

FINDINGS AND DECISION
in the matter of

COMPENSATION IN LIEU OF REINSTATEMENT

**HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AS REPRESENTED
BY TREASURY BOARD**

(The Board of Governors of the College of the North Atlantic)
(the Employer)
and

**NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC & PRIVATE
EMPLOYEES**
(the Union)

Grievor: Mr. Neil Bishop

For the Union: Mr. Fred Oates, Presenter
Mr. Bishop, Advisor

For the Employer: Mr. Dave Martin, Presenter
Ms. Deirdre Dunne, Advisor

The Board: Mr. Peter Ivany, for the Union
Mr. Sean Hanrahan, for the Employer
Mr. John A. Scott, Chair

The Hearing on *quantum* was held in St. John's on May 18, 2010.

DOCUMENTS & JURISPRUDENCE PRESENTED BY PARTIES:

- Consent A # 1 Grievor's "Self Service Paycheque" printout
- Union Submission: "Quantification Memo"
- Newfoundland & Labrador Judgement Interest Orders for 2004, 2005, 2006, 2007, 2008, 2009
- Employer Submission

COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED

ARTICLE 1

PURPOSE OF AGREEMENT

1.01 The purpose of this Agreement is:

- (a) to maintain and improve harmonious relations between the Union, Employer and employees;
- (b) to set forth certain terms and conditions of employment relating to

remuneration, hours of work, safety, employee benefits and general working conditions affecting employees covered by this Agreement.

(c) to set conditions conducive to the development and delivery of public, post-secondary education.

ARTICLE 6 ARBITRATION

- 6.05 Both parties to a grievance shall be afforded the opportunity of presenting the evidence and argument thereon and may employ counsel or any other person for this purpose.
- 6.08 The decision of the majority of the members of an Arbitration Board shall be the decision of the Board. The decision of an Arbitration Board shall be signed by the members of the Board making the majority report.
- 6.09 The parties and the employees bound by this Agreement shall comply with these provisions for final settlement of a grievance and they shall comply with the decisions of an Arbitration Board appointed in accordance with those provisions and do, or as the case may be, abstain from doing anything required by that decision.
- 6.12 An Arbitration Board may not alter, modify or amend any provision(s) of this Agreement, but shall have the power to set aside a decision of the Employer and to modify a disciplinary measure imposed by the Employer.

ARTICLE 27 TERMINATIONS

- 27.01 The Employer may at any time without notice dismiss an employee for just cause.
- 27.02 Subject to Clause 27.01, if an employee is to be terminated, he/she shall be notified as far in advance as is possible. In no case however, shall the period of notice be less than ninety (90) calendar days. If the minimum notice is not given, the employee shall be paid for the number of days by which the period of notice is reduced.

UNION SUBMISSION

The Union provided the Board with copies of a "Quantification Memo" arising out of the "Arbitrator's Decision overturning September 16, 2005 termination" that was prepared and conveyed to Mr. Bishop by Mr. J. Gordon Allen of *Auld Allen, Barristers & Solicitors* together with an Actuarial Report prepared by *Burnell Actuarial Consulting, Inc.*

The Board notes the Memo reports the fact of the Board's November 6, 2009 Awards which ruled (at p. 407) that:

"The grievance is sustained in part. The disciplinary termination of September 16, 2005 is set aside. In lieu of reinstatement, the Grievor is to be compensated in an amount to be determined."

The Quantification Memo notes (P1, 3rd paragraph) that "Reinstatement would often be something that would be awarded in such circumstances", and offers the comment that:

"Reinstatement would entail that Mr. Bishop would have his job back, with appropriate seniority and pay rate adjustment as if he had never been terminated, with the job to continue until expected retirement."

The Memo then sets out its view of the "Legal Principles re: Damages - Dismissal", and itemises its proposal concerning the Grievor's claim for "total loss" compensation, in the amount of \$820,529.26, under various heads, which may be summarised as follows:

"Loss of Opportunities/Monetary Value"	-	\$265,412.00
"Future Income Related Loss"	-	\$283,460.00
"Severance"	-	\$19,605.00
"Retirement Pension"	-	\$91,773.00
"Survivor's Pension Loss"	-	\$37,633.00
"Expenses" resulting from Termination	-	\$10,000.00
"Investment administration costs"	-	\$18,446.26
"Professional... legal" costs	-	\$4,200.00
"Aggravated damages"	-	\$60,000.00
"Intangible" performance revenues	-	<u>\$30,000.00</u>
Total Loss	-	\$820,529.26

Mr. Oates, for the Union, presented the Memo and supported its proposals by arguments drawn from Brown and Beatty *Canadian Labour Arbitration* and from the arbitral jurisprudence.

Mr. Oates acknowledged that, in calculating any amount relating to severance pay, the Board's award should take account of the fact that on October 5, 2005 the Employer paid the Grievor \$11,728.20, (Consent A#1), which should therefore be offset against the \$19,605.00 claimed for Severance, and thus the proper amount under that head should be \$7,876.80.

Mr. Oates also noted that amounts Mr. Bishop has received under LTD and through his CPP disability pension should not be used to offset any damages awarded, since Mr. Bishop paid all the premiums on which these benefits are based.

In the Union's view, the Board should award compensation according to the Memo's analysis from September 16, 2005, the date of termination, until April 1, 2010.

Mr. Oates invited the Board to consider *British Columbia Public School Employers' Assn (School District No. 36 Surrey) v British Columbia Teachers' Federation (Surrey Teachers Assn) (Wyndham Grievance)* 169 L.A.C. (4th) 117 Colin Taylor, Arbitrator 2007. The Union's purpose in citing this case is to establish that the Board does indeed have jurisdiction ...

"to award compensatory damages for mental distress in circumstances where it is to remedy a breach of the parties' agreement, as explained by the Court in *Fidler*."

The Board accepts that it does have the jurisdiction to make such an award, and will address its exercise of this right below in its Considerations.

Mr. Oates cited *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Service Commission)* 125 L.A.C. (4th) 353 (2004) as confirming the Board's jurisdiction to award interest on compensation due. The Board accepts that it does have the jurisdiction to make such an award, and will address its exercise of this right below in its Considerations.

Mr. Oates cited *Re. NAV Canada and I.B.E.W. Local 2228 (Coulter)* 131 L.A.C. (4th) 429 Arbitrator T. Kuttner, Q.C. (2003) to suggest appropriate considerations in situations where compensation in lieu of reinstatement is ordered when the employment relationship is ruptured. He noted however that, in the instant matter, the Union is not looking for a gross up but seeks instead the actual four or five years of pension benefits.

The Union also directed the Board's attention to *Canvil, a Division of Mueller Canada Ltd. V. Assn. Of Machinists and Aerospace Workers, Lodge 1547 (Stone Grievance)* [2006] 152 L.A.C. (4th) 378 as a further example of approaches adopted in respect of the instant issues by current arbitral jurisprudence.

OPSEU v. Ontario (Ministry of Community Safety & Correctional Services) (Latimer Grievance) 2004 S.D. Kaufman was introduced in support of the Union's position on the questions of interest payable on damages awarded, tax implications, and aggravated damages.

OPSEU v. Seneca College of Applied Arts & Technology [2004] 133 L.A.C. (4th) 193 O'Driscoll, MacFarland & Swinton JJ. at para 61 confirms, in the Union's view, that the Board has authority to "to grant such remedies as the legislature or Parliament has empowered them to grant in the circumstances."

Supreme Court of Canada, Weber v Ontario Hydro [1995] La Forest, L'Heureux-Dubé, Sopinka, McLachlin, Iacobucci and Major JJ. 125 D.L.R. (4th) 583 clearly establishes and defines, in the Union's view, the nature and extent of an Arbitration Board's jurisdiction as covering questions of damages raised in the instant matter.

Newfoundland Supreme Court, Howell v. Reitmans (Canada) Ltd. Green, C.J.T.D., N.J. [2002] No. 94 addresses an issue that the Board should bear in mind, in the Union's view: the inequality in bargaining positions of the Employer & Grievor.

Mr. Oates also directed the Board's attention to *Chénier v. Treasury Board (Solicitor General Canada - Correctional Service)* [2003] J.W. Potter, 119 L.A.C. (4th) 110 on the issue of the Board's jurisdiction to award aggravated damages, and its grounds for doing so.

Newfoundland Supreme Court - Court of Appeal: White v Woolworth Canada Inc. Goodridge C.J.N., Marshall and Steele JJA [1996] N.J. No. 113 address the issue of whether LTD & CPP benefits are to be set off against an award for damages, and speaks also to aggravated damages. (See also *Fraser v. Hunter Estate*, 2000 NSCA 63, 184 N.S.R. (2d) 217; *Dunlop v. B.C. Hydro & Power Authority*, 1988, 32 B.C.L.R. (2d) 334; *Cunningham v. Wheeler*; *Coper v. Miller*; *Shanks v. McNee* [1994] 1 S.C.R. 359)

EMPLOYER SUBMISSION

The Employer pointed out that in its view, the Union's analysis as set out in its Quantification Memo was a "fantasy" not supported either by precedent or by the arbitral jurisprudence or by the authorities actually cited by the Union, with many of which the Employer agrees.

Compensation in lieu of reinstatement is generally based on the employee's service and age, and calculated as a number of weeks or months. It is not appropriate to award damages based on speculative employment opportunities. The cases cited in support of the Union's claim do not come even close to the exaggerated amounts claimed in the instant matter.

The Union claims the Employer has done something that justifies aggravated damages. But that is not what the Board's November 6, 2009 Award actually found. The Board did not find the Employer's actions egregious. The Board noted that the Grievor's actions were over the top. What happened was a harassment complaint that had spun out of control in the circumstances. Yes, the College did not have just cause to terminate the Grievor; but the employment

relationship was ruptured. There is no justification for the Board to award aggravated or punitive damages in these circumstances.

The acceptable basis for calculating any compensation, in the Employer's view, is lieu of notice. The Board should carefully examine the cases cited by the Union, and it will find that the norm is somewhere between 1 and 1.5 months per year of service that is paid out.

Furthermore, there is a requirement to mitigate, even if the LTD and CPP are not to be considered to offset compensation. Nonetheless, mitigation is required. We are told that Mr. Bishop has not worked since his termination. The fact remains that the compensation awarded must address the common law mitigation requirement.

Mr. Martin cited a number of cases drawn from the arbitral jurisprudence in support of the Employer's position, including a local matter, *Brinks Canada Ltd & NAPE (Piercey)* [1998] 77 L.A.C. (4th) 260 C. Fagan *et al.*, which was subsequently reviewed and upheld in the *Trial Division of the Newfoundland Supreme Court*.

Re Castellholme Home for the Aged & CUPE Local 146 (Morabito) 153 L.A.C. (4th) 278 [2006] L. Slotnick addresses issues of compensation in lieu of reinstatement and, in the supplementary award (159 L.A.C. (4th) 251 [2007]) Arbitrator Slotnick addresses the quantum appropriate in the case of a 45 year old with 20 years seniority. In that case, the Arbitrator considered the Union's total claim of \$362,374.60 and awarded a total of \$81,328.00 using the approach adopted in *Metropolitan Toronto & CUPE Local 79 (2001)* 99 L.A.C. (4th) 1.

Mr. Martin also directed the Board's attention to the series of actions starting with Ontario *Superior Court of Justice Keays v. Honda Canada Inc.*, [2005] J. R. McIsaac J., reviewed on appeal to the *Ontario Court of Appeal in Keays v. Honda Canada Inc.* [2007] O.J. No. 4309 and in the *Supreme Court of Canada Honda Canada Inc. V. Keays* [2008] S.C.J. No. 40.

The Employer also directed the Board's attention to three cases that show, in its view, the appropriate approach to be adopted by this Board: *Re Newfoundland and Labrador Supreme Court Trial Division, Hicks v. Glynmill Inn Inc.* [2006] N.J No 12 R.D. LeBlanc J.; *British Columbia Supreme Court, Graham v. Galaxie Signs Ltd.* [2010] B.C.J. No. 788. J.R. Groves J.; *Alberta Provincial Court, Byblow v. Artistic Stairs* [2009] A.J No. 1494 N.R. Hess A.C.J.

CONSIDERATIONS

The Factual Background and the Board's jurisdiction to deal with the issue of *quantum* are both to be found set out the Board's November 6, 2009 Awards in respect of two grievances in which Mr. Bishop was the Grievor.

Arbitral jurisprudence As noted above, the Parties provided the Board with helpful cases drawn from the arbitral jurisprudence and also with summaries of current arbitral approaches to the relevant issues raised drawn from Brown and Beatty *Canadian Labour Arbitration* (4th ed.) The Board notes that there are a number of issues on which the Parties concur, but some on which there is disagreement, as considered below.

In Dispute between the Parties:

1. The Board's approach

The principal areas of disagreement are (1) the nature and extent of the Union's claims for damages, including aggravated but not punitive damages, in respect of the Grievor's termination, which was found to be without just cause; and (2) the Employer's claim that the Grievor must, in the instant circumstances, mitigate his losses. Brown and Beatty *Canadian Labour Arbitration* (4th ed.) offers the following, in part:

2:1421 Unjust discharge or suspension In calculating the back pay to which an employee who has been dismissed or suspended is entitled, arbitrators apply the general principles for the assessment of damages. Where reinstatement is not sought or ordered, damages are assessed in terms of months of salary that are appropriate given that dismissal was unjustified, subject to the usual duty to mitigate. More recently, however, unjust dismissal from a bargaining unit position has been regarded as having an independent value which is added to any period of reasonable notice, and in those circumstances, a failure to mitigate may not be part of the damages assessment. The first calculation is to determine what the grievor would have earned if he had worked his normal hours for the period in question. If a shift premium would have been paid, it should be included. However, if it is intended that these calculations will reflect the circumstances which actually prevailed, and where, for example, there had been a layoff of employees during this period, then apart from any benefits that might accrue in such circumstances, the grievor would not be entitled to include the period of the layoff in the calculation. Likewise, where the grievor was incapacitated and could not have worked for some or all of the period, that time would not be included in the assessment. Unless there are reasons to believe that overtime would not have been worked or where the agreement provides otherwise, it has been generally held that

lost overtime opportunities, lost profit sharing, and lost incentive bonuses ought to be included in the calculation. However, an amount for welfare premiums not required to be paid by the employer during the period that the employee was not working would not be included in assessing earnings unless the amount represented payments made by the grievor individually which he otherwise would not have had to make. Of course, in addition to the payment of damages, the employer would be required to make any necessary pension fund payments. On the other hand, the value of a fringe benefit of a lower plane fare would not be included in the award unless the plane trips were required; neither would capital losses on a property not attributable to the discharge in question, nor increased income tax liability stemming from deregistering an R.R.S.P.

Once this calculation has been made, the following deductions and allowances may have to be taken into account. Since the gross calculation contemplates employment throughout the period in question, vacation pay and any other payments received ought to be either repaid or set off against the gross calculation set out above, unless the period the employee was off work was treated as a vacation. Conversely, where reinstatement is not part of the remedy sought or warranted, it would appear that an amount for vacation pay ought to be added to the gross amount. As well as vacation pay received, any expenses saved, all moneys actually earned during the period the employee was off work, and any amount lost due to a failure to mitigate ought to be deducted from the gross amount. Any expenses incurred in the course of mitigating would then be added back. One arbitration board has held, however, that where a wrongly dismissed employee was ordered reinstated but refused this remedy, compensation for lost benefits was not warranted since the loss flowed from the refusal of employment itself.

And in one unusual case, an arbitrator has awarded damages for the tortious infliction of mental suffering by an employer and others, although he also ruled that the apportionment of damages was not within his jurisdiction."

The Board accepts that this summary accurately represents prevailing approaches to issues of this sort. The Board has also carefully considered the arbitral jurisprudence provided by the Parties as it bears on particular aspects of the claims made by the Union in the instant matter.

2. Assumptions

In particular the Board notes that the "*Quantification Memo*" that the Union submitted appears to make assumptions that, with respect, do not accord with the the Board's November 6, 2009 Awards, the instant Collective Agreement, current arbitral jurisprudence, or the direction provided by the *Supreme Court of Canada*.

The "*Quantification Memo*" appears to assume that the quantum of compensation due the Grievor under the Board's November 6 decision should be calculated on the assumption that the

Grievor is due compensation as though he had been reinstated. The *Memo* points out that, had the Grievor been reinstated he

"would have had his job back, with appropriate seniority and pay rate adjustment as if he had never been terminated, with the job to continue until expected retirement."

But the fact is that the Grievor was terminated. The Board found that the termination was without just cause, but did not order reinstatement. The Board ordered, instead, that "compensation in lieu of reinstatement" be paid to the Grievor. It is not, therefore, appropriate to ground a calculation of the *quantum* of compensation on the counterfactual assumption of what *might have been* the case *if* the Grievor had been reinstated.

Rather, the appropriate foundations for such a calculation include the facts of the instant Collective Agreement and the November 6, 2009 Awards that ground the Grievor's claim for compensation, the direction of the Courts, the Grievor's relevant personal circumstances, and the most appropriate prevailing arbitral jurisprudence.

- *the instant Collective Agreement & the Board's Award:*

The Board notes that the Collective Agreement provides, in Article 27 a clear statement of the two ways in which "terminations" shall occur. Article 27.01 provides that the Employer "may at any time without notice dismiss an employee for just cause." Article 27.02 provides that:

Subject to Clause 27.01, if an employee is to be terminated, he/she shall be notified as far in advance as is possible. In no case however, shall the period of notice be less than ninety (90) calendar days. If the minimum notice is not given, the employee shall be paid for the number of days by which the period of notice is reduced.

Thus, the Collective Agreement provides two ways in which "terminations" occur: "for just cause", and with "notice". The Board, in its November 6, 2009 Awards, found that the termination was without "just cause", and ordered that "The disciplinary termination of September 16, 2005 is set aside. In lieu of reinstatement, the Grievor is to be compensated in an amount to be determined."

As its November 6, 2009 Awards make clear, the Board's decision not to reinstate arose in its finding that the "...the evidence as a whole shows the employment relationship between the Grievor and the Employer was irreparably and irrevocably ruptured, and that effective communication between the Grievor and Employer was no longer possible..." (p. 406). Since the termina-

tion was without just cause, but the employment relationship was, nonetheless, at an end, it is clear the the Collective Agreement provides the Grievor with rights under Article 27.02 to "minimum notice", and when it "is not given, the employee shall be paid for the number of days by which the period of notice is reduced."

- *The Direction of the Courts:*

The Board notes the recent ruling of the *Supreme Court of Canada in Honda Canada Inc. V. Keays* [2008] S.C.J. No. 40 where, at paragraphs 21ff., the Court sets out "to clarify and redefine some aspects of the law of damages in the context of employment." The Court undertakes (para 22) specifically to "clarify what factors should be considered when allocating compensatory damages in lieu of notice for wrongful dismissal." *Honda Canada Inc. V. Keays* has also settled a number of questions about the award of damages, including aggravated damages. The Board will draw further on this ruling as it applies to its considerations of these issues below.

- *The Grievor's relevant personal circumstances:*

The Board notes that, at the time of his termination on September 16, 2005, the Grievor was 55 years old, with some health problems (see Union's Submission) and roughly 10 years and 11 months of service with the Employer, having started work on "10/11/1994" (Consent A1 p.3).

The Board also notes the Grievor's account (November 6, 2009 Awards p. 296) of the impact on his employability of the relative staleness of his qualifications within the technology-intensive Recording Arts field where much of his education and experience lies.

- *the most appropriate prevailing arbitral jurisprudence:*

In the instant circumstances and for reasons set out below, the Board favours the approach adopted by the Arbitrators in *Re. NAV Canada and I.B.E.W. Local 2228 (Coulter)* 131 L.A.C. (4th) 429 Arbitrator T. Kuttner, Q.C. (2003) and in *Canvil, a Division of Mueller Canada Ltd. V. Assn. Of Machinists and Aerospace Workers, Lodge 1547 (Stone Grievance)* [2006] 152 L.A.C. (4th) 378 Arbitrator W.A. Marcotte (relying, in part, on *Re Municipality of Toronto & C.U.P.E., (Dalton)* 99 L.A.C. (4th) 1, (Simmons)) as this line of approach is grounded in other arbitral jurisprudence and in Court rulings.

3. Compensation, and Aggravated Damages In introducing claims for compensation, (p. 1), the *Quantification Memo* states that:

"Reinstatement would often be something that would be awarded in such circumstances. Reinstatement would entail that Mr. Bishop would have his job back, with appropriate seniority and pay rate adjustment as if he had never been terminated, with the job to continue until expected retirement."

The Board finds, with respect, that, while this generalisation may be accurate, it is not relevant to the instant matter since the Grievor was not reinstated. The *Memo* acknowledges this fact when it goes on to accurately and relevantly point that:

"In lieu of reinstatement, the Arbitrator (*sic*) determined that Mr. Bishop is to be compensated by an amount to be determined."

The *Memo* also cites what it takes to be the pertinent "legal principles", and concludes that it falls to the Board to make the Grievor "whole". It proposes that in doing so:

"... we can look at the expenses incurred, past and future losses of income along with other categories that would be appropriately looked at by a court or arbitrator.

There are two basic streams to look at when examining what it would take to make Mr. Bishop "whole" in regards to this termination. One stream involves appropriate compensation for the actual monetary losses and costs of opportunities he has lost by virtue of the termination. This would include both past and future losses. The other stream would involve reimbursement for various costs and expenses that Mr. Bishop has incurred but would not have incurred but for the wrongful termination."

The Board accepts that it is its responsibility, in determining the amount of compensation it ordered be paid in lieu of reinstatement, to make the Grievor whole. As Arbitrator Simmons puts it (*Metropolitan Toronto & CUPE Local 79 (2001)* 99 L.A.C. (4th) p. 11) "The remedy is to compensate the Grievor an amount of money representing as closely as possible, the monetary value for his loss of employment" (*cf. Canvil* at para 34 and also *Nav Canada*). However, with respect, the Board does not accept that the "legal principles" established by the *Supreme Court of Canada* in *Honda v. Keays* and elsewhere, and reflected in the arbitral jurisprudence, normally or properly includes all that the *Memo* proposes.

The Board notes the commentary provided by Brown and Beatty *Canadian Labour Arbitration* (4th ed.) Particularly at paras 2:1410, in part, as follows:

2:1410 Damages

Unless the agreement provides otherwise, in assessing damages arbitrators have followed and utilized the same common law principles that are applied in breach of contract cases. Thus, the basic purpose of an award of damages is to put the aggrieved party in the same position he or she

would have been in had there been no breach of the collective agreement. This general principle is subject to three basic qualifying factors. In the first place, the loss claimed must not be too remote, that is, it must be "reasonably foreseeable". Secondly, the aggrieved party must act reasonably to mitigate his loss. Finally, the loss or damages must be certain and not speculative. As expressed by one arbitrator:

Stated in the abstract, the relevant principle is quite clear. The purpose of damages for breach of contract is not to punish but to compensate, and the function of compensation is to place the aggrieved party in a monetary position as near as possible to that in which he would have been had the contract been performed.

Accordingly, arbitrators have generally held that they do not have the authority to assess punitive damages. As was stated in one award:

It is desirable at this point to point up a distinction between the imposition of penalties and the award of damages. It is a distinction taken, and in this Board's view, properly taken, in the award in *U.A.W. & C.C.M. (Re)* [(1951), 3 L.A.C. 837 (Laskin)]. This board, sitting as a civil tribunal to resolve contract interpretation disputes, has no punitive function but is charged only with redressing private wrongs arising from breach of obligations assumed as a result of negotiation. The board's remedial authority, if it has any, must be addressed to the vindication of violated rights by putting the innocent party, so far as can reasonably be done, in the position in which he or it would be if the particular rights had not been violated. The redress, if any can be given, must be suited to or measured by the wrong done. A board of arbitration is not, however, a criminal court. True enough, it may play a role in passing upon or modifying a penalty imposed by an employer as a matter of discipline, but in so doing it is merely assessing the permissible limits of employer action taken under the collective agreement and not fashioning a penalty to reward an innocent party.

More recently, however, in light of the Supreme Court of Canada decisions in *Vorvis* and *Wallace*, some arbitrators have awarded punitive and aggravated damages in the rare circumstance where they are deemed appropriate. As well, while arbitrators have accepted the general common law rule that damages should be restricted to remedying monetary loss and ought not to be awarded for hurt feelings or loss of reputation which may flow, for example, from an unjust discharge, damages for the tortious infliction of mental suffering have been awarded against an employer and others, as they have for loss of dignity and for mental distress arising from harassment contrary to human rights legislation, from additional stress and anxiety resulting from an employer's breach of notice-of-allegation provisions, from the effects of a wrongful change of status to part-time, and from breach of confidentiality during the mediation process. As well, citing the recent Supreme Court of Canada decision in *Fidler v. Sun Life Assurance Co. of Canada*, one British Columbia arbitration board has held that an arbitrator has jurisdiction to award compensatory damages for breach of an agreement's term which creates an expectation of intangible psychological benefit, such as income or job security in the event of illness. Moreover, one arbitrator has ruled that an employee was entitled to damages for the inconvenience of having been wrongly assigned to night-shift work. Similarly, an award of damages has been made for the financial inconvenience experienced in the case of unjust suspension. As well, there is an emerging trend among arbitrators to structure damage awards to compensate for the loss of value of bargaining unit membership in cases where reinstatement is not warranted. In addition, in some circumstances, a union may be entitled to damages for injury to its reputation as an effective bargaining agent. And with the broadening of jurisdiction to encompass all disputes that emerge from the collective bargaining relationship, different measures of damages have been required. For example, one

arbitrator has assumed jurisdiction to adjudicate an employer claim for damages for negligence on the part of an employee.... Where there has been a failure to accommodate a disabled employee, damages should be awarded only where the employer acted in a "particularly egregious, outrageous or malicious manner", one arbitrator has stated.

The Board also notes that *The Supreme Court of Canada in Honda Canada Inc. V. Keays* provides (at para 23 ff.) "... a review of the basis for and calculation of damages for conduct in dismissal..." The Board has considered this portion of the Court's ruling very carefully, together with the arbitral jurisprudence provided by the Parties in addressing the instant matter.

At paragraphs 50-60, of *Honda Canada the Supreme Court of Canada* sets out the recent history and "Current State of the Law", in part, as follows:

3.2.2.1 Current State of the Law

[50] An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (*Wallace, <Supreme Court of Canada, Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701. >* at para. 115). The general rule, which stems from the British case of *Addis v. Gramophone Co., [1909] A.C. 488 (H.L.)*, is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated. This Court affirmed this rule in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper, [1966] S.C.R. 673, at p. 684*:

[T]he damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's] wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.

[51] Later in *Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085*, McIntyre J. stated at p. 1103:

I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the *Addis and Peso Silver Mines* cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) has always been one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result from a failure to give such notice.

[52] The Court in *Vorvis <Supreme Court of Canada, Vorvis v. Insurance Corporation of British Columbia, [1989] 1 S.C.R. 1085>* nevertheless left open the possibility of allocating aggravated damages in wrongful dismissal cases where the acts complained of were also independently actionable. McIntyre J. stated at p. 1103:

I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here. [Emphasis added.]

[53] In *Wallace*, Iacobucci J. endorsed a strict interpretation of the Vorvis "independently actionable wrong" approach, rejecting both an implied contractual duty of good faith and a tort of bad faith discharge. At para. 73, he said:

Relying upon the principles enunciated in *Vorvis, supra*, the Court of Appeal held that any award of damages beyond compensation for breach of contract for failure to give reasonable

notice of termination “must be founded on a separately actionable course of conduct” (p. 184). Although there has been criticism of *Vorvis* ... this is an accurate statement of the law.... An employment contract is not one in which peace of mind is the very matter contracted for (see e.g. *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233 (C.A.)) and so, absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence.... [Emphasis added.]

[54] This brings us to *Fidler* <*Supreme Court of Canada, Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30>, where the Court, per McLachlin C.J. and Abella J., concluded that it was no longer necessary that there be an independent actionable wrong before damages for mental distress can be awarded for breach of contract, whether or not it is a “peace of mind” contract. It stated at para. 49:

We conclude that the “peace of mind” class of cases should not be viewed as an exception to the general rule of the non-availability of damages for mental distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.

This conclusion was based on the principle, articulated in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, that damages are recoverable for a contractual breach if the damages are “such as may fairly and reasonably be considered either arising naturally.... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties” (p. 151). The court in *Hadley* explained the principle of reasonable expectation as follows:

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. [p. 151]

[55] Thus, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover (*Fidler*, at para. 42; *Vorvis*, at p. 1102). This principle was reaffirmed in para. 54 of *Fidler*, where the Court recognized that the *Hadley* rule explains the extended notice period in *Wallace*:

It follows that there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. [Emphasis deleted.]

[56] We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: “[W]hat did the contract promise?” The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was

formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.

[57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” (para. 98).

[58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that “as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable” (para. 48). In *Wallace*, the Court held employers “to an obligation of good faith and fair dealing in the manner of dismissal” (para. 95) and created the expectation that, in the course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees” (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* “explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law” (para. 54).

[59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee’s reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

[60] In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case.

In applying the principles set out above to the facts of the instant matter, the Board notes that the current state of the law in determining *quanta* of compensation directs boards of arbitration to focus on "reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract", and that, based on *Fidler* (relying on *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145)

"... damages are recoverable for a contractual breach if the damages are “such as may fairly and reasonably be considered either arising naturally.... from such breach of contract itself, or such as

may reasonably be supposed to have been in the contemplation of both parties". (*Honda Canada* para. 54)

The Court continues to hold:

"... as stated in para. 44 of *Fidler*: "[W]hat did the contract promise?" The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable." (*Honda Canada* para. 56)

The Board has already noted above that the instant Collective Agreement falls into the class of contract which is, "by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice " This Collective Agreement contemplates termination "for just cause" or "with notice".

The Board also notes that, in asserting that "the loss or damages must be certain and not speculative" (para. 2:1410 quoted above), *Brown and Beatty Canadian Labour Arbitration* is consistent with the position of the *Supreme Court* and prevailing arbitral jurisprudence.

The purpose of damages for breach of contract is not to punish but to compensate, and the function of compensation is to place the aggrieved party in a monetary position as near as possible to that in which he would have been had the contract been performed. (*idem* para. 2:1410).

Conduct in the manner of the dismissal?

However the Board also notes that *Supreme Court of Canada* points out:

"*Fidler* provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forth-right with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages."

and that:

Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or

dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

The Board must, therefore, ask whether, in its November 6, 2009 Awards, it found that the Employer had, in the conduct of the dismissal, acted in violation of the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (*Supreme Court of Canada, Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701., para. 98) or had otherwise imposed the dismissal in ways that fall into the category exemplified in "*Wallace* at paras. 99-100".

In its November 6, 2009 finding that the Grievor's termination was without just cause, the Board addressed issues in the Employer's conduct of the dismissal, including the fact that the 2004 letter of discipline on which the termination was based had been interpreted by some as a probationary procedure, and that the Employer had investigated the circumstances less fully than it was required to do. However, the Board did not find the Employer had failed to be "candid, reasonable, honest and forth-right", and made no finding that any particulars of the conduct of the dismissal were of the sort of "possible types of bad faith or unfair dealing in the manner of dismissal" (*Wallace* para. 101) contemplated in *Honda* or in *Wallace* as warranting "Damages attributable to conduct in the manner of dismissal." (*cf.*, *Chénier v. Treasury Board (Solicitor General Canada - Correctional Service)* [2003] J.W. Potter, 119 L.A.C. (4th) para. 44.)

The Board notes, further, that the Grievor did not provide, in the hearings that lead to the November 6, 2009 Awards or in the May 2010 *Quantum* hearing, persuasive evidence that any illness he suffered was attributable to the Employer's action. The Board finds that the Union's claim under the head of "aggravated damages" (in the amount of \$60,000.00) is disallowed. "*Ongoing loss from the time of termination and mitigation*"?

The Board notes that the *Quantification Memo* submitted by the Union claims the Grievor is due compensation that "would include both past and future loses" under a number of heads, as set out above, including loss of opportunities/monetary value in the amount of \$265,412.00, and future income related loss in the amount of \$283,460.00.

On the question of the effective date and duration to be used in this determination of compensation, the Board notes the analysis provided by Arbitrator Marcotte in *Re Canvil, a Division of Mueller Canada Ltd. V. Assn. Of Machinists and Aerospace Workers, Lodge 1547*

(Stone Grievance) [2006] 152 L.A.C. (4th) at paras. 25-27) Para. 27 reads, in part, as follows:

"... I do not agree with the Union position that reimbursement for lost wages ought to be from the date of dismissal to some future date... That approach fails to take into account the non-reinstatement per se in appearing to suggest that compensation include a calculation as though the grievor were reinstated. Further that approach does not provide for a logical or reasoned end-point for the calculation..."

The Board accepts the cogency of this analysis as appropriate to the circumstances of the instant case. The Board finds that its determination of compensation is properly to be calculated as having been incurred at the time of the termination, not subsequently. The Board, therefore, finds that the Union's claim for loss of opportunities/monetary value (\$265,412.00), "future salary loss" (\$283,460.00), "Future session/musical work" (\$30,000.00), and "moving/relocation" (\$10,000.00) are disallowed.

Mitigation?

The Board finds that the principle set out in *Canvil* applies also to the Employer's claim that the Grievor is required to mitigate his losses.

The Board notes that in framing his approach to the quantum of compensation appropriate Arbitrator Slotnick cites *Metropolitan Toronto & CUPE Local 79 (2001) 99 L.A.C. (4th)* (Simmons), which, he notes, resembles many other awards (that)

"... do not take account of mitigation, since the award does not represent an on-going loss of wages from the date of termination. Nor do the arbitrators consider the conduct of the Grievor relevant to the question of compensation, since the Grievor's actions have already been taken into account in the Arbitrator's decision not to reinstate. Some of the decisions consider the Grievor's prospects for employment, age and educational background..." (*Bardal* factors)

Also, as noted above, Arbitrator Marcotte finds, in *Canvil* (para. 34), that he agrees (with Arbitrator Simmons in *Metropolitan Toronto* at p.11):

"... that the remedy 'does not represent an ongoing loss from the time of the termination which would require mitigation ... The employment relationship has come to an end as a consequence of the Employer's breach of the collective agreement.'"

The Board finds that the reasoning is persuasive and appropriate to the circumstances of the instant matter. Thus, the Board finds that the Grievor is not required to mitigate losses. The Board accepts the Union's position that LTD and Disability pension benefits are not to be considered in mitigation.

General Damages:

The Board also notes that, at para. 59, the Court in *Honda* holds, with respect specifically to damages "attributable to conduct in the manner of dismissal" (see above) that "no extension of the notice period is to be used to determine the proper amount to be paid."

It remains, however, for the Board to determine what compensation is due the Grievor under the head of general damages. The *Supreme Court of Canada* in *Honda Canada* (at para 28 ff.) cites what it refers to as the "*Bardal* factors" as set out by McRuer in *Bardal v Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) at p.145 as follows:

"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

The Court in *Honda* (at para 29) notes other jurisprudence that applies these four *Bardal* factors and twice repeats, with emphasises (at para 31), the caution: "There can be no catalogue laid down as to what is reasonable notice in particular classes of cases." The Court (*idem* at para. 32) provides helpful comment on how the *Bardal* factors are to be applied when it says:

"No one *Bardal* factor should be given disproportionate weight. In the present (*Honda v Keays*) case, the trial judge erred in applying one of the factors... rather than examining the actual functions of Keays. Despite this error, the 15-month notice period is entitled to deference since, on the entirety of the circumstances here, there is no basis to interfere with the conclusions of the trial judge. Keays was one of the first employees at Honda's plant. He spent his entire working life with Honda. He did not have any formal education and suffered from an illness which greatly incapacitated him. All these factors will substantially reduce his chances of re-employment and justify an assessment of 15 months' notice."

Thus the Board concludes that the question of what impacts on a wrongfully terminated employee's chances of re-employment serves as a general criterion in applying the *Bardal* factors.

1. The Board finds it appropriate in the circumstances of the instant case, and consistent both with the arbitral approach exhibited in *Canvil, Nav Canada* and related jurisprudence and with Court's ruling in *Honda*, to use the *Bardal* factors in determining the amount of general damages due the Grievor.

2. The *Bardal* factors as described by the *Supreme Court of Canada in Honda v. Keays*:

2.1 *The character of the Grievor's employment* is set out in some detail in the November 6, 2009 Awards. It is clear from the evidence there presented that the Grievor was Coordinating Instructor in the College's Recording Arts program, which entailed specialised knowledge both of the music industry generally and of evolving recording technologies. He had been directly and intimately involved in the planning and development of Program, and was the Program's only Coordinating Instructor up to the point of his termination.

His teaching and related professional duties included responsibility for delivering various courses to students in the Recording Arts Program and, as required, to students in the Music in Performance program, with which close relationship was required. It also involved some work, on occasion, with the Broadcast Journalism program. The Grievor also engaged in some occasional community work related to the Program with the College's approval and support.

In considering the Grievor's employment record, the Board notes that the Employer had itself observed that some issues that eventually led up to the termination and breakdown of the employment relationship were "anomalous" (Consent #5, November 6, 2009 Awards p. 10, 284, 377, 387, 395.)

2.2 *The Grievor's length of service* is noted above. Based on the evidence supplied, the Board concluded that the Grievor was, effectively, an employee of the College for 11 years (from "10/11/1994", which the Board translates, from the usage in A1, as October 11, 1994, until September 16, 2005, a period of roughly 10 years and 11 months).

2.3 *The Grievor's age and the availability of similar employment*: The evidence shows Grievor's date of birth as January 27, 1950. At the time of termination, therefore, he was 55.

2.4 *The Grievor's experience, training and qualifications*: The Grievor is a professional with several years of experience in the recording industry both as a performing musician and as a specialist in recording technology. He holds a Computer qualification from the College.

The Board also notes that, at one point in his testimony, the Grievor referenced the issue of his own qualifications. When asked if he wants to return to the College. He said:

"I have ambiguous feelings. I'd love to be still there. I would love to be still teaching ... It would be a difficult transition. *A lot has happened in the industry, and there is a question of qualifications: a lot of new technical changes.* Yes, I'd

love to be there, and it would be a difficult transition, and I'm not sure whether my medical people would think it wise." (Emphasis added)

2.5 *Related circumstantial considerations:* The Court in *Honda*, in its assessment of the application of *Bardal* factors (para. 32), also noted the the Grievor in that instance "suffered from illness which greatly incapacitated him". The Grievor provided a self-assessment of his health, but the Board has no reliable evidence of how his condition affects his re-employment chances.

2.6 The Board has taken all of the above *Bardal* factors, as applied in *Honda*, equally into consideration in determining the *quantum* of compensation due under the head of general damages in the instant matter. The Board is persuaded that, at the time of his wrongful termination, the Grievor's chances of re-employment were very limited.

The Board has also reviewed the arbitral jurisprudence for indications of current practice in setting the levels of compensation in similar fact situations, bearing in mind the Court's repeated warning, already noted, that "There can be no catalogue laid down as to what is reasonable notice in particular classes of cases."

The Board notes that, as the Employer itself estimated based on its survey of the current arbitral jurisprudence including that provided by the Union, the norm is somewhere between 1 and 1.5 months per year of service. The Board concludes that the reduced possibility of the Grievor's ability to find work in the circumstances of his termination and the technological changes in his field of professional training and experience would suggest that compensation at the high end of this norm is appropriate in the instant matter.

The Board finds, therefore, that the Grievor is due monetary compensation in respect of general damages equivalent to 1.5 years of employment. The Employer is also directed to make its portion of pension contributions so as to provide the Grievor reinstated pension benefits equivalent to the same 1.5 years of his employment.

Other Compensation issues:

The Board accepts the evidence that severance pay in the amount of \$11,728.20 has already been paid to the Grievor. The Board therefore orders that a further \$7,876.80 be paid him, plus any amount that owing due to increased service of 1.5 years.

The Board finds no persuasive grounds in the evidence submitted, jurisprudence, or the Collective Agreement in respect of claim for survivor's pension, "contribution savings" or "intangible" performance revenues, and declines, therefore, to award under these heads.

DECISION

In Summary:

In view of the foregoing considerations, the Board orders the Grievor be paid compensation as follows:

- 1.5 years General Damages & pension benefits
- Severance pay in the amount of \$7,876.80

As indicated by the documentation which the Parties presented at the opening of this hearing, the above total compensation is to be calculated with interest, in accordance with the Province's *Judgment Interest Act*.

Respectfully submitted as the Decision of the Board:

for the Union

Mr. Peter Ivany

for the Employer

Mr. Sean Hanrahan

Chair

Mr. John A. Scott

June 15, 2010