IN THE MATTER OF: A grievance dated August 28, 2019 filed on behalf of Chris Klapatiuk (4-shift suspension) and an arbitration under the *Labour Relations Code*.

BETWEEN:

CARIBOO PULP AND PAPER COMPANY,

Employer,

AND

UNIFOR, LOCAL 1115,

Union.

AWARD

Appearances

Don Jordan, Q.C., counsel for the Employer
Craig Bavis, counsel for the Union

Date and place of hearing

July 13, 2020; Video Conference hearing

Arbitrator

Arne Peltz

Date of award

September 14, 2020

Introduction

1. The grievor Chris Klapatiuk is a warehouse forklift driver and has 10 years of service with the Company. He has no prior discipline on his record. He was suspended without pay for 3.5 shifts as a result of his behaviour toward a co-worker on August 22, 2019. The grievor disagreed with direction he had been given by a female supervisor concerning the "hot loading" of pulp on rail cars. The Employer alleged that the grievor "acted in an aggressive, intimidating and disrespectful manner", contrary to the Company's Bullying, Harassment & Violence Policy ("the Bullying Policy"). The Union maintained this was a one-time, momentary lapse borne out of understandable workplace frustration, for which the grievor expressed regret.

2. A grievance was filed on August 28, 2019 (Ex. 5). On May 20, 2020, I was appointed under the collective agreement (Ex. 1) to arbitrate the dispute.

3. The Union conceded that there was just cause for discipline but submitted that the penalty was excessive. A letter of warning or reprimand would have sufficed. Arbitral discretion should be exercised to mitigate the penalty. For its part, the Employer defended the decision and argued that management had considered all the appropriate factors in selecting a 3.5-shift suspension. The penalty was reasonable given the grievor's misconduct and his failure to take genuine responsibility. There was no apology. The victim was negatively impacted. In these circumstances, an arbitrator should not interfere.

4. At the outset of the hearing, the parties affirmed that I was properly appointed and vested with jurisdiction.

Employer evidence

5. Two witnesses testified for the Employer. Cassandra (Cassie) Woollends (hereafter "Cassie" or "Woollends") is a Quality Control Technician but on August 22, 2019, she was covering for the Shipper. Dan Wilson (hereafter "Wilson") is the Fiber Line Manager for the mill. His responsibilities include the warehouse, pulping room, and rail car loading. He made the disciplinary decision and issued the grievor's suspension letter (Ex. 4).

Cassie Woollends

6. In her evidence, Woollends gave the following account. On the morning of August 22, 2019, the grievor came into the Driver Shack and Woollends told him to hot load the wrap. "Wrap" refers to pulp, which is produced in the mill, stacked flat in sheets and loaded onto rail cars for shipment. "Hot load" means the wrap is moved directly from the production line to a rail car, without storing it and waiting to load at a later time. The reason for this direction was that shipping was behind schedule. Woollends told the grievor that "Sam needs it done." This was a reference to Samantha Wright, Quality Control Supervisor (hereafter "Sam") and Woollends' boss.

7. The grievor objected and said that was a hard way to load. Woollends replied that "Sam wants it shipped." The grievor replied, "That bitch", and left the shack. At the time, there was no one else present.

8. Woollends testified that she then went to the lunchroom to do paperwork, where she saw Ellery Skilleter (hereafter "Ellery"), another driver. The

grievor was elsewhere working. Ellery asked what was on the docket and Woollends replied that they had to hot load the wrap. Ellery said he didn't "have to" do anything. She answered that all she could do is tell him what she needs, and she left.

9. About an hour later, Woollends encountered both the grievor and Ellery in the warehouse. The grievor was at a computer and said, "We can't fucking hot load the wrap. It's too much. We have to turn the wrap." He explained that they needed to put it down, pick it up from the other side and then load the rail car. Ellery agreed. Woollends testified regarding the grievor's tone of voice, "It was just frustration."

10. In response, according to Woollends, she said that if it was too much, they could put the wrap on the floor and load from there, the usual way, rather than direct from the line. Ellery said that was too much work for one day. The grievor stated, "No offence Cassie but you don't fucking know how to do the job." Ellery made further comments but Woollends could not recall them. She responded that they should just do one load and night shift could do the other one.

11. Woollends initially testified that neither driver was yelling. However, she could tell they were frustrated.

12. Woollends was shown her investigative statement to Wilson to refresh her memory, and she affirmed the version of events recorded in the notes. This was substantially the same as her oral testimony, with some non-material

differences. One substantive difference was that in the investigative interview, she said that Ellery was yelling at times during the incident.

13. According to the notes, while in the shack, the grievor referred to Sam as "that bitch." The second interaction was in the lunchroom, and Woollends reported the exchange as follows (Ex. 2):

> A little while later, I walked into the lunch room. Chris [the grievor] was sitting and writing something. He said, "We can't fucking unload hot wrap, we have to turn the wrap. Ellery then commented "that's too much work for one day." I offered some alternatives to them. Ellery then yelled, "You don't fucking know this job!". He then had some more comments about Sam, I couldn't really hear what he was saying, he was mad. Chris then said, "No offence Cassie, but you don't fuckin know how to do this." He didn't say it aggressively, more just as a statement.
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> Ellery then said, "It's fucking ridiculous, why didn't the other shift do it? They just sat the whole time." I then said, "If you can only get one done, that's fine. Night shift can do one car." Then Ellery started yelling and said, "That fucking bitch! What? She doesn't think we can do our job? She doesn't fucking do this job! She blames us for everything." Chris then stood up and left.
>
> I felt like the situation wasn't going to get any better, I felt Ellery would just keep getting madder. Ellery then said, "I *was* in a good mood this morning, but now I'm not." I think Chris realized at that point that Ellery had taken it too far. He said, "It's OK Cassie, we're just frustrated."
>
> They said it was idiotic to load it like that.

14. In her testimony, Woollends said that the grievor left the lunchroom as Ellery was yelling very angrily. She followed him out. The grievor got on his forklift and made the comment reported in the notes that "It's OK Cassie, we're just frustrated." She testified that the grievor knows her. He knows what upsets her. "He was trying to show that he wasn't mad at me, just at the situation."

15. Nevertheless, Woollends testified that she *was* upset. "I like to think I stay strong and hide it, but it was obvious I was upset." She was not crying although she was holding back the tears strongly. In her statement, she said she was crying later when she went back to the office. She told Sam what happened.

16. Under cross examination, Woollends acknowledged the concern raised by the grievor and Ellery that it would not be possible to hot load two rail cars and have them ready for pickup by CN that day. She confirmed that Sam wanted the rail car door open, which was unusual, but there had been a problem with loads shifting in transit and Sam wanted to be sure they were loaded to pattern. It was a due diligence issue. Woollends agreed that since then, fewer loads are being sent as a response to the shifting problem. She confirmed that a hot load comes off the line without anything underneath it for stability. A staged load is placed on a pallet. It's harder to fit hot wraps together in a car.

17. Woollends testified she understood why the grievor resisted doing hot loads. That was why she suggested moving the full load over to the rail car (a full wrap run), putting the wrap down on the floor and loading them afterwards. She revised her instructions when there was opposition to hot loading.

18. Woollends agreed with the suggestion that the grievor was trying to calm things down. He was "a more reasoned voice" than Ellery.

19. It was put to Woollends that the grievor's comment to her was that he had trained her, and she was never trained to do a hot load. Woollends denied that

version and insisted the grievor actually said, "You don't fucking know this job."

20. Woollends testified that she went home very upset after the incident. Her boss said she didn't have to be at work when she was treated like that. In her statement, she told Wilson that this was the first time something like this had happened to her.

Dan Wilson

21. In his evidence, Wilson (the Fiber Line Manager) said he became aware of the incident about 45 minutes after it occurred. He mandated Shift Supervisor Luke Johnston (hereafter "Johnston") to investigate. Johnston met separately with the grievor and Ellery the same afternoon, in the presence of a shop steward, and prepared a detailed reporting email to Wilson. After his interviews, Johnston suspended both employees pending further investigation.

22. Johnston recorded the following interview notes (Ex. 8):

> Ellery Skilleter
>
> - When asked if this event took place and if what was being accused as said is true, Ellery's first reply was "nothing was directed at Cassie, that he had said the words but they were used to describe the situation in general."
> - Ellery said that these quotes applied to the situation of hot loading the wrap being "moronic" because Cassie doesn't have the experience to know otherwise.
> - The "Bitch" comments in regard to Sam Wright were "possible".
> - Ellery said his frustration is due to not consulting the drivers about the warehouse plans.

` Chris Klapatiuk

- Chris admits to using "bitch" in reference to Sam Wright.
- Chris states he never once called Cassie an "idiot" but did say that she has never once loaded a wrap car and doesn't understand.
- Chris is willing to apologize, and it seems that he genuinely feels remorse for the situation.
- Lots was said but Chris does not feel responsible for all that was said.
- Chris feels that he was trying to deescalate the situation.
- Chris felt that he "vented" and then tried to make light of the situation after to make Cassie feel better.
- Chris says that he never swore at Cassie but may have used the word "fuck" a few times.

23. Wilson testified that he met with the grievor on August 26, 2019. The grievor didn't think it was that big a deal. He expressed surprise that it got this far, which Wilson testified surprised *him*. The grievor said it was a normal conversation with Cassie, which again surprised Wilson. The grievor admitted there was some yelling and swearing, and he admitted calling Sam a bitch. He said Ellery was quite animated with Cassie as well. The grievor felt the instruction to hot load was too much work but said his comments were not directed at Cassie. It was not personal about her. He explained, "In my 7 years I have not seen 2 hot cars loaded on one shift. It wouldn't work. I told Luke we would do our best to get it done this shift. It was me being frustrated; it wasn't personal towards Cassie."

24. On August 30, 2019, Wilson issued a suspension to the grievor in the following terms (Ex. 4):

> On August 22, it was reported that you had acted in an aggressive, intimidating, and disrespectful manner towards a coworker. Our investigation showed that

> your behaviour resulted in your coworker being unable to perform the duties of their job and had to be sent home.
>
> This letter is to confirm that you have received a 3.5-day suspension without pay as a result of your actions. This behaviour is a direct violation of our Bullying and Harassment Policy and will not be tolerated.
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> …
>
> Chris, we take this type of behaviour very seriously. We hope you understand the seriousness of this incident. …

25. The grievor served the suspension during the remainder of his August 22 shift, as well as the remaining three days of his tour. He returned to work on August 30, 2019.

26. Wilson testified that he applied the definition of workplace bullying and harassment as stated in the Company's policy (Ex. 6, at p. 3-4):

> Workplace bullying and harassment is defined as unwanted conduct, comments, actions or gestures that affect an employee's dignity, psychological or physical health and well-being. Bullying and harassment may result from the actions of one individual towards another, or from the behaviour of a group.
>
> Bullying and harassment are often characterized through insulting, hurtful, hostile, vindictive, cruel or malicious behaviours which undermine, disrupt or negatively impact another's ability to do his or her job and result in a harmful work environment for the employee (s).
>
> Bullying and harassment can take many forms and may occur when the behaviour or conduct:
>
> - Would reasonably tend to cause offense, discomfort, humiliation or embarrassment to another person or group;
> - Has the purpose or effect of interfering with a person's work performance;
> - Creates an intimidating, threatening, hostile or offensive work environment.

…

> Bullying and/or harassment may be the result of deliberate intention or not. It is important to recognize that it is the impact of the behaviour on others, not the intent, which determines whether or not bullying has occurred.
>
> Generally, a pattern of behaviour is required for a finding of bullying and harassment to be made. However, depending on the severity and impact of the behavior, a single significant incident may constitute bullying, if it is found to be sufficiently offensive, threatening or intimidating.

27. Wilson testified that in his view, the grievor's behaviour met the above definition of bullying and harassment. The suspension was justified, he stated, because a co-worker had to be sent home, he saw no remorse and the grievor failed to apologize. Those were the factors he took into account.

28. Under cross examination, Wilson confirmed that the grievor said he was sorry that Cassie felt bullied. Wilson could not recall whether he informed the grievor that Cassie had been sent home that day. He did not pass on what she had reported about the encounter. Even so, Wilson found it surprising that the grievor felt it was not a big deal.

29. Asked to compare the grievor's conduct with Ellery's conduct during the incident, Wilson said Ellery's conduct was a little more aggressive.

30. Wilson was pressed to explain why a more moderate penalty would not have been enough in this case. He replied that when interviewed, the grievor described the exchange as normal conversation, not a big deal. But in fact, it *was* a big deal to the Company. Ellery received the same suspension.

31. It was put to Wilson that Johnston noted the grievor was willing to apologize. Was that given weight? Wilson answered that he considered it, but in fact the grievor did not apologize to Cassie. Wilson conceded that he had ordered the grievor not to contact Cassie.

32. Further, it was put to Wilson that Johnston said the grievor seemed genuinely remorseful on August 22. Wilson replied that does not mean he *was* remorseful. Wilson did not believe there was remorse, based on his meeting with the grievor on August 26. In any event, said Wilson, Johnston was not a decision maker when it came to discipline.

33. Wilson was cross examined about the difficulty of hot loading wrap and placing it in the rail car. He rejected the grievor's complaints but conceded it has been 25 years since he himself has done the job.

Union evidence

34. The grievor testified for the Union. He has been employed by the Company for 10 years. He has worked seven years in the warehouse and is currently classified as a Forklift Driver or Trucker. CN drops empty rail cars in the yard daily and a trackmobile is used to move them in and out of the warehouse. The drivers get instructions on priority orders to be loaded and after that may have some flexibility on which work to do. For hot loading, he pulls right up to the rail car door and another driver on the other side loads the product. Hot loading is rare and never two cars in a row, he testified.

35. On August 22, 2019, the grievor received direction from Cassie to hot load two cars. At the time, there was one 60-foot car and one 52-foot car on the track. The smaller car would not have taken the load. Even if they had loaded both cars, according to the grievor, they would not have gone out until the following day anyway. He admitted that he reacted by calling Sam a bitch and testified this was wrong. At the time, he had the idea that they could put one load on the floor, wait for a switch around 2:30 p.m. and then do their best to get the second load done when another 60-foot car came in. Night shift would have finished the job. It was the only way to do it.

36. The grievor added that what he said about Sam was just the wrong comment. Sam had obviously given Cassie direction and Cassie was just following orders. The grievor testified that he's had a year to reflect on his behaviour and it was not appropriate to call Sam a bitch. He noted that he himself has two daughters. He spoke poorly.

37. Later, when they got to the lunchroom, the grievor was filling out some forms and Ellery was also there. They expressed their displeasure to Cassie. The grievor recalled saying, "Cassie, I trained you, you don't know how to load wrap." He denied the version alleged by the Company: "… you don't fucking know how to do this."

38. At the end of the lunchroom exchange, the grievor said "Don't worry Cassie", because he was aware he was upsetting her. She was just the messenger. It was never a personal attack. However, it was poor judgment to speak that way, he acknowledged.

39. Later that afternoon, Johnston called him in and conducted an interview. The grievor confirmed that Johnston's notes (Ex. 8) were accurate in recording his statements. When he ended up in front of Wilson for discipline, he did think it was "super crazy that it came to this" and was sorry for how Cassie felt.

40. The grievor explained how hot loading can make it hard to fit the load inside a rail car because the stacks are not all square. If you make a mistake placing the load, and run out of space, you may have to do the job all over again. There had also been trouble with loads shifting in transit and being damaged.

41. Under cross examination, the grievor readily admitted that he has no flexibility to ignore a supervisor's direction on loading. His disagreement with the direction as given did not excuse his treatment of Cassie, he confirmed. "It's an explanation, not an excuse. It was nothing personal. But in this day and age, it was not right." It was just an off the cuff comment. He made it to Cassie because he thought they were work friends. He would not have said it to Sam. He thought of Cassie as an equal, he's known her for a while, but he had no problem taking direction from her.

42. It was put to the grievor that he had about an hour to consider things before the incident continued in the lunchroom. Did he realize the "bitch" comment had been a bad idea? The grievor replied that he didn't think about it. He maintained he did not recall saying to Cassie that "you don't fuckin know how to do this." Yes, he was frustrated. He was trying to explain about Sam's directive, they didn't know what's going on. The grievor admitted he had an hour to think it over before the lunchroom, and yet the incident continued. He said "no offense" so she wouldn't take his comment personally. In point of

fact, she did not know how to load wrap. It was not because he knew she *would* take offense.

43. In his notes (Ex. 8), Johnston recorded that "Lots was said but Chris does not feel responsible for all that was said." Asked to explain, the grievor testified that he only takes responsibility for what he personally said. Admittedly, Ellery was saying some heated things and the grievor should have told him to stop. Ellery was over the line. The grievor testified that he tried to make light of the situation in order to make Cassie feel better. He conceded that this was because he noticed that Cassie was clearly upset. However, regarding his use of "fuck" during the incident, he said this was just industrial mill talk and was not directed at Cassie.

44. Questioned about his discipline meeting with Wilson, where he said he thought it was "a normal conversation", the grievor admitted that in hindsight, it was not normal. It was put to him that this was an attempt at the time to diminish his responsibility in the incident. The grievor replied that thinking about it over the past year, it was not acceptable. He also told Wilson that he was sorry "if she felt bullied by it" (Ex. 3). He did not say he was sorry that he had bullied her. Pressed on the distinction, the grievor insisted it meant the same thing. He acknowledged his words caused it. So, he was sorry. He had earlier told Johnston that he was willing to apologize. Now he knows it was bullying. The grievor acknowledged in his testimony that Cassie did take it personally despite him saying to her, "No offense …".

Employer final argument

45. The Employer summarized Wilson's stated rationale for imposing a suspension as he did. First, the grievor didn't think it was a big deal. He called the exchange with Woollends "a normal conversation", which clearly it was not. It was bullying. Second, the grievor failed to apologize, or at best, it was a blame-shifting apology. He confessed but avoided taking responsibility. Third, the effect on Woollends was significant. Even though the grievor told her "Don't worry", she was upset enough that management sent her home after the incident.

46. The Employer called the grievor's testimony at arbitration "a late epiphany", reflecting current social standards, but it cannot assist the grievor because he failed to show such insight at the time of the investigation. Wilson did not have that available to him when he made the decision. At that time, the grievor was calling the interaction with Cassie a normal conversation.

47. The Employer cited the following authorities: *Re Vancouver General Hospital*, [1988] B.C.L.R.B.D. No. 301 (BCIRC); *Allied Systems Canada v. Teamsters' Union, Local 213 (Palmer Grievance)*, [1998] B.C.C.A.A.A. No. 511 (Hickling); *Re Levi Strauss Canada and Amalgamated Clothing and Textile Workers Union*, [1980] O.L.A.A. No. 77 (Arthurs); *Simon Fraser University v. Association of University & College Employees, Local 2*, [1986] B.C.C.A.A.A. No. 30 (Munroe); *Pacific Inland Resources v. Northern Interior Woodworkers' Association (Ford Grievance)*, [2006] B.C.C.A.A.A. No. 37 (Coleman).

48. The Employer argued that the present circumstances justified a suspension, even though the grievor had a clear discipline record over 10 years of employment. It was not mandatory to give a letter or reprimand for a first offence. *Vancouver General Hospital* established that there is no requirement for employers to follow progressive discipline in all instances, as follows (at QL p. 6):

> … First, the Panel acknowledges that the theory of progressive discipline not only plays an important role in our system of labour relations, but is also generally accepted by arbitrators as a part of the law of the collective agreement; however, neither the Board nor the Council have considered the progressive disciplinary approach to be mandated either by the Act or by the policies developed by the Board in *William Scott and Company Ltd., supra*. In *University of British Columbia*, BCLRB letter decision No. L28/80 the Board clearly articulated the role of progressive discipline under the Labour Code:
>
> > In my view, there can be little doubt that the theory of corrective discipline has its place in the industrial setting. It very clearly is one of the factors that should be considered in determining whether a particular disciplinary response is excessive in all of the circumstances. At the same time, there may be cases where it will not be necessary for an employer to establish that he has used the corrective or progressive approach.... But the answer to any one of those suggested questions [as set out in *William Scott and Company Ltd.*]...does not automatically dictate the "bottom line" result. It is an overall inquiry; the whole of the circumstances are intended to meld together in a just result. I have no doubt that the absence of earlier and more moderate attempts at correction will in many cases (especially those involving long suspensions or dismissals) be a powerful factor indicating that some lesser sanction should be substituted. However, and here I come to another but related point, that does not mean that every employer must utilize in rote fashion and regardless of the particular employment setting, the same uniform system of progressive discipline. Put another way, there is nothing expressed or implied in the Labour Code to indicate a legislative preference for any particular system of corrective responses....

49. In *Allied Systems Canada*, the grievor was a yardman with a clean record but due to carelessness, he caused an accident resulting in both financial loss and personal injury. A three-day suspension was imposed. The union said that a reprimand should be substituted but the arbitrator concluded the suspension was not "outside the ballpark" and denied the grievance (at para. 33). The arbitrator wrote as follows on the proper approach to assessing such employer disciplinary decisions (at para. 15, 30):

> 15 An arbitrator is not bound to defer to the opinion of management. Nor is it appropriate to tamper with every disciplinary decision. To do so would court the risk of being accused of management by arbitration. It is not the role of the arbitrator to run the plant, second guessing every management decision.
> …
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> 30 The range of sanctions in an employer's armoury may range from an oral or written warning at the bottom of the scale, through varying degrees of suspension and up to and including the ultimate sanction of dismissal. The notion of progressive discipline relied upon by the union does not dictate that the employer start on the bottom rung of the ladder and work its way up. The doctrine says nothing about the starting point in the process. That depends upon the seriousness of the employee's conduct and a variety of other factors, some of which may aggravate and others of which may mitigate the severity of the penalty.

50. The Employer submitted that in the present case, Wilson reasonably considered that the three factors he cited necessitated a penalty beyond merely a warning or reprimand. The grievor failed to understand that his comments were not normal or acceptable. There was no apology. The impact on Cassie was significant. In these circumstances, an arbitrator should not intervene.

51. The Employer argued that there is a longstanding arbitral consensus that employer judgement should generally be respected unless the penalty was

based on an irrelevant consideration or improper motive or would otherwise be unjust. In *Levi Strauss Canada*, decided 40 years ago, the grievor punched another employee's time card when they were late returning from lunch. There was no loss to the company. Similar to the present case, a three-day suspension was imposed but Arbitrator Arthurs dismissed the grievance, as follows (at para. 9-10):

> 9 I believe that my function is not merely to decide whether the employer acted reasonably or, as company counsel suggested, whether its judgment concerning a proper penalty fell "within the ballpark". I have to make an independent determination as to whether the penalty was indeed "just". At the same time, my own view of what is "just" has, to be frank, certain "ballpark" characteristics. One cannot say, to a moral certainty, that two days' suspension is just while a one or three-day suspension is not. The fact of the matter is that when an arbitrator selects a penalty different from that selected by an employer, he is really saying that the employer has ignored some relevant consideration, proceeded on some misunderstanding, acted from some illicit motive, or otherwise affronted the arbitrator's sense of what is "just". The opposite is true when the arbitrator reaches the same conclusion as the employer. In other words, the arbitrator is not only judging the grievor; he is judging the employer as well. The arbitrator's selection of some particular number of days of suspension as "just" is, I believe, accurately perceived by the parties in precisely those terms.
>
> 10 Fully appreciating that my award will be so read, I have decided that a three-day suspension is "just" in this case. Falsification is a serious matter, difficult to detect and to supress. Imposition of a suspension in this case will bring that fact home to all employees. …

52. In *Simon Fraser University*, the grievor received a five-day suspension when she used the employer's envelopes and postage to circulate a chain letter. The financial impact of the dishonesty was nominal, perhaps a dollar. Nevertheless, the penalty was upheld, although the arbitrator directed that it be removed from her record. The proper role of an arbitrator was reviewed, and *Levi Strauss* was adopted (at para. 20-21):

> 20 What is the proper role of a grievance arbitrator in cases of industrial discipline? It is well settled that in such cases, the onus rests with the employer to show not only that just or proper cause existed for the imposition of a penalty, but also for the imposition of the particular penalty selected. But different arbitrators have adopted different approaches to the second branch of the onus. Some arbitrators decline to interfere except where it is clear that the employer has acted arbitrarily or unreasonably. See, for example, *Julius Resnick Canada Ltd.* (1973) 3 L.A.C. (2d) 247 (Carter). Others show less deference to the employer's judgment, but still decline to interfere provided that the "... penalty chosen ... is within the range of reasonable latitude which management must have ...." See *Douglas Aircraft Co.* (1972) 2 L.A.C. (2d) 56 (Weiler). Still others show no deference at all, and engage in the fullest second-guessing. See *Phillips Cables Ltd.* (cited above).
>
> 21 In my view, the most satisfactory -- and realistic --expression of the arbitral role in discipline cases is found in *Levi Strauss Canada* …

53. Finally, the Employer relied on the principles reviewed in *Pacific Inland Resources* (at para. 29-31), where it was held that a cautious approach should be taken to second guessing an employer's decision, unless there are extenuating or mitigating circumstances, which must be real and substantial, outweighing the gravity of the offense (at para. 31). *Levi Strauss* was again approved.

54. The Employer also noted the provisions of provincial statute law that require an employer to ensure the health and safety of its employees: *Workers Compensation Act*, [RSBC 2019], s. 21(1). WorkSafeBC policy requires employers to take all reasonable steps to prevent or minimize workplace bullying and harassment.

55. On the present facts, said the Employer, a 3.5-day suspension must be upheld.

Union final argument

56. The Union submitted that a 3.5-day suspension was excessive on the present facts and pointed to authority endorsing the use of progressive discipline wherever reasonably practicable. Wilson's opinion is not the last word, even under the principles in *Levi Strauss* cited by the Employer in argument, said the Union.

57. In *Simon Fraser University v. Association of University & College Employees*, [1990] B.C.C.A.A.A. No. 409 (Munroe), where the grievor left work 2½ hours early while in a position of trust, there was an admission of wrongdoing, an expression of regret and a promise not to repeat the misconduct. As in the present case, management rejected the sincerity of the grievor's acknowledgements. However, the arbitrator held that he must reach his own independent judgement on these points (at para. 15):

> [The manager] had known the grievor for about two years. It therefore can be argued that he was in a reasonably good position to form a view about the sincerity of the grievor's statements. However, I am required to reach my own independent judgment on that score. It is true that I have met the grievor only once. But it is clear that he is a soft-spoken person who is not given to overly expressive communication. Having carefully observed the grievor in the witness stand, and listened to his testimony, I am not able to conclude that his acknowledgement of wrongdoing is contrived or lacking in sincerity.

58. The arbitrator reinstated the grievor, characterizing dismissal "as an apparent deviation from the accepted norm of a disciplinary progression, *i.e.*, from the commonly accepted view that wherever reasonably practicable, industrial discipline should be designed to correct and rehabilitate; not simply to punish and discard" (at para. 21).

59. In the present case, the Union argued that the grievor showed sincerity and true remorse in his testimony. He was consistent in that respect. Interviewing the grievor on the day of the incident, Johnston reported that it seemed the grievor "genuinely feels remorse for the situation." Contrary to the Employer's position, the grievor took the matter seriously. He was willing to apologize, again as reported by Johnston at the time. While there was no actual apology, it would have been difficult to do so, as the grievor had been directed not to make contact with Cassie. Wilson knew there was openness to an apology but did not facilitate it. In any case, apologies can be shallow or self-serving, but here the grievor was tested under aggressive cross examination and did not waiver. There was no blame shifting. The Union therefore submitted that the arbitrator should make a finding of genuine remorse and insight, regardless of Wilson's assessment. Arbitral review requires an independent exercise of judgement.

60. The Union urged caution in the use of terms such as harassment and bullying. As discussed in *Government of Province of British Columbia v. BCGEU (M, G & Z Respondents)*, [1995] B.C.C.A.A.A. No. 131 (Laing), not "every act of workplace foolishness was intended to be captured by the word 'harassment' ..." It should not be used "where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can fairly be said 'you should have known better' (at para. 228-229)". Moreover, the Company policy distinguishes between a pattern of misconduct and a single incident. There was no pattern on the grievor's part. The Union admitted there was conduct worthy of discipline in this case because the

grievor's comments to Cassie were inappropriate, but asked that the incident be kept in context, and not overstated.

61. An important contextual consideration was the grievor's frustration over what he viewed as an inefficient loading method, which also might cause damage to the product. The issue was about how best to do the job, not any intent to launch a personal attack and cause harm to Sam or Cassie. As the grievor admitted under cross examination, this did not excuse his behaviour, but the Union said it was relevant to the reasonableness of the penalty. There was no Employer evidence that progressive discipline was considered and no explanation of why a lesser penalty was not chosen.

62. In *Re Alcan Smelters & Chemicals Ltd. and Canadian Association of Smelters & Allied Workers, Local 1*, [1991] B.C.C.A.A.A. No. 511 (Hope), the employer had guidelines for progressive discipline but it jumped to a one day suspension for leaving work early after declining to discipline for earlier infractions. The arbitrator substituted a written warning, stating as follows (at para. 25-26):

> 26 The fact that the employer adopted a discipline code does not relieve it of any of the obligations it is required to meet in the arbitral authorities with respect to proof of just cause for disciplinary initiatives. The sole function performed by a disciplinary guide is to put employees on notice as to the expectations of the particular employer and its policy with respect to responding to work performance or conduct that it perceives and has defined as unacceptable. In its approach to discipline, an employer is expected to be consistent and to apply a progressive approach in the sense of escalating responses to repeated acts of misconduct with the aim of bringing home to the employee that a continuation of the pattern will lead to dismissal.

> 27 Here that progressive approach is encapsulated in the discipline guide in its provision of escalating penalties for successive acts of misconduct. In the guide the employer has reserved to itself a discretion to respond uniquely to particular facts. However, that unique response must be in accord with the general principles of progressive discipline …

63. The Union submitted that progressive discipline should not have been abandoned in the present case. The grievor had 10 years of service and no record. He was not an instigator of the incident. In fact, he tried to defuse the situation. He was much less aggressive than Ellery. As noted, he was remorseful. Jumping to a 3.5-days suspension was excessive and "outside the ball park", as per *Levi Strauss, supra*.

64. The Union referred to a recent case between these same parties, *Cariboo Pulp & Paper Company v. Unifor, Local 1115*, [2015] B.C.C.A.A.A. No. 78 (Keras), where an eight-shift suspension was reduced to four shifts by the arbitrator. That grievor made threats behind people's backs, demeaned people, ignored work assignments and took prolonged breaks. The bullying behaviour was longstanding. The Union argued that the present grievor's misconduct was far less serious. Nothing in the present case calls for a message of general deterrence. If a lesser penalty is substituted, the Company's need to ensure appropriate employee behaviour will still be met. The Union has acknowledged that the grievor's comments were wrong and the grievor himself has exhibited insight. There is no rationale for a 3.5 shift suspension.

Employer reply argument

65. The Employer responded to the Union's argument that the grievor committed only a momentary lapse. After he called Sam a bitch, he had an hour to think it over before making further inappropriate comments to Cassie in the lunchroom. Then he had four days to ponder his situation before the meeting with Wilson. After all that, he still called the interaction a normal conversation. These facts undermine the Union's main submission that the misconduct was momentary and that the grievor was remorseful.

66. The Employer characterized the grievor's testimony as a "strategic apology". It deserves no weight. He did not claim that he was prevented from apologizing by the no-contact order.

67. The Union cited the grievor's belief that Sam's direction to hot load was inefficient or unworkable. This is not a relevant consideration, said the Employer, given that the grievor admitted it was not his call to say how loading will be done.

68. The Employer distinguished the Union's authorities on the facts. In the *Cariboo* award in particular, the suspension was reduced because it failed to match the penalty received by another employee for similar misconduct. As for the arbitrator's caution in *Province of B.C. and BCGEU* about harassment allegations, the present grievor admitted to a violation of the policy. There was no suggestion during the evidence that applying the policy in this instance was overblown.

Analysis and conclusions

69. The *Labour Relations Code* does not mandate the application of progressive discipline in all cases, as the Employer argued, citing *Vancouver General Hospital, supra*. "It is an overall inquiry; the whole of the circumstances are intended to meld together in a just result" (at p. 6). In the present case, despite his 10 years of clear service, the grievor was not entitled as a matter of course to expect a warning and avoid a suspension for his inappropriate conduct, although the Union argued forcefully for this outcome. At the same time, an arbitrator "is not bound to defer to the opinion of management": *Allied Systems Canada, supra*, at para. 15.

70. Many years ago, Arbitrator Arthurs wrote about the arbitral role in discipline, "I am still left with the obligation of applying my own judgment. … I believe that my function is not merely to decide whether the employer acted reasonably or, as company counsel suggested, whether its judgment concerning a proper penalty fell 'within the ballpark'. I have to make an independent determination as to whether the penalty was indeed 'just'": *Levi Strauss Canada, supra*, at para. 8, 9.

71. While an independent judgement is required, there are still different arbitral opinions on the degree of deference that should be shown to an employer's discipline decision. In *Simon Fraser University (1990), supra*, Arbitrator Munroe described a series of possible approaches (at para. 24):

> … Some arbitrators decline to interfere except upon a finding that the employer has acted arbitrarily or patently unreasonably … Other arbitrators show less deference to the employer's judgment, but still decline to interfere provided that

> the "... penalty chosen ... is within the range of reasonable latitude which management must have ...." Still others show no deference at all, and engage in the fullest second-guessing …

72. In the present case, the Company argued strenuously that Wilson considered the relevant factors, grounded in the facts before him, and therefore his determination should be sustained. This reflects a minimal deference approach, where the Employer decision would be sustained because it was neither arbitrary nor plainly unreasonable. In my view, such an approach fails as an independent arbitral judgement, which is the standard laid down in *Levi Strauss Canada, supra*.

73. On the other hand, the "fullest second guessing" goes too far, because it would essentially involve arbitrators in managing the enterprise. "It is not the role of the arbitrator to run the plant, second guessing every management decision": *Allied Systems Canada, supra*, at para. 15.

74. The middle ground is best. Management does have a range of reasonable latitude, but an arbitrator will carefully scrutinize the decision to ensure it is fair and just. This incorporates a host of possible considerations, depending on the specifics of the case, and allows the arbitrator to intervene when relevant considerations were ignored, the employer proceeded based on error or misunderstanding, there was some improper motive or the decision is otherwise unjust: *Levi Strauss Canada*, at para. 9.

75. Turning to the present facts, the Company relied heavily on the grievor's statement to Wilson that he didn't think it was "that big a deal". Further, the grievor said it was a "normal conversation" with Cassie. Wilson testified that

he was surprised by both these comments because bullying language in the workplace is not normal. It *is* a big deal, and Wilson concluded the grievor missed the point. I agree that these were valid concerns, but on the overall evidence, I find that the grievor did have appropriate insight into the nature and gravity of his misconduct. He showed awareness during the incident itself and afterward during the investigation, as well as during his testimony at arbitration.

76. Specifically, the grievor referred to Sam as a "bitch" but admitted to doing so and acknowledged it was wrong. In saying that Cassie didn't know how to load, he was not speaking aggressively, "more just as a statement", according to Cassie herself. While Ellery was yelling and swearing at this point, the grievor was not. Again, Cassie said the grievor was "a more reasoned voice." "No offence Cassie," the grievor began, when telling her she was uninformed about the job. He used the F-word, which I accept was mill talk in this particular context, but he still maintained a measure of politeness. By contrast, Ellery was angry, loud, aggressive and abusive in his language. The conversation ended with the grievor trying to de-escalate and reassure by saying, "It's OK Cassie, we're just frustrated."

77. The grievor earns no medal for his conduct but on a fair assessment, he showed self-control and awareness that the exchange was hurtful to Cassie. She testified, "He was trying to show that he wasn't mad at me, just at the situation." He was trying to calm things down, she said.

78. Next, contrary to Wilson's conclusion, I find that the grievor felt and expressed genuine remorse over his misconduct. This was Johnston's

assessment when he interviewed the grievor shortly after the incident. While Johnston was not a decision-maker regarding discipline, his real-time opinion on the factual question of remorse is entitled to significant weight. In testimony at arbitration, the grievor continued to show remorse and insight. He said his frustration over hot loading was not an excuse. "It was nothing personal. But in this day and age, it was not right." While the Employer called the grievor's testimony a "late epiphany", even this characterization concedes a consciousness of personal responsibility.

79. On the subject of apology, again I accord significant weight to the grievor's attitude when interviewed by Johnston. He was willing to apologize. While he did not follow through, it was awkward because the Company had cautioned him not to have contact with Cassie. There are ways to deliver an apology even under these restricted conditions, but the absence of apology is not fatal to the grievance under the circumstances.

80. Finally, Wilson was influenced by the impact on Cassie. She was very emotionally upset, to the extent that she was offered the opportunity to go home, and she did so. She told Wilson this had never happened to her before. I agree that this was an important consideration in assessing the penalty. As stated in *Province British Columbia, supra*, the hallmark of harassment is that there has been a "heedless disregard" for the victim's rights and "it can fairly be said 'you should have known better'" (at para. 229). The grievor admitted his disregard. He said he should have known better and he acknowledged the harm caused to Cassie.

81. In sum, I accept much of the Union's submission in mitigation, and I agree that a 3.5 shift suspension was excessive given the grievor's employment record and all the facts of the incident. Moreover, the Employer failed to distinguish the relative culpability of the grievor and Ellery, which appeared to be significant on the available evidence. Ellery displayed anger, aggression, and profanity, which can be a toxic and dangerous mix. Not so the grievor.

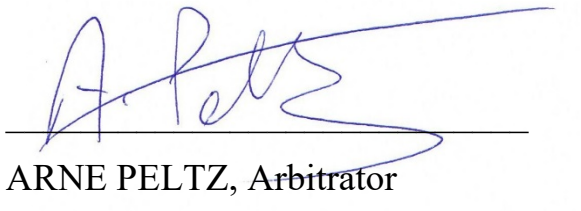
82. Nevertheless, the level of disrespect shown by the grievor to Cassie and Sam was striking and cannot be tolerated by the Company. The misconduct was too serious for a letter of reprimand or a warning. In this case, only a suspension conveys the message, to the grievor and to other employees, that bullying and harassment are simply unacceptable. To this extent, I endorse Wilson's approach.

83. The grievor no longer has a clear record and must sustain some loss of pay, but I find there was no necessity to extend the suspension to the full tour. Progressive discipline principles should be applied to the extent reasonably possible under the circumstances. A one-day suspension would be just. It tells the grievor that a repeat of this behaviour will carry much more serious consequences.

Award and order

84. The grievance is allowed in part. The 3.5-shift suspension without pay is set aside and a one-shift unpaid suspension is substituted. Jurisdiction is retained.

ISSUED at Victoria, B.C. on September 14, 2020.



ARNE PELTZ, Arbitrator