IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*

BETWEEN:

CARIBOO PULP AND PAPER COMPANY

(the "Employer")

AND:

UNIFOR, LOCAL 1115

(the "Union")

(Kevin Lawrence Termination Grievance)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Stephanie A. Vellins for the Employer
	Mary Thibodeau for the Union
HEARING:	June 2, 3 and 12, 2020
DECISION:	July 3, 2020

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The case arises from a grievance brought by the Union on behalf of the grievor, Kevin Lawrence. The grievance alleges that the grievor was unjustly terminated from his employment as a Field Operator 1 at the Employer's pulp and paper mill in Quesnel, British Columbia. Prior to his dismissal, the grievor had worked for the Employer for just over nine years and had a discipline-free record.

The dismissal letter is dated April 10, 2020 and sets out the Employer's basis for terminating the grievor's employment as follows:

> We have completed our investigation into the events of March 19, 2020. It is now clear you falsely reported to have been notified by an airline, you were in close contact with someone confirmed to have COVID-19.
>
> You claimed this happened on your flight home from vacation and needed to quarantine for 14 days. Your egregious actions and dishonesty caused a significant disruption to the leadership group and the business and could have resulted in mass panic amongst your co-workers and your community. You chose to use the fear and uncertainty caused by the COVID-19 pandemic to deceive your employer and extend your vacation.
>
> This choice has made it impossible to restore the employment relationship. Therefore, effective immediately, your employment is terminated for just cause.

The parties submitted an agreed statement of facts which is reproduced below:

1. The Employer and the Union are parties to a collective agreement which expires in 2021 ("Collective Agreement"). (A copy of the Collective Agreement is included at Tab 1.)

2. The Employer, a division of West Fraser Mills, operates a pulp and paper mill located in Quesnel, British Columbia.

3. The Union is the exclusive bargaining agent for employees employed at the Employer's mill.

4. Kevin Lawrence (the "Grievor") is 33 years old and was employed by the Employer from March 14, 2011 until his employment was terminated on April 10, 2020. (A copy of the termination letter is included at Tab 2.)

5. At the time of his termination, he was employed in the position of Field Operator 1, a position which he had held since October 2016.

6. The Grievor's seniority date is March 14, 2011: he was a nine (9) year employee at the time of his termination.
7. The parties agree that the Grievor has a discipline free record.

8. The Grievor took a pre-scheduled vacation taking two tours off from work in March 2020. His last day of work was February 29, 2020. The Grievor was scheduled to be off work until his shift on Saturday, March 21, 2020.

9. On March 18, 2020 the Province of BC declared a state of emergency to support the COVID-19 response.

<u>Telephone Calls between the Grievor and Luke Johnson: March 19, 2020</u>

10. In the afternoon of Thursday March 19, 2020, the Grievor phoned Luke Johnson, Fiberline Shift Supervisor. The phone calls between the Grievor and Luke Johnson are as described in Mr. Johnson's record dated March 20, 2020 (a copy of which is included at Tab 3.)

<u>Andrew Generous' communication with Central Mountain Air flight: March 19, 2020</u>

11. On the afternoon of March 19, 2020, Andrew Generous searched CMA's website and found no advisory regarding a passenger on board one of their flights with COVID-19.

12. Mr. Generous searched for a method to contact CMA and found only an email address for customer care. Mr. Generous emailed customer care at 3:11pm.

13. CMA responded by email at 3:34pm on March 19, 2020, indicating that to their knowledge no passengers had been exposed to COVID-19 on one of their flights and that no email advisory had gone out. CMA stated they would inquire further and verify with the company the following day. (A copy of emails between Andrew Generous and CMA on March 19th and 20th are included at Tab 4.)

Telephone call from the Grievor to Luke Johnson: March 20th

14. On the morning of Friday, March 20, 2020, the Grievor called Luke Johnson. The phone call between the Grievor and Luke Johnson at that time is as described in Mr. Johnson's record dated March 20, 2020 (a copy of which is included at Tab 3).

Telephone call from the Grievor to Rachel Stefan (HR): March 20th

15. The Grievor called Rachel Stefan in HR at around 8:50am on March 20th. [*There are disputes between the evidence of Rachel Stefan and the Grievor as to some of the discussion during this call so further evidence about what was said during this call will be provide through oral evidence.*]

16. The Grievor said he had been told to call her.

17. The Grievor advised Ms. Stefan that he had recently been on a flight that had a passenger infected with COVID-19 and that all passengers 3 rows ahead and 3 rows behind need to self quarantine due to being exposed and that it was also recommended everyone on the flight go into self quarantine. He advised Ms. Stefan that this information had been emailed to him by CMA.

18. Ms. Stefan asked the Grievor what else the email said. The Grievor responded that he was not sure because he had deleted the email. When asked why he would delete that important of an email, the Grievor said that it really wasn't that important to him and that he didn't think he needed to keep it.

19. During this call, the Grievor emphasized three or four times that the quarantine his doctor and 811 directed him to do was different than the flight quarantine.

The Grievor asked for Weekly Indemnity paperwork to be emailed to him. Ms. Stefan took down the Grievor's email address and said she would email him the paperwork. (A copy of Ms. Stefan's account of her phone call with the Grievor is included at Tab 5).

20. Ms. Stefan emailed the Weekly Indemnity forms to the Grievor subsequent to the call with the Grievor. The Grievor did not apply for Weekly Indemnity relating to this absence, but he intended to do so.

Follow-up Email from Central Mountain Air: March 20th

21. At 8:50am on March 20, 2010, CMA sent Mr. Generous a follow up email confirming that no email had been sent out and confirming that CMA had received no reports of any of their passengers or staff confirmed with COVID-19. (Tab 4)

Telephone call from Dan Wilson to Grievor on March 20, 2020

22. At approximately 10:45am on March 20, 2020, Dan Wilson tried to contact the Grievor by calling his cell phone. There was no answer and Mr. Wilson left a message stating that Mr. Wilson had some questions for the Grievor and that he needed to call him back that day so they could talk.

23. At approximately 12:36pm the Grievor called Mr. Wilson back.

24. Mr. Wilson explained that he had some questions about the current situation.

25. During the call, the Grievor confirmed he had called the provincial COVID-19 hotline [Employer: *that morning*] [Union: *no time frame was given for the 811 call*] and they advised him to self-quarantine for 14 days. He said that he then called his doctor's office and was advised by them to quarantine as well.

26. When asked if he had spoken to his doctor, the Grievor said he had just spoken to the reception desk.

27. Mr. Wilson explained his concern that the Grievor said he had deleted the airline's email, which did not make sense. The Grievor was asked to contact the airline to have them re-send the email to him.

28. The Grievor told Mr. Wilson he had contacted Ben Reuther (union representative) the night before (night of March 19th) to let him know what was happening. He said that Mr. Reuther told him he did not have to supply the company with any information; that this was a government approved program and he was good to go.

29. Mr. Wilson said that the company still wanted to see the email from the airline. The Grievor said if it was going to be a problem, he would try and get the email. Mr. Wilson confirmed there may be a problem if he cannot provide the email.

30. The Grievor then said he would try and call the airline.

31. At 12:52pm the Grievor called Mr. Wilson back. He told Mr. Wilson that he was "really freaking out now". He indicated that he had called the airline and they said they did not know what he was talking about.

32. Mr. Wilson asked if he was sure it was CMA, to which the Grievor replied "yes". Mr. Wilson commented that it did not make sense.

33. Mr. Wilson told the Grievor the Employer would discuss the situation and get back to him. (A copy of Mr. Wilson's notes regarding these discussions is included at Tab 6.)

34. Andrew Generous prepared a form of chronology as part of the Employer's review of the unfolding events relating to the Grievor's absence from work, a copy of which is included at Tab 7 for the purposes of establishing a chronology.[*The Union does not agree that the chronology is being accepted for the truth of its contents*].

<u>Doctor's Note Dated March 23, 2020</u>

35. On Monday, March 23, 2020, the Grievor obtained a doctor's note of same date, which stated "*Due to medical illness, he has been advised to be off work for 14 days*". The doctor's note was signed by Dr. Pieter H. Slabbert. (A copy of the doctor's note is included at Tab 8.)

36. The Grievor provided the doctor's note to the Union on April 3, 2020.

37. The doctor's note was emailed to Ms. Stefan by Glen Barker (union) just prior to the investigative meeting on April 3, 2020. The Employer was not furnished with the doctor's note prior to that time.

March 23 West Fraser Update Notice

38. On March 23, 2020 at 3pm West Fraser issued a COVID-19 update and information notice (the "Update Notice") through its President and CEO, Ray Ferris.

39. The Update Notice advised that West Fraser would continue to follow the guidance from local Health Authorities and take steps to keep the workplace safe.

40. The Update Notice stated that everyone should ensure they practice good hygiene, stay home when sick, and maintain a safe physical distance. (The Update Notice is included at Tab 9)

April 3, 2020 Communication

41. On April 3, 2020 Cariboo Pulp and Paper and West Fraser sent out an email to employees and staff titled COVID-19 Assessment and Expectations. The email stated that Cariboo Pulp is considered an essential service by the BC Government, however, there were precautions that employers were required to follow to minimize the risk of COVID-19 transmission and illness.

42. The email further stated that anyone with COVID-19 like symptoms, such as sore throat, fever, sneezing or coughing, must self-isolate at home for a minimum of 10 days from onset of symptoms, until their symptoms have completely resolved. (The April 3, 2020 Communication is included at Tab 10)

First Investigative Meeting: April 3, 2020

43. An investigative meeting into the Grievor's absence took place on Friday, April 3, 2020 at 1:30pm. In attendance were the Grievor and his union representative Glen Barker, as well as Andrew Generous, Rachel Stefan and Dan Wilson.

Follow-up Investigative Meeting: April 8, 2020

44. The Employer arranged for a follow up meeting with the Grievor to take place on April 8, 2020 at 2pm, in order to ask some additional questions.

45. In attendance at the meeting were the Grievor and his union representative, Glen Barker, and Andrew Generous, Rachel Stefan and Dan Wilson.

Termination of Employment: April 10, 2020

46. The Grievor's employment was terminated in a meeting with [him] on April 10, 2020 held at the mill with the following persons in attendance: Bruce Eby, Dan Wilson, Rachel Stefan, the Grievor and Glen Barker.

47. During the meeting the Grievor was given a termination letter dated April 10, 2020 signed by Bruce Eby, Genera[l] Manager of the mill. (Tab 2.)

Clinical Records

48. Clinical Records were produced pursuant to a request from Arbitrator Ready during a conference call. Dr. Slabbert had been summonsed to testify at the hearing and the grievor's clinical records are included with a copy of the Summon[s] at Tab 11. The parties agree that the clinical records are admissible as evidence of what the Grievor told his doctor (and the other medical professionals) and of the plan, assessment, observations and any medication prescribed by the doctor (and other medical professionals).

The grievor testified at the hearing that he went on vacation between March 2 and March 17, 2020, taking a flight from Prince George, British Columbia to Edmonton, Alberta on March 2, and from Edmonton, Alberta to Kelowna, British Columbia on or around March 12, 2020. The grievor's evidence was that he visited with more than a dozen people while on this trip – mostly friends with whom the grievor played online video games. The grievor testified he attended many public places while on vacation including a go-kart track and arcades, and that he stayed at several different people's residences

during this time. The grievor's evidence was that he returned home on March 17, 2020 after being prevented from boarding his March 16, 2020 flight because airport COVID-19 precautions meant he missed his flight.

The grievor was scheduled to return to work on March 21, 2020. His rotation meant he was on early morning shifts on March 21 and 22, 2020 followed by afternoon shifts starting on March 23, 2020. However, the grievor's evidence was that he "panicked" upon returning to Quesnel in the midst of the COVID-19 pandemic and was "terrified" to return to work. The grievor's evidence was that the anxiety he was experiencing made it difficult for him to sleep and he felt unsafe to attend work as scheduled on March 21 and 22, 2020 due to sleep deprivation. According to the grievor, he has suffered from anxiety issues for the past 10 years and this condition got worse during the COVID-19 pandemic. The grievor also testified he was fearful to return to work because he worried he might infect his co-worker Nate with COVID-19 and that Nate might then infect his elderly father with whom he lived.

The grievor's evidence was that he planned to tell his Employer he was unable to work those days but that he "panicked" when Fiberline Manager Luke Johnson answered the phone on the afternoon of March 19, 2020. According to the grievor, on the spur of the moment, he decided to repeat to Mr. Johnson a story he had heard on the news about passengers who had been required to quarantine after being on a flight with a COVID-19 positive passenger. According to the grievor's evidence, he and Mr. Johnson had been childhood friends, making the grievor embarrassed to admit to Mr. Johnson that he was having mental health issues that prevented him from attending work. The grievor therefore told Mr. Johnson he had received an email from Central Mountain Air ("CMA") advising that there had been a COVID-19-infected passenger on a flight he'd taken on March 8, 2020 and that all passengers on the flight were being advised to quarantine for fourteen days. The grievor told Mr. Johnson he did not have any symptoms and that he was

fine to attend work if required. Mr. Johnson advised that he should complete the fourteen-day waiting period as advised by the airline. Mr. Johnson and the grievor spoke at least one other time on March 19, 2020 at which time Mr. Johnson asked the grievor to provide a copy of the email he received from CMA. The grievor told Mr. Johnson that he had deleted the email, and that his email settings meant that his trash folder automatically deleted after twenty-four hours.

The grievor's evidence was that he landed on the March 8, 2020 date by looking at his colour-coded work calendar while on the phone with Mr. Johnson and calculating that in order for him to end quarantine on March 23, 2020 – when he was scheduled to work afternoon shifts and felt he would be safe to return to work – he would need to have flown on March 8, 2020. At the hearing, the grievor testified he did not actually fly on March 8, 2020.

The grievor's evidence was that he was not experiencing any COVID-19-like symptoms when he spoke to Mr. Johnson the first time on March 19, 2020. However, he testified that "within an hour or two" of speaking to Mr. Johnson, he began to develop symptoms. Under cross-examination, the grievor stated he may have had a sore throat by the time he spoke with Luke Johnson at or around 3:19 p.m., although he agrees he did not tell Mr. Johnson this at this time, nor at any other point on March 19, 2020. The grievor denied that he knew from his conversations with Mr. Johnson that the Employer questioned the veracity of his story about receiving the email. His evidence was that he did not think the Employer would press the issue any further.

According to the grievor's evidence, he attempted to contact his friend and co-worker, "Ron H" to get contact information for Union President Glen Barker or Union 1st Vice-President Ben Ruether. The grievor testified he wanted this information because he knew that one of them was married to a nurse with Northern Health. The evidence indicates he attempted to contact Ron H at

1:24 p.m. and 3:31 p.m. on March 19, and that Ron returned his call at 4:30 p.m. the same day. The grievor's cell phone records reveal the grievor also spoke with Ron on March 18, 2020. Under cross-examination, the grievor was asked about what he told his friend Ron during their discussions. The grievor's evidence was that he told Ron the same story that he told the Employer about being on a plane with a COVID-19 positive individual. Under cross-examination, the grievor could not recall whether he told Ron this story on March 18 or 19. The grievor also at some point told Ron he had developed symptoms, hence his request for the Union contact info.

The evidence establishes the grievor contacted Mr. Ruether at 4:56 p.m. on March 19, 2020, at which time he repeated the same story to Mr. Ruether about being exposed to a COVID-19 infected passenger on March 8, 2020. The grievor also told Mr. Ruether that he had begun experiencing symptoms consistent with COVID-19. The grievor's evidence was that Mr. Ruether advised him to contact the provincial COVID-19 hotline at 8-1-1.

The grievor's cell phone records reveal that he contacted the 8-1-1 hotline at 5:50 p.m. the same day. His evidence was that he told the nurse with whom he spoke that he had a cough and a sore throat, and that the nurse told him that his symptoms could be COVID-19 or just a cold or flu. The grievor testified he asked the nurse if he could be tested for COVID-19, but was put through a series of questions and told he did not have any significant risk factors that would warrant testing, and that he should just stay home unless his symptoms became life-threatening.

The grievor's cell phone records show he attempted to contact his doctor's office at 8:20 p.m. the same night. When asked under cross-examination why he attempted to contact his doctor's office so far outside of normal operating hours, the grievor testified he was unaware of the time when making this call. His evidence was that the voicemail for the doctor's office had

a pre-recorded message advising that the office was not seeing patients in person unless absolutely necessary and patients with cold and flu like symptoms should self-isolate.

As noted in the Agreed Statement of Facts submitted by the parties, the grievor contacted Mr. Johnson again the next morning, Friday, March 20, 2020. Mr. Johnson testified the grievor told him he had "woken up" with symptoms consistent with COVID-19. The grievor also told him that he had been advised by 8-1-1 that he should quarantine for fourteen days. The evidence is that Mr. Johnson advised the grievor that he should contact Human Resources Manager Rachel Stefan to obtain the application forms for the weekly indemnity benefit.

The grievor subsequently phoned Ms. Stefan at 8:50 a.m. that morning, March 20, 2020. As indicated in the Agreed Statement of Facts, there is conflicting evidence about the conversation that took place during this phone call. According to Ms. Stefan's evidence, the grievor told her he woke up with symptoms and that he had spoken with his doctor that morning. Ms. Stefan testified the grievor told her he had been advised by both his doctor and the 8-1-1 hotline that he should quarantine for fourteen days due to the onset of symptoms consistent with COVID-19. According to Ms. Stefan's evidence, she found this information suspicious because she is a patient of the same doctor's office as the grievor and knew it did not open before 9:00 a.m.

The grievor denies telling Ms. Stefan that he "woke up" with symptoms, noting in his evidence that his onset of symptoms began around 4 p.m. the previous day. The grievor's evidence was that he thought "he was pretty clear" with Ms. Stefan that he "only talked to reception" at his doctor's office during their conversation on March 20, 2020. With respect to the discrepancy over when the grievor contacted the doctor's office, the grievor noted he was "distraught" and "sleep-deprived" at the time of this call and may have been

mistaken about the date of that call. The grievor testified he was provided an application for weekly indemnity by Ms. Stefan and was told he should scan and send the forms to the office because the office was not accepting paper forms at that time due to the pandemic. The grievor confirmed in his evidence that he planned to submit an application for weekly indemnity but that he did not have a scanner and did not think to send a photograph using his cell phone. With respect to taking a photo with his cell phone, the grievor testified that he agreed this could be done although he was "not good" with technology.

The grievor also spoke with Department Manager Dan Wilson on March 20, 2020 at 12:36 p.m. The grievor told Mr. Wilson essentially the same information he had given to Mr. Johnson and Ms. Stefan about being advised by both the 8-1-1 hotline and his doctor's office to self-quarantine. The evidence is that the grievor told Mr. Wilson he would contact CMA to follow-up on the email he claimed to have received regarding exposure to a COVID-19 positive passenger. The evidence reveals the grievor called Mr. Wilson back less than twenty minutes later and told him he was "freaking out" because the airline did not know what he was talking about. The grievor told Mr. Wilson he could not remember the name of the contact person from the airline because he did not think the email was important at the time he received it. The grievor confirmed in his evidence that he did not, in fact, contact anyone from CMA before calling Mr. Wilson and fabricated a story that he had spoken to someone at CMA, and they could not confirm the email he had told his Employer about had been sent to passengers.

The evidence establishes that the grievor attended a telehealth appointment with his family doctor, Dr. Slabbert, on March 23, 2020. Dr. Slabbert's notes indicate the grievor told him at that time that he had been "struggling with some cold and flu like symptoms". The medical records indicate the grievor was prescribed an inhaler and told by Dr. Slabbert to self-isolate for fourteen days from March 20, 2020. At the hearing, the grievor

testified that he had also told Dr. Slabbert that he was having trouble breathing, had pains in his chest, and was “shivering and sweating”, although these additional details are not recorded in Dr. Slabbert’s notes.

The grievor testified he followed his doctor’s advice and self-isolated in his basement until April 3, 2020. His evidence was that he did not leave the house during this time, and that his dad filled out the prescription for the inhaler and left it hanging on the grievor’s door handle. The grievor’s evidence at the hearing was that he was sicker than he had ever been in his life and that he barely ate throughout the fourteen-day isolation period. Under cross-examination, the grievor explained that he had a fever “on and off” for approximately eight days. When asked why he did not seek further medical attention, the grievor replied that his symptoms did not get any worse during this period. The grievor also explained that his breathing problems were of such a degree that he was having trouble speaking to people on the phone.

According to the grievor, his first trip out of the house was to attend the April 3, 2020 investigation meeting with the Employer. The grievor testified that at this April 3, 2020 meeting, he maintained his story about receiving an email from CMA, once again going through the fabricated sequence of events from receiving and deleting the email to contacting the airline and being unable to verify the email was sent. At one point in the meeting, the Employer put to the grievor that the whole story sounded fabricated; however, the grievor remained steadfast that he had received this email and had inadvertently permanently deleted it.

At the hearing, the grievor testified that he maintained his story during this April 3, 2020 meeting out of “stupidity” and panic, and because he thought he had no choice but to continue with the lie. Incidentally, at some point during this meeting, the grievor denied having ever been on the Employer’s attendance management program. At the hearing, the Employer

sought to impugn the grievor's credibility on this point by introducing into evidence two emails between Ms. Stefan and the grievor's supervisors, which indicate they had spoken to the grievor about his attendance in May, 2019 and November, 2019. Neither supervisor was called as a witness in this proceeding to confirm the accuracy of their emailed statements.

The Employer scheduled a second investigatory meeting with the grievor for April 8, 2020. In the evening of April 7, 2020, the grievor telephoned Mr. Barker, Union representative, to confess that he had fabricated the whole story about being exposed to a passenger with COVID-19 and being advised to quarantine by the airline. The grievor testified he decided to come clean to Mr. Barker because he felt guilty about lying. The evidence is that the grievor apologized to Mr. Barker for making up the story.

The following day, on April 8, 2020, at the commencement of the second investigatory meeting, Mr. Barker announced to the Employer representatives present that the grievor had something to say. The evidence is conflicting about whether the grievor apologized during this meeting. According to both the grievor's and Mr. Barker's evidence, the grievor apologized to the Employer for lying and then went on to explain why he had fabricated the story about the email. Both Mr. Barker and the grievor testified that the grievor apologized twice in this meeting – the second apology being given at the end of the meeting. However, this evidence was contradicted by Ms. Stefan, who testified she never heard the grievor apologize during this meeting. Ms. Stefan's notes taken during the meeting do not record an apology. Her evidence was that she did her best to take as close to verbatim notes as possible, recording "as much as she could". Mr. Barker's notes – also taken during the meeting – are far sparser than Ms. Stefan's; however, his notes do record the grievor as having apologized.

There was also a discrepancy in the evidence about whether the grievor explained at this April 8, 2020 meeting that the reason he had made up the story was that he was embarrassed to tell Mr. Johnson about his mental health issues. The grievor and Mr. Barker both testified that he did; however, Ms. Stefan's evidence was that the grievor did not advance this explanation until the hearing. All witnesses confirmed the grievor was very emotional during this meeting and was crying throughout.

There is also a conflict in the evidence over whether the grievor apologized for his misconduct at the termination meeting held on April 10, 2020. Mr. Barker's evidence was that, although he did not record the grievor's apology in his notes from the meeting, the grievor did apologize at this meeting. According to Mr. Barker, General Manager Bruce Eby "berated" the grievor during this meeting. Ms. Stefan was steadfast in her evidence that the grievor did not issue an apology until he submitted a written apology dated May 13, 2020. Mr. Eby similarly did not recall the grievor apologizing during this meeting.

Mr. Eby testified at the hearing about how he came to the decision to terminate the grievor's employment. His evidence was that he considered the grievor's nine year, discipline-free service. However, in his view, the grievor's misconduct had irreparably broken the employment relationship. Especially egregious, according to Mr. Eby, was the fact that the grievor had used the pandemic for personal gain to get a few extra days of vacation. According to Mr. Eby's evidence, other employees were working hard to keep the mill operational while the grievor was exploiting COVID-19 to get extra vacation days.

Following his dismissal, the grievor sought assistance through the Employee and Family Assistance Program (EFAP). Through this program, the grievor consulted with a Dr. Tahmasbi, whose notes indicate the grievor told him he had been experiencing anxiety and depression for years but that it had

been worse lately. The grievor testified that he also sought out the mental health services team through the hospital, and is currently waitlisted for a program called “Changeways”. The grievor also submitted a written apology to the Employer dated May 13, 2020 wherein he acknowledged he had made “an awful mistake” by deceiving the Employer about why he was unable to attend work on March 21 and 22, 2020, and offering his “sincere apologies” for his actions. The grievor’s letter stated he had learned a “valuable lesson” and would not make a mistake like this ever again.

POSITIONS OF THE PARTIES

On behalf of the Employer, Ms. Vellins argues the Employer had just cause to terminate the grievor’s employment. In the Employer’s submission, the grievor concocted his story about the email to get a few extra days off work following his vacation. Indeed, Ms. Vellins submits, the grievor conveniently fabricated the March 8, 2020 flight date so that his quarantine would end on Monday, March 23 – giving him two additional days of vacation over the weekend, and avoiding his two early morning shifts.

In Ms. Vellins’ submission, the grievor’s actions cannot be characterized as spur of the moment. In the Employer’s submission, the grievor told a pre-meditated lie which he maintained from March 19, 2020 until April 8, 2020 – when he finally came clean about fabricating the story about receiving an email from an airline advising him to self-isolate. Ms. Vellins observes that the grievor lied to a total of five managers throughout the period he persisted with this lie.

According to the Employer, the grievor persisted in piling on additional lies, including that his email account deleted emails in his trash folder automatically after twenty-four hours. The Employer notes the grievor continued his pattern of dishonest behaviour by providing details about this

fake flight such as that three rows ahead and three rows behind were required to quarantine. She notes the Employer only learned at the arbitration that the grievor never actually took a flight on March 8 – yet another part of his story conveniently manufactured to support his desire to extend his vacation. Ms. Vellins submits the grievor's evidence is not credible, arguing his denial at the April 3, 2020 meeting about never having been on the attendance management program supports this finding. According to Ms. Vellins, the fact the grievor was on this program would have clearly been known to him and his denial is yet a further example of dishonesty.

The Employer asserts the grievor was also lying when he told the Employer, his doctor, and his Union, he came down with symptoms consistent with a COVID-19 diagnosis immediately following his lie about the airline email. In Ms. Vellins' submission, the timing of the grievor's claim that he came down with symptoms is highly suspect. Indeed, the Employer argues that once the grievor knew the "jig was up" on his story about the COVID-19 infected passenger, he concocted a further lie about developing symptoms to provide an alternate basis to get time off work. Ms. Vellins concedes it would be impossible for the Employer to definitively prove the grievor was asymptomatic throughout the time he claimed to be experiencing COVID-19 like symptoms. However, she asserts the standard of proof to be met in this case is merely to establish it is "highly improbable" when all the surrounding circumstances are considered that the grievor never developed these symptoms as he claimed. In her submission, this threshold has been met in this case.

In support of this position, the Employer points to the grievor's inconsistent stories about when he contacted the 8-1-1 hotline and his doctor. The Employer relies on the doctor's records from the grievor's March 23 visit, arguing these records undermine the grievor's evidence that he was sicker than he had ever been in his whole life during this period of self-isolation. The Employer takes issue with the Union's claim that Dr. Slabbert's notation that

the grievor was suffering “cold and flu” symptoms was shorthand for specific symptoms the grievor testified he told the doctor he was experiencing. According to the Employer, the grievor’s testimony at the hearing about the severity of his symptoms was nothing more than a transparent attempt to evoke sympathy. The Employer notes the grievor never sought medical attention after March 23, 2020 for symptoms, despite his claim he was sicker than he had ever been in his life. Ms. Vellins argues that any advice given to the grievor through 8-1-1 that he must self-isolate was based on misleading information the grievor provided during his call and is therefore of no assistance in justifying the grievor’s failure to attend work for the fourteen day quarantine period.

Regarding the grievor’s claim that he suffered anxiety, the Employer asserts there is no medical evidence to corroborate that the grievor had anxiety at the relevant time. The clinical records in evidence, Ms. Vellins asserts, merely demonstrate the grievor told a doctor he has anxiety after he was discharged from his employment. The Employer states there is no medical evidence that any anxiety from which the grievor may suffer caused him to engage in the series of lies that led to his dismissal. The Employer questions the authenticity of the grievor’s evidence regarding his anxiety, observing that the grievor never told the Employer he made up the lie about receiving an email to cover up embarrassment he felt admitting that he from suffered anxiety. Indeed, the first time the Employer heard this claim, it asserts, was at the hearing. The Employer submits that it would be of great concern if it were determined the grievor’s conduct was caused by his anxiety given that there was no evidence tendered by the Union that the grievor is under treatment for this condition.

The Employer takes the position that the employment relationship has been irreparably harmed due to the extent and longevity of the grievor’s lies. In its submission, little weight if any should be given to the grievor’s confession in

this case. This is so, Ms. Vellins argues, because it was clear the Employer already knew the grievor was lying about the email at the time he tendered this partial confession, and because the grievor was coached by the Union to come clean. The Employer points to the evidence of Ms. Stefan and Mr. Eby that the grievor did not apologize in either of the meetings with the Employer. In the Employer's submission, if any apology was given at these meetings, it was very understated. The Employer accordingly asserts the termination ought to be upheld.

In support of its submission, the Employer relies on the following authorities: *Wm. Scott & Co. (Re)*, [1976] B.C.L.R.B.D. No. 98; *Surrey (City) v. Canadian Union of Public Employees, Local 402 (Saliken Grievance)*, [2007) B.C.C.A.A.A. No. 8; *McKinley v. BC Tel*, [2001] S.C.J. No. 40; *United Steel Workers, Local 7884 v. Tech Coal Ltd. (Blain Grievance)*, [2015] B.C.C.A.A.A. No. 64; *Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union (EA Grievance)*, [2003] B.C.C.A.A.A. No. 161; *Quality Meat Packers Ltd. v. United Food Commercial Workers International Union, Local 743*, [1998] O.L.A.A. No. 5; *Western Forest Products Inc. v. United Steelworkers, Local 1-1937 (Bell Grievance)*, [2018] B.C.C.A.A.A. No. 85; *Protrans BC Operations Ltd. v. British Columbia Government and Service Employees' Union (Perron Grievance*), [2012) B.C.C.A.A.A. No. 141; *Sheridan College Institute of Technology and Advanced Learning v. Ontario Public Service Employees Union (Rowe Grievance)*, [2010] O.L.A.A. No. 632; *Chatfield v. Deputy Head (Correctional Service Canada)*, 2017 LNPSLREB 2; and *Stewart v. Elk Valley Coal Corp.*, [2017]1 S.C.R. 591.

On behalf of the Union, Ms. Thibodeau argues termination of the grievor's employment was excessive in the circumstances of this case. While the Union concedes the grievor has given just and reasonable cause for some discipline, it submits the grievor's dishonesty in this case was less serious than

in other cases where terminations for dishonesty have been upheld because the dishonesty in this case was not premeditated nor was it continued at arbitration.

Indeed, Ms. Thibodeau argues the grievor's lie constituted "a momentary and emotional aberration" and was the result of the grievor's heightened anxiety during the COVID-19 pandemic. The Union points to the grievor's evidence that he "panicked" when Mr. Johnson answered the phone on March 19, 2020 and that he spontaneously concocted his story about receiving an email from the airline in a moment of panic. According to the Union, the grievor's anxiety over COVID-19 "clouded his thinking" and "influenced an impulsive decision to lie".

The Union maintains that the grievor did develop COVID-19 like symptoms and that his evidence was credible. On this, Ms. Thibodeau notes the grievor was not dishonest when he denied he was under the Employer's attendance management program in the April 3, 2020 meeting. In the Union's submission, the evidence is insufficient to establish that the grievor was made aware of the fact he was on the program when he was previously spoken to by his supervisors regarding his attendance. The Union notes the Employer did not follow its own attendance management program guidelines when it failed to issue a letter of expectation to the grievor as a follow-up to the November 2019 discussion. The Union states this oversight by the Employer undermines its position that the grievor was aware he was on the program. The Union submits it would be inherently unfair for the Employer to be allowed to substantiate its disciplinary penalty on the basis of past incidents for which the grievor was not disciplined.

According to the Union, the Employer was obligated to consider more moderate discipline in this case. The Union points to the grievor's nine-year discipline-free record, noting the grievor has no past practice of dishonesty.

Ms. Thibodeau argues that the Employer improperly sought to make an example of the grievor so as to discourage other employees from using the COVID-19 pandemic to get time off work. The Union submits that can be gleaned from Mr. Eby's accusation that the grievor used the pandemic to extend his vacation.

In the Union's submission, the employment relationship is capable of restoration. Ms. Thibodeau advances that the grievor expressed remorse for his actions and apologized both in person and in writing. According to the Union, the grievor understands the seriousness of his misconduct. Ms. Thibodeau asserts there is no evidence in this case that lesser discipline would not have been effective in correcting the grievor's behaviour. The Union therefore requests the grievor be reinstated to his former employment and defers on the appropriate quantum of discipline to be substituted for the dismissal.

The Union relies upon the following cases in support of its position: *ADM Agri-Industries Ltd. v. C.A.W., Local 195*, 1991 CarswellOnt 6477, 22 L.A.C. (4th) 254; *B.C. Rail v. C.U.T.E. Local 6*, 1996 CarswellBC 3166, 44 C.L.A.S. 17; *British Columbia Hydro & Power Authority v. I.B.E.W., Local 258*, 2001 CarswellBC 3356, [2001] B.C.C.A.A.A. No. 50. 63; *British Columbia Transit v. I.C.T.U., Local 1*, 1993 CarswellBC 3108, [1993] B.C.C.A.A.A. No. 37; *Caesars Windsor and Unifor, Local 444 (Desbiens), Re*, 2016 CarswellOnt 6596, 127 C.L.A.S. 33; *Deere-Hitachi Specialty Products and IUOE, Local 115, Re*, 2018 CarswellBC 822, 135 C.L.A.S. 44; *Molsen Brewery B.C. Ltd. v. B.F.C.S.D., Local 300*, 1985 CarswellBC 4255, 25 L.A.C. (3d) 82; *Overwaitea Foods/Save-on-Foods British Columbia v. U.F.C.W., Local 1518*, 2011 CarswellBC 3892, [2011] B.C.C.A.A.A.; *Simon Fraser University and A.U.C.E., Loc. 2, Re*, (1990) 17 L.A.C. (4th); *U.F.C.W., Local 1977 v. Zehrs Markets*, 1996 CarswellOnt 5430, [1997] L.V.I 2814-1; and *Vancouver (City) v. V.M.R.E.U.*, 1983 CarswellBC 2387.

DECISION

Arbitrators determining discharge grievances apply a three part inquiry as was set out by the British Columbia Labour Relations Board in *Wm. Scott,* [1976] B.C.L.R.B.D. No. 98. The first question is whether the grievor's conduct gave rise to just cause for the imposition of some form of discipline. The second question is whether the discharge imposed was excessive. Third, if discharge was excessive, what disciplinary penalty should be substituted as just and equitable?

In the present case, the Union rightly concedes that the first *Wm. Scott, supra*, question must be answered affirmatively. The grievor concocted a story upon his return from vacation and compounded his dishonest conduct by repeating the falsehoods to several members of management as well as to his Union representative. Indeed, the grievor admits he lied to the Employer about being exposed to a passenger with COVID-19 and about other details related to this fabricated story. In the present circumstances the grievor may have been justified over his concern about the COVID-19 virus, but he was not justified in lying about it. It is therefore undisputed that some measure of discipline is warranted for the grievor's dishonesty.

With respect to whether the discipline is excessive, I observe the grievor's conduct in this case cannot properly be characterized as "spur of the moment". Even if I accepted that the grievor spontaneously made up the story about being exposed to a COVID-19 positive individual while he was on the phone with Mr. Johnson on March19, 2020, the fact is he maintained this lie throughout a protracted period, and made up additional lies to bolster his initial lie. These additional lies included that his email permanently deleted emails that had been moved to the trash folder after twenty-four hours and that he had contacted the airline and been told they did not know anything

about the email he told the Employer he had received. The extent and duration of the grievor's lies simply cannot be said to be a momentary aberration.

With respect to the grievor's confession, I find that while the grievor did eventually admit to the Employer that his email story had been a hoax, he did not come clean in respect of all aspects of his COVID-19 story. Indeed, when the evidence is considered in its totality, I find it highly improbable the grievor ever developed COVID-19 like symptoms as he claims to have.

The grievor's credibility is highly questionable given the numerous inconsistencies throughout his evidence. These inconsistencies start with his stated reason for calling the Employer on March 19, 2020. According to the grievor's evidence, he was anxious and not sleeping and did not feel safe to attend work for his two early morning shifts following his vacation. Yet, on his phone call with Mr. Johnson, the grievor told Mr. Johnson that although he had been advised by the airline to quarantine, he was okay to come into work if the Employer wanted him to. If the grievor felt it was unsafe for him to attend work on March 21, 2020, why did he tell Mr. Johnson he could come in if needed?

The grievor's use of the concocted March 8, 2020 flight date, in my view, undermines his assertion that the story was spontaneously concocted during a moment of panic. The grievor's email story meant he would only be absent the two morning shifts immediately following his vacation. In other words, the grievor made up a date for a flight with the clear intent to avoid his two morning shifts. If the grievor was truly feeling too scared and anxious to return to work due to the pandemic, and his fear of getting co-workers sick as he alleges, why did he not use the date he took his last flight on his vacation to allow for maximum time off before returning to work? One is left wondering why the grievor went to the effort of crafting a story that resulted in his missing

only the two weekend morning shifts immediately following his vacation, and how he was able to come up with this date spontaneously while panicking.

With respect to the grievor's claim that he developed symptoms of COVID-19 on March 19, 2020, I find there are many inconsistencies in grievor's version of events that call his credibility into question. For instance, on the grievor's evidence – and as established by his cell phone records – the grievor would have had to have developed symptoms in a very short timeframe. The grievor confirmed in his evidence that he spoke with Mr. Johnson at least two times between 2:00 p.m. and 3:19 p.m., and that he did not have any symptoms when he first spoke with Mr. Johnson. The grievor under cross-examination – perhaps recognizing his version of events would mean he would have had to have developed symptoms between 3:19 p.m. and at the very latest, 4:30 p.m. when he asked Ron for the Union contact information – stated that perhaps he had developed a sore throat by the second conversation with Mr. Johnson. However, if the grievor had developed a sore throat by the time he spoke with Mr. Johnson the final time on March 19, 2020, he certainly did not advise Mr. Johnson that he was starting to feel ill.

Even if the grievor had started feeling a sore throat by his later conversation with Mr. Johnson, it still means his symptoms came on very suddenly in light of the grievor's evidence that he had no symptoms during his earlier conversation with Mr. Johnson at 2:10 p.m. Of course, if the grievor had been experiencing symptoms when he first spoke with Mr. Johnson, there would have been no need for him to make up a story, since the grievor could simply have told the Employer he had symptoms consistent with COVID-19 and that he accordingly better stay home for the next fourteen days. That narrative, though, would have meant the grievor missed the next fourteen days of work, whereas his email story resulted in his missing only the two days following his vacation.

The alleged timeline within which the grievor's symptoms developed is highly suspect when one considers that, according to the grievor's evidence, these symptoms developed almost immediately following conversations with the Employer wherein he was asked to provide documentation supporting his story about receiving an email advisory from CMA. Of course, the grievor could not provide the supporting documentation because his story about the email was fabricated. Although the grievor testified he was unaware at this time that the Employer suspected his story was a hoax or that it would pursue this matter any further, I find this evidence not particularly credible given the fact that Mr. Johnson explicitly called the grievor back to elicit more information about the alleged email.

Further, given the grievor's attempts to reach his friend Ron, and the fact that his calls to Ron came before the grievor's calls with Mr. Johnson, the period the grievor claims to have developed symptoms, seemingly overlaps with time wherein he states he did not yet have symptoms. The grievor gave evidence that he was trying to contact his friend Ron to obtain contact information for Mr. Ruether or Mr. Barker because he knew one of them was married to a nurse with Northern Health. Yet, the grievor's cell phone records reveal the grievor spoke to Ron on March 18, and that he attempted to contact him several times on March 19, 2020, including two calls to Ron at 1:24 p.m. that day. Although the grievor testified he could not remember specifically why he called Ron at that time – which would have been before he had started developing symptoms according to his evidence – he also testified that he may have spoken to Ron about receiving the email from the airline on March 18 or March 19, 2020. The grievor's lack of certainty regarding whether he told Ron the story about receiving an email from the airline before or after he told the Employer this story greatly undermines his assertion that the lie was spontaneously concocted out of embarrassment when Mr. Johnson answered the phone. If the lie was spontaneous, clearly he could not have told Ron the same story the day before. Yet, the grievor was confused on this point, as well

as why he was trying to contact Ron on March 19, 2020 prior to developing symptoms.

The many inconsistencies in the grievor's story greatly undermine his credibility generally. For instance, the grievor told the Employer that he had been advised by his doctor's office that he should quarantine for a period of fourteen days. The grievor speculated during his testimony that he must have been confused about the date he contacted his doctor due to being sleep deprived and distraught. Yet, the grievor did not explain in his evidence why he told the Employer he had spoken with his doctor's office when, in actuality, he had merely listened to a recording on the doctor's office's voicemail advising patients to quarantine if they were suffering from flu-like symptoms. Even the grievor's version of this conversation reveals that he misrepresented to Ms. Stefan that he had spoken to someone from the doctor's office when, in fact, all he had done was listen to a pre-recorded message.

I also query why, if the grievor developed symptoms as he claims, he did not contact the airline through which he took a flight from Kelowna, BC to Prince George, BC on March 17, 2020. Given his anxiety about the pandemic, his concerns about making others sick, and his obvious awareness that COVID-19 could be easily transmitted by passengers on airplanes, one would expect the grievor would have reported his illness accordingly. The grievor's evidence on this point was that it "wasn't at the forefront of [his] mind." I find this hard to believe given that he was in the midst of being untruthful to his Employer about this very scenario.

The grievor's evidence about the extent and severity of his symptoms is also at odds with the other evidence in this case. The grievor testified he had never been sicker in his life than during the fourteen-day period he spent self-isolating in his basement. Yet, Dr. Slabbert's notes dated March 23, 2020, record the grievor as reporting that he was suffering a "mild sore throat".

Further, Dr. Slabbert's notes do not reflect many of the symptoms the grievor claims to have told Dr. Slabbert he was experiencing such as difficulty breathing and chest pain. I agree with Employer Counsel that it is highly unlikely a doctor would not record this kind of important information from a patient. More likely, in my view, on a balance of probabilities, is that the grievor never told Dr. Slabbert this information and was embellishing his evidence at the hearing. Further, I note the grievor never sought medical attention after March 23 for these symptoms despite how serious he alleges they were. His evidence was that his symptoms did not get any worse after March 23, 2020. Yet, if he was the "sickest [he] had ever been" when he spoke to Dr. Slabbert as he so claims, again, why don't Dr. Slabbert's notes reflect this? The grievor also never advised the Employer on the extent or degree of his illness.

The grievor testified that the inhaler his father picked up for him during his quarantine period greatly alleviated his symptoms. Certainly, evidence this prescription was filled could have provided support to the notion that the grievor was, in fact, experiencing symptoms during this period. I note the grievor's father could have been called as a witness, or a receipt from the pharmacy provided, to bolster the grievor's evidence that he was actually sick during this period. In the absence of such evidence, and in light of the grievor's lack of credibility and the evidence as a whole, I find the more plausible version of events is that the grievor concocted his story about developing symptoms after recognizing the Employer did not believe his story about the email, and that he needed a "Plan B" to substantiate his absence from work.

The facts of this case render it distinguishable from the facts in *Deere-Hitachi Specialty Products, supra*, relied on by the Union. In that case, the grievor misreported where he sustained an injury – causing the Employer to investigate what it thought was a workplace injury when, in fact, the injury had been sustained while the grievor was in his own vehicle. The grievor did

not submit a claim for workers' compensation benefits, nor did he lie for any other material or pecuniary benefit. The reason for his lie was because he was embarrassed to tell the employer he had dislocated his shoulder through the mere act of tossing his jacket into the backseat of his car. There was no question in that case that the grievor had, in fact, sustained an injury and was unable to attend work as a result. The whole case turned on whether the grievor's dishonesty about where he was injured was of sufficient severity to substantiate the dismissal. The grievor in that case confessed to his dishonesty during the investigation meeting and apologized for his misconduct. His dishonesty, as found by Arbitrator McConchie, was not used to mask an underlying wrong.

Those facts can be contrasted with the facts of this case, where the evidence establishes the grievor's story about developing symptoms was fabricated so that he could obtain additional time off work following his vacation. Although the grievor admitted that he fabricated the email from the airline, he never came clean about his lie that he developed COVID-19-like symptoms immediately following the Employer's request for documentation supporting his email story. Indeed, the grievor maintained this lie right through the arbitration of this matter. While the grievor in the present case did not submit an application for weekly indemnity benefits, I cannot find this fact in any way lessens the severity of his misconduct. On the grievor's own evidence, he fully intended to submit an application. The only reason he didn't was because he knew the Employer did not believe his story about the email by the time he was in a position to submit the forms.

It bears comment that the parties called much evidence about whether or not the grievor lied about being on the attendance management program. Given that the grievor testified he was unaware that he was on the attendance management program, and the Employer's evidence purporting to undermine

the grievor's assertion was hearsay, I cannot find the grievor was dishonest in this regard.

With respect to the Union's claim that the grievor's anxiety is a contextual factor to be considered in this case, I respectfully agree with the Employer that the requisite causal connection between any anxiety the grievor may suffer from and an increased propensity for lying has not been established in this case. While I acknowledge, and accept, that the COVID-19 pandemic has led to an increase in anxiety some people are experiencing, this context does not militate against the seriousness of the grievor's wilful and sustained dishonesty in this case.

I do find, however, that the evidence supports that the grievor apologized at both the April 8, 2020 investigation meeting and the April 10, 2020 termination meeting. I find Mr. Barker's evidence in this regard credible and compelling. I agree with Ms. Vellins, however, that any apologies the grievor offered in these meetings must have been somewhat understated given that Ms. Stefan did not hear them in either meeting, nor did Mr. Eby recall the grievor apologizing in the April 10, 2020 meeting.

Further, I note the sincerity and authenticity of the grievor's apologies is greatly undermined given my finding that the grievor's dishonesty persisted even while on the witness stand. In my view, the grievor's continued dishonesty in this case renders the present matter distinguishable from cases relied on by the Union such as *ADM Agri-Industries Ltd., supra*, and *British Columbia Hydro & Power Authority, supra*, wherein the grievors were contrite and truthful at the hearing. As noted by Arbitrator Burkett in *Great Atlantic & Pacific Company of Canada v. Retail Wholesale Department Store Union, Local 414* (1978) 19 L.A.C. (2d) 139 (cited in *British Columbia Hydro & Power Authority v. I.B.E.W., supra*):

> A grievor who has engaged in some misconduct and who then gives false testimony in respect thereof is in effect telling the arbitrator that he does not acknowledge his wrongdoing. An arbitrator must conclude in these circumstances that the grievor may continue to engage in the misconduct and consider this fact in conjunction with whatever other facts are relevant to the exercise of his discretion.

While I have struggled with the notion that the grievor's behaviour may be capable of modification through the application of corrective discipline as advanced by the Union and have considered his unblemished work record, I simply cannot overlook the fact that he has continued his dishonest conduct right through the arbitration of his grievance. Had that not been the case I may well have accepted the Union's assertion to reinstate the grievor without backpay. However, when all of the circumstances are considered, I find the discipline in this case was not excessive.

Finally, I recognize that employees who exhibit symptoms of COVID-19 have a statutory right to stay home from work. In my view, the evidence establishes that the grievor lied to his Employer, his Union, and medical professionals to get time off work under false pretenses – and that he maintained this lie at arbitration. I find that any direction the grievor received from medical professionals to stay home from work for fourteen days was predicated on false information he provided to them about symptoms he never had. The grievor's sustained and serious dishonesty has irreparably fractured the employment relationship, and the Employer's decision to terminate the grievor's employment was reasonable in the circumstances.

The grievance is dismissed.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 3rd day of July, 2020.

Vincent L. Ready