Employer's allegations that the grievor has failed to mitigate her losses by turning down work on the "Final Destruction" project, the Union denies the allegation and claims that the grievor earned more working for IATSE 891.

DECISION

The issues in this case are:

a) The preliminary issue as to the arbitrability of this situation based on the question of whether the grievor was an employee;

b) The question as to whether the communication from Mr. Carroll was privileged communication;

c) The question as to whether the Employer was justified in creating strict rules pertaining to confidentiality in the circumstances of the "Watchmen" production;

d) The traditional questions posed in *Wm. Scott, supra,*:

i) has the employee given just and reasonable cause for some form of discipline by the employer?

ii) if so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case?; and

iii) if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and reasonable?

Specifically, whether the Employer had just and reasonable cause to treat the grievor as being terminated following her work on "Watchmen" and to decide not to name request the grievor in the future. If not, what is the appropriate remedy?

e) Does this arbitration board have the ability to award damages in light of Article 11.06 of the Master Agreement;

f) If yes, has the grievor proven any loss under the circumstances given the fact that the letter has not been publicized and there are no recall rights under the Collective Agreement and work is obtained by name request;

g) Is the grievor entitled to damages based on a loss of opportunity under the circumstances;

h) Is the grievor entitled to damages for mental distress;

i) If damages are awarded, should the damages be discounted under the circumstances?

PRELIMINARY ISSUE

The terms and conditions of the grievor's employment were detailed in a Deal Memo. Other hiring documents were submitted into evidence. The documents clearly list the grievor's name under "Employee Name"; refers to "Conditions of Employment" and outlines "Employee Rules and Regulations". Indeed, in his letter dated April 16, 2009 Mr. Carroll specifically accuses the grievor of violating "item #11 of the Employee Rules and Regulations" and irrevocably damaging "any prospect of continuing employment".

There were ongoing discussions between the Union and the Employer during the relevant times and those discussions culminated in the emails of April 15, 2009 between Ms. Moon and Mr. Carroll which led Mr. Carroll to the action contained in the April 16, 2009 letter. All issues pertaining to the April 16, 2009 letter originated during the tenure of the "Watchmen" production.

While the Master Agreement language may differentiate in some ways, the documentation provided to the grievor clearly indicates that she was an employee in the ordinary sense of the word and, in my view, consistent with the intended use of the word under the *Code*.

Therefore, the fact that she was not still working on Watchmen at the time the grievance was filed does not preclude her from accessing the rights negotiated by the Union including the right to grieve the actions of the Employer under the circumstances. To conclude otherwise in a project-based environment would be an injustice to the intentions of the parties as outlined in the language of the Master Agreement and would preclude the opportunity for resolution of post-production labour relations issues: a situation that would not be a healthy one for either party and would create ineffective and inefficient labour relations which would in turn result in a deteriorating labour relations environment.

Therefore, I have no hesitation in concluding that the grievor was entitled to grieve and the grievance was properly filed. However, in any event, for these reasons, and consistent with the principles of natural justice under the circumstances, I would have exercised my authority pursuant to section 89 of the *Code* to relieve against any inconsistencies or delays. The preliminary issue is dismissed and I conclude that the matter is arbitrable and I have jurisdiction to address the merits of this matter.

REMAINING ISSUES

Privileged Communication

Having reviewed the Supreme Court of Canada's conclusions in *Pritchard, supra,* I find that the communication from Mr. Carroll to the accounting department was privileged communication. Mr. Carroll is counsel and the fact that he works in-house does not detract from his professional status. The March 25, 2008 email should have remained confidential. However, that was a matter between Mr. Carroll and the Union – not the grievor.

Strict Rules Re Confidentiality

The Employer has been clear and unequivocal in outlining its expectations. The grievor was advised of the requirement and her signature confirms her understanding of them and her commitment to abide by them. I agree and accept that confidentiality is a cornerstone of the employment relationship, particularly for individuals working in confidential role such as those in the accounting department on a project such as "Watchmen". I conclude that the Employer was justified in creating strict rules regarding confidentiality.

That said, in this case, there is no evidence to suggest that the grievor failed to abide by the rules of confidentiality set out by the Employer.

Wm. Scott Questions

It became apparent at the hearing that the grievor had not provided any cause for discipline and therefore any discipline imposed was excessive. In other words, it became clear that the Employer had no basis to treat the grievor as being terminated following her work on "Watchmen" and no reason to decline to name-request her in the future. In sum, the answer to the first *Wm. Scott* question is "no".

Damages

The law in British Columbia is settled: an arbitration board has the authority to award damages notwithstanding collective agreement language such as Article 11.06 (see *Supernatural, supra*; *BCPSEA (Wyndham), supra*; *BCPSEA (Bonfield), supra*; *and HEABC, supra*).

The legislature endowed arbitration boards with a remedial authority to enforce collective agreement rights and to attempt to place a wronged party in a similar position to the one she would have been experienced but for the violation. This make whole principle must include damages when appropriate and supported by the evidence. In other words, the remedy should be appropriate for the violation.

In *Greater Toronto Airports Authority, supra,* Arbitrator Shime addressed a similar situation and had no hesitation in concluding that damages were appropriate:

> Employees are not like tissues to be used up and then thrown out at a whim into the bin of low level employment or unemployment. Employees, particularly those such as the Grievor, who have been long term local employees, are entitled to both a reasonable consideration of their seniority and work record and to a reasonable investigation of their conduct before being discharged and accused of dishonesty. There was not cause to discharge the Grievor, and since the GTAA's conduct in both its investigation and

> also in its ultimate determination was not only unreasonable but also in bad faith, the Grievor is entitled to an appropriate remedy including damages. *Whiten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595.

Due to the unique nature of the facts in evidence, especially the serious nature of the accusations leveled against the grievor's integrity, I find the principles expressed in *Greater Toronto Airports Authority, supra,* are on point. Therefore, I conclude that damages are appropriate.

Loss of Opportunity

In *Vancouver Shipyards, supra,* Arbitrator Taylor accepted that an employer's intention to never re-employ the grievor constituted termination of employment. Similarly, the Employer's intention in the present case, as stated in the April 16, 2009 letter, was to ensure that the grievor did not work on Warner Bros. productions and to place one "strike" against her record generally.

In *Greater Toronto Airports Authority, supra,* Arbitrator Shime concluded that the employer did not have cause to terminate the grievor and so seriously breached the implied terms of mutual trust and confidence that its conduct when viewed objectively had so badly damaged the relationship that damages for loss of future employment prospects were appropriate especially given the years of honest and diligent service. Similarly, the evidence before me shows that the grievor had performed the accounting work with integrity across a number of projects and the letters of reference (Exhibits 4 and 5), demonstrate that the grievor was well respected and used her skills to advance her employer's interests. She was well regarded by her peers including Mr. Ritscher, her Manager on "Watchmen".

Turning to the question of loss, the Collective Agreement and Deal Memo are clear. The grievor has explicitly agreed that a work guarantee would be

limited to one day or one week. Therefore, I conclude that the grievor's wage loss would have been limited to one week. However, there is no direct wage loss from "Watchmen" since the Employer did not act until long after work had concluded. I conclude that the grievor would have worked on "Sucker Punch" and on "Red Riding Hood" and I conclude that the grievor is entitled to first refusal on the next two projects. *Grand Yellowhead, supra,* is distinguishable based on the facts.

Mental Distress

In British Columbia the arbitral law has developed such that arbitrators clearly possess the necessary jurisdiction to make a remedial award of damages for mental distress. An arbitrator may award damages for mental distress in circumstances where it is to remedy breach of the parties' agreement and the damages are based on conduct. I agree with Arbitrator Sullivan in *HEABC, supra*, that if an employer attacks an employee's reputation at the time of dismissal, those actions could attract an award of aggravated damages.

The circumstances before Arbitrator Shime are very similar to the case before me as are the principles he applied in reaching his conclusion. Therefore, I accept that the quantum reached in *Greater Toronto Airports Authority*, *supra,* is appropriate and applicable to the circumstances before me.

The situation before me can be distinguished from the situations of the respective grievors in *HEABC, supra; BCPSEA (Wyndham), supra* and *BCPSEA (Bonfield), supra* because the evidence before me demonstrates that the grievor did suffer significant additional distress and discomfort arising from the actions of the Employer. She was in a vulnerable position because of the name referral system and the fact that there is no tenure, *per se*, under the Collective Agreement. The evidence – Mr. Ritscher's testimony and several letters of

reference – indicate that the grievor's work performance was excellent. The Employer's failure to properly investigate the source of the leaked email led directly to the April 2009 letter besmirching her integrity, when her livelihood in an accounting position is premised on that integrity which must be the cornerstone of the name-referral system. It was natural for her to be shocked since she was being accused of a breach she had not committed and the accusation had the potential to derail all her future work in the movie industry.

In *Azuma, supra,* the Court awarded punitive damages based on an employer's failure to uphold its implied obligation of good faith and fair dealing in the manner of dismissal and based on the Supreme Court of Canada's determination in *Honda Keays, supra,* that bad faith dismissal is capable of grounding a cause of action in damages. The obligation of good faith in the manner of dismissal imposes a behavioural requirement on employers to investigate allegations of misconduct, give employees the opportunity to respond, and requires employers not to fabricate grounds for cause, maintain unfounded allegations of cause, or treat an employee in a humiliating manner. In *Azuma* when the employer violated this obligation, the Court awarded $20,000.00 in punitive damages.

I accept that Mr. Carroll based his reaction on his *bona fide* belief that the grievor had disclosed the March 25, 2008 email. However, the conclusion he reached was wrong and the truth could have been determined if the Employer had taken the time to conduct a proper investigation. The email chain indicates that Mr. Carroll's decision to write the April 2009 letter to the grievor was made in a matter of hours. While it may be unfortunate that Ms. Moon did not take any steps to clarify the identity of the individual who provided the Union with disclosure, Mr. Ritscher, a member of the management team, knew the grievor was not responsible for the disclosure of the email.

Under these circumstances, it is necessary to award compensatory damages for mental distress in order to restore the grievor to the position she would have been in but for the Employer's actions. These damages may be fairly and reasonably considered to arise naturally from the Employer's actions which were based on assumptions now acknowledged to be incorrect. In reviewing the spectrum of the award and the recent guidance from the Courts, I conclude that the grievor is entitled to the amount of $30,000.00 in damages.

In summary, based on the stated issues, I have held as follows:

a) *The preliminary issue as to the arbitrability of this situation based on the question of whether the grievor was an employee*: The preliminary issue of jurisdiction is dismissed;

b) *The question as to whether the communication from Mr. Carroll was privileged*: The communications from Mr. Carroll are privileged;

c) *The question as to whether the Employer was justified in creating strict rules pertaining to confidentiality in the circumstances of the "Watchmen" production*: The strict rules in place at the relevant time in order to protect confidentiality were justified. The grievor did not violate any of them;

d) *The traditional questions posed in Wm. Scott, supra, specifically, whether the Employer had just and reasonable cause to discipline the grievor and to treat the grievor as being terminated following her work on "Watchmen" and to decide not to name request the grievor in the future*: The answer to the first *Wm Scott* question is "no". The Employer had no just or reasonable cause to discipline the grievor or to decline to name request her in the future;

e) *Does this arbitration board have the ability to award damages in light of Article 11.06 of the Master Agreement*: This arbitration board has the jurisdiction and authority to award damages; damages are appropriate in the circumstances;

f) *Has the grievor proven any loss under the circumstances given the fact that the letter has not been publicized and there are no recall rights under the Collective Agreement and work is obtained by name request*: I conclude that the grievor has proven a loss under the circumstances;

g) *Is the grievor entitled to damages based on a loss of opportunity under the circumstances*: The grievor is entitled to compensation of $28,126.49 for work missed on "Sucker Punch" and "Red Riding Hood";

h) *Is the grievor entitled to damages for mental distress*: Damages for mental distress are appropriate and should be set at $30,000.00 in recognition of the serious nature of the breach;

i) *If damages are awarded, should the damages be discounted under the circumstances*: This is not a situation which supports discounting of damages.

In addition, I order the Employer to remove all copies of and references to the April 16, 2009 letter from its records; and in order to provide finality to this matter, as requested by Mr. Carroll in his April 16, 2009 email to Ms. Moon, I further order the Union provide the Employer with all documentation and material in their possession, direction and control that was not provided as authorized by the Collective Agreement, pertaining to this matter.

The grievance is upheld. It is so awarded.

I retain jurisdiction to resolve any issues arising from implementation of this decision.

Dated at the City of Vancouver in the Province of British Columbia this 4th day of March, 2011.

Vincent L. Ready