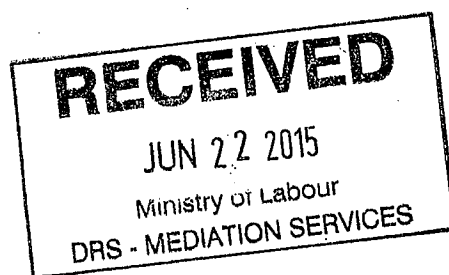


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IN THE MATTER OF AN ARBITRATION

BETWEEN:

CITY OF TORONTO

(the "City" or the "Employer")

AND

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 79

(the "Union" or "Local 79")

AND IN THE MATTER OF THE GRIEVANCES OF A. MISRA
GRIEVANCE NOS. C07-08-8303; C07-10-8432; C09-04-9540; C09-05-9570;
C09-05-9571

SOLE ARBITRATOR:

MAUREEN K. SALTMAN

APPEARANCES

FOR THE CITY:

DARRAGH MEAGHER, COUNSEL

FOR THE UNION:

DOUGLAS J. WRAY, COUNSEL

AWARD

The Grievor in this case, Ajay Misra, who commenced employment with the City in 2000, was employed as a Budget Analyst in the Business Support Unit of the Facilities & Real Estate Division as of the date of discharge on April 23, 2009.

There are five grievances in this case: Grievance No. C07-08-8303 claiming unjust discipline in respect of a two-day suspension issued July 10, 2007 for insubordination in ignoring his Manager's instruction to desist from distributing inappropriate e-mails; Grievance No. C07-10-8432 alleging that the City violated Minutes of Settlement dated November 4, 2005; Grievance No. C09-04-9540 claiming unjust discharge on April 23, 2009; Grievance No. C09-05-9570 respecting sick time; and Grievance No. C09-05-9571 claiming that the City failed in its duty to maintain an harassment and discrimination-free workplace.

By agreement of the parties, these grievances were consolidated and heard together. For the most part, the grievances will be dealt with as discrete matters in the findings. However, as the facts are inextricably intertwined, they may be most accessible to the reader if presented chronologically, as many of the facts apply to multiple grievances.

By way of introduction, it may be helpful to understand the organization of the Division in which the Grievor was employed. To the extent I was able to discern from disparate and conflicting accounts, the following was the organizational structure during the relevant period. It is important to note, however, that nothing whatsoever turns on minor discrepancies (of which there were many) in job titles, chronology, etc., in this introductory section and, unless otherwise noted, throughout the award.

I. Organizational Structure

In November 2000, the Grievor was hired in the temporary service of the City by Cyrus Patel, who was the Manager of the Business Support Unit in the Facilities & Real Estate Division of the Corporate Services Department. As of the date of hire, the Grievor's Supervisor was Angie MacKinnon. Three months earlier, Murtaza Nalwala, who ultimately became the Grievor's Manager, was also hired in the temporary service of the City. The Grievor and Mr. Nalwala were hired as Budget and Accounts Analysts, renamed Budget Analysts as part of harmonization, in the Business Support Unit. Initially, both worked at 500 University Avenue.

In or around November 2001, there was a job call for permanent Budget Analysts. According to the Grievor, the job call process consisted of an interview and a written test. Although Mr. Nalwala was successful on the job

call, the Grievor failed to attain a permanent position as a Budget Analyst, as he did not pass the written test. The Grievor took the opportunity to look at the test, which he understood to have been graded by Darrel Fernandopulle, who ran the competition. When the Grievor expressed doubts as to the fairness of the test, the Director of Facilities Services, Keiko Nakamura, agreed to look into the matter.

At or around the same time as Ms. Nakamura assumed the Director's position and as the job call for permanent Budget Analysts was posted (November or December 2001), the Budget Analysts were moved from 500 University. Some of the Analysts were deployed to Metro Hall; others, to Scarborough Civic Centre, and the Grievor, to the Etobicoke Civic Centre.

The Grievor further testified that Ms. MacKinnon was the Supervisor assigned to the Etobicoke Civic Centre and that he was basically doing her job, which he claimed also to have done when she was the Supervisor at 500 University. The Grievor testified, as well, that in February 2002 (or thereabouts), Ms. MacKinnon retired from the City (although she was retained as a Consultant for a further six to eight months); that upon her retirement, he became a permanent employee of the City with a base position of Budget Analyst and an alternate supervisory rating, at which time he was appointed as Acting Supervisor, Accounting & Administration.

As to the Grievor's evidence that he was basically doing Ms. MacKinnon's job as a Supervisor in Etobicoke, as he had done at 500 University, the Grievor testified in cross-examination that when he was working in Etobicoke, Ms. MacKinnon was his Supervisor for a "very brief period" (which would have been from approximately November 2001 to February 2002); and that he effectively did both the Supervisor's and the Budget Analyst's jobs for that brief period. However, he also testified that Ms. MacKinnon was off work for about six months; that he did her job when she was absent; but that when she was present, she did the supervisory duties and he did the Budget Analyst's job (which contradicts his earlier evidence unless he was referring to 500 University Avenue, as Ms. MacKinnon was his Supervisor in Etobicoke for only about three months and as the Grievor claimed to have done supervisory duties in Etobicoke even when Ms. MacKinnon was in attendance). Subsequently, the Grievor testified, Ms. MacKinnon retired (in February 2002) and became a Consultant, and the Grievor became the Acting Supervisor.

The Grievor was advised at the outset that his appointment as Acting Supervisor would be for a period of one year, and, in fact, his acting appointment in Etobicoke lasted from about February 2002 to February 2003.

Meanwhile, the decision was made to consolidate all of the Budget Analysts to a single unit (the Business Support Unit) in one location. As a result of this decision, in or around February 2003, the Grievor was deployed to the

Business Support Unit in Metro Hall. At that time, the Acting Manager was Darrel Fernandopulle. Shortly thereafter, it would appear, the Manager's position was posted and, within a month or so of being appointed to the position on an acting basis, Mr. Fernandopulle was confirmed in the position.

At or about the same time as the consolidation of all of the Budget Analysts in the Business Support Unit at Metro Hall and Mr. Fernandopulle's appointment as Manager of the Financial Reporting & Expenditure Control Unit (February 2003 or thereabouts), the Grievor's alternate rating was cancelled and his acting supervisory assignment came to an end. As a result, he reverted to his base position of Budget Analyst.

On April 29, 2003, a job call was posted for the position of Supervisor, Finance & Administration who was responsible for the Financial Accounting & Administration Unit in the Facilities & Real Estate Division. Although the Grievor testified in examination-in-chief that he applied for the position but was unsuccessful, as he did not have the required qualifications, he testified in cross-examination that he did not apply for the position because he did not have the qualifications listed in the posting. In any event, on the Grievor's understanding, the position was not filled as a result of the posting.

In or around August 2003¹, Mr. Nalwala was alternate-rated as a Senior Budget Analyst (sometimes referred to as "Senior Analyst") on special assignment in the Strategies Improvement and Innovation Unit at City Hall. It was the Grievor's belief that Mr. Nalwala was appointed as a Senior Analyst, a management position², and also given extra overtime, because he was upset over the Grievor's appointment as Acting Supervisor. In fact, the Grievor testified that he was told by Ms. MacKinnon and by Ms. Nakamura that his appointment as an Acting Supervisor in Etobicoke (in February 2002) had caused a "severe backlash" among the Budget Analysts at Metro Hall and that Mr. Nalwala, for one, was unhappy about the appointment.

When pressed as to the basis for his belief that Mr. Nalwala was appointed to the Senior Analyst position because he was upset that the Grievor had been appointed as an Acting Supervisor, at one point, the Grievor denied having spoken with any of the Budget Analysts, and with Mr. Nalwala, in particular, as Mr. Nalwala was at Metro Hall and the Grievor was in Etobicoke. However, at another point, the Grievor testified that there had been ongoing discussions both *between* him and other staff, and *among* other staff, including

¹ There was contradictory evidence of time frames, dates, etc. of the assignments, appointments referred to in this introductory section, which make the labyrinth of evidence as to the organizational structure more difficult to follow. However, the dates are provided for context for the factual matrix in the five grievances which follow.

² While Senior Budget Analyst was referred to both as a "management" and an "exempt" position, it is clear that the position was outside the bargaining unit. Accordingly, although nothing turns on the matter for purposes of the material issues in this case, the term "management" position will be used in reference to the Senior Budget Analyst position. A similar descriptor will be used in relation to the Budget Coordinator position referred to below.

Ms. MacKinnon and some of the Budget Analysts, in Etobicoke and at Metro Hall. In yet another contradictory statement, the Grievor denied that Ms. Nakamura was party to any of these discussions. In fact, the Grievor testified that the only discussion he had with Ms. Nakamura about Mr. Nalwala was in relation to a posting that came up for the job of Manager of the Financial Reporting & Expenditure Control Unit, wherein Ms. Nakamura suggested that Mr. Nalwala would be unlikely to apply for the posting because he was happy in his Senior Analyst position.

A posting for this position came up twice in the period at issue in this case: once in or around February 2003 when, the Grievor testified, Mr. Fernandopulle was the successful applicant, and again in 2006 when Mr. Nalwala applied for, and was the successful applicant on, the job posting. The Grievor testified that it was the earlier posting he was referring to. Although the posting was not submitted as an exhibit, it would appear that the posting (February 2003) predated Mr. Nalwala's appointment as a Senior Analyst (April 2003) and so, it seems improbable that Ms. Nakamura would have been opining on the likelihood of Mr. Nalwala's applying for a position (Manager, Financial Reporting & Expenditure Control) based on his satisfaction with another position (Senior Analyst) he had not yet assumed. And, as to the later posting, the Senior Analyst position lasted less than a year, until April 2004 (or thereabouts), and so, I find it highly improbable that the Grievor and Ms. Nakamura would have been discussing the likelihood of Mr. Nalwala's applying for a 2006 posting

based on his satisfaction with a temporary position (Senior Analyst) which ended some two years earlier. In any event, by 2006, Ms. Nakamura was no longer in the employ of the City.

As to the assertion that Mr. Nalwala was given extra overtime because he was upset over the Grievor's appointment as an Acting Supervisor, the Grievor testified that when he raised the matter with Ms. MacKinnon, who had retired but was retained for an additional six to eight months as a full-time Consultant, she suggested that it was *possible* that Mr. Nalwala (and Fares Sultan, who had the highest overtime among the Budget Analysts in 2002) were assigned additional overtime to placate them because the Grievor had been appointed as an Acting Supervisor. However, the basis for Ms. MacKinnon's purported knowledge was never established, as there was an acknowledgement that Ms. MacKinnon was not responsible for the assignment of overtime.

In any event, upon completion of the special project as a Senior Analyst at City Hall in April 2004 (or thereabouts), Mr. Nalwala was also deployed to Metro Hall as a Budget Analyst in the Business Support Unit. In or around the same time³, he was appointed as Acting Supervisor, Finance & Administration. In that capacity, he became the Grievor's immediate Supervisor. As with Mr. Nalwala's appointment to the Senior Analyst position, the Grievor testified that it was his belief that Mr. Nalwala was appointed as an Acting

³ This is an example of discrepant dates. The witnesses vacillated between February and August 2004 in discussing this matter.

Supervisor in 2004 because he was upset over the Grievor's appointment as an Acting Supervisor in Etobicoke two years earlier (in 2002). In any case, Mr. Nalwala remained in the acting supervisory position for approximately two years (one month of which he was Acting Manager).

As Acting Supervisor in Etobicoke, the Grievor testified that he was performing all of the functions, including releasing purchasing documents (which involved approval of purchase orders and requisitions in order to generate payment to vendors), which had been done by Ms. MacKinnon in her supervisory role at 500 University Avenue. And, he claimed in examination-in-chief that he continued to perform *all* of these functions (which he revised in cross-examination to *some* of these functions) even after Mr. Nalwala was appointed as Acting Supervisor and the Grievor had reverted to his base position of Budget Analyst at Metro Hall.

Although there were two Budget Analyst positions reporting to Mr. Nalwala as Acting Supervisor: Payroll Analyst (or Accounting Analyst, as it was then known) and Purchasing Analyst, the Grievor testified in examination-in-chief that the Purchasing Analyst position was vacant when Mr. Nalwala was appointed as Acting Supervisor^{4,5}. As the Purchasing Analyst position was

⁴ Although the Grievor understood Mr. Nalwala's appointment to have been made at the end of 2003, it would appear to have been made in or around April 2004.

⁵ While it may simply be a matter of semantics, after testifying repeatedly that he performed the duties of the Purchasing Analyst *and* the Payroll Analyst, the Grievor claimed that at the time Mr. Nalwala assumed the role of Acting Supervisor, there was "no such thing as an Accounting Analyst or a Purchasing Analyst," but only

vacant, the Grievor claimed that he was performing the duties of *both* Analyst positions, as well as *some* of the supervisory duties. Nevertheless, he was not paid the alternate rate and so, in 2005, he filed a number of grievances, one in respect of the denial of the alternate rate⁶. Notwithstanding his assertion in examination-in-chief that, at the time Mr. Nalwala assumed the role of Acting Supervisor, the Purchasing Analyst position was vacant, the Grievor acknowledged in cross-examination that (i) in September 2002, the position was filled in Etobicoke by Vivek Inamdar (in fact, in his role as Acting Supervisor, the Grievor hired him); and (ii) Mr. Inamdar was performing the duties of the Purchasing Analyst when the Grievor returned to Metro Hall in or around February 2003.

The Grievor further testified that upon his return to Metro Hall in February 2003, he continued to release purchasing documents; i.e., purchase orders and requisitions to generate payment to vendors, which he had done when he took over Ms. MacKinnon's job and which, he claimed, was a supervisory function. He then testified that if releasing purchasing documents were a Purchasing Analyst's job, he was doing the Purchasing Analyst's job, but if it were a Supervisor's job, he was doing the Supervisor's job. Moreover, he claimed to have been doing additional supervisory duties. Notwithstanding his acknowledgement that Mr. Inamdar was performing the duties of the Purchasing

undifferentiated Budget and Accounting Analysts (the former name for Budget Analysts).

⁶ Although the Grievor denied that he filed a grievance claiming the alternate rate, there is a grievance which, on its face appears to deal with this matter, which was resolved by Minutes of Settlement dated November 4, 2005 and is dealt with at pp. 155 - 157 herein.

Analyst (aside from releasing purchasing documents), the Grievor testified, somewhat inscrutably, that prior to Mr. Nalwala's appointment as Acting Supervisor, he (the Grievor) was performing the duties of both Analysts' positions and of the Supervisor's position, and subsequent thereto, the duties of both Analysts' positions and *some* of the duties of the Supervisor's position.

When pressed as to what supervisory duties he was performing, aside from releasing purchase orders and requisitions, the Grievor cited fleet and telecom administration, fleet and telecom budgets, security access and payroll release although, inexplicably, he testified at several junctures⁷ that some of these duties were encompassed within the Budget Analyst position, and the Payroll Analyst position, in particular. Nonetheless, at *this* juncture, the Grievor maintained that these were supervisory duties, as Ms. MacKinnon had performed them, as had he in his role as Acting Supervisor, and as they were listed in the job call, which was posted on April 29, 2003, for the position of Supervisor, Finance & Administration.

In any case, Mr. Nalwala remained in the acting supervisory position for approximately two years (one month of which he was Acting Manager). In or around April 2006, Mr. Nalwala was appointed Manager of the Financial

⁷ namely, when he returned to Metro Hall in or around February 2003 and in December 2005 wherein, in the context of a dispute resolution meeting, it was agreed that these duties, which were referred to as "purchasing and administration back-up duties," would be reassigned to the Purchasing Analyst and, further, that the "administration component of the Grievor's duties (being a reference to parking administration, security access and telecom administration) would be delegated to a Clerk.

Reporting & Expenditure Control in the Business Support Unit of the Facilities & Real Estate Division. Subsequently, the Facilities & Real Estate Division was split in two: the Facilities Management Division and the Real Estate Services Division. Although the Business Support Unit provides support to both Divisions, the Business Support Unit is a section of the Facilities Management Division. The Business Support Unit provides support to all other business units within both Divisions in the form of preparing budgets, preparing reports for City Managers and Directors, and providing payroll administration and accounting services, among other matters.

Among the staff of the Business Support Unit were seven Budget Analysts, each of whom was assigned a portfolio. However, between 2004 or 2005 and 2009, there was some fluctuation in the number of Budget Analysts, as two Budget Analyst positions became vacant around 2004 – 2005, three Budget Analysts were hired between about August 2006 and 2007, and in 2007, a vacant Budget Analyst position was converted to a Senior Budget Analyst position, which is outside the bargaining unit. Since its inception in 2007, this position has been filled by Mario Cuoco. Although Mr. Cuoco was counted among the three new hires, evidently he was a City employee in Public Health who was the successful applicant on a job posting for a Budget Analyst position in around August 2006. Approximately a year later, Mr. Cuoco was promoted to Senior Budget Analyst. As Senior Budget Analyst was a management position, it was not posted and filled under the collective agreement.

Although at the relevant time, Budget Analysts were assigned to the same portfolios as in 2005, the reporting relationships changed. Whereas in 2005, five Budget Analysts reported directly to the Manager of the Financial Reporting & Expenditure Control Unit and two Budget Analysts reported to the Supervisor, Finance & Administration, subsequently, five Budget Analysts reported to the Senior Budget Analyst (Mr. Cuoco) and two, to the Supervisor, Finance & Administration. The two Budget Analysts who reported to the Supervisor were the Payroll Analyst and the Purchasing Analyst.

Although the Supervisor's position was not filled on a permanent basis, as indicated, from April 2004 to April 2006 (or thereabouts), Mr. Nalwala was the Acting Supervisor. Notwithstanding that Heather Cunningham was appointed Supervisor, Finance & Administration, in or around August 2006, the Grievor continued to report to Mr. Nalwala until May 2007 when Ms. Cunningham assumed supervisory responsibility for the Grievor. Subsequent to Ms. Cunningham's departure in August 2008, the Supervisor's position was vacant and so, the Grievor reported to Mr. Nalwala following his return to work from a one-year unpaid leave of absence in November 2008 until February 1, 2009 (or thereabouts) when Leslie Fleming was appointed as Acting Supervisor, which was her assignment as of the date of the Grievor's discharge.

The Manager of Financial Reporting & Expenditure Control, to whom five of the Budget Analysts reported until the Senior Budget Analyst position was created, was Darrel Fernandopulle. Mr. Fernandopulle left the position (and apparently the employ of the City) some time around August 2005 and was not immediately replaced. However, following a job posting, in or around April 2006, Mr. Nalwala was appointed to the Manager's position (but continued *de facto* to supervise the Grievor until Ms. Cunningham assumed the responsibility in May 2007). For his part, Mr. Nalwala reported to the Director of Facilities Services. From April 2005 (or thereabouts), following the departure of Keiko Nakamura, the Acting Director of Facilities Services was Doug Reid. In or around February 2006, Fred Towers assumed the position of Director of Facilities Services (and Mr. Reid returned to his base position of Manager, Customer Support, Facilities & Real Estate). Mr. Towers was the Director as of the date of the Grievor's discharge.

As noted, each of the Budget Analysts was assigned a portfolio. Of particular importance for this case are the payroll and purchasing portfolios. Within each portfolio, the Budget Analyst is responsible for preparing budgets, management reports and journal entries; responding to *ad hoc* management requests; dealing with issues that arise on a day-to-day basis; and performing work related to year-end accruals.

According to Mr. Nalwala, an incremental budget is prepared by the Budget Analyst, based on the previous year's budgeted and actual results along with current economic projections, and then provided to the business unit Managers for their review and input. The revised budget is then consolidated by the Budget Analysts in a format prescribed by Financial Planning, subjected to a budgetary review process and, finally, approved by Council. Once the budget has been approved by Council, it is entered into SAP, which is the computer-based accounting system used by the City. Subsequently, the budgeted figures are reviewed against actual expenses and a variance report created, which indicates differences between budgeted (projected) and actual expenses. If there are budget adjustments to be made following a review of the variance report, the Budget Analyst prepares the necessary documentation.

Aside from reports relating to the budget, each Budget Analyst is required to prepare monthly, quarterly and annual reports relating to the Analyst's assigned portfolio. And, at the end of the year, the Budget Analyst is responsible for ensuring that all expenses pertaining to that year are recorded and that accruals are made.

II. Facts

Although there has been no change in the manner of assigning portfolios (each Budget Analyst is assigned a particular portfolio), in or around the beginning of May 2007, Mr. Nalwala made the decision to change portfolio assignments and to reassign the payroll portfolio, which had been assigned to the Grievor as the Payroll Analyst, to the Budget Coordinator, a management position within Facilities & Real Estate, which reported directly to Mr. Nalwala. Prior to May 2007, the Business Support Unit did not include a Budget Coordinator.

Mr. Nalwala testified that the Budget Coordinator was assigned a specific task; namely, to "report out" on the portfolio or, in other words, to prepare a report recommending efficiencies and improvements to the payroll portfolio, including automation and other means of ensuring that reports were being produced in a timely manner.

The assignment was given to Bosco Wong, a Budget Analyst who had been responsible for the Design Construction and Asset Preservation ("DCAP") portfolio in the Business Support Unit. According to Mr. Nalwala, the Director wanted a report similar to one Mr. Wong had produced for DCAP, but for which, it was felt, he had not been adequately compensated. In order to ensure that he would be adequately compensated for producing a similar report on this

occasion, Mr. Wong was appointed as a Budget Coordinator, which was paid at a higher rate than Budget Analyst. As indicated, aside from producing a report, as Budget Coordinator, Mr. Wong was assigned responsibility for the payroll portfolio. Mr. Nalwala denied that the work Mr. Wong was asked to do as Budget Coordinator was substantially the same work the Grievor had performed as the Budget Analyst responsible for the payroll portfolio (the "Payroll Analyst"), as the Grievor was not asked to produce a report recommending efficiencies and improvements to the payroll portfolio. Moreover, Mr. Nalwala testified that the Grievor was not asked to produce the report, because there were problems with the payroll portfolio, and management wanted someone who understood the Budget Analyst role, but had not worked on the payroll portfolio, to prepare the report.

As Budget Coordinator was a management position, Mr. Nalwala testified that seniority was not taken into account in appointing Mr. Wong, who had less seniority than the Grievor, to the position. Rather, Mr. Nalwala testified, the appointment was based on "merit, experience and qualifications." As well, as Budget Coordinator was a temporary assignment, the position was not posted. Mr. Nalwala did not recall whether he had advised the other Budget Analysts that the assignment would entail only a temporary pay increase for Mr. Wong.

However, the Grievor testified that he knew from SAP that Budget Coordinator was a "three-month financial accommodation"⁸ for Mr. Wong.

In any event, when the payroll portfolio was assigned to Mr. Wong as Budget Coordinator effective May 9, 2007, the Grievor was assigned the purchasing portfolio as the Purchasing Analyst. Upon completion of the report recommending efficiencies to the payroll portfolio, Mr. Wong was assigned the payroll portfolio as a Budget Analyst (specifically, the Payroll Analyst).

Prior to the reassignment of the payroll portfolio from the Grievor as a Budget Analyst to Mr. Wong as the Budget Coordinator in May 2007, the Grievor had been responsible as a Budget Analyst for both the purchasing portfolio and the payroll portfolio including, he claimed, fleet and telecom administration, as well as fleet and telecom budgets. While Mr. Nalwala did not dispute that the Grievor had been responsible for both the purchasing and payroll portfolios, his understanding was that the Grievor had assumed this dual responsibility for only about a month prior to the assignment of the payroll portfolio to Mr. Wong as the Budget Coordinator in May 2007, whereas the Grievor claimed that he had assumed this responsibility since being deployed to Metro Hall in or around February 2003.

⁸ Although nothing turns on the discrepancy, as noted at pp. 23-24 herein, as it turned out, the temporary assignment lasted just under five months, from May 9 to September 30, 2007.

However, the Grievor acknowledged that another employee, Vivek Inamdar, who was hired as a Budget Analyst in Etobicoke in September 2002, was responsible for the purchasing portfolio when the Grievor was deployed to Metro Hall in or around February 2003. The Grievor further acknowledged that Mr. Inamdar reported to Mr. Nalwala as Acting Supervisor, which suggests that at some point, he, too, was deployed to Metro Hall (presumably with the other Budget Analysts). It is unclear how long Mr. Inamdar remained at Metro Hall (although the Grievor agreed that Mr. Inamdar was at Metro Hall when Mr. Nalwala was appointed Acting Supervisor, most probably in April 2004) or, as noted, for what period he continued to be responsible for the purchasing portfolio. Moreover, although the Grievor testified initially that Mr. Inamdar was responsible for preparing, but not releasing, purchasing documents, in December 2002, the Grievor requested that Mr. Inamdar receive training for releasing purchase orders and requisitions, which the Grievor claimed Mr. Inamdar required in order to provide backup for him, and that when Mr. Inamdar performed these functions, he was paid overtime⁹.

Indeed, Mr. Nalwala acknowledged that the Payroll Analyst and the Purchasing Analyst commonly provided backup for each other. Therefore, if the incumbent of either portfolio were absent for any reason or if one of the portfolios were vacant, the incumbent of the other portfolio was expected to cover both

⁹ While overtime is paid for work performed outside of an employee's regular schedule, which is inapposite to the issues at hand, it is possible that the Grievor was referring to acting pay, which is paid when an employee is performing the duties and responsibilities of a higher position; in this case, supervisory functions. However, this matter was not clarified and, in any event, is not relevant to my determination.

portfolios. Apart from the payroll and purchasing portfolios, Mr. Nalwala testified that other portfolios were paired so that the incumbent of one provided backup for the other. However, when Budget Analysts were backing each other up, or even covering two portfolios, they were not paid a premium, unless they were required to work additional time to cover both portfolios, in which case, overtime would be paid.

Mr. Nalwala testified that, in reassigning the payroll portfolio, he took into account time constraints with respect to producing the budget and related reports. In addition, the Payroll Analyst uses organization charts, which are updated on a quarterly basis and entails about a week's work each quarter, as the basis for the budget. Organization charts must be prepared at budget time and there are *ad hoc* requests for these charts at other times as well. Although this function had been performed by the Director's Administrative Assistant, it was decided that it was more appropriately a payroll function. However, Mr. Nalwala understood that the Grievor had refused to perform this function, taking the position that the Director's Administrative Assistant should continue to do it. Subsequently, Mr. Nalwala testified that even though he had done these charts before, the Grievor claimed he was not familiar with the computer programme used for producing them. Although there was no specialized training available, Mr. Nalwala arranged for him to have training on the software used in producing the charts and a 20-inch computer monitor. Some months later, according to Mr. Nalwala, the Grievor claimed he was unable to do the organization charts

because of problems with his eyes (although if the City provided him with a 20-inch computer monitor, it is reasonable to assume that this was not the first time the Grievor raised the issue of problems with his eyes). Mr. Nalwala testified that the Grievor's complaints about doing the organization charts was a factor in reassigning him from the payroll to the purchasing portfolio.

In any case, it was apparent that the Grievor was dissatisfied with the portfolio reassignment. Accordingly, when the Budget Coordinator position was created, he raised the issue with the other Budget Analysts who, he claimed, were concerned that it was the City's intention to convert all of their positions to management positions. And so, on May 2, 2007, he sent an e-mail to the Union on their behalf seeking confirmation as to whether it had given its consent to the conversion of a Local 79 Budget Analyst position to a "newly created management position" within the Business Support Unit.

Although the Grievor requested that the Union provide such confirmation, no response was forthcoming. Ultimately, he ascertained that the Union had not consented to the creation of a management position within the Business Support Unit of Facilities & Real Estate.

Moreover, although the Grievor confirmed with the Union Steward, Jason Desjardins, that there was a protocol if a union position were being converted to a management position, the Grievor never ascertained what that

protocol was. He also never discussed with Mr. Desjardins whether that protocol had been followed in this case; i.e., when the Budget Coordinator position was created. Furthermore, the Grievor claimed there was no such position on the organization chart for Facilities & Real Estate and that the City was, in effect, engaged in a subterfuge by creating a management position in order to justify paying Mr. Wong a higher rate than had been paid the Grievor for performing the same duties; namely, the duties of the payroll portfolio. In contrast to his contention that the City created a management position by nefarious means, the Grievor argued somewhat inconsistently that as SAP did not reflect a position of Budget Coordinator within Facilities & Real Estate, the City was simply referring to Mr. Wong as a Budget Coordinator in order to justify paying him the higher rate in order to circumvent the seniority and/or overtime provisions of the collective agreement.

However, as the facts bear out, the Grievor *knew* there was a position of Budget Coordinator within the City's corporate structure, as he had applied for the position within another Division (Children's Services). But, even when confronted with an excerpt from SAP, which indicates that for the period from May 9 to September 30, 2007, Mr. Wong was assigned to the "position" of Budget Coordinator within the same classification in the Facilities & Real Estate Division as the position for which the Grievor had applied in another Division in 2005, the Grievor was resolute in his refusal to acknowledge that there was any such position in Facilities & Real Estate. In fact, notwithstanding evidence to the

contrary, the Grievor testified that he knew from SAP that there was *no* position of Budget Coordinator within Facilities & Real Estate.

When confronted with the fact that he had no legitimate reason, as the Purchasing Analyst, to have been looking at SAP, the Grievor claimed that the Payroll Analyst uses SAP; that the Purchasing Analyst does backup for the Payroll Analyst; and so, he *might* have been looking at SAP in his role as backup Payroll Analyst. And, in a further attempt to justify having accessed SAP, the Grievor testified in re-examination that he noticed an anomaly in one of the reports (which he did not identify) that listed Mr. Wong as Budget Coordinator (although he failed to explain how this purported report related to his role as backup Payroll Analyst) and so, he checked SAP, which confirmed that Mr. Wong was being paid as a Budget Coordinator "for a period of time." When further confronted with the fact that it was improper for him to have been accessing confidential payroll information, the details of Mr. Wong's employment information, on SAP, the Grievor attempted to resile from his categorical statement that he knew from SAP that Budget Coordinator was a "three-month financial accommodation" for Mr. Wong, by claiming that he learned from Mr. Wong that he had been given a short-term assignment, and from SAP that there was no position of Budget Coordinator within Facilities & Real Estate. However, notwithstanding the Grievor's attempt at obfuscation, the excerpt from SAP, which was filed as an exhibit in these proceedings, supports the conclusion that,

for the period from May 9 to September 30, 2007, Mr. Wong held the "position" of Budget Coordinator within the Facilities & Real Estate Division.

As to the justification for paying Mr. Wong a higher rate of pay, initially the Grievor acknowledged that Mr. Wong *might* have assumed responsibilities beyond those of the Budget Analyst position; namely, recommending efficiencies to the payroll portfolio. However, the Grievor claimed that *he* also assumed responsibilities beyond those of the Budget Analyst position, being supervisory responsibilities for which he received no additional compensation. Furthermore, although he acknowledged that Mr. Wong was doing payroll in a different format, as mandated by Mr. Towers, in order to make the administration of the portfolio more efficient, the Grievor claimed that he, too, was developing a format to improve efficiency, although he did not know whether Mr. Wong was developing a new format or simply improving on the one he (the Grievor) had developed. The Grievor then attempted to resile from this acknowledgement, claiming that he had "direct personal knowledge" that Mr. Wong was only doing the work of the payroll portfolio although, I note parenthetically, that even if he spoke to Mr. Wong and observed him in the performance of his work, as he claimed to have done, it was not possible for the Grievor to have known everything Mr. Wong was doing in his temporary assignment as the Budget Coordinator. Furthermore, the Union did not file a grievance respecting the creation of the Budget Coordinator position¹⁰.

¹⁰ As noted at p. 27 herein, there was an individual grievance, which was not referred to arbitration.

Notwithstanding that the Union did not file a grievance with respect to the creation of the Budget Coordinator position or even respond to the Grievor's e-mail of May 2, 2007, wherein he claimed that the creation of the Budget Coordinator position was of "grave concerns" [sic] to all of the Budget Analysts and requested that the matter "be escalated immediately and intervention sought" to prevent the creation of such position, the Grievor, who was the Union Steward, testified that on June 14, 2007, following a discussion with the other Budget Analysts, he was "goaded" into sending an e-mail, alleging that Mr. Wong had been accorded "preferential treatment" in being compensated at the Budget Coordinator rate of pay. However, as noted, earlier in cross-examination, the Grievor claimed that when advised of the creation of the Budget Coordinator position, the concern raised by the other Analysts was that their positions would be converted to management positions; no mention was made of "preferential treatment." The e-mail sent by the Grievor is as follows:

From: Ajay Misra
To: Cunningham, Heather; Donohue, Chuck; Nalwala, Murtaza;
Towers, Fred
Date: 6/14/2007 10:00 AM
Subject: Grievance – Budget Coordinator
CC: Gill, Jag; Gill, Kulbir Singh; Kumar, Naresh; Suren, Rathika;
Wong, Bosco

It has come to my knowledge that special arrangements have been made to compensate the new payroll analyst as a 'Budget coordinator' rate of pay. For the last six plus years that I have done this portfolio, no such consideration was made in my case.

Please note that such preferential treatment is not acceptable. To top it, unilateral decisions are being made without regard to seniority in the workplace. This is a matter of grievance.

Thanks,
Ajay Misra

As to the recipients of the e-mail, in June 2007, Ms. Cunningham was the Grievor's Supervisor in the Financial Accounting & Administration Unit; Mr. Nalwala, the Manager of the Financial Reporting & Expenditure Control Unit; Mr. Towers, the Director of Facilities Services, and Chuck Donohue was Mr. Towers's boss and the Executive Director of Facilities & Real Estate. As well, the e-mail was copied to other Budget Analysts (aside from Mr. Cuoco, who apparently had not yet been appointed as Senior Budget Analyst), and to the Budget Coordinator, Mr. Wong. As to the reason for copying Mr. Towers, in particular, on the e-mail, the Grievor testified that he understood that it was Mr. Towers's decision to appoint Mr. Wong to the Budget Coordinator position, as he wanted reports done in a similar manner to the reports Mr. Wong had produced in his previous portfolio (DCAP) (which is not quite accurate, as the evidence indicates that Mr. Towers wanted a report prepared on the payroll portfolio similar to the one Mr. Wong had produced on the DCAP portfolio). In any case, as he was the Union Steward, the Grievor was adamant that he had done nothing wrong in sending the e-mail or in copying it to "[his] boss and [his] boss's boss."

With respect to the content of the e-mail, as noted, as Budget Coordinator is a management position, seniority was not taken into account in appointing Mr. Wong, who, as indicated, had done similar work in another portfolio (DCAP). Although the Grievor identified the payment of Mr. Wong at a higher rate of pay than the Grievor had received as the Payroll Analyst as "a matter of grievance," as noted, the Union did not file a grievance respecting the matter. However, it would appear that at some unspecified date, there was an individual grievance filed by Mr. Misra respecting the assignment of Mr. Wong to the Budget Coordinator position, although it seems that that grievance was not referred to arbitration. Nor would it seem that a grievance was filed respecting the reassignment of the payroll portfolio to Mr. Wong upon completion of the Budget Coordinator assignment.

In any event, Mr. Nalwala responded to the Grievor's e-mail on June 22, 2007 as follows:

From: Murtaza Nalwala
To: Misra, Ajay
Date: 6/22/2007 9:20 AM
Subject: Re: Grievance – Budget Coordinator
CC: Cunningham, Heather; Donohue, Chuck; Towers, Fred

Ajay,

Your ... e-mail is inappropriate, particularly as you have opted to cc so many individuals. Please cease from sending any further e-mails of this challenging and accusatory nature.

Should you wish to discuss your ... concerns, please come to see me in my office.

Murtaza

Mr. Nalwala testified that he considered the Grievor's e-mail to be inappropriate as (i) it contained accusations of preferential treatment in compensating Mr. Wong at the Budget Coordinator rate of pay for performing the work the Grievor had done as the Payroll Analyst, which was compensated at a lower rate of pay (although the evidence indicates that the Grievor had never performed the duties of Budget Coordinator); and (ii) the e-mail was copied to the Grievor's co-workers (including all but one of the Budget Analysts and the Budget Coordinator), his Supervisor and senior management. In contrast, Mr. Nalwala did not copy his response to any of the Grievor's co-workers.

Notwithstanding that Mr. Nalwala advised the Grievor that his e-mail of June 14th was inappropriate and offered to meet with him to discuss his concerns, the Grievor persisted in continuing with the e-mail exchange. Accordingly, by e-mail dated June 27, 2007, the Grievor responded to Mr. Nalwala as follows:

From: Ajay Misra
To: Nalwala, Murtaza
Date: 6/27/2007 11:42 AM
Subject: Re: Grievance – Budget Coordinator
CC: Cunningham, Heather; Cuoco, Marco; Donohue, Chuck; Gill, Jag; Gill, Kulbir Singh; Kumar, Naresh; Suren, Rathika; Towers, Fred

Please deal with the issue at hand and not threaten me to acquiesce. Special financial arrangements, inducements, enticements have definitely

been made to circumvent the issue of OT compensation and secondly seniority has been blatantly overlooked in this special treatment. Please note that my complaint is based on 100% factual information.

As noted, the Grievor again copied the same individuals, including the Budget Analysts, who had been copied on the previous e-mail, and added Mr. Cuoco who was at the time a Budget Analyst (and later became a Senior Budget Analyst), but who had inadvertently been excluded from the first e-mail, and deleted the Budget Coordinator, Mr. Wong. As to the content of the e-mail, although the Grievor alleged that "[s]pecial financial arrangements, inducements, enticements have definitely been made to circumvent the issue of [overtime] compensation and secondly seniority has been blatantly overlooked in this special treatment," he denied that he made allegations of misconduct against Mr. Nalwala. He further denied that he made baseless or unfounded allegations against Mr. Nalwala. Rather, he claimed that he was simply stating the facts and that his statements were "100% factual," presumably including the allegation that Mr. Nalwala was threatening him by directing him to desist from sending further e-mails of a "challenging and accusatory nature."

As to the so-called "[s]pecial financial arrangements" to circumvent the overtime provisions of the collective agreement, the Grievor insisted that Mr. Wong was performing the duties of the payroll portfolio and, therefore, there was no justification for paying him more than a Budget Analyst, which is diametrically opposed to his acknowledgement that Mr. Wong might have been doing more

than simply administering the payroll portfolio; namely, that he was engaged in a review of the payroll portfolio with a view to improving efficiencies. In fact, as noted at p. 24 herein, the Grievor provided an elaborate justification as to why he, too, was doing work beyond that of a Budget Analyst and should, therefore, have been paid the higher rate as well.

With respect to allegations made by the Grievor, Mr. Nalwala emphatically denied that he intended to threaten or intimidate the Grievor in his e-mail of June 22, 2007 or that the appointment of Mr. Wong was intended to circumvent the overtime provisions of the collective agreement. In this regard, Mr. Nalwala testified, in effect, that overtime was assigned to the Budget Analyst responsible for the portfolio in which the overtime arose. Accordingly, overtime which arose in the payroll portfolio would be performed by the Payroll Analyst; whereas overtime which arose in the purchasing portfolio would be performed by the Purchasing Analyst. Therefore, the Purchasing Analyst might not be busy during budget time but would be busy at year-end. And, the Analyst would receive payment for overtime performed within the Analyst's portfolio in accordance with the overtime provisions of the collective agreement.

Furthermore, although the Grievor believed that in or around June 2007, there was a temporary freeze on overtime, Mr. Nalwala clarified that there had been vacancies in three Budget Analyst positions. However, once these vacancies were filled, there was sufficient staff to do the work of the Business

Support Unit during regular hours. There were also summer students to assist with the work in regular hours. And so, the Grievor allowed, overtime could no longer be performed at the employees' discretion, but had to be pre-approved. Accordingly, while Mr. Nalwala agreed that Mr. Wong was the only employee to be paid additional compensation without pre-approval, the comparison is inapt, as Mr. Wong was being paid a higher rate of pay associated with the Budget Coordinator position, and not overtime work. Rather, he was performing work (preparing a report on the payroll portfolio) beyond that of a Budget Analyst and so, the decision was made to appoint him to the Budget Coordinator position and compensate him at a higher rate of pay.

Following receipt of the Grievor's e-mail of June 27, 2007, Mr. Nalwala consulted with Labour Relations and the decision was made to issue a two-day suspension. Pursuant to this decision, by e-mail dated June 28, 2007, the Grievor was summoned to a meeting the following day. The e-mail, which was sent from Mr. Nalwala and copied to Ms. Cunningham, advised that the Grievor's attendance at the meeting was mandatory and further reproduced then Clause 16.25 of the collective agreement, effectively advising the Grievor of his right to attend the meeting with union representation. However, the Grievor testified that that the meeting did not take place, as it was scheduled on his birthday.

On the Grievor's evidence, the meeting was not rescheduled but, on July 10, 2007, he was given the following letter imposing a **two-day suspension**:

July 10, 2007

Ajay Misra
Budget Analyst
Business Support
Facilities Services
Metro Hall, 2nd Floor

Dear Ajay:

Re: Two Day Suspension

This letter serves to advise you of management's decision regarding disciplinary action in response to your recent misconduct in the workplace.

On June 14, 2007, you sent out an e-mail accusing management of preferential treatment regarding the assignment of an alternate rate to one of your co-workers, copying both senior management and your co-workers on the distribution of the e-mail. I responded back advising that your e-mail was inappropriate, to cease from sending any further e-mails of this nature and to come to see me in my office should you wish to discuss your concerns regarding the alternate rate assignment. You ignored my instruction and issued yet another inappropriate e-mail.

This is not an isolated incident. You have already been warned about this type of challenging and insubordinate conduct in the workplace, yet despite the counseling and disciplinary action that you have received, this behaviour persists.

In light of your current disciplinary record which includes a written warning, you will be suspended for two (2) days without pay to be served on July 11 & 12, 07. You are expected to return to work at your regular start time on July 13, 2007.

Ajay, immediate improvements are expected in your workplace conduct and failure to do so will result in additional, more progressive disciplinary action. Please govern yourself accordingly.

Yours truly,

'Murtaza Nalwala'
Murtaza Nalwala
Manager, Financial Reporting and Expenditure Control
Business Support
Facilities Services

cc:

H. Cunningham Labour Relations Corporate Personnel File

For his part, Mr. Nalwala testified that the suspension was issued because the content of the Grievor's e-mails was patently untrue and because the e-mails had been disseminated so widely. The letter of suspension refers to Grievor's "challenging and insubordinate conduct," which the letter states, was "not an isolated incident," having been the subject of "counseling and disciplinary action," and makes reference to the Grievor's disciplinary record, which consisted of a written warning issued some six weeks earlier (May 30, 2007). The **written warning**, which was not grieved, was also imposed for "challenging and insubordinate" behaviour in refusing to accept direction from his Supervisor, Ms. Cunningham, particularly in relation to performance issues, such as meeting assigned deadlines and releasing purchasing documents, a matter raised in both a prior and subsequent **letter of expectation**¹¹ and further explicated below, as well as various other issues which might be broadly characterized as "attendance".

¹¹ Although the letters of expectation are not disciplinary in nature, there was no objection to their admissibility. Rather, it was agreed that submissions would be made in argument as to their relevance. While the matter was merely adverted to in argument, it is uncontroversial that letters of expectation are not considered to be part of the disciplinary record.

Notwithstanding the written warning, the Grievor testified that he had "a good working relationship" with Ms. Cunningham; that she was "good to work with," although she took direction from Mr. Nalwala. More particularly, she could not direct the Grievor's work or his working conditions without consulting Mr. Nalwala. And so, he testified, she could not issue an instruction or grant permission for him to work through lunch without obtaining Mr. Nalwala's approval. She was also required to copy Mr. Nalwala on all e-mails.

The written warning makes reference to the **letter of expectation** dated **May 1, 2007**, which identifies particular areas of concern in relation to the Grievor's work performance; notably, his rate of absenteeism, failure to meet assigned deadlines, failure to adhere to managerial directives and unexplained absences from the work station. The letter of expectation does not constitute discipline, but advises the Grievor that failure to "respond and adhere to the directives of Management ... may be construed as insubordinate conduct and be subject to disciplinary action."

Following receipt of the letter of expectation, the Grievor sent an e-mail dated May 14, 2007 to Mr. Nalwala, wherein he attempted to address the concerns raised in the letter. He also made reference to an e-mail dated May 11, 2007 from Heather Cunningham effectively confirming the change in his assignment from the payroll to purchasing portfolio and attaching a list of

purchasing-related duties, and complained that, as the most senior Budget Analyst, his preference for a particular portfolio (obviously, the payroll portfolio) had not been accommodated. The Grievor also raised a myriad of other issues in the May 14th e-mail regarding the implementation of Minutes of Settlement resolving a number of outstanding grievances, a request for clarification of his reporting relationship, and an allegation of ongoing harassment, among other matters. As to the allegation of harassment against Mr. Nalwala, in particular, the Grievor stated,

... I cannot work with you as your demands are totally unreasonable. ... I am now reasserting that your condescending behaviour is tantamount to abuse and absolute harassment in the worst form. The work environment is totally intolerable and has inflicted such mental duress that at times during the day I 'simply stop functioning'. Under your perceived threat all the time, I simply 'can't get anything done'.

Finally, although the Grievor made a request for a dispute resolution meeting to address these issues, no such meeting was ever held. (Nevertheless, there was an acknowledgement in the Grievor's e-mail that a dispute resolution meeting had been convened some six months earlier, on November 30, 2006.)

In any event, there would appear to have been a conversation at 8:55 a.m. on May 24, 2007 between the Grievor and Mr. Nalwala in the presence of Ms. Cunningham, wherein Mr. Nalwala referred to the e-mail of May 11, 2007 as confirmation that the Grievor's reporting relationship had been changed to the

Supervisor, Accounting & Administration¹², Ms. Cunningham. However, the Grievor expressed concern that the e-mail of May 11th does not directly address the reporting relationship; namely, that he would be reporting to Ms. Cunningham, and not to Mr. Nalwala, which he understood to be the intent of the Minutes of Settlement dated November 4, 2005¹³ (an understanding which the City did not share). Accordingly, the Grievor requested written confirmation of the reporting relationship, which Mr. Nalwala refused to provide, as he considered the matter to have been dealt with in Ms. Cunningham's e-mail of May 11th. Moreover, if the Grievor did not already know that he was reporting to Ms. Cunningham, he was advised of such in the conversation of May 24th. Although the Grievor acknowledged the advice from Mr. Nalwala on May 24th, he seemed intent on securing written confirmation of the change in his reporting relationship. As noted, Mr. Nalwala refused to accede to the Grievor's request for written confirmation and, on the Grievor's story, directed him to "pack his bags and leave," if he did not understand the instruction to report to Ms. Cunningham, and that the matter would be addressed with the Union. For his part, Mr. Nalwala did not recall having directed the Grievor to "pack [his] bags and leave," although he did suggest that the matter be dealt with in consultation with the Union.

¹² While there would appear to have been changes in job titles, names of organizational units, etc. throughout the period covered by this award, such changes have no impact on the decision. By way of example, throughout the award, the above-noted position, Supervisor, Accounting & Administration, has been referred to as Supervisor, Finance & Administration.

¹³ This matter is further explicated at p. 164 herein.

Nevertheless, the Grievor characterized Mr. Nalwala's response as a lack of respect for his subordinates and "ongoing proof of [his] daily harassment." The Grievor also claimed that as "a direct result of such interactions," he was "under extreme duress." He then asserted that he was "not feeling well and need[ed] to leave for the day". Although the Grievor acknowledged that he was dissatisfied with the outcome of the meeting and that he left work due to stress, he claimed that he was legitimately ill and that his illness was unrelated to the outcome of the meeting. Accordingly, he adamantly denied that he was absent without authorization.

Nonetheless, the Grievor was off work for the balance of the day and the following day, May 25th. The evidence indicates that he was required to submit a medical note to substantiate his absence and warned that failure to do so would result in the absence being coded as "unauthorized leave without pay" (also referred to as "leave not authorized" or "absent without authorization"). The Grievor adamantly objected to the characterization of his absence as "leave not authorized," which he understood to have a disciplinary connotation. In this regard, the Grievor claimed that an absence coded as "leave not authorized" was treated as a break in service, even if the absence were for only one day, which affected the accumulation of sick pay credits and calculation of years of service.

Although the Grievor indicated that he would address the matter with Mr. Nalwala upon his return from vacation on June 4th, nevertheless, he provided a medical note to substantiate the absences. The Grievor testified that he was required to produce a medical note every time he was absent or left the workplace due to illness, which he claimed was in violation of the Minutes of Settlement. In this regard, the Grievor acknowledged that the Minutes of Settlement are not a proscription against requiring him to produce a medical note; nor did he deny management's right in appropriate circumstances to require a note. However, he claimed that he pursued a grievance in respect of this matter because he was required to produce a medical note for every absence due to illness (although I note that Paragraph 12 of the Minutes of Settlement addresses only the requirement to produce a medical certificate when an employee *leaves the workplace* due to illness).

In any event, the Grievor returned to work on Monday, May 28th at 9:30 a.m., some 90 minutes after his scheduled start time due, he claimed, to "car trouble and issues with [his] son."

By e-mail dated May 29, 2007, from his Supervisor, Ms. Cunningham, the Grievor was directed to attend a meeting at Metro Hall the following day (May 30th). He was advised that his attendance at the meeting was mandatory and that he had a right to union representation pursuant to Clause 16.25 of the collective agreement, which was reproduced in the e-mail. The Grievor attended

the meeting, as directed, with union representation, at which time, he was handed the **written warning** dated **May 30, 2007**. Among other matters, the warning directs the Grievor to contact Ms. Cunningham should he anticipate being late, and to notify her immediately upon arrival should he arrive after his assigned start time. In the event Ms. Cunningham were not in her office, the Grievor was directed to send her an e-mail advising of the time of his arrival. And, although it was not expressly mentioned in the written warning, the Grievor understood that he was required to e-mail his Supervisor as to his departure time as well. Moreover, in order to address lapses in performance (in relation to completion of duties in a timely manner and meeting assigned deadlines, among other matters), the Grievor was directed to meet with Ms. Cunningham at the start of each day to review the tasks and priorities for the day and to submit a work log of the tasks he had completed via e-mail to Ms. Cunningham at the end of the day. Although the Grievor claimed that there had never been a requirement of this nature imposed upon him, in fact, he adverted in his e-mail of May 14, 2007 to a **letter of expectation** dated **November 23, 2006** setting out certain performance standards and requiring that (i) he notify his Manager prior to the start of any shift on which he expected to be late; and (ii) he e-mail the Manager advising of his arrival time on all shifts. While not expressly stated, as with the written warning, the Grievor understood that this requirement applied to departure times as well.

By e-mail dated July 31, 2007, the Grievor was summoned to a meeting by Mr. Nalwala. When confronted as to why the e-mail was sent by Mr. Nalwala rather than Ms. Cunningham, Mr. Nalwala explained that although Ms. Cunningham had been a Supervisor for almost a year, she had only recently assumed full supervisory responsibility for the Grievor. In any event, the meeting was scheduled for the next day (August 1st) "as a follow-up to the letter of expectation" issued May 1, 2007. Once again, the Grievor was advised that his attendance at the meeting was mandatory. He was also advised that both Ms. Cunningham and Mr. Nalwala would be in attendance and that, although the meeting was not disciplinary in nature, he could avail himself of union representation.

As the Grievor was advised that the meeting was non-disciplinary, he did not avail himself of the opportunity for union representation, although he attended with a co-worker, Jag Gill. While the Grievor acknowledged that he was given a further **letter of expectation** dated **August 1, 2007**, he claimed there was no discussion in the meeting of the contents of the letter; namely, work performance and attendance. With respect to work performance in particular, the letter advises that the Grievor was "not meeting the base expectations of [the Budget Analyst] position; specifically, failure to complete [his] work in a timely manner and constant requests for written instruction regarding the tasks assigned to [him]."

For his part, although Mr. Nalwala acknowledged that the letter, which was copied to Mr. Towers and Ms. Cunningham, had been prepared prior to the meeting, he claimed that there was discussion of the issues set out in the letter. By way of background, Mr. Nalwala testified that when the Grievor's portfolio changed from payroll to purchasing in May 2007, he refused to work on the new portfolio and, when he did, he "worked to rule," spending approximately four to five hours a day releasing purchasing documents (a process which involves verifying the accounting; ensuring that the purchase has been charged to the correct account, that the proper signing authority has been obtained, and that the information has been entered correctly into SAP by the clerical staff; and releasing these documents in SAP in order to generate a binding contract to be presented to the vendor to supply the goods or services requested by staff in an operations unit, which Ms. Cunningham, who had experience as a Budget Analyst prior to assuming the supervisory role, claimed in the written warning ought to have taken no more than half an hour to an hour, and Mr. Nalwala, who issued the subsequent letter of expectation, allowed one to two hours, in aggregate to complete). As well, the Grievor asked for detailed, written instructions for all of the tasks that were assigned to him. Yet, Mr. Nalwala testified, he complained when these tasks were explained to him. From Mr. Nalwala's perspective, the Grievor persisted in challenging management at every turn. Management, therefore, resorted to issuing letters of expectation.

More particularly, in the **August 1, 2007 letter of expectation**, Mr. Nalwala noted an increase in the Grievor's rate of absenteeism since the previous letter of expectation (May 1, 2007), as well as attempts that had been made to address the excessive time expended in releasing purchasing orders and repeated requests for written instructions for all of the tasks assigned to him. Specifically, the letter refers to the written warning of May 30, 2007, wherein the Grievor was directed to meet with his Supervisor (Ms. Cunningham) at the start of each day to review the tasks and priorities for that day and to submit a work log of tasks he had performed to the Supervisor at the end of the day. The letter further notes that, on June 27, 2007, his Supervisor attempted to "job shadow" him for the day "to determine why it [was] taking [him] so long to complete [his] tasks ...". However, the Grievor apparently said that he "could not work under such conditions" and, although he attempted to resile from this statement in cross-examination, left work due to illness before the job shadowing even began. Notwithstanding that the Grievor left work because of the spectre of job shadowing, the letter advised that his Supervisor would be job shadowing him again in the near future, and that failure to co-operate might be construed as insubordination and lead to disciplinary action. In fact, the Grievor testified, Ms. Cunningham job shadowed him on numerous occasions and, on one occasion, directed him to submit his daily work log for purposes of comparison with the Supervisor's shadow log. Finally, the letter reiterated that the Grievor was not meeting the base expectations of his position; that he was expected to co-operate with management's efforts to assist him in raising his work performance

to an acceptable level; and that failure to demonstrate marked improvement in his work performance might result in reassignment and/or demotion to a different position. A further formal assessment meeting was scheduled for October 5, 2007. However, no such assessment ever took place.

Meanwhile, by e-mail dated August 3, 2007, the Grievor submitted a written retort to the second letter of expectation, which he copied to Mr. Towers and Ms. Cunningham. Among other matters, the Grievor maintained that his absences from work had all been for legitimate medical reasons and that his absenteeism had not been excessive. By way of further explication, the Grievor testified in these proceedings that he did not view his absenteeism as excessive in comparison to his co-workers, although at some point in time he had depleted his entire sick bank. In any event, in his view, the issue for the City was not whether his absenteeism was excessive but whether he was legitimately ill. In other words, he failed to appreciate why the City should be concerned with excessive absenteeism if an employee were legitimately ill. The Grievor further complained in his e-mail that, notwithstanding repeated requests from May to August 2007, his Supervisor refused to provide him with a "detailed step-by-step documented procedure for releasing purchasing documents." When questioned as to why he would need a detailed, step-by-step procedure, the Grievor did not deny that he had had experience in releasing purchasing documents, but claimed that he wanted to ensure that he was carrying out his functions "by the book," because releasing purchase orders or requisitions was a supervisory

responsibility. In this regard, there was no dispute that approval to commit funds to acquire goods or services is given in the operations unit and that the Business Support Unit has no role in approving the commitment of funds to acquire such goods or such services. Rather, the role of the Business Support Unit is to ensure that the appropriate approval elements are present, which is effectively a review function, but, in any event, is not an approval function. Specifically, when a staff member in a particular operations unit wishes to acquire goods or services, and the staff member initiating the acquisition does not have the requisite signing authority, the staff member is responsible for ensuring that the acquisition is approved by staff in the operations unit who has the authority to make the acquisition. Once signing authority has been obtained, the staff member initiating the acquisition prepares the necessary documentation (a departmental purchase order, if the acquisition is below a certain dollar amount (\$2500 at the relevant time), or a requisition, if it is above that amount). The purchase order or requisition, as the case may be, is then entered into SAP by a clerical staff member.

When the purchase order or requisition comes to the Business Support Unit (having been entered into SAP by clerical staff in the operations unit), the Purchasing Analyst is required to review the purchase order or requisition to ensure that the appropriate approval elements are present; i.e., that the proper signing authority has been obtained; that the appropriate cost centre has been identified; that the appropriate general ledger account has been

identified; and that the information has been correctly entered into SAP by the clerical staff. (The Purchasing Analyst is not required to ensure that the invoice that accompanies the requisition is for the right amount or that the goods or services have been delivered, which is an operations function). If these elements are present, the purchase order or requisition is released by the Business Support Unit, which effectively authorizes the Finance Department to provide payment to the vendor for the provision of goods or services requested by the staff member in the operations unit. But if the appropriate signing authority is not present, the purchase order or requisition should not be released. In this regard, the Grievor agreed that if a purchase order or requisition were forwarded without a signature or if the cost centre were not properly identified, it should not be released. However, if there were a signature on the purchase order or requisition, but because of an increase in the cost of the purchase or acquisition, a higher level of signing authority were required, it would be a matter of judgment as to whether or not to release the purchase order or requisition.

Where the parties join issue is with respect to who in the Business Support Unit is responsible for exercising that judgment and, more particularly, for releasing the purchase order or requisition to generate payment. The City's position, articulated by counsel as well as by Ms. Cunningham and Mr. Nalwala, is that the responsibility lies with the Purchasing Analyst, which is consistent with Mr. Nalwala's instruction to the Grievor by e-mail dated November 15, 2006 that "until further notice, you will release all purchasing documents." The Union's

position, also articulated by counsel, is that the responsibility for releasing purchasing documents lies with the Supervisor of the Business Support Unit. Some support for the Union's position is found in the Pay Equity Questionnaire, which was filled in by the incumbent and which indicates that in 2002, the Supervisor, Accounting & Administration in Etobicoke, Angie MacKinnon, provided "on-line release/approval on SAP of purchase orders and purchase requisitions."

However, the Grievor's position is inconsistent and inscrutable. In his retort to the second letter of expectation, the Grievor complained about the absence of refresher training for purchasing (presumably a reference to the Purchasing Analyst functions) and, of particular importance for this case, the time allotted to releasing purchasing documents, which "has been downloaded to [the] analyst function" and, he claimed, allowed for little more than "rubberstamp[ing]" electronic signatures/approvals without analysis, due scrutiny, and with minimal or no oversight at all" and was about 1/10th of the time required to enable him to follow due procedures and perform all of the checks prescribed by financial by-laws, which was tantamounts *[sic]* to fraud." Finally, he asserted that undue pressure was being exerted, and that the restrictive time allotted to releasing purchasing orders was a "frame-up" designed to cause him to make financial errors and provide the City with cause (presumably a reference to cause for discipline). Leaving aside the intemperate assertions made by the Grievor, he stated unambiguously in his written retort that the releasing function

had been downloaded to the Purchasing Analyst. And, further, he did not challenge Ms. Cunningham's assertion, in an e-mail dated August 2, 2007 responding to the Grievor's request for "the documented detailed step-by-step city-wide procedure for releasing purchasing documents," that he had been doing the releasing function for "the past several years."

It is hard to reconcile the Grievor's oral evidence either internally or with his written retort to the second letter of expectation. In oral evidence, the Grievor maintained that, because it is a judgment call, responsibility for releasing purchase orders or requisitions lies with the Supervisor of the Business Support Unit and, further, that a detailed, step-by-step procedure should be provided to the Purchasing Analyst (although it is unclear why the Grievor would be advocating for a step-by-step procedure if releasing of purchase orders or requisitions were, in fact, a supervisory responsibility). Nonetheless, the Grievor claimed that given the magnitude of some of the acquisitions, which could be in the millions of dollars, he was not comfortable exercising this responsibility as a Purchasing Analyst without a step-by-step procedure although, inexplicably, he did not experience the same level of discomfort exercising this responsibility as an Acting Supervisor.

On October 23, 2007, the Grievor submitted a request for a one-year unpaid leave of absence from November 12, 2007 to November 12, 2008 to deal with issues, which, he claimed, had arisen due to the death of his grandparents

in India. He also sought permission to deplete his sick days and accumulated vacation leave to cover the period prior to the commencement of his unpaid leave. On October 24th and October 27th, the Grievor attended at his family doctor, Steve Litsas, who provided him with medical notes, the first of which indicates that the Grievor was "able to return to work but not in his current environment" although he could work in "a totally unrelated area." The second note, which is to the same effect, states that the Grievor was "unable to return to work in the current environment, indefinitely" and further states that "[h]e is fit to return to full duties immediately only if place [sic] in an alternate work environment that is totally distinct from his current environment." Although the first note states that his medical opinion was based on his "direct examination or management of this patient," the Grievor testified that he had complained to Dr. Litsas on numerous occasions prior to October 2007 that he was under extreme stress, which he ascribed to his working relationship with Mr. Nalwala and for which he was prescribed medication (although there was no evidence as to what medication was prescribed). Pursuant to his understanding that a medical note was required every time he was absent due to illness, the Grievor submitted the medical notes from Dr. Litsas.

It would appear that the Grievor's request for a one-year unpaid leave of absence was approved by the Executive Director of Facilities & Real Estate, Chuck Donohue, on November 8, 2007. However, as the Grievor was not advised of the approval, he followed up with an e-mail to Ms. Cunningham dated

November 9th. Aside from following up on his request for a leave of absence, the Grievor stated in the e-mail that he was "rendered totally not fit to come to work in [his] present state of mind." Ms. Cunningham forwarded the Grievor's e-mail to Mr. Nalwala on November 12th. Attached to the e-mail was another note from his family doctor dated November 5, 2007 stating that the Grievor had been seen in his office that day; that due to "the ongoing environment related stress, [he] was unable to work Oct. 26, 31, Nov. 5"; and that the Grievor would be off work for an additional four days (which coincidentally would appear to have covered his absence until the start of his unpaid leave).

In any case, although there was some delay in notifying the Grievor¹⁴, on November 12, 2007, he was advised of the approval of a one-year leave of absence effective the same date. In conjunction with approval of the Grievor's unpaid leave, the parties agreed that three outstanding grievances: one in respect of a two-day suspension issued July 10, 2007; another, claiming violation of Minutes of Settlement dated November 4, 2005; and another respecting Mr. Wong's assignment as a Budget Coordinator, which was not pursued) be held in abeyance pending the Grievor's return to work in November 2008.

Although the Grievor's request for a one-year unpaid leave of absence was based on the need to attend to matters which had arisen upon the

¹⁴ Although nothing turns on it, the Grievor failed to provide the minimum notice (at least one month prior to the start of the leave) mandated under the City's Leave Without Pay policy.

death of his grandparents in India, about halfway through the leave (in March 2008), an article appeared in IndUS Business Journal, an online newspaper, indicating, among other matters, that "Ajay Misra was looking for a business opportunity and the chance to come to the United States," and so, in November 2008, coincidentally the start of his leave of absence from the City, "Misra took over operations of two Gloria Jean's Coffees locations in New Hampshire ... Misra is currently in the process of purchasing another Gloria Jean's location." Gloria Jean's, the article indicates, are franchised specialty coffee shops. The article continues:

For Misra, Gloria Jean's was a perfect opportunity to head up his own business, and the fact that he was able to acquire existing locations got him rolling quicker. It also made it easier for him to move to the United States from Toronto, where he had been living since 1998.

Misra was able to purchase his Gloria Jean's locations on an E-2 Visa, a non-immigrant visa for individuals who make a substantial investment in a U.S. business, typically \$25,000 or more, and intend to come to the United States to direct operations of the business as an executive.

...

His wife, who works in the pharmaceutical industry, and 4-year-old son are also still in Toronto and he hopes to be able to bring them to New Hampshire.

...

Notwithstanding the content of the article, including reference to an E-2 Visa, the Grievor claimed that he simply made an investment but had no involvement with the operation of the business. When confronted with the allegation that when he commenced his leave, he went to the United States and

began operating the two franchises, the Grievor blatantly denied the allegation. And, while he acknowledged that it might be a long-term goal, he further denied that he intended "at that time" to move to the United States to direct the operations of the business or to move himself or his family to the United States. As to the information in the article, the Grievor testified that IndUS Business Journal is his brother-in-law's newspaper and that he was looking to write an article, which, of course, adroitly avoids the purported inaccuracies in the content of the article.

Although the Grievor's leave was due to expire on November 12, 2008, on September 29, 2008, he sent an e-mail to Ms. Cunningham requesting that "[d]ue to ongoing personal reasons," his leave of absence be extended for another year. As Ms. Cunningham had assumed another position within the City in August 2008, the Supervisor's position was vacant at the time of the Grievor's request for an extension of his leave of absence, which was referred to Mr. Nalwala's attention. (In fact, it would appear that, as a result of the vacancy, the Grievor was reporting directly to Mr. Nalwala.) As the request for a one-year extension of the Grievor's leave of absence fell outside Mr. Nalwala's signing authority, by e-mail of the same date (September 29th), Mr. Nalwala asked the Grievor to fill out a Leave of Absence Request Form with detailed information as to the reasons for his request. Although the Grievor filled out the form, including the dates for which the extension was requested (November 13, 2008 to November 13, 2009), no information was provided as to the reasons for his

request. By e-mail dated October 20, 2008, Mr. Nalwala advised that, as the Grievor's application for an extension of his leave of absence fell outside the Human Resources policy, it had been forwarded to the Executive Director of Human Resources for approval. Mr. Nalwala also reiterated his request for additional information as to the reasons for the Grievor's request so that his application could be properly evaluated. The following day, the Grievor submitted a note from his doctor confirming that the Grievor had been seen in his office that day (October 21, 2008) and reiterating *verbatim* the content of his medical note dated October 27, 2007; namely, that the Grievor was "unable to return to work in the current environment, indefinitely" and, further, that "[h]e is fit to return to full duties immediately only if place [sic] in an alternate work environment that is totally distinct from his current environment." This time, Dr. Litsas expounded upon his opinion by adding that the Grievor has "no functional limitations that prevent him from working. He can return to full duties without restriction as long as [the City] provide[s] alternate division/unit."

In an e-mail dated October 24, 2008, Mr. Nalwala acknowledged receipt of the Grievor's medical note dated October 21st and advised that the note had been forwarded to Linda Baycliffe, an Occupational Health Nurse in the Employee Health and Rehabilitation Clinic at City Hall, and that Ms. Baycliffe would be contacting him shortly to arrange for an independent assessment. Mr. Nalwala further advised that the period between November 13, 2008 (the end of his one-year leave of absence) and the date on which Employee Health and

Rehabilitation provided its assessment would be recorded as a leave of absence. While his request for an extension of his one-year unpaid leave of absence was under consideration, the Grievor contacted Mr. Nalwala and Human Resources Consultant, Cindy O'Reilly, to request a transfer because, upon receipt of Dr. Litsas's October 21st medical note, Mr. Nalwala suggested that the Grievor submit his "request for transfer with Human Resources immediately."

By e-mail dated October 27, 2008, the Grievor advised Mr. Nalwala that his request for transfer had been on file with Human Resources since 2005¹⁵ and asked that his e-mail be forwarded to Ms. O'Reilly who, he claimed, had acknowledged receipt of his previous requests for transfer. In order not to delay consideration of his request for transfer until he met with Human Resources¹⁶, he also provided consent for Human Resources to communicate with his doctor.

By e-mail dated November 4, 2008, which was sent to the Grievor and Mr. Nalwala, and copied to Ms. Baycliffe, Ms. O'Reilly indicated that although she recalled speaking with the Grievor about his request for transfer and forwarding him a transfer request form, she did not recall receiving a completed form back from him, and there would appear to have been no such form on file for the Grievor. The Grievor replied to all of the recipients of Ms. O'Reilly's e-

¹⁵ Although nothing turns on the discrepancy, the Grievor claimed in other e-mails within the same time frame that there had been requests for transfer on file since 2004, even 2003.

¹⁶ Although not material for this case, it is unclear whether the intended reference was to Human Resources or to Employee Health and Rehabilitation.

mail (including Mr. Nalwala and Ms. Baycliffe) the following day (November 5, 2008) indicating that "[t]he transfer request was formally filed in 2004/2005/2006/2007." He attached an e-mail confirming his request for 2004 and renewal for 2005, and undertook to provide other related e-mail correspondence in the City GroupWise e-mail system upon his return to work. For his part, Mr. Nalwala testified that this was the first notification he had received that the Grievor had submitted a request for transfer, as none of the requests came to his attention, as requests for transfer are submitted to Human Resources, rather than to the individual department¹⁷.

In the same (November 5th) e-mail, the Grievor advised that he had met with Ms. Baycliffe in the Employee Health and Rehabilitation Clinic. In this regard, the Grievor testified that he had also met with Ms. Baycliffe in 2005. He further testified that in 2008, he explained his work environment, as he had done in 2005, and submitted a request for transfer. According to the Grievor, Ms. Baycliffe advised him that it was up to the Manager and the Director to arrange for a transfer¹⁷ but that, in her experience, transfers were usually accommodated in "work injury cases." She recommended that he return to work on a trial basis and continue to pursue his request for transfer.

¹⁷ In fact, there was some confusion as to whether requests for transfer were submitted to the individual department (the Manager and the Director, in particular) or to Human Resources. Although the matter was not clarified in evidence, under the collective agreement, it would seem to depend on whether the request was for transfer within or outside the division. In this case, it would appear that the Grievor was seeking a transfer outside the division and therefore, as recommended by Ms. O'Reilly and Mr. Nalwala, the request for transfer would have been submitted to Human Resources rather than to the individual department (Manager and Director).

Although the Grievor's evidence as to Ms. Baycliffe's advice would be hearsay if relied upon for the truth of its contents, it forms the basis for the final medical note dated November 4, 2008, which the Grievor attached to the November 5th e-mail, wherein Dr. Litsas stated that he had seen the Grievor on November 4th and that he was ready to return to regular work on November 10th. Apparently, Dr. Litsas now felt that "a trial to return to work in the former environment is reasonable. We will reassess the impact on his health monthly." At no time, however, did Dr. Litsas provide a further assessment as to the impact on the Grievor's health of a trial of his return to work in his former work environment. In any event, based on his doctor's advice, the Grievor stated in his e-mail of November 5, 2008, "I am ready to come back to work. I will report to duty on Monday, November 17th."

Meanwhile, in an e-mail dated November 7, 2008, sent to the Grievor and Mr. Nalwala and copied to Ms. Baycliffe and Senior Human Resources Consultant, Rosanne Rinella, Ms. O'Reilly confirmed, contrary to her earlier advice, that there were indeed transfer request forms on file for the Grievor for 2004 and 2005. However, she explained, in early 2006, a letter was sent advising that in order to remain on the transfer request list, he was required to renew his request by completing and submitting a new form. As there was no indication that the Grievor renewed his request for transfer, his name was removed from the transfer request list. Furthermore, Ms. O'Reilly advised, had

the Grievor resubmitted a transfer request form, he should have received written confirmation acknowledging receipt. Accordingly, Ms. O'Reilly inquired as to whether the Grievor had received any such confirmation. She also included a transfer request form for the Grievor to complete and return should he wish to reinstate his transfer request. After a further exchange of e-mails, the Grievor assured Ms. O'Reilly that he had indeed renewed his request for transfer in 2006 and 2007. Nonetheless, on November 12, 2008, he completed the transfer request form, which he sent to both Ms. O'Reilly and Mr. Nalwala on November 14th, and undertook to check the City GroupWise archives for the 2006 form upon his return to work.

Although the Grievor attempted to obfuscate by stating that he did not know whether or not his request had been approved "internally", it seems clear that his request for an extension of his leave of absence had not been approved, and that the Grievor *knew* it had not been approved, as he returned to work on November 17, 2008. The period between the end of his one-year unpaid leave of absence and his return to work was recorded as a leave of absence without pay.

On or about the Grievor's first day back at work, he made a conciliatory gesture toward Mr. Nalwala, expressing his desire to start with "a clean slate" and offering to shake hands. The Grievor stated that he was glad to be back at work and suggested that they "forgive and forget" whatever had

happened between them. Furthermore, notwithstanding that there were grievances being held in abeyance, the Grievor said that he was returning to work with "an open mind." According to the Grievor, Mr. Nalwala said that it was good to have him back; that "things had gone down the wrong path"; that the Grievor was one of the best Analysts in the unit; and that he hoped they could work together cordially. The two men then shook hands. Mr. Nalwala described the interaction upon the Grievor's return to work somewhat differently. While Mr. Nalwala agreed that there was a conciliatory return to work following the Grievor's leave of absence in November 2008 and that there was an expression of interest in starting with "a clean slate," on Mr. Nalwala's version of events, the Grievor apologised for having taken "the wrong route." Although Mr. Nalwala did not recall telling the Grievor that he was one of the best Analysts, he did not deny having made the statement or that they had shaken hands. In any event, the import was that they would agree to start anew. And indeed, as evidence of a conciliatory gesture on his part, upon the Grievor's return to work in November 2008, Mr. Nalwala did not reinstate the requirement for him to submit a work log to his Supervisor prior to leaving work each day.

When the Grievor returned to work, he was seated in a vacant cubicle across from Mr. Nalwala's Assistant, as Leslie Fleming, who had filled in for approximately nine months of his absence (from January to November 2008), was seated at his former work station. From the time the Grievor returned to work on November 17th, while he was transitioning back into his role, he was

instructed to work with Ms. Fleming and to familiarize himself with some additional reports she had implemented in his absence. According to the Grievor, in early January 2009, there were two staff meetings. In the first, staff were advised that Ms. Fleming was returning to her base position in the Toronto Water High Level Pumping Station and, in the second, some seven to 10 days later, that she was being appointed Acting Supervisor, Finance & Administration (the position vacated by Ms. Cunningham) effective February 1, 2009 (or thereabouts). Thereafter until the date of discharge, although Ms. Fleming became the Grievor's direct Supervisor, as she was in an acting capacity, he was required to copy the Manager, Mr. Nalwala, on all e-mails. (Notwithstanding that she was not in an acting position, a similar requirement was imposed on the Grievor when Ms. Cunningham was Supervisor.) For her part, as she was on secondment, Ms. Fleming generally copied Mr. Nalwala on e-mails she sent as well. And, as with Ms. Cunningham, the Grievor claimed that prior to becoming Acting Supervisor, Ms. Fleming was friendly and had a pleasant demeanour. But, with her appointment as Acting Supervisor, her demeanour changed. Furthermore, when on "a couple of occasions," the Grievor sought permission to change his lunch break or shorten his paid breaks (presumably to facilitate his leaving work early), she had to seek Mr. Nalwala's permission before granting the request. In fact, from the Grievor's perspective, Ms. Fleming was just the "messenger" for Mr. Nalwala or, bluntly put, Mr. Nalwala was "firing the gun from [Ms. Fleming's] shoulder."

Aside from four (or so) clerical staff, two Budget Analysts reported to Ms. Fleming as Acting Supervisor: Mr. Wong and the Grievor who were the Payroll Analyst and the Purchasing Analyst, respectively. Ms. Fleming, in turn, reported to Mr. Nalwala. Ms. Fleming's work station was a point of contention with the Grievor. According to the Grievor, immediately upon being appointed Acting Supervisor, Ms. Fleming moved to an enclosed office and the Grievor returned to his former work station in the open office area. However, Ms. Fleming testified that immediately following her appointment as Acting Supervisor, she occupied a different work station in the open office area, as the Grievor had returned to his former work station. Some time later, she was assigned an enclosed office.

Among Ms. Fleming's responsibilities as Acting Supervisor was overseeing the work of the staff under her supervision, making work assignments, monitoring their attendance and addressing any administrative issues in respect of their employment. One such issue related to the Grievor's hours of work.

In or around February 2009, shortly after Ms. Fleming assumed the acting supervisory role, the Grievor requested a change in hours of work. Although Ms. Fleming's recollection was that the Grievor asked that his hours be changed from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. in order to accommodate daycare arrangements for his child, the Grievor's recollection was

somewhat different. Although the evidence is unclear, it would appear that the Grievor's original request, which was not approved, was to start at 8:00 a.m., work through his one-hour lunch break and leave at 3:00 p.m. on Fridays (although he also testified that his original request was to take a half-hour lunch break, work through the other half hour, and leave half an hour early; i.e., at 3:30 p.m., on Fridays). The scope of this request was also unclear, as the Grievor testified that his wife was pregnant with their second child and, on the advice of her doctor either "to take it easy" or "to take it easy for a couple of weeks" (the Grievor testified to both), she had decided to work from home on Fridays, which required the Grievor to pick up his son from daycare at around 4:00 p.m. The Grievor lived in Woodbridge where his son's daycare was also located.

Aside from his childcare responsibilities, the Grievor drove to the Yorkdale subway station, left his car in the commuter parking lot and took the subway downtown. In February 2009, TTC was implementing a \$5.00 per day charge for parking in the Yorkdale commuter parking lot. Therefore, the Grievor decided to take the GO Train from the Maple Station rather than commute to the Yorkdale station and use the TTC. When the Grievor's request to leave early (whether at 3:00 p.m. or 3:30 p.m.) on Fridays was denied, he asked to change his hours of work from 8:00 a.m. to 4:00 p.m. to 7:00 a.m. to 3:00 p.m. five days a week to facilitate his taking the GO Train. It would seem that this request was also denied, but it was ultimately agreed that effective February 13, 2009, the Grievor would work from 7:30 a.m. to 3:30 p.m., Monday to Friday with a one-

hour unpaid lunch break and two 15-minute paid breaks, one in the morning and one in the afternoon. Although nothing turns on the matter, it would appear that this arrangement was agreed to on a trial basis only, although there was no attempt to discontinue the trial until some two months later when, in the course of a meeting on April 17th between the Grievor and Ms. Fleming, the Grievor asked to revert to a later, atypical, shift (7:55 a.m. to 3:55 p.m.) (described in greater detail at p. 104 herein).

In any event, to the extent the Grievor's request for a change in hours of work was motivated by his wife's pregnancy and the need to pick up his son from daycare at 4:00 p.m. in Woodbridge on Fridays, the Grievor allowed only 30 minutes (45 minutes at the most, given his testimony that the daycare centre afforded parents 10 to 15 minutes' leeway in picking up their children) to get from Metro Hall to Woodbridge which, the Grievor allowed, was a "challenge" and, it would seem, wholly unrealistic. And, to the extent the Grievor's request for a change in hours of work was intended to avoid a \$5.00 per day charge for parking being implemented at the Yorkdale commuter parking lot, the Grievor testified that he intended to take the GO Train that arrived at Union Station at 7:44 a.m. When confronted in cross-examination with the fact that a train that arrived at Union Station at 7:44 a.m. would not have allowed him to start work at 7:30 a.m., the Grievor revised his response and testified that he would have taken the GO Train that arrived at Union Station at 7:14 a.m., which would have facilitated a 7:30 a.m. start. However, the Grievor never followed through with

his intention to take the GO Train to work. Instead, his practice on Fridays was to leave the office at 3:30 p.m., walk up University Avenue to the St. Andrew's subway station and take the subway to the Yorkdale subway station, get into his car in the Yorkdale commuter parking lot and drive to the daycare centre in Woodbridge to pick up his son. He followed the same practice on other days as well but only on Fridays, when he picked up his son, was he constrained by the hours of operation of the daycare centre.

Although there was some confusion about the matter, as Ms. Fleming initially confirmed her written notation that, on February 12th, the Grievor requested a change in hours of work, she ultimately agreed that the request was likely made at a staff meeting which took place on February 13th. While Ms. Fleming had no objection in principle to his request, as there were, in effect, staggered work hours for other employees (some starting as early as 6:30 a.m.; others, as late as 9:30 a.m.), she indicated that she had to check with Mr. Nalwala before acceding to the Grievor's request. Although there is no evidence as to the date this conversation took place, Ms. Fleming consulted with Mr. Nalwala, who deferred to her decision whether or not to grant the Grievor's request. However, Mr. Nalwala required that there be a proper record of any arrangements made with the Grievor, including written confirmation that it was the Grievor who initiated the request for a change in hours of work.

Accordingly, on February 13, 2009, Ms. Fleming sent the Grievor an e-mail seeking written confirmation of his request to change his hours of work from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. effective that date. The Grievor acceded to Ms. Fleming's request, and in an e-mail of the same date, advised of his intention to change his hours of work from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. on a trial basis. However, he stated his understanding that the change would commence "after the staff meeting," which apparently took place that day. And, although Mr. Nalwala seemed to have suggested that the Grievor would be permitted to change his hours of work as of February 14th, it is not necessary to resolve this discrepancy, because the parties appear to have agreed that the change in the Grievor's hours of work would be effective from February 13th. However, the parties' agreement creates an inconsistency because there was no dispute that the Grievor was considered to have been late when he reported for work at 7:36 a.m. on February 13th, which could only have been the case had the new schedule (7:30 a.m. to 3:30 p.m.) taken effect as of that date.

In any event, from Ms. Fleming's perspective, the new schedule was not working out, as the Grievor seemed to be coming in late or leaving early almost every day. Accordingly, on February 17, 2009, Ms. Fleming sent the Grievor an e-mail noting that, even though he had requested a change in hours of work from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m., he came to work that day at 7:45 a.m. and left at 3:25 p.m., and reminding him of the need to

report for work at the start of his shift and remain at work until the end of his shift. Ms. Fleming testified that she received no response to her e-mail or any explanation as to why the Grievor came to work late and left early on February 17th.

Accordingly, Ms. Fleming began to record instances when the Grievor arrived late or left early in her "labour journal," in which she diarized matters of significance in relation to staff. For her part, Ms. Fleming testified that she made the decision to monitor the Grievor's arrival and departure times on her own, and not under the direction of Mr. Nalwala. Furthermore, although it is clear that she advised Mr. Nalwala of her decision, it is unclear whether he was aware of her journal notations. Finally, Ms. Fleming acknowledged that she had not monitored the arrival and early departure times or maintained similar records with respect to other staff (aside from various notations in respect of one other staff member, Rebecca Pamor, who left early to accommodate a Wheel Trans pickup), as, she testified, there was no need to do so. She also discontinued her labour journal when the Grievor's employment was terminated, as she testified that she had no issues with other employees under her supervision. While the Union, in effect, questioned Ms. Fleming's *bona fides* in this regard, it called no evidence to the contrary. In any event, with respect to the Grievor, Ms. Fleming recorded 14 late arrivals and two early departures in the period between February 13, when the Grievor started working on the 7:30 a.m. to 3:30 p.m. shift, and March 24, 2009.

Although the Union sought to ascribe nefarious motives to Ms. Fleming's monitoring of the Grievor's late arrival and early departure times, Ms. Fleming testified that she decided to monitor the Grievor's arrival and departure times because, as soon as he had been granted permission to change his hours of work, he began coming in late¹⁸. However, Ms. Fleming expressly denied that she was in the open office area (also referred to as the "common area") at the start of the shift in order to "catch" the Grievor coming in late. In fact, Ms. Fleming was either at her desk in the open office area, from which vantage point she could see the Grievor coming in, or, once she was assigned an enclosed office, she came out of her office to talk to some of the clerical staff who were scheduled to work an earlier shift about business-related matters, and, therefore, took note of the Grievor's arrival times. However, she asserted that she did not make a conscious effort to be in the common area to check on the Grievor. Nevertheless, she was often in the common area conferring with her clerical staff by 7:30 a.m. However, she acknowledged that at the *end* of the Grievor's shift, she positioned herself in the common area doing paperwork or talking to staff specifically to check on his departure times.

¹⁸ In fact, there was some suggestion that the Grievor had been late even on the 8:00 a.m. to 4:00 p.m. shift, which predated Ms. Fleming's acting supervisory role and, therefore, her knowledge of these matters. However, as noted at footnote 41 herein, there was no *proof* of lateness at any time on the 8:00 a.m. to 4:00 p.m. shift (up to February 2009). In any event, lateness on the 8:00 a.m. to 4:00 p.m. shift would not have inured to the Grievor's benefit.

Ms. Fleming recorded the Grievor's arrival and departure times according to the clock on the wall, which was in the general office area and was consistently later than the data generated by the security access card (in this case, a swipe card) used by employees, including the Grievor, to gain access to the second floor office area. Although it was suggested in cross-examination that Ms. Fleming used the clock on the wall, knowing it was running fast, to gauge the Grievor's arrival times in order to "make him look bad"; i.e., to make him appear to be late when he was not, there was only one day (March 9th) when Ms. Fleming recorded the Grievor as arriving late that the swipe card data did not. Moreover, as she also used the clock on the wall to gauge his departure times, and as she only recorded two early departures between February 13 and March 24, 2009, using the same logic, she must have recorded the Grievor as having worked to the end of shifts (i.e., until 3:30 p.m.) in order to "make him look good"; i.e., to make it appear as if he worked until the end of his shifts when, in fact, he left early (presumably by the same number of minutes as she recorded him as having arrived late) on 12 days between February 13 and March 24, 2009. However, on one (of only two) occasions that she recorded him as having left early, it was by fewer minutes than she recorded him as having arrived late on the same day. More importantly, the discrepancy between her records of his late arrival times and the swipe card data varied from day to day, making it likely, in my view, not that the clock on the wall was recording time *inconsistently*, but that Ms. Fleming recorded the Grievor's arrival times when

she first noticed him, which might have been when he entered the common area or when he arrived at his work station, among other possible times.

In any case, the swipe card data are more *complete* than Ms. Fleming's journal entries, as (i) Ms. Fleming was on vacation on at least two of the days (March 13 and March 19, 2009) on which swipe card data record the Grievor as being late; (ii) there are no journal entries whatsoever for two other dates (February 27 and March 10, 2009) and no indication of whether or not Ms. Fleming was at work on those dates on which the swipe card data indicate that the Grievor was late by two and five minutes, respectively; (iii) Ms. Fleming made no inquiries as to the Grievor's arrival time if he was already at work by the time she arrived, which may account for the fact that there were no arrival times recorded for the Grievor in Ms. Fleming's labour journal for two additional dates (February 18 and March 11, 2009) on which the swipe card data record the Grievor as being late, albeit by only two minutes on both of these dates; and, finally, (iv) there was one date (February 26, 2009) on which Ms. Fleming's data record the Grievor as being on time and the swipe card data record him as being one minute late. Accordingly, the swipe card data, which record arrival times but not departure times, indicate that the Grievor was late 20 times (15, by five minutes or longer) out of 22 working days (exclusive of five days the Grievor was off sick) in the period between February 13 and March 24, 2009.¹⁹ As noted, Ms.

¹⁹ Although the swipe card data indicate an additional working day in the period between February 13 and March 24, 2009; namely, February 16th, on which the Grievor was not late, this date was included in the swipe card data in respect of this period but not in Ms. Fleming's labour journal. As well, there are two additional dates, February

Fleming recorded the Grievor as having been late "only" 14 times in the same period.

While the Grievor offered a number of explanations for his late arrival times, in particular, that (i) there were several means by which his arrival times could have been measured: the clock on the wall, the clock in his computer, or his own watch; (ii) he might not have used his access card to "swipe in," if another employee "swiped in" immediately before him and, as a courtesy, let the Grievor in, these explanations have application only to the times recorded by Ms. Fleming (who testified that she used the clock on the wall to gauge the Grievor's arrival times), and not to the times generated by the swipe card reader, which reveal a pattern of persistent lateness.

In fact, the Grievor did not dispute that, on occasion, he was late arriving at his work station, which he attributed to a myriad of reasons beyond his control, such as weather conditions (particularly in the period in question – February/March), traffic conditions (especially highway traffic), delays with the subway, long lineups to get into the commuter parking lot, or because he was talking to someone outside the work area or decided to use the washroom

25th and February 26th, which were included in both the swipe card data and Ms. Fleming's labour journal, but not in the chart comparing these data, which was entered as an exhibit in these proceedings. According to the swipe card data, the Grievor was not late on February 25th and one minute late on February 26th, whereas he was not late on either date according to the entry in Ms. Fleming's labour journal. Were these dates to be factored into the calculus, between February 13 and March 24, 2009, the Grievor would have been late 14 out of 16 working days on Ms. Fleming's data and 20 out of 23 working days according to the swipe card data.

outside the work area before swiping in. Although it was suggested in cross-examination that snow in February and highway traffic congestion were predictable and to be expected as part of the daily commute, remarkably, the Grievor claimed that they were not entirely predictable, as there was no indication as to when these issues might arise. He also claimed that he was generally on time, which is contrary to the swipe card data (which indicate that he was almost always late, if only by a few minutes) and, therefore, demonstrably untrue.

In any case, following a particularly egregious instance of lateness, when the Grievor swiped in at 8:09 a.m. on February 24, 2009, Ms. Fleming called the Grievor into her office at around 2:45 p.m. to discuss his attendance, and his arrival and departure times, in particular.

For his part, the Grievor testified that when he came into the office, Ms. Fleming confronted him about his persistent lateness. However, there was no mention of a particular date. Nevertheless, the Grievor asserted that he had been late on *that* day because of a problem with the subway. On the Grievor's evidence, Ms. Fleming indicated that she was aware of the problem, which the Grievor described as a medical emergency on the subway resulting in a delay and a subsequent request that passengers disembark and wait for the next train.

Although Ms. Fleming testified that the Grievor notified the City that he would be late due to a problem with the subway, the Grievor testified that he *would* have notified the City but that he did *not* do so on this occasion, as Ms. Fleming was on the same subway train as he was. He acknowledged, however, that she likely had not seen him, as she was one subway car ahead and there had been no communication between them, even though the Grievor had followed closely behind her through the security area and into the second floor office area. Notwithstanding the Grievor's carefully-constructed story of having been late for work because of a delay on the subway and having followed Ms. Fleming off the subway and into work, Ms. Fleming testified that she drove to work that day and so, would not have been on the subway train that was delayed. Moreover, on the assumption that there was a delay and that Ms. Fleming was aware of the delay, it could have been because the Grievor, or any other employee, for that matter, notified her of the delay (which is consistent with her evidence), or that she was on the subway (which is inconsistent with her evidence), or for any number of other reasons. While I can accept that the Grievor was late for work on February 24th because of a subway delay, I have difficulty accepting his assertion that Ms. Fleming was on the same subway train. If indeed his elaborate description of having noticed her on the subway and effectively following her into work some 40 minutes late were true, I find it telling that Ms. Fleming was not even cross-examined on her assertion that she drove to work that day, which is wholly incompatible with the Grievor's story and, in the

absence of cross-examination, may be treated as an acceptance of the truth of Ms. Fleming's evidence on the matter.

In any event, on the Grievor's evidence, Ms. Fleming reiterated in the meeting that afternoon that he was persistently late, in response to which the Grievor said that he was trying out different options for getting to work (although there was no indication as to what those options were and, as noted earlier, the Grievor acknowledged that he never actually took the GO Train). For her part, Ms. Fleming stated that she would notify Mr. Nalwala and record the Grievor's lateness. She then asked the Grievor how he intended to make up the time, and the Grievor asked Ms. Fleming to identify the policy under which employees who were late due to problems with the subway or other circumstances beyond their control were required to make up the time. Ms. Fleming said that she would check with Mr. Nalwala as to the policy.

Ms. Fleming testified that she reminded the Grievor that it had been *his* initiative to change from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. shift and that, as soon as the change was approved, he started coming in late¹⁸. In fact, he was late (7:45 a.m.) and left work early (3:25 p.m.) on February 13th, which was the first day of the new arrangement. She also reminded him that although she attempted to address the matter in an e-mail dated February 17th, there was no response to the e-mail. According to Ms. Fleming, the Grievor became very defensive and, aside from reiterating his request for the policy,

asked about the hours of work of other staff. Ms. Fleming explained that other staff were required to adhere to their scheduled hours of work and work a full shift (seven hours), and that it was unfair to them if he left early. On Ms. Fleming's version of events, the Grievor made some puerile comment to the effect that he would salute her every morning. Ms. Fleming then advised the Grievor that as he had reported for work at around 8:00 a.m., he would have to stay until 4:00 p.m. to make up the time he was late. Again, the Grievor pressed for a copy of the policy, as he claimed that his lateness was unavoidable, because the subway had been delayed. On her version of events, Ms. Fleming agreed to inquire as to the policy, but clearly stated that the Grievor did not have permission to leave work at 3:30 p.m. that day. Nonetheless, it would appear that the Grievor did not make up the time he was late on February 24th.

Finally in this meeting, the Grievor complained about two indisputably contradictory matters: that Ms. Fleming was not coming to work until some time between 8:00 a.m. and 8:15 a.m. and that she was coming to work at 7:30 a.m. to monitor his hours. In fact, the Grievor claimed that Ms. Fleming was upset because she had to be at work by 7:30 a.m. in order to monitor the Grievor's hours. As to the first matter, Ms. Fleming responded that her hours of work differed from the Grievor's, but that she worked a full seven-hour shift and, as to the second, that his information was incorrect. By way of explanation, Ms. Fleming testified that she did not have fixed hours; that she came to work some time between 7:15 a.m. and 8:00 a.m.; and that although she was not always

there when the Grievor came to work in the morning (especially after the change in his start time from 8:00 a.m. to 7:30 a.m.), as noted previously, she was often in the common area at 7:30 a.m. conferring with the clerical staff. However, if she were not at work at 7:30 a.m. or, at least before the Grievor arrived, she made no inquiries as to his arrival time.

In any case, as the Grievor continued to badger her about *her* hours of work, as well as the policy under which employees who were late for work due to circumstances beyond their control were required to make up the time, Ms. Fleming terminated the meeting and reiterated that she would check with Mr. Nalwala as to the policy.

Two days later, on February 26th, as he had not made up the time (half an hour or so) he was late on February 24th, Ms. Fleming called the Grievor into her office at around 8:15 a.m. to ask how he proposed to make up the time and to advise that, if he did not, the time would be recorded as "leave without pay," and he would be docked half an hour's pay. According to Ms. Fleming, the Grievor became confrontational, and once again, requested a copy of the policy under which he was required to make up the time. Ms. Fleming indicated that she had ascertained from Mr. Nalwala that there was no written policy, but that, as employees were paid for a seven-hour work day, the practice had always been for them to make up the time they were late. Ms. Fleming testified that the Grievor again raised the issue of *her* hours and the hours of other staff, and, as

he continued to belabour the point, Ms. Fleming agreed to provide written confirmation. She also suggested that they meet with Mr. Nalwala to discuss the matter. And, in order to clarify the matter for future, she proposed involving the Union and Labour Relations as well. However, this meeting ended with the matter unresolved.

For his part, the Grievor did not dispute that he became "confrontational". He also confirmed that he asked for a copy of the policy under which he was required to make up the time; that Ms. Fleming indicated there was no such policy; but that she had spoken to Mr. Nalwala who confirmed that if he did not make up the time, he would be docked half an hour's pay. As to the assertion that this had always been the practice, the Grievor testified that prior to February 2009, he had never been required to make up the time he was late. The Grievor further acknowledged that he raised the issue of Ms. Fleming's hours and the hours of other staff. With respect to Ms. Fleming, in particular, he alleged that she, too, was on the subway train that was delayed and therefore, claimed that she was late on February 24th as well. (Of course, had she been on the train, which she effectively denied, it is debatable whether she would have been late, as she worked entirely different hours than the Grievor.) He also claimed that other employees have flexible hours and were not required to make up time for lateness or were allowed to make up time at lunch, which the Grievor was not permitted to do. (According to Ms. Fleming, there was never any discussion of the Grievor's making up the time he was late at lunch.) However,

on the Grievor's evidence, Ms. Fleming foreclosed any discussion of her hours or the hours of other staff.

Nevertheless, Ms. Fleming testified in these proceedings that, although there were no notations in her labour journal, she had required other employees to make up time as well. However, there was a notation about an employee (Rebecca Pamor) who left early on February 26 and March 4, 2009 to accommodate a Wheel Trans pickup. According to Ms. Fleming, Ms. Pamor made up the time when she left early. Although the Grievor claimed that Ms. Pamor complained to him in his capacity as Union Steward about not being allowed to make up time at lunch, Ms. Fleming offered to allow Ms. Pamor to make up time by taking a half-hour lunch, but could not allow her to forego her entire lunch break, which the Grievor would not have known, as Ms. Pamor was dealing directly with Ms. Fleming without the assistance of the Union.

Finally, in a conversation with Ms. Fleming (the date of which was not identified), the Grievor suggested that other employees in his unit (Kulbir Gill and Jag Gill) who were late did not have to make up the time. No particulars were given as to when this might have occurred. On closer examination, however, it would appear that these employees worked flexible hours and, when they did come in late on occasion, made up the time during their lunch breaks. Other employees who were late, but who were not identified, were also required to make up the time, as the Grievor said he was as well, although there is no

evidence as to when this might have occurred. In fact, the only evidence as to a specific date is to the opposite effect; namely, that the Grievor was *not* required to make up the time in respect of February 24th, the date of the subway delay.

In a further attempt to address the issue of the Grievor's persistent lateness, on February 27, 2009, Ms. Fleming sent an e-mail requesting that staff confirm their arrival and departure times, as well as lunch times and break times, which were set out in an attachment to the e-mail. Although the e-mail indicates that there was some flexibility with respect to break and lunch times, it clearly states that, due to operational requirements, there was no such flexibility with respect to arrival and departure times. Accordingly, staff were expected to be in the work area at the start of their shifts and remain at work until the end of their shifts. Although the e-mail was addressed to "all staff," which suggests that there was an issue with staff coming in late and leaving early, Ms. Fleming testified that only the Grievor was implicated in this issue. Nevertheless, she took the opportunity to obtain confirmation from all staff of their arrival and departure times, as well as break times, and to reinforce the need for adherence to the shifts they had chosen and for which approval had been given. The Grievor acknowledged receipt of this e-mail.

Further with respect to the Grievor, following yet another late arrival on March 24, 2009, Ms. Fleming issued an e-mail wherein she reviewed the Grievor's record of lateness from February 13, 2009, when the City

accommodated his request for a change in hours of work from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. Although the e-mail makes reference to 14 lates, which were recorded by Ms. Fleming, as noted, the swipe card data indicate that the Grievor was late 20 times in the relevant period (February 13 to March 24, 2009), six more than recorded by Ms. Fleming. In any event, the Grievor was not docked pay for the times he was late. However, the e-mail advises that, in future, pay would be deducted²⁰. As well, the Grievor was asked how he intended to make up the time on the 14 occasions Ms. Fleming recorded him as having been late. (There was no mention of the additional six occasions recorded in the swipe card data.) Ms. Fleming testified that the Grievor asked yet again if there was a written policy pursuant to which this decision was being taken. Ms. Fleming acknowledged that there was no written policy but, as she had explained on numerous occasions, the Grievor was being paid for a seven-hour work day and, as his lateness had persisted, the decision was taken to require him to make up the time. Finally, it should be noted that the Grievor was offered the option of reverting to the 8:00 a.m. to 4:00 p.m. shift.

In response to the e-mail of March 24th asking him, among other matters, how he intended to make up the time, the Grievor took issue with the assertion that he had been late 14 times between February 13 and March 24, 2009. Specifically, he stated in an e-mail dated March 25, 2009, "Your claim is

²⁰ Notwithstanding the purported practice that if employees did not make up the time, they would be docked pay for the time they were late, there is no evidence of the Grievor's having made up the time or been docked pay in respect of any of the dates on which he was late.

absolutely not correct," and asked for his "arrival times with acceptable documented proof on all the dates that you say I was late." And so, the City produced such proof; specifically, a comparison between Ms. Fleming's record of the Grievor's arrival times for the period from February 13 to March 24, 2009 gauged by the clock on the wall and the swipe card data for the same period. While the Grievor took issue with the proof that was provided, he appeared to object to the accuracy of Ms. Fleming's observations rather than the swipe card data, on which he appeared also to rely, but which reveal a more persistent pattern of lateness (20 times in the period in question).

Aside from lateness, the Grievor was off work from Tuesday, March 3rd to Friday, March 6th.²¹ It would appear that he left a voice mail message for Ms. Fleming on March 3rd, wherein he stated that he was sick; that he did not know when he would be returning to work, but that he would provide a doctor's note upon his return. While the Grievor testified that he also indicated in the voice mail message that he would be off for "a couple of days," there is nothing in Ms. Fleming's labour journal to suggest that he gave any indication of the duration of his absence. As the Grievor had not specified a return-to-work date in his voice mail message or called in to report his absence on March 4th or March 5th, at around 4:00 p.m. on March 5th, Ms. Fleming left a message on the Grievor's home telephone. Aside from inquiring as to the date of his return to work, Ms. Fleming indicated that the Grievor's absence on March 4th and March

²¹ Although a doctor's note subsequently provided would suggest that the Grievor was off work from March 2nd, nothing turns on the matter, as there was no intimation of any impropriety with respect to that date.

5th would be recorded as "failure to report" for duty. She further advised that he was required to call her the next day (March 6th) and provide a doctor's note upon his return to work. Although the Grievor did not call Ms. Fleming on March 6th, he sent an e-mail to Mr. Nalwala at 10:46 p.m. on March 5th, advising that he was unable to attend at work because of "a bad bout of viral fever" and that he would provide a doctor's note, as requested, upon his return. As the Grievor did not have access to Ms. Fleming's e-mail address at home, he asked Mr. Nalwala to forward his e-mail to her, which Mr. Nalwala did on the Grievor's behalf.

When the Grievor returned to work the following Monday (March 9th), Ms. Fleming asked for the medical note. However, the Grievor indicated that he had been too sick to attend at his doctor's office and, in any case, had been unable to schedule an appointment with his doctor in order to obtain a medical note until that evening. Nevertheless, he undertook to provide a medical note, which he did the following day. The note from Dr. Litsas, which is based, for the most part, on information provided by the Grievor, states that the Grievor was seen in the office on March 9, 2009; that he was "totally disabled on Saturday, February 28, 2009 and I estimate through to Friday, March 6, 2009. Return to regular work on Monday, March 9, 2009."

Following receipt of the medical note, a meeting was convened on March 11, 2009 to discuss the Grievor's failure to follow the reporting procedures set out in the collective agreement on March 4, 5 and 6, 2009. In attendance at

the meeting were Mr. Nalwala and Ms. Fleming, for the City, and the Grievor and his Local 79 Union Representative, Karen Fulcher. Mr. Nalwala put forward the position of the City; namely, that the Grievor failed to report his absence on March 4th and March 5th. The Grievor responded much to the effect as he did in these proceedings; namely, that he left a voice mail message for Ms. Fleming on March 3rd, wherein he stated that he would off work for "a couple of days"; that he did not know when he would be returning to work, but that he would provide a doctor's note upon his return. While Ms. Fleming acknowledged that the Grievor left a voice mail message, she disputed that he gave any indication of the duration of his absence. However, when the Grievor suggested that the matter could be resolved by listening to the voice mail message, inexplicably, Ms. Fleming indicated that she had deleted the message.

Ms. Fleming further indicated that she had left a message for the Grievor on March 5th asking him to call her the next day. Rather than complying with Ms. Fleming's request, the Grievor sent an e-mail to Mr. Nalwala confirming, among other matters, that he would provide a medical note, as requested by Ms. Fleming in her voice mail message of March 5th, and asking Mr. Nalwala to forward his e-mail to Ms. Fleming on his behalf. As noted, the Grievor followed through with his commitment to provide a medical note, as a result of which, his absence was designated as "sick" rather than "failure to report," which would have been a disciplinary notation. In fact, there was no further action taken as a result of the Grievor's absence on the dates in question.

Shortly after 11:00 a.m. (11:09 a.m.) on Friday, March 13, 2009, the Grievor sent an e-mail to Ms. Fleming stating that he was leaving early and would report his absence on his timesheet. The Grievor testified that he left early because he was not feeling well and that he tried to see Ms. Fleming before he left, but she was not in her office. He then checked with her Assistant, Beverly O'Leary, who advised him that neither Ms. Fleming nor Mr. Nalwala was in that day. He also tried unsuccessfully to find the Senior Budget Analyst, Mr. Cuoco, who supervised a number of other Budget Analysts, and the Director, Mr. Towers. When neither was available, he went back to his desk and composed the e-mail to Ms. Fleming. As he was leaving, the Grievor mentioned to Ms. O'Leary that he was not feeling well and that he had sent an e-mail to Ms. Fleming to this effect. Ms. Fleming responded by e-mail on March 17th inquiring as to why the Grievor had left early and how he intended to record the absence. She also told him that in future, if she and Mr. Nalwala were not available, he should inform Mr. Cuoco that he was leaving, as Mr. Cuoco was the Supervisor in her absence. The Grievor responded to Ms. Fleming on March 23rd advising of the efforts he had made to find all of the above-named members of management and of his intention to record the absence as sick time on his timesheet, as he had left work early due to illness. Later the same day, Mr. Nalwala responded by e-mail to both the Grievor and Ms. Fleming requesting that the Grievor provide a doctor's note justifying his absence on March 13th no

later than March 27th,²² failing which the absence would be recorded as "sick no pay."

Given the imperative to provide a doctor's note by March 27th, the Grievor testified that he called the doctor's office on March 23rd or March 24th to make an appointment, but was told that he could not secure a medical note in an after-hours appointment, and so, he asked for time off during working hours to attend at the doctor's office to obtain a medical note, but his request was denied. As it turned out, however, the Grievor was sick again on March 25th and, pursuant to a new same-day booking policy in Dr. Litsas's office, he was able to secure an appointment that day and obtain a doctor's note covering both March 13th and March 25th, which he gave to management upon his return to work the following day.

As to March 25, 2009, shortly after 11:00 a.m. (11:18 a.m., to be exact) on this occasion as well, the Grievor sent an e-mail to Ms. Fleming indicating that he was not feeling well and needed to leave. However, unlike the circumstance on March 13th, when he was unable to locate a member of management, on this occasion, he found Ms. Fleming in her office and reiterated that he was leaving early because he was not feeling well. He then went back to his desk and wrote a confirmatory e-mail. As referred to above, in support of his absence, he provided a note from Dr. Litsas dated March 25th indicating that he

²² It seems that, because of a clerical error in Mr. Nalwala's e-mail, Ms. Fleming extended the deadline to March 30th.

had "a medical condition requiring absence from work March 13 and today, March 25/09. ... Return to regular work on Thursday, March 26, 2009." In fact, the Grievor did return to work on March 26th and March 27th, subsequent to which, he left on vacation.

Aside from the absences for less than half a day on March 13th and March 25th, for which proof of illness was provided by Dr. Litsas, albeit after the fact in respect of March 13th, there was an absence during working hours for which prior permission was not obtained; namely, on March 20, 2009, when it was alleged that the Grievor was away from his work station for 45 minutes, from 11:15 a.m. to 11:58 a.m. (and subsequently took a one-hour lunch break). With respect to this incident, Ms. Fleming testified that the computer in her office had malfunctioned and so, she was working at her old desk in the open office area where the Budget Analysts and clerical staff worked. However, her evidence as to what she saw from that vantage point is inconsistent: either she noticed that the Grievor was not at his work station, or she saw him leaving his work station, at 11:15 a.m. Although the fact that Ms. Fleming noticed that the Grievor was not at his work station at 11:15 a.m. does not establish when he left the work station, but only when she noticed he was gone, the inconsistency is immaterial, as the allegation is that the Grievor left the workplace at 11:15 a.m. Her evidence is clear, however, that she saw him return to his work station at 11:58 a.m. However, she took note of the fact that he took a lunch break from either 1:00 p.m. (or 1:10 p.m., at the latest) to 2:00 p.m.

Although Ms. Fleming acknowledged that she did not confront the Grievor that day, at around 9:30 a.m. (9:29 a.m.) the following Monday, March 23rd (March 20th being a Friday), Ms. Fleming sent an e-mail to the Grievor inquiring about the matter. At 2:10 p.m., the Grievor responded to Ms. Fleming indicating that he had come by her desk at around 11:20 a.m. to inform her that he was taking a half-hour break to attend a dental appointment; and that, as the appointment was extended by 8 to 10 minutes, he took a shorter lunch break (from 1:20 p.m. to 2:00 p.m.) and did not take his afternoon break that day. For her part, Ms. Fleming testified that the notation in her labour journal indicates that the Grievor took lunch from 1:00 p.m., or 1:10 p.m., to 2:00 p.m. There is no reference to the afternoon break in her journal and Ms. Fleming could not recall whether or not the Grievor had taken an afternoon break.

There was a final e-mail exchange between the Grievor and Ms. Fleming before Mr. Nalwala became involved. At 2:29 p.m., Ms. Fleming disputed that the Grievor came by to inform her that he was taking a break to attend a dental appointment, even though she claimed that he knew where she was working (at her old desk in the open office area), as he had seen her there all morning. She also stated in the e-mail that if the Grievor had a dental appointment, he should have informed her the previous day or as soon as he came into the office that day; that he was gone from 11:15 a.m. to 11:58 a.m.; that even when he returned to the office, he did not advise her that he had left

the workplace to attend a dental appointment or that he had taken his entire lunch break, from 1:00 p.m. to 2:00 p.m. She further advised that she would be bringing the matter to Mr. Nalwala's attention. The Grievor's retort, sent by e-mail some 20 minutes later, was that Ms. Fleming was off work the previous day (which indeed she was) and that, when he got back from his appointment, Ms. Fleming appeared to be busy with another employee. He then reiterated that he took a shorter lunch break (from 1:20 p.m. to 2:00 p.m.) and did not take his afternoon break that day.

For his part, the Grievor testified in these proceedings that he had cancelled a dental appointment the week before and had asked to be put on a cancellation list, as he was leaving for India a week or so later. The Grievor testified in examination-in-chief that some time after 10:00 a.m. on March 20th, the receptionist in the dentist's office called to offer him an appointment at 11:20 a.m. that day. The Grievor accepted the offer of an appointment and, as it was booked for half an hour, he worked through the morning break, which he otherwise would have taken at around 10:30 a.m., and left for the dentist's office at 11:15 a.m. The Grievor further testified that before he left, he walked over to Ms. Fleming's office to inform her that he was leaving for a dental appointment, but she was not there (which contradicts his e-mail to Ms. Fleming at 2:10 p.m. on March 23rd, wherein he stated that he came by her desk at around 11:20 a.m. – a time which is inconsistent with his claim that he attended at the dentist for a one-half hour appointment, from 11:20 a.m. to 11:50 a.m., and with Ms.

Fleming's response at 2:29 p.m. that the Grievor knew she was not in her office, as he had seen her working at her old desk in the open office area all morning but had not come by her desk to notify her that he was leaving).

In cross-examination, the Grievor testified in a manner that was more consistent with the e-mail trail. Specifically, he testified that he came by Ms. Fleming's desk, presumably before 11:15 a.m., as he claimed to have left the office at 11:15 a.m., but Ms. Fleming was not there. Nevertheless, when challenged about the matter later in cross-examination, the Grievor adamantly denied that he came by Ms. Fleming's desk before 11:15 a.m., although he insisted that he left the office at 11:15 a.m. When pressed as to the matter, he concluded his evidence on this matter by stating that he left the office between 11:15 a.m. and 11:20 a.m. (although, as noted, 11:20 a.m. is inconsistent with his claim that he attended at the dentist for half an hour, from 11:20 a.m. to 11:50 a.m.).

I am not satisfied that the Grievor made any effort to inform Ms. Fleming that he was leaving to attend a dental appointment, because he testified both that he tried to find her in her office and at her desk. Based on Ms. Fleming's uncontradicted evidence, he would have known that, had he gone to her office, he would not have found her there. And, had he gone to her old desk in the open office area, he would have found her. As he did not find her anywhere, I can only conclude that he did not make an effort to do so.

Aside from his failure to notify Ms. Fleming that he was leaving, other aspects of the Grievor's story changed in cross-examination. Although he still maintained that he received a call from the dentist's office on March 20th at 10:11 a.m., on their face, records from the dentist's office, which the Grievor submitted in support of his story, suggest that on March 18th at 10:11 a.m., the receptionist confirmed an appointment for March 20th at 11:00 a.m. When confronted with the records, improbably, the Grievor claimed that the records were conflated and that the conversation on March 18th was unrelated to the March 20th appointment (but rather related to the cancellation of a March 24th appointment and a request to be put on a cancellation list for another appointment, which, as it turned out, is the appointment at issue in this case). As unlikely as it seems, the Grievor submitted amended records from the dentist's office on which there is a handwritten notation, which states "appointment confirmed on March 20th/09 at 10:11 a.m. for 11:00 a.m." and would appear to be signed by "Jennette Mend" followed by some initials, which cannot be deciphered. Jennette Mend was never identified but presumably worked in the dentist's office and had a propensity for making telephone calls at 10:11 a.m.

Given the amended records, which are open to interpretation (as it is not clear, for instance, what "confirmed" means), I am constrained to conclude that the appointment for March 20th was scheduled at 10:11 a.m. that day. However, it is clear from the dentist's records, and Ms. Mend's clarification, that

the appointment was for 11:00 a.m., and not 11:15 a.m., as the Grievor testified in examination-in-chief, or 11:20 a.m., as he testified in cross-examination. Confronted with clear confirmation of an 11:00 o'clock appointment, the Grievor testified later in cross-examination that, although the appointment was for 11:00 a.m., in confirming the appointment, he indicated that he would be "a little bit late," allowing for the possibility that he left for the dentist's office at about 11:15 a.m. but, for reasons already stated, not that he came by Ms. Fleming's desk to inform her that he was leaving "around 11:20 a.m.," as he claimed in an e-mail to Ms. Fleming at 2:10 p.m. on March 23rd. Moreover, the Grievor claimed that the appointment lasted only half an hour, from 11:20 a.m. to 11:50 a.m. (although I note parenthetically that he was billed for three units of scaling).

In any case, the Grievor completed the dental treatment (scaling), settled the account and swiped back into his office at 11:56 a.m. When he arrived at his work station at 11:57 a.m., he saw Ms. Fleming working at another employee's desk. As she appeared to be fully occupied, he did not interrupt to tell her about his dental appointment. On his evidence, he worked until 1:20 p.m. and left for lunch until 2:00 p.m. As noted in the e-mail exchange, he did not take his 15-minute afternoon break, which, he testified, he normally would have taken at 3:00 p.m. for 15 minutes, and worked until 3:30 p.m. that day. However, the Grievor neglected to mention in the e-mail exchange that he had also worked through his morning break.

As noted above, there was a subsequent e-mail exchange between the Grievor and Mr. Nalwala starting with Mr. Nalwala's response to the Grievor's last e-mail to Ms. Fleming at 2:40 p.m. on March 23rd, wherein he advised, in effect, that any "change in timings" (an apparent reference, in this context, to changing the time of his breaks, including his lunch break) required prior approval; that the period for which the Grievor absented himself without prior approval would be recorded as "leave no pay" and that the Grievor would be docked a commensurate amount of pay (45 minutes). The following morning, the Grievor responded by e-mail at 7:54 a.m., challenging the assertion that there had been a "change in timing," as he "made up all the time [attributable to the dental appointment] and then some" (his evidence being that he shortened his lunch break by 20 minutes and worked through his two 15-minute breaks, although there is no reference to his having worked through the morning break in this e-mail or any other e-mail sent by the Grievor), which is contrary to Ms. Fleming's evidence that he left for lunch at 1:00 p.m. or, in any event, no later than 1:10 p.m. He also claimed that the response (presumably a reference to recording the absence as "leave no pay" and docking him 45 minutes' pay) was "totally unjust and unreasonable for something trivial."

In an e-mail at 9:08 a.m., Mr. Nalwala challenged the notion of the Grievor's actions as being "trivial" and indicated the substance of the City's position as follows:

Leaving the workplace during your normal working hours for personal reasons and without prior permission is a very serious matter and subject to further disciplinary action.

On Friday March 20, you came in late ..., you left the workplace without permission from 11:15 a.m. to almost noon. At 12:30 p.m., you had lunch at your desk and then again from 1:00 p.m. to 2:00 p.m. you were away."

...

The e-mail concluded by setting out the requirement that the Grievor report for work on time and obtain permission from his Supervisor before making changes to his normal breaks, including the lunch break.

Half an hour later, the Grievor reiterated by e-mail that he could not have informed his Supervisor the previous day (Thursday, March 19th), as she was away from work (which would seem irrelevant, as he claimed not to have been offered the appointment until Friday); that she was not in her office on Friday (which adroitly avoids addressing Ms. Fleming's assertion that the Grievor had seen her working at her old desk in the open office area prior to leaving the office for his dental appointment); and that when he returned from his appointment, Ms. Fleming was engaged with another employee and so, he took it upon himself to make up the time. The Grievor then suggested that he should have been afforded some flexibility (presumably to reschedule breaks) but committed to "endeavor" to inform and seek permission from his Supervisor, if similar circumstances arose in future.

Two hours later, Mr. Nalwala asserted by e-mail that the Grievor had had ample opportunity to inform his Supervisor that he was leaving, but chose not to do so. He further asserted that the Grievor only offered up the excuse that he made up the time when confronted with his absence. As noted below, that excuse was cleverly constructed but, as with much of the Grievor's evidence, riddled with half-truths. Mr. Nalwala also made reference to the fact that the Grievor arrived late that day (7:39 a.m., according to the swipe card data) and failed to inform his Supervisor (presumably that he was leaving the workplace during normal working hours to attend an appointment), which Mr. Nalwala characterized as "blatant disrespect towards your Supervisor." By e-mail less than 10 minutes later, the Grievor expressed his indignation at Mr. Nalwala's characterization of him as disrespectful, as Mr. Nalwala did not believe that the Grievor made up the time. However, the Grievor suggested a meeting to discuss the issues raised in the e-mail exchange.

Aside from the conciliatory gesture of a meeting to discuss outstanding issues, the Grievor's indignation was disingenuous and misplaced. To reiterate, as proof of his excuse for having left the workplace to attend a dental appointment, the Grievor offered up records from the dentist's office, which, I have found, *support* his assertion that he had no prior notice of the dental appointment, as it was only that morning (Friday, March 20th) at 10:11 a.m. that the dentist's receptionist arranged an appointment for 11:00 a.m. that day (although notably, the Grievor claimed that the appointment was for 11:15

a.m. or 11:20 a.m. but, in any event, none of this information was conveyed to the City in either the e-mail exchange between the Grievor and Ms. Fleming or between the Grievor and Mr. Nalwala or indeed at any time prior to the hearing), but *contradict* his assertion that he could not have given prior notice of the appointment to Ms. Fleming because she was away from work on Thursday (March 19th). In addition, although the Grievor claimed to have worked through his morning break in order to make up part of the time he was gone from the workplace, inexplicably, this information was also not conveyed in the e-mail exchange between the Grievor and Ms. Fleming or between the Grievor and Mr. Nalwala. Moreover, the Grievor claimed that had he taken his morning break, it would have been around 10:20 a.m. and there would have been a record of his having swiped in at the end of the break. However, as pointed out in cross-examination, there is no record of the Grievor's having swiped in around that time on March 23rd or March 24th, among numerous other days covered by the swipe card data submitted in evidence, which leads to the conclusion that the Grievor either regularly failed to take his morning break (which was not suggested and, I find, is highly unlikely) or that he varied the time of his morning break, which is much more likely. And so, I am not persuaded by the fact that he swiped in at 9:56 a.m. on March 20th that he did not take his morning break that day, as there are only 10 out of 28 days for which swipe card data were produced on which the Grievor swiped in around 10:30 a.m. (or even between 10:00 a.m. and 11:00 a.m.).

The Grievor proceeded on vacation to India from Monday, March 30th to Wednesday, April 15th. He was due back at work on Thursday, April 16th. However, he claimed that when he arrived at the airport on April 15th to board the outbound flight, he learned that the flight had been cancelled and that the airline was rerouting passengers based on the availability of other flights. (Although nothing turns on the matter, it would appear from the proof provided by the Grievor that the flight was delayed rather than cancelled.) As it was apparent that the Grievor would be unable to report for work on April 16th, as scheduled, he sent an e-mail to Mr. Nalwala advising that his flight had been delayed²³; that he was now scheduled to arrive in Toronto in the late afternoon of Thursday, April 16th and so, he would be unable to report for work until the following day. For his part, Mr. Nalwala responded by e-mail asking for proof that the Grievor's flight had been delayed. Ms. Fleming was copied on this e-mail exchange. While the Grievor did not recall when he read Mr. Nalwala's e-mail, he testified, in effect, that he expected he would be required to prove the veracity of his claim and, therefore, he secured a letter from the Customer Service Manager of the airline (KLM) confirming a delay on Flight 872 on April 15th.

The Grievor reported for work at 7:35 a.m. on April 17th. He testified that his flight landed in Toronto at 2:00 a.m.; that when he arrived at the office at 7:30 a.m., he did not have access to his swipe card, which was not in his wallet,

²³ Although the email advising Mr. Nalwala of the flight delay was dated April 14th, no explanation was given for the date of the e-mail. However, I have taken nothing from the discrepancy, which may be attributed to a change in time zone, a setting on the computer, among other reasons.

and so, he waited outside the security area. On a whim, at 7:35 a.m., he put his back against the swipe card reader, which apparently released the door. The Grievor walked over to his desk and tried to log on to his computer. However, as his password had been automatically reset, he was unable to log in. He called the Help Desk, which provided assistance in resetting his password and he successfully logged on to his computer. He then went over to the printer and scanned the letter from the airline confirming a delay in his outbound flight. As it was configured, the scanner uploaded an e-mail message to the Grievor's computer with the letter as an attachment and at 7:49 a.m., the Grievor sent the e-mail with the attachment to Ms. Fleming. The Grievor then walked over to Ms. Fleming's office and put the original letter on her desk. Ms. Fleming was on the telephone when he got there and so, he "signalled" her to call him when she off the phone, as there were a couple of matters he wished to discuss. He then went back to his desk and about 10 minutes later (at 7:57 a.m.), Ms. Fleming summoned him to her office.

Ms. Fleming sat down behind her desk while the Grievor stood leaning against the door jamb, a distance of about six feet. The Grievor testified that he made reference to the letter from the airline explaining the flight delay and asked that April 16th be recorded as a floating holiday. Ms. Fleming agreed to discuss the matter with Mr. Nalwala and get back to him.

According to Ms. Fleming, the Grievor complained about the fact that he had been docked pay in respect of two days, although there would appear to be some confusion as to which days were at issue. For her part, Ms. Fleming understood that the Grievor was complaining about the deduction of 3.25 hours' pay for March 13th and 45 minutes' pay for March 20th, while the Grievor asserted that he had been paid in full for March 13th and that his claim was in respect of the deduction of 45 minutes' pay for March 20th and 3.25 hours' pay for March 25th.

By way of background, the Grievor testified that employees fill in their own timesheets and that he entered 3.75 regular hours and 3.25 hours "sick" for March 13th; that under the collective agreement, no deductions from pay are to be made for absences due to illness of less than half a day. However, Ms. Fleming explained that as the Grievor was absent due to illness for 3.25 hours and, as there were no credits in his sick bank, the payroll system required that his absence be recorded as "sick no credit" and so, 3.25 hours were deducted from his pay. Parenthetically, as the absence was for less than half a day, had there been credits in his sick bank, the Grievor would have been paid, and there would have been no deduction from his sick bank. However, the Grievor testified, once he submitted a doctor's note, he was reimbursed for the amount deducted and so, on his evidence, he received a full day's pay for March 13, 2009.

A similar explanation was given for the deduction of 3.25 hours' pay on March 25th, when the Grievor left partway through the day due to illness. As the Grievor was absent for 3.25 hours and, as he had no credits in his sick bank, the payroll system required that his absence be recorded as "sick no credit" and a commensurate amount of time (3.25 hours) be deducted from his pay. In this case, however, even though the Grievor submitted a doctor's note, he was not reimbursed for the amount deducted for March 25th.

For his part, the Grievor claimed that he did not know whether there were credits in his sick bank. In any event, he did not accept Ms. Fleming's explanation; namely, that had there been credits in his sick bank, he would have been paid for an absence due to illness of less than half a day, and there would have been no deduction from his sick bank; but, as there were no credits, he was not paid. Moreover, he claimed that he never heard this explanation until it was proffered by Ms. Fleming on April 17, 2009. From his point of view, this was not the intent of the collective agreement, presumably because (i) if there were no deduction from sick credits for absences of less than half a day, there would be no need for credits in one's sick bank; and, (ii) had the Payroll Clerk entered the code for sickness, the payroll system would have accepted it, although the Payroll Clerk made such an entry and the payroll system did *not* accept it, and so, Ms. Fleming altered the timesheet to reflect "sick no credit," thereby triggering the deduction of 3.25 hours' pay.

A different explanation applies in respect of the deduction of 45 minutes' pay for March 20th, when the Grievor was absent without permission from 11:15 a.m. to 11:58 a.m. to attend a dental appointment. Although the Grievor entered seven regular hours on his timesheet, which he submitted to the Payroll Clerk on March 23rd, the entry was changed to 6.15 regular hours and .75 hour "leave not authorized" (although the Grievor claimed that there was no code for "leave not authorized." There was, of course, a code for "leave no pay.")

When the Grievor met with Ms. Fleming on April 17th, he complained about the fact that he had been docked 45 minutes' pay for March 20th and 3.25 hours' pay for March 25th. He raised no complaint in respect of March 13th, as he understood he had been paid in full for the day.

As to March 20th, however, the Grievor claimed that he made up the time attributable to the dental appointment that day, which Ms. Fleming disputed. In his contemporaneous notes, the Grievor said there was no trust; whereas he testified in oral evidence that it was Ms. Fleming who raised the issue of trust, stating that she did not trust that he made up the time (which may be a distinction without a difference). Irrespective of who raised the issue, on Ms. Fleming's evidence, the Grievor became angry and upset, and said that she had no right to make deductions from his pay. Ms. Fleming stated, in response, that

the Grievor had ample opportunity to contact her to request time off for any appointments he was required to attend.

On the Grievor's evidence in-chief, Ms. Fleming then raised the issue of his lateness, contending that he had been late again that day (April 17th) and that, in fact, he was continually three, five, seven minutes late, and that he never made up the time that he was late. However, in cross-examination, the Grievor testified that Ms. Fleming never explicitly discussed his making up the time nor was he offered the opportunity to do so, which is diametrically opposed to his evidence in examination-in-chief and to the thrust of Ms. Fleming's insistence upon the Grievor's making up time whenever he was late or absent. In any event, on the Grievor's evidence, Ms. Fleming refused to engage in any further discussion of his lateness and asked the Grievor to leave her office. But the Grievor did not leave. Instead, he continued to belabour the point, stating that although he had worked for three or four other Supervisors on the 8:00 a.m. to 4:00 p.m. shift (whom he identified as Ms. MacKinnon, Ms. Cunningham, Mr. Patel, Mr. Fernandopulle and Mr. Reid, among whom were Managers and a Director), none had ever taken issue with two, three, or even five minutes of lateness. Only Mr. Nalwala was concerned about such minor lateness (and, when goaded by Mr. Nalwala, other Supervisors occasionally made an issue of minor lateness as well).

As to Ms. Fleming, in particular, the Grievor disagreed that she was not concerned with one, two or less than five minutes of lateness; but, in any event, maintained that he had not been 10 minutes late that day (April 17th). In fact, the swipe card data support the Grievor's contention that he had been five, and not 10, minutes late that day. Nevertheless, as pointed out by counsel for the City, the swipe card data indicate that the Grievor was late 20 out of 22 working days (23 working days, if February 16th were included and taking into account that he was off sick five days) in the period between February 13 and March 24, 2009 and three out of five working days (as he was on vacation between March 30th and April 16th) in the period between March 25 and April 20, 2009. Of the 20 instances of lateness in the earlier period (February 13 to March 24, 2009), 15 were for five minutes or longer, and, if the latter period (March 25th to April 20th) were included, 16 were for five minutes or longer. But, on Ms. Fleming's observations, which were gauged according to the clock on the wall, the Grievor was late 14 times out of 14 working days²⁴, none of which was for less than five minutes. Therefore, there is no support for the Grievor's contention that Ms. Fleming was focussed on "catching" him coming in less than five minutes late, as he was virtually never late for such short periods, according to the measure she used (the clock on the wall) and, further, no indication that she relied upon the measure (the swipe card data) which was more favourable to the Grievor (as the arrival times were generally earlier than the times based on

²⁴ or 14 times out of 16 working days, taking into account two additional dates: February 25th and February 26th, on which the Grievor was not late and in respect of which Ms. Fleming maintained data in her labour journal, but which were not included in the comparison between Ms. Fleming's data and the swipe card data for the period between February 13 and March 24, 2009.

the clock on the wall), but which recorded multiple instances of minor lateness (although only three were for less than five minutes in the period from February 13 to March 24, 2009 and two, in the period from March 25 to April 20, 2009).

At this point, there is some variation in the evidence. On Ms. Fleming's version, the Grievor said, in effect, that she was making it "very difficult," as she was constantly monitoring him, and that she was being "stupid" about his lateness (which the Grievor denied, although he acknowledged having referred to the *issue* as "stupid"). Ms. Fleming then told the Grievor that he was being insubordinate and that she wished to terminate the conversation. However, the Grievor was intent on rebutting Ms. Fleming's assertion that he had been 10 minutes late that day and that his lateness was a persistent problem and so, he asked her to open the e-mail he had sent from his computer that morning, attaching the letter from the airline confirming a delay on his outbound flight, in order to see the time it was sent.

According to Ms. Fleming, the Grievor then asked if she was monitoring him for minor instances (one to two minutes) of lateness (whereas the Grievor testified that he did not pose a question but rather made a statement to this effect). Ms. Fleming said he was late most days, which was not fair to the City or the other staff, as it was "theft of time." At this point, Ms. Fleming claimed that the Grievor became confrontational; that he raised his voice and said there would be "consequences". He then said that "this was also done with Mr.

Nalwala," which Ms. Fleming did not understand, but which prompted her to ask the Grievor if he intended to slow down or stop working altogether. It was then, according to Ms. Fleming, that the Grievor stated that he could not work like this and that he would "break" her, which the Grievor adamantly denied. For her part, Ms. Fleming testified that she repeated three times that the Grievor was being insubordinate and confrontational; that she wished to terminate the conversation; and that any further discussion should take place with Mr. Nalwala present.

For his part, the Grievor disputed that he asked Ms. Fleming to open the e-mail he had sent from his computer that morning to rebut the assertion that he had been 10 minutes late that day. However, he did not dispute that Ms. Fleming made the assertion that he was late most days; that his recurrent lateness was unfair to the City and other staff, and that it was "theft of time," which the Grievor took to mean that he was being dishonest and cheating on his time. The Grievor said, in response, that Ms. Fleming's characterization was a "stretch" (in effect, extrapolating too much from his conduct) and that he found it frustrating to be continually discussing minor lateness, which he defined, depending on the question, as being between one and seven minutes late (although the Grievor was often more than seven minutes late even on the most favourable measure, the swipe card data). Although the Grievor strongly disagreed that Ms. Fleming was not concerned with minor lateness, as the swipe card data cover even brief periods of lateness (one or two minutes), as noted,

there was no indication that Ms. Fleming relied on the swipe card data and, on the measure used by Ms. Fleming (the clock on the wall), the Grievor was never less than five minutes late.

The Grievor reiterated that there was no trust and so, he was "singled out" for monitoring over "trivial" amounts of lateness (three, five, seven minutes), whereas no one else was being so closely monitored. He also testified that he shouldn't have to worry if he walked into work one, two or three minutes late; that this constant worry was "driv[ing] up [his] blood pressure" and he "could have an accident some day." In a similar vein, the Grievor testified that it was "absolutely crazy for [him] to have to be stressed out about being monitored on a minute-by-minute basis"; and that "it [was] going to make [him] go insane over this type of work environment and certainly make [him] non productive" over a "trivial" issue with which he was willing to comply by ensuring that he was not late or by making up the time, if he were. (I note, of course, that less than two months earlier, the Grievor adamantly objected to making up the time.) According to the Grievor, Ms. Fleming then alleged that he wanted to "sit around" and be unproductive, in response to which the Grievor reiterated that he found it stressful to be subjected to minute-by-minute monitoring while attempting to concentrate on work. For her part, Ms. Fleming denied having made the statement attributed to her (namely, that the Grievor wanted to "sit around" and be unproductive) although, as noted, she acknowledged that she asked the Grievor if he intended to slow down or stop working altogether. She also

referred to him, three times, as "insubordinate", as well as "confrontational", and asked him to leave her office (although nothing turns on the discrepancy, the Grievor claimed it was twice).

Further with respect to lateness, the Grievor asserted that (i) he was not intentionally late; and (ii) no one could be expected to be at work at the exact same time every day and that it was unreasonable to impose such an expectation on him. When confronted in cross-examination with the fact that he was not required to be at work at the exact same time every day, but rather to report for work before the start of his shift, the Grievor had a novel response, claiming that he was required to report for work not before or after 8:00 a.m., but exactly at 8:00 a.m., which is, of course, patently absurd. And, while the Grievor might only have cited 8:00 a.m. as an example of the City's alleged insistence upon his reporting for work at the precise start time of his shift, it is noteworthy that he had not had an 8:00 a.m. start time since the City accommodated his request to change his hours of work from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. effective February 13, 2009. Moreover, he testified, he was being falsely accused of theft, although it was never his intention to steal two, three, even five minutes of time from the City. By characterizing his conduct as "theft of time," he felt distrusted and, therefore, compelled to provide an explanation for his lateness, which, I find, is not an unreasonable requirement (although Ms. Fleming testified that the Grievor did not offer an explanation for any of the days on which he was late, aside from one day attributable to the subway delay).

Finally, the Grievor adamantly disputed that he was not taking steps to ensure he would not be late, although, apart from proposing an unorthodox shift (referred to below), there is no evidence as to what those steps might have been.

Nevertheless, the Grievor testified that he wanted to find a solution, so that they would not be continually discussing "this stupid thing" (a reference, he claimed, to the lateness issue, and not to Ms. Fleming). However, the Grievor acknowledged that Ms. Fleming, who was acting in a supervisory capacity, did not want to discuss the matter until Mr. Nalwala returned and so, she reiterated her request that he leave her office and undertook to convene a meeting to discuss the issue with Mr. Nalwala present. Notwithstanding Ms. Fleming's requests, the Grievor refused to leave because, he contended, if a solution could be found, there would be no need for another meeting. The solution, which he claimed to have proposed, was not to revert to the 8:00 a.m. to 4:00 p.m. shift (although he testified to that effect initially), but rather to change his hours of work from 7:30 a.m. to 3:30 p.m. to 7:55 a.m. to 3:55 p.m., so that he could take the GO Train that arrived at Union Station at 7:44 a.m. and the GO Train that left Union Station at 4:10 p.m. (although, I note parenthetically, there is no evidence that the Grievor ever took the GO train). In any case, according to the Grievor, as Ms. Fleming was not familiar with the GO Train schedule, she agreed to discuss his request with Mr. Nalwala and report back to the Grievor.

Notwithstanding the Grievor's evidence both in examination-in-chief and cross-examination that Ms. Fleming asked him to leave her office at least twice, later in cross-examination, the Grievor engaged in sophistry by testifying that although Ms. Fleming, and subsequently Mr. Nalwala, told him to leave their offices, they did not issue "clear and concise" orders directing him to leave. For her part, Ms. Fleming gave no indication that there would be "consequences" if he refused to leave. In fact, on the Grievor's reformulated evidence, Ms. Fleming continued to engage him regarding his lateness and making adjustments to his start time, which even his earlier evidence did not intimate, and to provoke him by referring to his lateness pejoratively as "theft of time" and suggesting that he was intent on "sitting around" and being unproductive, which, if the Grievor were to be believed, led him to conclude that he was not being directed to leave but rather to reply to Ms. Fleming (presumably by stating that he wanted to find a solution to the lateness issue in order to curtail discussion of "this stupid thing"), which he referred to improbably as "entrapment".

Ms. Fleming either disputed or did not recall some of the statements allegedly made by the Grievor, including that her characterization of his lateness as "theft of time" was a "stretch"; that he was singled out for excessive monitoring of his lateness; and that it was unreasonable to expect him, or anyone, for that matter, to report for work at the exact same time each day. She further disputed that he said he wanted to find a solution to the lateness issue in order to curtail discussion of "this stupid thing" and that, if a solution could be

found, there would be no need to convene another meeting. However, as he perseverated about his lateness in a loud tone of voice, Ms. Fleming concluded that the conversation was not productive. Finally, Ms. Fleming denied having said that she would consult with Mr. Nalwala regarding the Grievor's request for a change in hours of work based on the GO Train schedule and get back to him once she had done so.

In fact, Ms. Fleming had a significantly different recollection of the discussion of the GO Train from that of the Grievor. On her recollection, the Grievor stated that because of the GO Train, he couldn't report for work at 7:30 a.m. He, therefore, proposed, not a change of shift, but rather that he be given the flexibility to be five or 10 minutes late in reporting for work in the morning to take into account delays with the GO train, and that he be permitted to leave five to 10 minutes early to enable him to catch the GO train in the evening. In other words, Ms. Fleming understood that the Grievor was proposing a flexible start time based on whatever time the GO train arrived (which might be 7:35 a.m. one day; 7:45 a.m., another) (although, as noted, the Grievor *never* took the GO Train). However, Ms. Fleming stated that other staff took the GO Train and came in at their respective start times and were required to make up the time if they were late. Accordingly, Ms. Fleming rejected the Grievor's proposal to effectively report for work at a different time each day.

For his part, the Grievor denied having proposed that he be allowed to report for work at a different time each day, although he reiterated that no one could be expected to come to work at the same time every day. And, although he based his request for a shift extending from 7:55 a.m. to 3:55 p.m. on the GO Train schedule, he testified in cross-examination that he proposed this shift in order to forestall further discussions of lateness, as this shift would enable him to get to work on time and so, eliminate the need for discussions of two, three, even five minutes of lateness. In any case, the Grievor agreed that it was possible to achieve the same effect by simply reverting to the 8:00 a.m. to 4:00 p.m. shift, which he had worked for eight years prior to February 13, 2009.

At this point, Ms. Fleming testified, the Grievor became louder and more confrontational and stated that he had been with the City "a very long time" (the implication being longer than she had) and that he would outlast her. Ms. Fleming asked what that was supposed to mean, and the Grievor said that he had "broken" previous Supervisors, including Mr. Nalwala, and he would "break" her as well. Ms. Fleming testified that she was very shaken by the Grievor's remark, which she took as a threat, and asked him (for the third time, on her evidence) to leave her office, which he did at around 8:35 a.m. (or some 35 minutes after the meeting began). Although nothing turns on the discrepancy, on the Grievor's evidence, he left Ms. Fleming's office considerably earlier, at 8:11 a.m. (or approximately 13 minutes after the meeting began).

For his part, the Grievor denied that he became confrontational. And, as noted, he adamantly denied that he threatened to "break" Ms. Fleming. He also denied having said that (i) he had been with the City "a very long time" and that he would outlast her; and (ii) he had "broken" previous Supervisors, including Mr. Nalwala, and that he would "break" her as well. Rather, he claimed to have said that he had worked with three or four other Supervisors, none of whom had ever bothered about five or 10-minute breaks, which the Grievor did not explain, but which would seem to have been a reference to short periods of lateness (and not to the two 15-minute break, or rest, periods afforded by the collective agreement) and, further, that this discussion was going to cause him to have a "breakdown".

Although this would seem to have been an *ex post facto* rationalization, even the Grievor's own record²⁵ of the meeting confirms that the reference to other Supervisors was in relation to short periods of lateness in reporting for work, and not to break periods. Moreover, the Grievor's oral evidence would suggest that, aside from unrelated matters, the focus of the meeting with Ms. Fleming that morning was on lateness, and not on break times. Although the Grievor testified that there was some discussion in the meeting of his having made up the time attributable to his dental appointment on March 20th by shortening his lunch break by 20 minutes and working through his 15-minute

²⁵ The Grievor's own notes of the meeting state: "AM [Ajay Misra] said there were 3-4 supervisors he worked for in the City on an 8:00AM - 4:00PM schedule and nobody had bothered about 2,3,5 minutes which is normal because of public transit. AM mentioned nobody can guarantee to be at work on the same exact time and it is unreasonable to make that demand."

morning and afternoon breaks, there is nothing in either his oral evidence or his contemporaneous notes of the April 17th meeting (aside from an oblique reference in the notes to an e-mail exchange on March 23rd and March 24th dealing with the matter, which does not mention the morning break) to support his contention that he ever mentioned *how* he made up the time; i.e., by shortening his lunch break and foregoing his morning and afternoon breaks. Accordingly (and leaving aside the veracity of the Grievor's claim), I find that his claim that he made up the time was not a topic of discussion between the Grievor and Ms. Fleming in the April 17th meeting, but rather an excuse offered up by the Grievor when confronted by Ms. Fleming (specifically, in an e-mail of March 23rd at 9:29 a.m.) with the fact that he had absented himself from the workplace during normal working hours without prior permission on March 20th. Therefore, and notwithstanding the Grievor's evidence to the contrary, I find that breaks were not the focus of the discussion, or likely even raised, in the April 17th meeting. It follows, therefore, that I reject the Grievor's suggestion, not that Ms. Fleming misunderstood his statement that other Supervisors had a more lenient attitude toward breaks as being a threat to "break" her, but rather that she understood the reference, but improperly *recorded* it as being a threat to "break" her, as being convoluted, inconsistent with the discussion that took place in the meeting and utterly nonsensical. As with much of the Grievor's evidence, it is simply inscrutable.

More importantly, the Grievor resolutely denied that he threatened to "break" Ms. Fleming (or some variation thereof – break her spirit, break her motivation), as he would never have used the expression because it has no meaning. Whether or not the Grievor *would* have used this expression is a matter of credibility and, for reasons I will expound upon further, I find that he *did*, in fact, use the expression. Whether or not the expression has meaning is a matter of linguistic interpretation. While the Grievor professed to be of the view that the expression to "break" someone is devoid of meaning, I find that it is a common expression, used in common parlance, the meaning of which (to ruin or destroy someone) is commonly understood. I further find that the Grievor was fully cognizant of the meaning when he directed it at Ms. Fleming.

In any case, Ms. Fleming testified that once the Grievor left her office, she sat there shaking. As Mr. Nalwala was not in his office (he was in the building attending training), she sought Mr. Cuoco's advice. After explaining what had transpired with the Grievor, they decided that she would document the incident in her labour journal and wait for Mr. Nalwala to return. Accordingly, after documenting the incident, she waited for Mr. Nalwala to come back to his office. When Mr. Nalwala returned on a break from training, Ms. Fleming, who was visibly shaken, came into his office and recounted the salient details of the incident, including the fact that the Grievor said that she was either "stupid" or "acting stupid," and that she felt threatened by him; specifically, that he had threatened to "break" her as he had "broken" other Supervisors. According to

Mr. Nalwala, Ms. Fleming said that the Grievor was disrespectful; that she could not deal with him; and that she required Mr. Nalwala in attendance were she obliged to interact with him again.

After listening to Ms. Fleming's account of the incident, Mr. Nalwala called the Grievor into his office in the presence of Ms. Fleming to inquire as to what had transpired in the meeting between them. According to Ms. Fleming, the Grievor said that he dropped off a letter (the letter from the airline confirming a delay in his outbound flight from India) and that he wanted to talk about his pay (presumably a reference to a number of occasions²⁶ on which deductions were made from the Grievor's pay for absences due to illness of less than half a day, as there were no credits in his sick bank). For her part, Ms. Fleming confronted the Grievor with the fact that he had called her "stupid" over "timing issues" (primarily, lateness), which the Grievor denied, although he acknowledged having said she was "crazy" or "acting crazy" over these issues. According to Ms. Fleming, Mr. Nalwala intervened and said that the Grievor should not be speaking to his Supervisor, or anyone else for that matter, in this manner. Mr. Nalwala then confronted the Grievor with his statement that he had threatened to

²⁶ Although initially the Grievor complained that pay was improperly deducted in respect of two dates, March 13 and March 25, 2009, on which he was absent due to illness for less than half a day, at some point, a third date was mentioned – February 10, 2009. And, although it would appear that the Grievor was reimbursed for March 13th, for which a doctor's note was provided, apparently a doctor's note was also provided for February 10th and March 25th for which no reimbursement was provided. There was no explanation for this discrepancy in either evidence or argument.

"break" Ms. Fleming, which the Grievor adamantly denied. Moreover, although Mr. Nalwala reiterated that the Grievor should not be addressing his Supervisor in this manner, and that when his Supervisor asks him three times to leave her office, he should comply, on Ms. Fleming's evidence, the Grievor kept talking over Mr. Nalwala, as he persisted in pursuing issues regarding his lateness. As it appeared futile for Mr. Nalwala to continue the discussion, and as Ms. Fleming suggested that they should not be discussing these matters without a third party present (it is common ground that the Grievor was not offered union representation in this initial meeting with Mr. Nalwala and Ms. Fleming), Mr. Nalwala asked the Grievor to leave his office, which the Grievor refused to do, as he was intent on resolving the lateness issue. After three such requests, Mr. Nalwala got up from his chair, opened his office door and directed the Grievor to return to his work area.

For his part, Mr. Nalwala testified that, after speaking with Ms. Fleming about the incident, he called the Grievor into his office to get his side of the story as to what had transpired in Ms. Fleming's office that morning. Mr. Nalwala recalled that it was Ms. Fleming, and not he, who confronted the Grievor with the allegation that he had threatened to "break" her, as he had "broken" other Supervisors. And, although Ms. Fleming testified that the Grievor denied having threatened her, Mr. Nalwala testified that the Grievor evaded the question. In fact, rather than being responsive to Mr. Nalwala's (or Ms.

Fleming's) questioning, including (i) whether he had called Ms. Fleming "stupid"; (ii) whether he had threatened to "break" her, as he had "broken" previous Supervisors; and (iii) why he had refused repeatedly to leave Ms. Fleming's office, the Grievor responded only to the last question by stating that he had resisted leaving, as he was trying to arrange a change in shift in order to address Ms. Fleming's concerns about his lateness, which Mr. Nalwala had raised. However, the Grievor assiduously avoided answering the first two questions by diverting the entire discussion to the issue of lateness (the essence of which was that lateness should not be an issue; that "a few minutes [of lateness] here and there"²⁷ were too trivial a matter for a person in his position to be questioned about; and that he felt importuned ("picked on"), as Ms. Fleming had confronted him about his lateness on his first day back from vacation) and, in the context of which, the Grievor skilfully evaded answering the question of whether he called Ms. Fleming "stupid" by stating that it was "stupid" and "crazy" to be continually questioned about such matters: a few minutes of lateness, a request for a shift change, and even the requirement for him to produce a letter confirming a flight delay.

Given the Grievor's attempt to deflect the first two questions, Mr. Nalwala concluded there was no specific denial in the April 17th meeting of the allegations raised by Ms. Fleming; namely, that the Grievor had called her

²⁷ As noted, however, the Grievor was not late "here and there," but rather, was habitually late.

"stupid" and that he had threatened to "break" her. It was suggested in cross-examination that the alleged threat made no sense, as (i) the Grievor had never threatened to "break" Mr. Nalwala or his predecessors (specifically, Mr. Fernandopulle or Ms. Cunningham); and (ii) Mr. Nalwala acknowledged that the Grievor had not "broken" him; nor had he ever directly threatened to do so. Nevertheless, Mr. Nalwala suggested that the Grievor had effectively "broken" Ms. Cunningham and, further, implied that he had "broken" Mr. Fernandopulle, when he opined as to the reason why Mr. Fernandopulle left the employ of the City. However, Mr. Nalwala could not recall what the Grievor actually said about Mr. Fernandopulle. In any case, whether the Grievor had "broken", or even threatened to "break", other Supervisors is not dispositive of whether or not he *claimed* to have done so.

In contrast to Ms. Fleming, who described the Grievor as "loud" and "confrontational" during the meeting, Mr. Nalwala acknowledged that the Grievor remained calm, as he maintained that nothing untoward had happened in the meeting with Ms. Fleming or that what had happened was inconsequential, and that it was he (Mr. Nalwala) who became upset, which is consistent with the Grievor's evidence that Mr. Nalwala "lost his cool" in the April 17th meeting. In any case, as the Grievor attempted to divert the conversation to a discussion of his "timings" (a reference in this context to his request to change his hours of work from 7:30 a.m. to 3:30 p.m. to 7:55 a.m. to 3:55 p.m.), his lateness (which he believed to be inconsequential), and the denial of sick pay for legitimate

illness (a reference to deductions from pay for absences due to illness of less than half a day), Mr. Nalwala concluded he was not getting any "straight answers" to his questions and so, he ultimately ordered the Grievor to leave his office. When the Grievor resisted for the third time (notwithstanding a clear and concise order to do so), Mr. Nalwala got up from his chair, opened the door and effectively ushered him out.

On the Grievor's version of events, he was summoned to Mr. Nalwala's office shortly after 11:00 a.m. on April 17th. When he arrived, Ms. Fleming was in attendance. Prior to being seated, the Grievor testified, he asked if this was a disciplinary meeting because, if it were, he would avail himself of the right to union representation (Clause 16.25). Mr. Nalwala assured him it was not, and the Grievor sat down. Mr. Nalwala indicated that he had been apprised of what had transpired in the meeting between the Grievor and Ms. Fleming earlier that morning: that the Grievor had been insubordinate, as he had called Ms. Fleming "stupid" and "crazy" and had refused to leave her office when directed to do so. The Grievor stated, in effect, that Mr. Nalwala had been misinformed; that he never called Ms. Fleming "stupid" or "crazy".

However, the Grievor asserted that Ms. Fleming raised the issue of his lateness, contending that he was consistently one, three, five minutes late. For his part, the Grievor claimed that he simply wanted to find a resolution to this issue; i.e., by arranging for a shift change, in order to forestall further discussion

of the matter. In any event, the Grievor denied having called Ms. Fleming "stupid" or "crazy" (or having said that she was acting "crazy") over the issue of his lateness. Rather, he said, in examination-in-chief, that it was "silly" and "driving [him] crazy" to be continually discussing this issue and, in cross-examination, that it was "crazy" to be discussing three, five, even seven minutes of lateness. He also emphatically denied that he was asked in this meeting whether he had threatened to "break" Ms. Fleming, as he had "broken" other Supervisors.

In any case, on the Grievor's story, it was after his characterization of Ms. Fleming's management of the lateness issue as "silly", "crazy" or "driving [him] crazy" that Mr. Nalwala said that this was his "last and final" warning, in response to which, the Grievor responded, "Warning about what? I have done nothing wrong," or words to that effect. But Mr. Nalwala did not reply. For his part, Mr. Nalwala denied having issued a final warning to the Grievor, and Ms. Fleming testified that the Grievor was not told in this meeting that he was being warned.

Nevertheless, the Grievor reiterated that he wanted to resolve the issue of his lateness and, further, to discuss an issue which had arisen on March 20th (although the date is unclear) when, he alleged, Ms. Fleming had spoken to him in a condescending manner, but which had been deferred because the Grievor was leaving on vacation. That issue, which was dealt with in an

investigatory meeting which was convened on April 20th, and is dealt with at pp. 127 – 130 herein, was not entirely comprehensible, but would appear to relate to an allegation that Ms. Fleming had spoken to him in a condescending manner in relation to a request she had made that the Grievor retract an e-mail he had sent to Managers because of an error in the attachment.

Leaving aside the nature of the issue, the Grievor testified that Mr. Nalwala was "irate" and "furious", a conclusion he drew from the fact that Mr. Nalwala's hands were shaking, and that he looked "visibly disturbed" (although he acknowledged that (i) his contemporaneous notes describe Mr. Nalwala in more restrained terms as "very agitated"; and (ii) Mr. Nalwala's demeanour changed when the Grievor refused to leave his office for the second time). And so, the Grievor suggested they set up a separate meeting to discuss the issue. It is unclear whether Mr. Nalwala responded but, according to the Grievor, he sprung up from his chair with such force that the chair hit the credenza behind him, leapt toward the door, opened the door and, in a tone the Grievor described as "very demeaning," asked him to leave.

Given Mr. Nalwala's demeanour, which the Grievor again described as being "visibly disturbed," and the action taken (to issue a final warning and usher him out the door), the Grievor claimed that he felt intimidated, or at least shaken, by Mr. Nalwala. Nevertheless, the Grievor remained seated and stated that he wanted to resolve the lateness issue. Mr. Nalwala reiterated his request

for the Grievor to leave. At this point, the Grievor acceded to Mr. Nalwala's request and went back to his work area. Two minutes later, he walked back toward Mr. Nalwala's office. Mr. Nalwala was standing outside the office and the Grievor approached him with a request to discuss the issue(s) that had arisen before he left on vacation. According to the Grievor, Mr. Nalwala agreed to discuss these matters and suggested that the Grievor speak with the Administrative Assistant, Ms. O'Leary, about setting up a meeting.

Although nothing turns on the matter, Mr. Nalwala seemed to recall that after the Grievor finally left the office, it was he, and not the Grievor, who suggested setting up a separate meeting if he wanted to engage in further discussion. In any case, it would appear that the Grievor did request that Ms. O'Leary arrange a meeting with Mr. Nalwala. While Ms. O'Leary agreed to discuss his request with Mr. Nalwala and get back to the Grievor, in light of subsequent events, nothing further transpired with respect to this request.

Meanwhile, after consultation with Labour Relations, the decision was taken to convene an investigatory meeting with union representation in attendance. The meeting took place on Monday, April 20th at 3:00 p.m. on the 17th floor of Metro Hall. Although the Grievor complained about having been notified of the meeting that morning, in fact, the meeting was convened on short notice, either that morning or the preceding Friday afternoon. Nevertheless, he was able to arrange for union representation. In attendance at the meeting were

Mr. Nalwala, Ms. Fleming and Charles Pringle, a Manager in the same Division as Mr. Nalwala, for the City, and the Grievor and the Local 79 Representative, Virginia Ashberry.

The evidence indicates that Mr. Pringle, who had more experience than either Mr. Nalwala or Ms. Fleming in dealing with labour relations matters involving Locals 79 and 416 members, but no managerial authority over the Grievor, was the spokesperson for the City. The evidence further indicates that Mr. Nalwala, Ms. Fleming and a representative from Labour Relations met about half an hour beforehand with Mr. Pringle, who had no personal knowledge of these matters, to apprise him of the issues to be raised with the Grievor. In fact, all of the questions put to the Grievor by Mr. Pringle in the April 20th meeting were based on information provided by Mr. Nalwala and Ms. Fleming. Furthermore, Ms. Fleming, who was employed in an acting capacity, did not participate in the meeting, but was assigned to prepare an agenda and take notes of the meeting (although it is unclear who actually prepared the agenda or how closely Mr. Pringle adhered to it).

As for note-taking, the Grievor testified in examination-in-chief that he complained to Ms. Ashberry that Ms. Fleming, who continued to be a member of the Local 79 bargaining unit, was in attendance at the meeting and, in re-examination, that she said something to which he objected. Accordingly, after discussion between Ms. Ashberry and Mr. Pringle, it was agreed that Ms.

Fleming could remain in attendance but that, as indicated, her role would be restricted to taking notes. However, as Ms. Fleming could not keep up with the pace of the discussion, she stopped taking notes and, over the course of the following day, produced a record of the meeting from memory, which she then e-mailed to Mr. Nalwala.

The first issue discussed in the meeting was the second item on the agenda: lateness. Included under the rubric of lateness, among other matters, was one occasion, January 26, 2009, on which the Grievor was not late, but rather left work early without permission. For his part, the Grievor claimed that he left early to pick up his son and made up the time by taking a half-hour lunch.

Moreover, although the City did not seem to have relied on this incident, in response to an e-mail dated January 23, 2009, in which Mr. Nalwala expressed concern about the Grievor's having left early on several days without permission and reinforced the need for adherence to his "timings" (a reference in this context to his designated hours of work) and for pre-approval of any changes to these designated hours, the Grievor acknowledged having taken a half-hour lunch and left work at 3:30 p.m. on that day (January 23rd) as well.

Aside from occasions when the Grievor left early without permission, Mr. Pringle made reference to 14 occasions between February 13²⁸ and March 25, 2009 (although it would appear that the period in question was February 13th to March 24th, and not March 25th) on which the Grievor was recorded as having been late (although, as noted at p. 77 herein, according to the swipe card data, there were 20 occasions when the Grievor was actually late during that period).

As to the 14 occasions of lateness with which the Grievor was confronted, as noted, Ms. Fleming's observations, which were gauged by the clock on the wall, consistently indicate that the Grievor was later than swipe card data, which record him as having been late for five minutes or longer for 15 out of 20 lates in the period from February 13 to March 24, 2009. And, as to the 14 instances of lateness with which the Grievor was confronted (based on Ms. Fleming's observations), all were for five minutes or longer. Nonetheless, the Grievor persisted in minimizing one, two, even five minutes of lateness, to which Mr. Pringle responded by stating that the Grievor was required to be at his desk and ready to work at the start of his shift. Although the Grievor attempted to divert the discussion to other employees who were also late including, he claimed, Ms. Fleming who was late on February 24, 2009, as was he, due to a subway delay (which Ms. Fleming disputed, as she drove to work that day), Mr.

²⁸ While there was some confusion as to this matter, as the Grievor did not request a change in shift from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. until February 13, 2009, nevertheless, as noted at pp. 63 - 64 herein, the parties appeared to agree that the change in the Grievor's hours of work was effective from February 13th and, therefore, that the Grievor was considered to have been late when he reported for work at 7:36 a.m. that day. I am bound by that agreement.

Pringle declined to discuss other employees and focussed the discussion on the Grievor's recurrent lateness.

After being rebuffed in an attempt to compare himself to other employees, the Grievor challenged the City as to whether it had proof of its allegations of lateness, and Mr. Pringle asserted there was ample proof of his late arrivals and early departures (although, as noted, Mr. Pringle was relying on information provided by Mr. Nalwala and Ms. Fleming in making this assertion). For his part, Mr. Pringle reinforced the need for the Grievor to notify his Supervisor when he was leaving the workplace during normal working hours and, in response to the Grievor's inquiry as to whether the City was monitoring only him or all of the staff, Mr. Pringle reiterated that the meeting was convened to deal with issues relating to the Grievor. The Grievor then expressed concern as to what measure would be used to gauge lateness. Although a number of measures of lateness were discussed (the clock on the wall, also referred to as the "City clock," which was the measure Ms. Fleming relied on to gauge the Grievor's lateness, or the clock in the employee's own computer), Mr. Pringle and Ms. Ashberry agreed to measure lateness by the clock in the employee's own computer (i.e., computer time), which they understood to be the measure used in most areas of the City; although Mr. Nalwala testified that he relied on the Acting Supervisor's observations of employees' late arrivals or early departures, which Ms. Fleming gauged from the clock on the wall and which, I note parenthetically, might be highly inconsistent as they would depend on when

the Acting Supervisor first noticed employees' arrivals at or, for that matter, departures from, work. Indeed, once there was agreement that computer time would be the measure of lateness, the Union Representative, Ms. Ashberry, agreed that the Grievor was required to be at his desk and ready to work at the start of his shift.

Another measure of lateness was the time recorded by the swipe card reader. Although Mr. Nalwala testified that the swipe card data were not generally used to monitor lateness, he acknowledged that the data were accessible and occasionally used for that purpose. And, indeed the times recorded in this award, and submitted by the City in evidence, were taken from the swipe card data, a measure which was most favourable to the Grievor, as it was taken when he "swiped in" near the entrance to the second floor office area, even before he arrived at his work station.

At the end of the discussion of lateness, Mr. Pringle stated that effective April 21, 2009, the Grievor's hours of work would revert to 8:00 a.m. to 4:00 p.m. and that he would be required to e-mail his Supervisor as to his arrival time (effectively the time he logged on to his computer; i.e., computer time) and departure time each day. As indicated, there was a similar requirement imposed on the Grievor in the context of a written warning dated May 30, 2007 and even earlier, on November 23, 2006, in an attempt to address the Grievor's apparent lateness, to e-mail his Manager on arrival each day. It is unclear whether

this requirement was ever enforced, as it was re-imposed in respect of both arrival and departure times only six months later. In any event, although Ms. Ashberry agreed that the Grievor was required to be at his desk and ready to work at the start of his shift, she did not agree to singling him out for this reporting requirement and suggested that the matter would be taken up by the Union at a later date. There was no indication as to whether there was any follow-up in this regard.

Nevertheless, the requirement for the Grievor to e-mail his Supervisor as to his arrival and departure times, as well as the requirement to submit a daily work log, effective May 30, 2007, was not reinstated upon his return to work in November 2008, although it was within Mr. Natwala's discretion to have done so. And, although it was intended that the requirement to e-mail his Supervisor as to his arrival and departure times would be reinstated pursuant to Mr. Pringle's direction in April 2009, that requirement was never implemented, as the Grievor was sent home at the end of the April 20th meeting and did not return to the workplace until he was summoned to a meeting on April 23, 2009, at which time his employment was terminated.

Further with respect of the April 20th meeting, Mr. Pringle took issue with the fact that the Grievor left work early without notification or permission from his Supervisor on March 13th. However, the Grievor believed there to be no issue with respect to March 13th, as he had provided a doctor's note to justify the

absence. Nevertheless, Mr. Pringle claimed, in effect, that the Grievor had not properly notified his Supervisor of the fact that he was leaving early, nor of his reason for doing so, and, further, that notification to the clerical staff (Ms. O'Leary) was not sufficient. In response, the Grievor stated that, as Ms. Fleming and Mr. Nalwala were not in the office that day, he had tried to notify Mr. Cuoco, who was not at his desk, and Mr. Towers, whose door was locked. Accordingly, although the Grievor mentioned to Ms. O'Leary that he was leaving, he sent an e-mail to this effect to Ms. Fleming and to Mr. Nalwala (although, I note that the e-mail to Mr. Nalwala was dated March 23rd). Nonetheless, Mr. Pringle took issue with the fact that it took numerous e-mails over several days to find out that the Grievor had left early on March 13th because he was sick and 10 days for him to produce a doctor's note (notwithstanding multiple requests for him to do so). In fact, although it took until March 23rd for the Grievor to respond to Ms. Fleming's e-mail inquiry of March 17th, advising that he had left early because he was not feeling well, it should be noted that he did provide a doctor's note justifying the absence prior to March 27th, which was the deadline set by Mr. Nalwala in his e-mail of March 23rd (and well before March 30th, which was the extended deadline set by Ms. Fleming). In any case, Mr. Pringle maintained that the Grievor was absent from work without authorization, as he did not seek permission to leave early. However, the Grievor insisted that once he submitted a doctor's note, he was reimbursed for the amount deducted and so, he received a full day's pay for March 13, 2009.

Mr. Pringle then addressed the allegation that the Grievor was absent without permission for 45 minutes on March 20th. More particularly, Mr. Pringle asked why the Grievor left his work station for 45 minutes to attend a dental appointment without notifying or obtaining authorization from his Supervisor who was readily accessible, as she was working in close proximity to the Grievor in the open office area. In response, the Grievor said that it was an emergency dental appointment and that he made up the time by taking a 40-minute lunch break (from 1:20 p.m. to 2:00 p.m.) and foregoing his afternoon break. When confronted by Mr. Nalwala with the fact that he took a full hour for lunch, the Grievor reiterated that he made up the time attributable to the dental appointment, which Ms. Fleming and Mr. Nalwala might not have known. However, Ms. Fleming testified in these proceedings that after the Grievor returned to the office at 11:58 a.m., he proceeded to eat his lunch, work until 1:00 o'clock and then leave the office again for an hour. Finally with respect to the issue of his absence on March 20th, the Grievor asserted that when he was Acting Supervisor, employees were accorded some degree of trust.

Under the rubric of "Performance Issues," Mr. Pringle raised a number of issues relating to the Grievor's work performance, including the need for accuracy and consistency in the work he produced, as well as allegations of work that needed to be redone (which the Grievor disputed, but which lacked sufficient detail to enable me to come to any firm conclusions) and issues that had been deferred because the Grievor was leaving on vacation.

According to Mr. Nalwala and Ms. Fleming, the Grievor challenged the assertions made regarding deficiencies in his work performance and insisted upon being given detailed instructions for all of the work he was required to perform, although Ms. Fleming had prepared an instruction manual, actually one page, which was available on the G Drive. With respect to the formatting of reports, it would appear that most, if not all, reports were required to be colour-coded and the Grievor claimed he experienced perceptual distortions with colours and lines. Mr. Pringle indicated that various forms of accommodation were available provided the Grievor produced a medical note and, although it was not entirely clear, perhaps a note from a specialist. In any case, the Grievor indicated at the meeting with Mr. Pringle that he was in the process of arranging an appointment with a specialist and, although nothing really turns on it (aside from credibility), he testified in these proceedings that he had an appointment with a specialist; that his family doctor had referred him to a specialist; and that the family doctor was considering referring him to a specialist. Parenthetically, Mr. Nalwala noted that prior to the change in his portfolio in May 2007, the Grievor never expressed difficulty colour-coding any of the reports he was required to produce (although, as indicated at pp. 20 – 21 herein, he also objected to preparing organization charts for reasons unrelated to colour). However, as the City provided him with a 20-inch computer monitor, it is reasonable to assume that the Grievor had previously raised the issue of his visual acuity.

By way of background, the Grievor testified that on March 17, 2009, Ms. Fleming asked him to retract an e-mail he had sent to all Managers because of errors in the attachment, a spreadsheet relating to the overspent contracts report, as it had been incorrectly colour-coded. When the Grievor opened the attachment and compared it to the spreadsheet Ms. Fleming had approved, he was unable to discern any difference between the two. On the Grievor's evidence, Ms. Fleming pointed her finger in his face and said, "Don't you get it?," which Ms. Fleming denied and which the Grievor termed "total harassment." In response, the Grievor upbraided Ms. Fleming by saying, "Don't you dare speak down to me like that." Although the Grievor testified that Ms. Pamor overheard the conversation, Ms. Pamor was not called as a witness to corroborate the Grievor's version of events.

For her part, Ms. Fleming recalled there having been two incidents: one on March 17th and the other on March 20th, although the notation in her labour journal reflects only an incident on March 17th. However, that incident was unrelated to colour-coding. On Ms. Fleming's evidence, she asked the Grievor to retract an e-mail sent to all Managers, as some of the reports attached to the e-mail were dated incorrectly. But when she made the request, the Grievor "exploded on [her]" and intimated that she was calling him "stupid", which the Grievor denied. In any event, the Grievor had some sort of outburst and, on his evidence, upbraided Ms. Fleming ("Don't you dare speak down to me

like that"). For her part, Ms. Fleming did not recall being upbraided by the Grievor. She simply asked that he retract the e-mail so that *she* could make corrections. She then stated in her journal entry that she felt as if the Grievor were "sabotaging all of [her] decisions and any work that is given to him." While Ms. Fleming did not utter these words, when confronted at the hearing with the journal entry, the Grievor suggested that it was an exaggeration to equate incorrectly dating a report with "sabotage".

Nonetheless, on the Grievor's evidence, the incident on March 17th related to colour-coding on the overspent contracts report, and not an incorrect date on "some" reports, as recorded by Ms. Fleming in her labour journal. And, although Ms. Fleming testified that she asked the Grievor to retract the report so that *she* could make corrections, the Grievor testified that *he* was told to correct the colour which, he claimed, he was unable to do because of "problems with his eyes." As the report was "99.9% done," he requested that Ms. Fleming make the colour corrections, but she refused to do so, and reminded the Grievor of the need to produce a doctor's note to substantiate his claim.

Notwithstanding that the notation in Ms. Fleming's labour journal for March 17th indicates that the matter at issue was that the overspent contracts report was dated incorrectly, Ms. Fleming would appear to have accepted the Grievor's account that the issue related to colour-coding, as she directed him in an e-mail dated April 20, 2009 to obtain a medical note substantiating his claim

that he was unable to correct the overspent contracts report due to a visual acuity problem affecting his perception of colours and lines.

However, in a complete inversion of facts, the Grievor testified that the incident involving incorrect colour-coding on the overspent contracts report, wherein he admonished Ms. Fleming not to speak to him in a condescending manner, actually took place on March 20th and that, although he had no recollection of any reference to a report which was dated incorrectly, there was a separate incident on March 17th, unrelated to either colour-coding or the overspent contracts report.

Under the heading "Expected", Mr. Pringle asked the Grievor what had transpired in Ms. Fleming's office on April 17th. According to Mr. Nalwala, the Grievor reiterated what he had told Ms. Fleming in their meeting on April 17th; namely, that he had dropped off a letter with Ms. Fleming from the airline confirming a delay on his outbound flight from India on April 15, 2009, which caused him to be late returning from vacation; that he had asked to speak to Ms. Fleming who was on the telephone; that, when she was done with her phone call, Ms. Fleming summoned him to her office; that the Grievor complained about the fact that he had been docked pay on two occasions: one, for 45 minutes, and the other, for 3.25 hours. Ms. Fleming explained that 45 minutes had been characterized as "leave no pay," as the Grievor had left work to attend a dental appointment without permission, and that 3.25 hours had been recorded as "sick

no credit," as he had gone home sick and, as there were no credits in his sick bank. (As noted previously, as the absence was for less than half a day, had there been credits in his sick bank, in accordance with the collective agreement, the Grievor would have been paid and there would have been no deduction from his sick bank.)

Mr. Pringle then specifically confronted the Grievor with the allegation that he had called Ms. Fleming "stupid" when he met with her in her office on April 17th. According to both Mr. Nalwala and Ms. Fleming, in *this* meeting, the Grievor denied having called Ms. Fleming "stupid", although he said, in substance, that it was "crazy" and was going to "drive him insane" to be continually monitored for one or two minutes of lateness. Although the Union made an issue of the fact that Ms. Fleming did not confront the Grievor with the fact that he *had* called her "stupid", as Mr. Nalwala pointed out, at the Grievor's insistence, it was agreed between Mr. Pringle and Ms. Ashberry that, as a condition of her attendance, Ms. Fleming was required to refrain from speaking in the April 20th meeting. (As indicated, Ms. Fleming's recollection was that, when confronted by Mr. Nalwala about the matter on April 17th, the Grievor denied having called her "stupid", although he said she was "crazy" or "acting crazy" over the issue of his lateness; whereas Mr. Nalwala's recollection was that the Grievor evaded the question of whether he had called Ms. Fleming "stupid" by conflating the two issues and stating that it was "stupid" and "crazy" for him to be continually questioned about a few minutes of lateness.) For his

part, the Grievor testified that, when confronted with the allegation on April 20th, he denied having called Ms. Fleming "stupid" in their meeting of April 17th, although he acknowledged having said that it was "stupid" and "crazy", or "driving him crazy," to be constantly discussing one, two or even three minutes of lateness (which is essentially what he told Mr. Nalwala on April 17th as well). And, although the Grievor questioned the accuracy of the records, the City established that even on the measure which was most favourable to the employee, the swipe card data, the Grievor was generally (15 out of 20 working days from February 13 to March 24, 2009) late, not one, two or three minutes, but at least five minutes (or considerably longer).

According to Messrs. Nalwala and Pringle and Ms. Fleming, the Grievor specifically denied, in the April 20th meeting, that he threatened to "break" Ms. Fleming, as he had "broken" other Supervisors, including Mr. Nalwala, when he met with her in her office on April 17th (which is consistent with Ms. Fleming's recollection of the Grievor's response when confronted with the allegation in the April 17th meeting with Mr. Nalwala, whereas Mr. Nalwala could not recall a specific denial of the allegation in that meeting). For his part, although the Grievor acknowledged that he was confronted with the allegation in the April 20th meeting that he had threatened to "break" Ms. Fleming, as he had "broken" other Supervisors, including Mr. Nalwala, he emphatically denied having been confronted about the matter in the April 17th meeting with Mr. Nalwala. In any event, when confronted with the allegation on April 20th, he

expressly denied it. Notably, however, he did not claim that the discussion related to break periods, or that the expression to “break” someone was devoid of meaning, as he did in these proceedings.

Finally, in response to an allegation that he was insubordinate in the manner in which he addressed his Acting Supervisor, Ms. Fleming, and in refusing three times to leave Ms. Fleming’s office and three times to leave Mr. Nalwala’s office, when requested to do so, on April 17th and April 20th, respectively, the Grievor claimed that he was merely trying to resolve his lateness issue, first, with Ms. Fleming and, then, with Mr. Nalwala (which addresses the *reason* for his refusals to leave but not the *manner* in which he allegedly addressed Ms. Fleming). In an attempt to resolve the lateness issue, the Grievor reinstated his request to change his hours of work from 7:30 a.m. to 3:30 p.m. to 7:55 a.m. to 3:55 p.m. to conform to the GO Train schedule, but Mr. Nalwala was dismissive of his request.

In any event, according to Mr. Nalwala and Ms. Fleming, at the end of April 20th meeting, the Grievor was told that he was suspended with pay pending investigation, and that he would be contacted once the investigation was concluded. While there was some suggestion that the Grievor was told that he would be contacted on April 23rd (Thursday), nothing turns on whether a specific date was mentioned. For his part, the Grievor testified that although he was sent home with pay pending investigation, he was not suspended. And, although he

was told that someone from the City would be contacting him, he was given no indication as to when he would be contacted. While nothing turns on the matter, as being sent home with pay is tantamount to being suspended with pay, the letter of termination clearly indicates that the Grievor was, in fact, suspended with pay pending investigation at the end of the April 20th meeting. Moreover, although the payroll records are anomalous, the Union conceded that the Grievor was paid for the days during which the investigation was conducted. However, as the meeting did not end until 3:50 p.m., some 20 minutes after the end of his shift, the City acceded to the Union's request to pay the Grievor one-half hour of overtime. It would appear from the payroll records that payment was never made. If that was the case, a one-half hour overtime payment will be made pursuant to this award.

In any event, according to the Employer witnesses, the Grievor was directed to leave the workplace immediately, which the Grievor disputed. Nonetheless, following the conclusion of the meeting, the Grievor and Ms. Ashberry left the 17th floor meeting room and took the elevator to the second floor, so that Ms. Ashberry could have some sense of the work area. According to the swipe card data, the Grievor swiped in on the second floor at 3:55 p.m. He entered the work area with Ms. Ashberry and, after giving her a "tour" of the area, they exited the work area past the card reader and had a brief discussion about what had transpired that day. The Grievor then swiped back into the work area at 4:02 p.m. and went directly to his work station.

Meanwhile, after a brief (five to 10-minute) discussion among representatives of the City (Messrs. Nalwala and Pringle and Ms. Fleming) of what had transpired in the meeting with the Grievor, the decision was taken between the Managers (Messrs. Nalwala and Pringle) to conduct a further investigation as to what had occurred in the initial meeting between the Grievor and Ms. Fleming on April 17th. Ms. Fleming testified that she played no part in either the investigation or the decision to discharge, because, as an Acting Supervisor, she was still a member of the bargaining unit. In any event, following the conclusion of the discussion among the representatives of the City, they took the elevator to the second floor work area as well. Mr. Nalwala and Ms. Fleming returned to their respective offices. As Mr. Pringle was walking through the open office area, he noticed the Grievor working on his computer. On Mr. Pringle's version of events, when he confronted the Grievor as to what he was doing, the Grievor said he was downloading a file. Although Mr. Pringle acknowledged that he did not know which file the Grievor was referring to, he directed the Grievor to stop what he was doing, shut down his computer and leave the workplace immediately, as he had been directed to do in the meeting with his Union Representative present, and waited at the Grievor's work station until he complied with this direction. Mr. Pringle then went to Mr. Nalwala's office to apprise him of what had transpired at the Grievor's work station.

In the meantime, Ms. Fleming testified that when she got back to the second floor, although she had an unobstructed view of the Grievor and Mr. Pringle from a distance of some 15 feet, and although she saw the Grievor at his computer, she did not know what he was doing. However, she did hear Mr. Pringle ask the Grievor what he was doing on his computer and the Grievor reply that he was downloading a file. For his part, although the Grievor saw Mr. Nalwala go into his office, he did not notice Ms. Fleming after leaving the 17th floor.

The Grievor testified that when he got back to his desk after giving Ms. Ashberry a tour of the work area, he was picking up his personal effects (jacket, lunch box, bag) and shutting down his computer when Mr. Pringle came up behind him and asked what he was doing at his work station, as he had been directed to leave the workplace immediately. On the Grievor's evidence, he told Mr. Pringle that he was shutting down his computer and picking up his bag. Mr. Pringle waited at the Grievor's work station while he e-mailed notes he had made of the April 17th meeting with Mr. Nalwala and Ms. Fleming to his home computer. The Grievor then shut down the computer, gathered up his personal effects and left the building.

In cross-examination, the Grievor testified that he had no intention of e-mailing his notes of the April 17th meeting but, as the file with the notes was open on his computer, he e-mailed the notes from his personal "Yahoo account"

to his personal "gmail account" before shutting down the computer. For his part, the Grievor denied that he told Mr. Pringle that he was downloading a file to his home computer. In fact, it would appear that he said nothing to Mr. Pringle about the fact that he had sent himself an e-mail (although the Union produced a record of an e-mail sent from the Grievor's "Yahoo account" to his "gmail account" at 4:05 p.m. on April 20, 2009). Contrary to the allegation that he flouted the instruction to leave the workplace immediately, the Grievor reiterated that he sent himself the notes of the April 17th meeting with Mr. Nalwala and Ms. Fleming and shut down his work computer.

Over the next three days, Mr. Nalwala testified, an investigation was conducted, including consultation with Human Resources and with Mr. Towers, who was required to seek the approval of the Executive Director, Mr. Donohue, to terminate the Grievor's employment. While Mr. Nalwala understood that Mr. Pringle had some involvement in the investigation, aside from a brief consultation following the April 20th meeting, wherein Mr. Pringle expressed the opinion, based on a limited understanding of the facts, that discharge was appropriate, the evidence indicates that Mr. Pringle took no active role in the investigation. In any event, it would appear that approval was given, as the decision was made to discharge the Grievor. Although the decision was made by Mr. Nalwala, it was concurred in by the management team.

Accordingly, at 1:00 p.m. on April 23, 2009, a further meeting was convened at Metro Hall to effect the Grievor's termination. To be clear, this was not a further investigatory meeting, but rather was intended to communicate to the Grievor that the decision had been taken to terminate his employment. In attendance were Messrs. Nalwala and Pringle and Ms. Fleming, for the City, and the Grievor and his Union Representative, Ms. Ashberry. At that time, a copy of the letter of termination was given to the Grievor and Ms. Ashberry and its contents were read aloud. According to the Grievor, there was no discussion of the contents and as soon as the letter was read, he and Ms. Ashberry got up to leave. Mr. Pringle's recollection is that there was some discussion of the contents of the letter, although his recollection was vague.

The letter of termination, which was given to the Grievor, is to the following effect:

April 23, 2009

Ajay Misra

...

Dear Mr. Misra:

RE: Termination of Employment

This letter will confirm the results of our meeting of April 20, 2009, when we met to discuss some recent workplace issues and incidents. Also present at the meeting were Charles Pringle – Manager, Leslie Fleming – Acting Supervisor, and Virginia Ashberry – Local 79.

Since your return for [s/c] a one year leave of absence on November 17, 2008 we discussed several issues including your regular and excessive lateness, leaving without permission, being absent without authorization, various performance issues, and constant insubordination.

One of the more serious incidents discussed involved your confrontational behaviour with your acting supervisor on Friday, April 17, 2009, whereby your behaviour was aggressive, intimidating and harassing in nature, which violates the City's Human Rights and Anti-Harassment Policy. During the interaction you were insulting, rude, loud, inappropriate, and intentionally intimidating toward your supervisor. You referred to her actions as 'stupid' and stated that her attitude towards you 'would have consequences'. When asked what you meant by that you stated that you would 'break' her as you have 'broken' others in the past. Your behaviour is considered a threat which violates the City's Workplace Violence Policy. When you were told to leave her office (3 times) you did not, and continued to pursue the confrontation.

In our meeting, you showed no remorse for any of your actions including the incident outlined above. You admitted that you were told three times to leave your supervisor's office but did not. However, you took no ownership and responsibility for your unacceptable behaviour and offered no apology. You have provided no indication that you regret your actions or that your behaviour will change in the future.

You also referenced a subsequent meeting that you had with Leslie and me on Friday April 17, 2009, where you were repeatedly asked to leave my office and proud of the fact that I felt intimidated by your insubordinate behaviour.

After our meeting, you were directed to immediately leave the workplace, on suspension with pay, pending the results of the investigation. Instead, you were found at your desk attempting to download information from your computer and thereby not following instruction to leave the workplace.

Given all of the above, and in consideration of your past record and the seriousness of your current misconduct, I believe that the employment relationship has been irreparably damaged. Therefore, your employment with the City of Toronto is terminated effective immediately.

You must hand in all keys and access cards belonging to the City immediately. In the meantime, you are not to have access to your former workplace.

Any outstanding wages or documents will be sent to you at the above address.

Sincerely,

'Murtaza Nalwala'
Murtaza Nalwala
Manager, Financial Reporting & Expenditure Control
Facilities & Real Estate

Copy: Charles Pringle, Manager
Leslie Fleming, Acting Supervisor
Virginia Ashberry, Local 79 Union Representative
Marilyn Labine, HR Consultant
Recording Secretary, Local 79
Employee File, Metro Hall – 5th Floor

By way of further explication, although reference was made in the second paragraph to discussions between Mr. Nalwala and the Grievor respecting a variety of issues, "regular and excessive lateness, leaving [work] without permission, being absent without authorization, various performance issues, and constant insubordination," Mr. Nalwala acknowledged that between the Grievor's return to work following a one-year leave of absence on November 17, 2008 and his discharge on April 23, 2009, although he had been docked pay for leaving work without permission (45 minutes in respect of March 20, 2009) and being absent without authorization (3.25 hours in respect of at least March 25, 2009)²⁹, but not for lateness, none of the allegations identified in the second paragraph resulted in the imposition of discipline. And, notwithstanding Mr. Nalwala's recollection to the contrary, the Grievor had not been issued a letter of

²⁹ However, as noted at pp. 149-153 herein, the Union is relying on two other dates: February 10, 2009, in respect of which no information was provided aside from an assertion in the Grievor's particulars that he had been docked 3.00 hours' pay, and March 13, 2009, in respect of which 3.25 hours' pay was deducted initially, but for which the Grievor testified he was ultimately reimbursed, when he was absent due to illness for less than half a day but had no credits in his sick bank.

expectation in respect of "various performance issues" during the period in question (November 17, 2008 to April 23, 2009).

However, the gravamen of the allegations against the Grievor is set out in the third paragraph; namely, the threat to "break" his Acting Supervisor, Ms. Fleming, as he had "broken" previous Supervisors, characterized in the letter of termination as a violation of the City's Workplace Violence Policy, as well as his harassment and intimidation of Ms. Fleming, characterized as a violation of the City's Human Rights and Anti-Harassment Policy. For her part, Ms. Fleming testified that she was asked to review the letter, and the third paragraph, in particular, for accuracy. Having done so, Ms. Fleming confirmed that the facts set out therein accorded with her recollection of what had transpired on the morning of April 17, 2009. She also confirmed that at no time during the meeting of April 20th did the Grievor express any remorse, nor at any time, offer an apology, for his conduct toward her on April 17th.

Furthermore, it was alleged that on that date, the Grievor was rude and insulting toward his Acting Supervisor; that he referred to her actions as "stupid" and threatened that there would be "consequences", which would appear to be a reference to the threat to "break" her, as he had "broken" other Supervisors. For his part, the Grievor denied that he referred to his Acting Supervisor as "stupid", and attempted to reframe the issue by claiming to have said that it was "stupid", "crazy", or "driving him crazy," to be constantly

discussing the issue of lateness. As to "consequences", the Grievor introduced yet another "spin"; namely, that Ms. Fleming's excessive monitoring of his brief periods of lateness would ultimately result in grievances being filed, which would "not be pleasant for both parties." And, as to the allegation that the Grievor threatened to "break" his Acting Supervisor, the Grievor claimed that he had worked for three or four other Supervisors and none had ever bothered about "time breaks," which he testified in this meeting was a reference to break periods and in the April 17th meeting, a reference to brief periods of lateness. Moreover, he offered up the same rationalization (or at least one of them) respecting the discussion of break periods in the April 23rd meeting³⁰ as he had in relation to the discussion of brief periods of lateness in the initial meeting with Ms. Fleming on April 17th; namely, that he had not threatened to "break" her, but that the incessant discussion of break periods (apparently a reference to lateness) was going to cause him to have a "breakdown" and, he added, "at times, rendered [him] unable to work." I find this rationalization for the threat to "break" Ms. Fleming, when offered up in this meeting, to be as nonsensical as in the earlier meeting.

Similarly, I reject the Grievor's denial, reiterated in the evidence relating to the April 23rd meeting, that he threatened to "break" Ms. Fleming, as he asserted that he would never have used the expression, as it has no

³⁰ While the Grievor testified at p. 138 herein that there was no discussion of the letter of termination in the April 23rd meeting, the content of his oral evidence would suggest that some discussion might have taken place.

meaning. Notwithstanding the Grievor's assertion, I find that he *did* use the expression, which is used in common parlance and which is commonly understood to have a pejorative meaning.

I also find the explanation that the Grievor did not refuse to leave Ms. Fleming's office on April 17th because (i) there was never a clear, concise order for him to do so; (ii) although Ms. Fleming asked him to leave, she continued to discuss his lateness; and (iii) she never mentioned any consequences of his refusal to leave, to be sophistry. The Grievor was asked three times to leave Ms. Fleming's office. By his own admission, Ms. Fleming made it clear that she did not wish to continue the dialogue without Mr. Nalwala present and so, she reiterated her request for the Grievor to leave her office and undertook to convene a meeting to discuss the issue with Mr. Nalwala in attendance.

Furthermore, the Grievor neither expressed remorse nor apologised for his threatening and insubordinate behaviour, but rather "gloated" over the fact that Mr. Nalwala felt intimidated by his egregious misconduct (a conclusion drawn from the fact that Mr. Nalwala "lost his cool" when the Grievor repeatedly refused his direction to leave his office on April 17th, leapt to his feet and escorted the Grievor out the door (in a manner described more fully at p. 117 herein)).

For his part, the Grievor testified that he did not intimidate Mr. Nalwala in the April 17th meeting; nor did he know that Mr. Nalwala felt intimidated, although he assumed he was frustrated. Nevertheless, the Grievor claimed that he sat calmly in his chair trying to find a resolution to his work "timings" (presumably a reference to lateness, although, as noted, the Grievor attempted to insert a reference to "break periods" into this meeting as well).

As to the Grievor's refusal to leave the office on April 17th, Mr. Nalwala roundly disputed that when he "lost his cool" and ordered him to leave his office, the Grievor was simply trying to resolve a number of outstanding issues (including, it would appear, the lateness issue). To the contrary, Mr. Nalwala testified that he was attempting to address the Grievor's insubordination toward Ms. Fleming, but the Grievor refused to listen and continued to press the lateness issue and his request for a shift change. As the Grievor refused to address the issue at hand (insubordination toward his Acting Supervisor), Mr. Nalwala asked him to leave his office, which the Grievor refused to do until Mr. Nalwala repeated his request for the third time.

In sum, taking into account the threat to "break" his Acting Supervisor, Ms. Fleming, his harassment and intimidation of Ms. Fleming, as well as a recitation of misconduct set out in the letter of April 23, 2009, and the Grievor's

past record³¹, the City concluded that the employment relationship had been irreparably damaged and, in the result, his employment should be terminated.

Although the conclusion that "the employment relationship has been irreparably damaged" is one which is generally drawn, where appropriate, taking into account whether a viable employment relationship can be re-established between the employee and the employer in a holistic sense, Mr. Nalwala was pressed in cross-examination to identify a particular employee (and was restricted to choosing between himself or Ms. Fleming) with whom the Grievor could not be reconciled. In the context of that narrow question, based on the egregious conduct of the Grievor toward Ms. Fleming in the initial meeting between on April 17, 2009, as well as the fact that he was a Union Steward and she was a member of the bargaining unit, Mr. Nalwala expressed concern about the Grievor's ability to sustain a relationship with Ms. Fleming. Nonetheless, Mr. Nalwala acknowledged that he, too, had had a difficult relationship with the Grievor over a number of years. However, he took umbrage at the suggestion, for which absolutely no proof was proffered, that their difficulties were rooted in religious differences (Mr. Nalwala is a Muslim and the Grievor is a Hindu). He also did not see the necessity for an apology or admission of responsibility for the dysfunctional relationship between himself and the Grievor. And, indeed, for the most part, I would agree with that assessment.

³¹ Mr. Nalwala's description of the Grievor's past record as being the "past record of everything that happened from May 1, 2007 until the date of discharge" was none too clear. However, there was no suggestion that the City took into account non-disciplinary action in making the decision to terminate the Grievor's employment.

In any event, it was my decision, communicated to the parties on June 20, 2014, that the Grievor be reinstated with no loss of seniority but without compensation. The **reasons for that decision**, as well as the decisions on the other grievances are set out below.

I. Sick Pay/Sick Pay Credits

The claim in this grievance would appear to be that sick pay was improperly deducted from the Grievor on days on which he was absent due to illness for less than half a day. In addition, although the matter was not raised in argument, based on the Grievor's particulars, there would appear also to be a claim that he was denied sick pay credits for the months (February and March 2009) in which those absences took place.

A determination of these issues invokes the following provisions of the collective agreement:

Article 11 SICK PAY

11.01(a) Permanent employees shall be eligible to receive sick pay commencing the first of the month following completion of the probationary period.

...

11.02 In this Article 'month' shall mean calendar month.

11.03 Each employee shall receive a sick pay credit of one and a half (1½) days for each month of 'unbroken' service with the City, as defined in clause 11.04 such credit to be cumulative from the beginning of the first complete month following the commencement of employment.

11.04(a) Except as provided in clause 11.04(c), a month of 'unbroken' service shall be one where an employee works on all scheduled working days in the month, ...

11.04(b) For the purpose of clause 11.04(a), lost time because of illness (except as provided in clause 11.06), ... shall not be considered as breaking a month's service.

11.04(c) If an employee returns from illness without sick credits, and thereafter works and is paid on all remaining scheduled working days of the month in which the employee returns to work the employee shall receive a sick pay credit of one and a half (1½) days for such month.

...

11.06 Subject to clause 11.04(c) if an employee is absent on account of illness and his/her cumulative sick pay credit has been exhausted, his/her service, for the purpose of this Article, shall be broken and, therefore, he/she shall not receive a credit of one and a half (1½) days per month for the remainder of such absence.

...

11.10 The number of days for which an employee receives 'sick pay' shall be deducted from his/her Cumulative Sick Pay Credit but no deduction shall be made on account of any day on which an employee would normally be entitled to be off work. Absence on account of illness for less than half a day shall not be deducted. Absence on account of illness for half a day or more and less than a full day, shall be deducted as one half (1/2) day.

...

Clause 11.03 of the collective agreement provides for an employee to receive a sick pay credit of one and a half days for each month of "unbroken" service with the City. As a general rule, a month of "unbroken" service is one in which an employee works on all scheduled working days in the month (Clause 11.04(a)). Lost time because of illness, among other matters, ... *shall not* be considered as breaking a month's service (Clause 11.04(b)), although service for the purpose of Article 11 *shall* be broken and, therefore, an employee shall not receive a credit of one and a half days per month, if the employee is absent on account of illness and his/her cumulative sick pay credit has been exhausted (Clause 11.06). However, if an employee returns from illness without sick credits, and works on, and is paid for, all remaining scheduled working days of the month in which the employee returns to work, the employee shall receive a sick pay credit of one and a half days for such month (Clause 11.04(c)). Finally, "[t]he number of days for which an employee receives 'sick pay' shall be deducted from his/her Cumulative Sick Pay Credit Absence on account of illness for less than half a day shall not be deducted. Absence on account of illness for half a day or more and less than a full day, shall be deducted as one half (1/2) day" (Clause 11.10).

From the City's perspective, the facts in respect of this grievance are straightforward: there were days on which the Grievor was absent due to illness for less than half a day and, as his sick bank had been depleted, he was not paid for time not worked. While the City did not identify these dates in argument, the

Union relied on a list of dates compiled by the Grievor on which he claimed he was absent for less than half a day and pay was deducted, as his sick bank had been depleted; namely, March 13 and 25, 2009 (about which voluminous evidence was submitted) and February 10, 2009 (about which little, or no, evidence was submitted, aside from a cursory reference in a document compiled by the Grievor and provided as particulars in this matter). While the parties appeared to understand that a claim was being made in respect of March 13, 2009, the Grievor was adamant that he was reimbursed for March 13th because he submitted a medical note. However, he also submitted a medical note for February 10th and March 25th, for which he was not reimbursed. In any event, nothing really turns on the particular dates, as the same legal principle is invoked, and so, I am prepared to accept the list of dates compiled by the Grievor, because notwithstanding the Grievor's protestations about having been paid for March 13th, these were the dates (including March 13th) on which the Union relied in argument.

The central issue in this grievance is whether, pursuant to Article 11 of the collective agreement, the Grievor was entitled to payment for absences due to illness of less than half a day when his sick pay credits were exhausted.

This issue was dealt with under a collective agreement with substantially similar language in *Re The Municipality of Metropolitan Toronto and Metropolitan Toronto Civic Employees Union, Local 43*; Grievance of Crkovski,

October 29, 1986 (unreported (Kilgour)) ("*Metro Toronto*"), wherein the grievor, who was absent for less than half a day due to illness was denied payment for 3¼ hours (being the period representing the balance of his shift), as his sick pay credits had been depleted.

The Arbitrator's reasoning is instructive for this case and merits close examination:

... Employees receive a sick pay credit of 1 – ½ days for each month of unbroken service with the Municipality, such credit to be cumulative. ...

When an employee is absent due to illness, the number of days for which the employee received sick pay is deducted from his sick pay credits. There are two important exceptions to this procedure:

...

2. No deduction is made from sick pay credits when the absence because of illness is for less than half a day.

The clear intent of the language of this Article is that employees accumulate credits related to their months of service, and then draw upon these credits when they are off work due to illness, in order to be protected from loss of income. It is an insurance plan. Like any insurance plan, the benefits are *only* if the plan is in force.

The key section of Article 15 relating to the grievance of Mr. Crkovski is Article 15.13.³² Although its general provisions are outlined above, it should, at this point, be quoted in its entirety, and in the context of the notion of the Metropolitan Sick Pay Credit Plan being viewed as a form of insurance. Article 15.13 reads as follows:

The number of days for which an employee received 'sick pay' shall be deducted from his Cumulative Sick Pay Credit but no deduction shall be made on account of any day on which an employee would

³² This provision is identical, in all material respects, to Clause 11.10 in this case.

normally be entitled to be off work. *Absence on account of illness for less than half a day shall not be deducted.* Absence on account of illness for half a day or more, and less than a full day, shall be deducted as one-half day.
(emphasis added)

It is the underlined sentence of Article 15.13 upon which the [u]nion bases its contention that Mr. Crkovski is entitled to pay for the afternoon of February 24th [being the balance of the shift on which the grievor in that case left work early due to illness].

The word 'deducted' or 'deduction' is used four times in the three sentences of this article. 'Deducted' from what? The most reasonable interpretation is that the deduction is to be made from the accumulated sick pay credits. The underlined sentence, upon which the [u]nion bases its case, simply means that the number of credits in place at the time of the absence due to illness will not be reduced by an absence of less than half a day. It is language which recognizes that an employee's 'bank' of sick pay credits should not be reduced by a unit of less than half a day. Such a reduction would present substantial record-keeping problems and could be perceived as unfair.

No deduction was made from Mr. Crkovski's sick leave credits for his absence on the afternoon of February 24th, for two reasons:

1. His absence was for less than half a day. Thus, he received the protection contemplated by the underlined sentence of the article, as quoted above.

2. There were no sick leave credits available from which to make a deduction. A deduction from a zero quantity would, mathematically, create a negative quantity. Clearly, the sense of the article cannot lead to the conclusion that the parties intended such a result. The employee without credits cannot be placed in a 'negative credits' position by absence due to illness after his credits have been exhausted.

Even if the [u]nion's argument is accepted on its face, which is not my finding, and the number of credits available is ignored and considered to be without meaning, the language of Article 15.13 does not support the *inference* that Mr. Crkovski is entitled to pay for the afternoon of February 24, 1986.

It is my finding that Article 15 of the collective agreement has been properly applied in the instant case. There has been no violation.

Accordingly, the grievance must fail, and it is hereby dismissed.

(emphasis in original)

Although the *Metro Toronto* case deals with a collective agreement between a predecessor employer and another union, the material provisions are virtually identical to the provisions at issue in Article 11 in this case. And, while I am not bound by the decision in *Metro Toronto*, in my opinion, I ought to follow the decision unless I am persuaded that it is clearly wrong or patently unreasonable. I am persuaded of neither and, therefore, propose to follow the decision of Arbitrator Kilgour, with which I agree, in any event.

Extrapolating from the swipe card data, which were more accurate than Ms. Fleming's journal entries, it would appear that subsequent to his absence due to illness for less than half a day on February 10, 2009 (about which essentially no information was provided), the Grievor worked on all remaining days in the month of February and so, pursuant to Clause 11.04(c), should have received a sick pay credit of one and a half days in respect of that month. However, the evidence indicates that he was absent due to illness for five days immediately thereafter (from March 2nd to March 6th) and so, he would have depleted that credit in the first week in March. As there were no other credits in his sick bank from the period prior to February 10, 2009, and as (i) a sick pay credit of one and a half days in respect of the month of February presumably would not have been earned until the end of the month and, therefore, would not been available to cover the partial day absence on February 10th; and (ii) he would not have been paid on all remaining days in March

subsequent to returning to work following his absence due to illness from March 2nd to March 6th, his service, for the purpose of Article 11 was broken and there would also have been no sick pay credits for the month of March and, therefore, no deduction from credits or, in other words, no credits upon which to draw in respect of the Grievor's absences on March 13 or March 25, 2009 (Clause 11.04(c)).

Therefore, I find no violation of the collective agreement, as (i) there was no deduction from the Grievor's sick pay credits for his absences due to illness on the dates in question, February 10, March 13 and March 25, 2009, as his sick bank had been depleted; and (ii) as his sick bank had been depleted, there were no sick pay credits upon which to draw to indemnify the Grievor against loss of income on those dates. Accordingly, the Grievor would not have been entitled to sick pay for absences of less than half a day on February 10, March 13 and March 25, 2009. (If the Grievor was paid for March 13th, notwithstanding that he had no sick pay credits to draw upon, which he asserted, but did not otherwise prove, and which the Union disputed, then payment was in error.) In the result, I find no violation of the collective agreement. This grievance is, therefore, dismissed.

II. Minutes of Settlement dated November 4, 2005.

In 2005, the Grievor filed 11 discrete grievances, one of which related to a claim for payment of the alternate rate for the position of Supervisor, Accounting & Administration³³ following Mr. Nalwala's appointment as Acting Supervisor (although, when confronted with the prospect that it might not be possible to obtain an alternate rate for a position that was already occupied, the Grievor denied he was claiming an alternate rate, even though it is clearly stated on the face of the grievance); one, to the denial of vacation payout; one, to the denial of sick pay; two, to a claim of unjust discipline, a five- and a seven-day suspension; and four, to a claim of harassment or harassment and discrimination, some of which related to the denial of substantive benefits (vacation and sick pay), among others. The allegations of harassment and discrimination were made primarily against Mr. Nalwala. On the advice of the Union Steward, the grievances also identified Mr. Fernandopulle, who had signed the letters of suspension and was the Grievor's Manager at the time the grievances were filed. The Grievor testified that he and Mr. Fernandopulle disagreed on a number of issues, especially in relation to vacation payout. He further testified that there were e-mails between them in relation to this issue and that, at some point, the e-mails became personal and acrimonious.

³³ As noted at footnote 13, also referred to as Supervisor, Finance & Administration.

In an effort to resolve the outstanding grievances, a meeting was convened on November 4, 2005. In attendance at the meeting were the Acting Director, Mr. Reid, and Human Resources Consultant, Ms. O'Reilly (and presumably Senior Human Resources Consultant, Rosanne Rinella, because she signed the Minutes of Settlement which emanated from the meeting), for the City, and the Grievor and his Union Representative, Tim Maguire. Although Mr. Nalwala was present at the start of the meeting, when the Grievor objected to his attendance, as he was a member of the Local 79 bargaining unit (being a Budget Analyst who was in an acting supervisory role), Mr. Nalwala recused himself. As a result of the meeting, the grievances were resolved and Minutes of Settlement, executed:

MINUTES OF SETTLEMENT
Between
Canadian Union of Public Employees, Local 79
And
The City of Toronto

RE: Grievances of A. Misra, C05-01-6219 (Vacation Credits) C05-04-6424 (Harassment), C05-05-6490 (Denied Benefits), C05-05-6491 (Alternate Rate), C05-05-6492 (Unjust Suspension 5 days), C05-06-6547 (Unjust Suspension 7 days), C05-08-6638 (Denied Sick Pay), C05-08-6640 (Denied Vacation), C05-06-6573 (Harassment), C05-06-6583 (Harassment), C05-08-6637 (Harassment & Discrimination)

In an attempt to mediate the outstanding issues, the parties agree to resolve the above grievance [sic] on the following basis without precedent or prejudice to the position of either party:

1. The grievor will receive 3 days of pay at his current rate as reimbursement for vacation days scheduled on his behalf for 2003.

2. The period of time coded as leave not authorized effective November 15, 2004 until December 28, 2004 will be charged as sick time paid, taken from the grievor's sick bank entitlement.
3. The five (5) day suspension dated April 2005 will be amended to reflect a one (1) day suspension and the remaining four (4) days will be coded as vacation days and reimbursed appropriately.
4. The seven (7) day suspension dated June 2005 will be amended to reflect a two (2) day suspension and the grievor will be reimbursed for two (2) days of day [sic] and 3 days will be coded as vacation days and he will be reimbursed appropriately.
5. The grievor will schedule and utilize all remaining 2004 vacation credits by December 31, 2005.
6. The grievor will be allowed to carry over his 2005 vacation entitlement into 2006. However all 2005 vacation credits must be scheduled and utilized by December 31, 2006. There will be no further payout or carry over of the 2005 vacation entitlement.
7. The grievor's internet access will be restored, however, he must abide by the City of Toronto's Acceptable Use Policy.
8. Overtime will be assigned as per the Collective Agreement.
9. The grievor will receive \$80 less statutory deductions.
10. The grievor's work location will be reviewed at the beginning of 2006.
11. The City will review the assignment of the Budget Analysts within the Business Support Unit to determine the reassignment of the grievor to another portfolio. The reassignment will be confirmed in writing to the grievor and Local 79 by Thursday, November 10, 2005.
12. The grievor will not be required to provide a medical note should he leave the workplace due to illness. However, should the grievor establish a pattern of leaving the workplace early due to illness, the City will reverse [sic] its right to require a medical certificate.
13. Should there be no further incidents of discipline, all disciplinary notations will be removed from the grievor's file on September 1, 2006, provided the grievor has submitted his firm vacation schedule prior to September 1, 2006.

14. All outstanding grievances including those omitted in error, are withdrawn.
15. The parties agree that the terms of these Minutes of Settlement shall constitute full and final settlement of all matters in dispute, including any and all Human Right *[sic]* Complaints.
16. I have read and understand the terms of these Minutes of Settlement and I freely and voluntarily agree to sign them. I hereby release the City and the Union from any claims, actions, grievances and complaints arising out of the issues in dispute.
17. The terms and conditions of this settlement are to remain confidential.

...

'Rosanne Rinella'
For the City of Toronto

'T. Maguire'
For C.U.P.E., Local 79

'Ajay Misra'
A. Misra
4 Nov. 2005

Following efforts by the City to comply with the Minutes of Settlement and a further dispute resolution meeting, a grievance was filed on September 28, 2007 claiming violation of the Minutes of Settlement. Although the Minutes run some 17 paragraphs, covering 13 substantive obligations, the Union made submissions regarding two of these obligations (set out in Paragraphs 11 and 12) and the Grievor also took issue with two others (Paragraphs 8 and 10).

On its face, **Paragraph 8** requires that overtime be "assigned as per the [c]ollective [a]greement." Although no submissions were made as to this matter, the collective agreement provides, in its relevant portion, that overtime "shall be offered in order of seniority, to those who normally perform the work in the work location concerned" (Art. 7.01(d)). Although there was no argument as to the meaning of the term "work location" in Article 7, the Grievor acknowledged that overtime was assigned to the Budget Analyst responsible for the portfolio in which the overtime arose. Nevertheless, he complained that he had "about the lowest number of hours of overtime" among the Budget Analysts in the Business Support Unit. However, there is no evidence, aside from the Grievor's vague assertion, to support that claim. Specifically, there is no indication as to how much overtime the Grievor was offered or indeed how much overtime was available in his "work location." There was also no indication as to the period in respect of which the claim arose.

Furthermore, the Grievor claimed that he was the only Budget Analyst who required pre-approval to perform overtime work (and that it was "like pulling teeth" to obtain such approval). Of course, the Grievor would have had no knowledge of whether other Analysts required prior approval to do overtime aside from what he had been told by the Analysts themselves and, he claimed, from a perusal of the payroll report, which indicated the amount of overtime performed by other Analysts, but not whether pre-approval had been required. In any event, the Grievor acknowledged that, once there was a full complement

of Budget Analysts and summer students in or around 2007, overtime had to be pre-approved for *all* employees (which is consistent with Mr. Nalwala's evidence), but then resiled from that acknowledgement. In any event, I am unclear as to how the issue of pre-approval of overtime relates to the Grievor's claim that overtime was not assigned "as per the [c]ollective [a]greement." In the absence of further clarification or submissions on the matter, I am unable to find a violation of Paragraph 8 of the Minutes of Settlement.

The primary concern at this juncture would seem to be in relation to the enforcement of Paragraphs 10 and 11. As to **Paragraph 10**, it would appear that the Grievor was complaining about his work location. Evidently, when the Grievor moved to Metro Hall in 2003, work stations were assigned according to seniority. The Grievor's work station was along the outside perimeter of the office. However, in the fall of 2005, when Mr. Pringle was Acting Director for a brief period, he came upon the Grievor reading a novel on his lunch break. The Grievor asked if Mr. Pringle needed anything, which apparently he did not, as Mr. Pringle simply walked away. Shortly thereafter (within a couple of days), the Grievor's Internet access was terminated and his work station, moved to a "more conspicuous" location in the open area of the office (albeit with the same amenities as in his former work location), which led the Grievor to believe that the move was precipitated by his encounter with Mr. Pringle.

It is common ground that although there is nothing in the collective agreement that entitles an employee to a particular work location, there was a commitment in Paragraph 10 to "review" the Grievor's work location at the beginning of 2006. And, it was subsequently agreed that the review would be conducted by Mr. Reid. While the Grievor acknowledged that an agreement to conduct a review is not a guarantee of a change in work location, he claimed that the intent of Paragraph 10 was that he be returned to his former work station, and, further, that there were subsequent e-mails, which ensured that result (although no such e-mails were entered into evidence). In fact, the Grievor testified that he was told in discussions with Mr. Reid that arrangements were being made for him to return to his former work location. According to the Grievor, there were also discussions about restoring his Internet access, which was guaranteed under certain conditions in Paragraph 7 of the Minutes of Settlement. Although the Grievor claimed there was an e-mail covering both the restoration of Internet access and the return to his former work location, that e-mail was also not submitted in evidence. Moreover, the Grievor's work location never changed. However, even accepting the Grievor's evidence at face value, for there to have been the commitments the Grievor testified to, there must have been a review of the Grievor's work location in conformity with the provisions of Paragraph 10. And, while there is no evidence as to when this review took place, if it was not in 2006, which would have been a technical breach at best, it was up to the Union to adduce evidence to prove it. No such proof was ever provided.

By way of background for **Paragraph 11**, the Grievor testified that, on the recommendation of the City's Human Rights Office, he filed a transfer request with Human Resources under Article 14 of the collective agreement, in 2003, which he renewed at the beginning of 2004 and 2005, for the most part, because of a fractious working relationship with Mr. Nalwala (although it would appear that Mr. Nalwala did not become the Grievor's Supervisor until completion of his special project at City Hall in or around April 2004³⁴). When a transfer was not forthcoming, an attempt was made to address the Grievor's work assignment in the Minutes of Settlement, and Paragraph 11, in particular. As noted, under Paragraph 11, the City undertook to "review the assignment of the Budget Analysts within the Business Support Unit to determine the reassignment of the [G]rievor to another portfolio"³⁵ and to provide written confirmation of such reassignment to the Grievor and Local 79 by Thursday, November 10, 2005. However, due to the absence of another Budget Analyst with whom Mr. Reid wished to discuss an exchange of portfolios with the Grievor, the City was unable to meet the November 10, 2005 deadline, which Mr. Reid advised Ms. Rinella by e-mail dated November 10th and which Ms. Rinella forwarded to the Chief Steward and the Grievor by e-mail of the same date.

³⁴ While there was a lack of clarity as to dates, for the most part, nothing turns on specific dates and, where it does, I have dealt with the matter directly.

³⁵ Although the Grievor referred to his inability to obtain a transfer as the background for Paragraph 11 of the Minutes of Settlement, a commitment to reassign the Grievor to another portfolio is not synonymous with a transfer, particularly if the request is for transfer outside the division.

Subsequently, although not mandated by the Minutes of Settlement, a dispute resolution meeting was convened at the Grievor's request on December 6, 2005 to review his work assignment and other commitments set out in the Minutes of Settlement. At the meeting, it was agreed, among other matters³⁶, that, effective December 12, 2005, (i) the Grievor's direct reporting relationship would be changed from the Supervisor to the Manager, Financial Reporting & Expenditure Control (although, as the Manager's position was vacant, the Grievor would be reporting directly to the Acting Director, Mr. Reid, who was also Acting Manager at the time); (ii) the Grievor would maintain responsibility for payroll/fleet/telecom budgets; (iii) the administration component of the Grievor's duties; apparently a reference to parking administration, security access and telecom administration³⁷, would be assigned to a Clerk (although responsibility for these duties reverted to the Grievor following Mr. Reid's departure effective mid-February 2006); and (iv) the purchasing and administration back-up duties would be reassigned to the Purchasing Analyst, but the Grievor would continue to perform year-end duties until February 15, 2006 (or February 1st, had he

³⁶ Although not material for this decision, it was also agreed to restore the Grievor's vacation entitlement for 2005 to 15 days. As a result, the Grievor's 2006 vacation bank was credited with two additional days.

³⁷ While the Grievor stated in his e-mail of February 17, 2006 that telecom administration, among other matters, came within the duties and responsibilities of the Purchasing Analyst, in oral evidence, he testified that telecom administration came within the purview of the Payroll Analyst. Although nothing turns on this particular discrepancy (aside from the fact that elsewhere in oral evidence, he identified fleet and telecom administration as a supervisory responsibility), it is important to note that the Grievor's evidence is, for the most part, contradictory and confusing. And so, there may be some inconsistencies, discrepancies or even inaccuracies in this award (which, despite prodigious efforts, I was unable to clarify), but none of these inconsistencies, discrepancies or inaccuracies is material to the outcome of this, or any other, grievance, which is the subject matter of this award.

accepted a job offer in Children's Services referred to at pp. 22, 192 and 198 herein).

Although these changes were agreed to in the dispute resolution meeting of December 6, 2005, Paragraph 11 of the Minutes of Settlement required that there be written confirmation of the Grievor's reassignment. Accordingly, on January 5, 2006, Mr. Reid provided written confirmation of the changes that had been agreed to in the December 6th meeting and stated his understanding that these changes had been accommodated effective December 12, 2005 (being the deadline in the Minutes of Settlement of November 10, 2005, as extended by the parties' agreement of December 6, 2005). And, immediately thereafter, he advised Mr. Nalwala and other members of the Facilities & Real Estate management team, as well as a number of Budget Analysts, of changes to the Grievor's assignment.

However, given the departure of Mr. Reid from the Acting Director's position in or around February 21, 2006 and vacancies in other positions necessary to effect the Grievor's reassignment, changes could not be made to the Grievor's assignment by the revised deadline, which Mr. Reid advised the Grievor by e-mail dated February 17, 2006. Nevertheless, Mr. Reid indicated that he anticipated that the positions necessary to effect the changes (aside from the Manager) would be filled imminently (within four to six weeks). (As it turned out, the Manager's position was filled within six weeks, by April 2006.) Until that

time, the Grievor was directed to carry on with the work he had been doing. Mr. Reid further advised that his successor, Mr. Towers, would prioritize looking into the Grievor's assignment and make changes as he saw fit.

Mr. Reid also expressed his belief in the same (February 17, 2006) e-mail that the City had fulfilled its obligation under Paragraph 11 of the Minutes of Settlement by acceding to the Grievor's request to report to the Manager rather than the Supervisor, which the Grievor disputed and which, I find, in any event, misconstrues the nature of the obligation in Paragraph 11, which deals with the Grievor's work assignment, and not his reporting relationship. Therefore, there was no obligation on the City to provide written confirmation of the change in the Grievor's reporting relationship. And, although the City missed the revised deadline (December 12, 2005) for providing written confirmation of the Grievor's work assignment, it must be inferred that at some point, he was reassigned to the payroll portfolio because, as noted, in May 2007, he was removed from that portfolio attendant upon the appointment of Bosco Wong as Budget Coordinator. Indeed, one does not have to rely on inference because, by e-mail dated May 14, 2007, the Grievor complained that he had been advised in an earlier (May 11th) e-mail that his portfolio had been changed from payroll to purchasing and that he would be responsible for a list of purchasing duties.

In any case, as to reporting relationships, the evidence indicates that the Grievor reported to Mr. Reid for a short period only, months, as it were, if not

weeks; i.e., from December 12, 2005 to February 21, 2006 (or thereabouts), when Fred Towers assumed the position of Director of Facilities Services (and Mr. Reid returned to his base position of Manager, Customer Support, Facilities & Real Estate). Between February 2006, when Mr. Reid left the position of Acting Director of Facilities Services (and Acting Manager of Financial Reporting & Expenditure Control), and April 2006, when Mr. Nalwala was appointed to the Manager's position, although the evidence is not entirely clear, it would appear that the Grievor reported directly to Mr. Towers. Immediately thereafter, as a consequence of Mr. Nalwala's promotion, the Grievor was again reporting to him, which was not anticipated in December 2005, when the Grievor's reporting relationship was changed from the Supervisor to the Manager.

Although Heather Cunningham was appointed Supervisor of the Financial Accounting & Administration Unit in or around August 2006, it was not until May 2007 that the Grievor (as well as one other Budget Analyst) began reporting to her, at which time, his portfolio was also changed. However, from April 2006, when Mr. Nalwala was appointed to the Manager's position, to May 2007, when Ms. Cunningham assumed her supervisory responsibilities in relation to the Grievor, he continued reporting to Mr. Nalwala.

In fact, it would appear that Mr. Nalwala supervised the Grievor, either directly or indirectly, from the time Mr. Nalwala was appointed as Acting Supervisor in or around April 2004 until the Grievor's employment was

terminated in April 2009, for all but an aggregate of about a year, being in excess of two months (from December 12, 2005 to February 21, 2006) under the Acting Manager, Mr. Reid; two months (from February 2006 to April 2006) under the Director, Mr. Towers; six months (or so) under the supervision of Ms. Cunningham (from May 2007 until the commencement of the Grievor's unpaid leave of absence in November 2007, as Ms. Cunningham had left the Supervisor's job by the time the Grievor returned to work in November 2008) and in excess of three months (from about February 1 to April 23, 2009 during which time, the Grievor was on vacation for at least two weeks) under the supervision of the Acting Supervisor, Ms. Fleming.

Moreover, although the Grievor complained that, even when he reported to other Supervisors (Ms. Cunningham and Ms. Fleming), he was required to copy Mr. Nalwala on all e-mails, he acknowledged that, as Ms. Cunningham (and which would have applied equally to Ms. Fleming) reported to Mr. Nalwala, Mr. Nalwala effectively supervised the Grievor. Finally, although the Grievor complained about taking direction from Mr. Nalwala, when advised by Mr. Nalwala in May 2007 that his reporting relationship had changed, the Grievor resisted accepting direction from his Supervisor, Ms. Cunningham (this being the same Ms. Cunningham with whom the Grievor claimed to have enjoyed "a good working relationship").

Leaving aside reporting relationships, the Grievor responded to Mr. Reid's e-mail of February 17, 2006 on the same date. The Grievor referred to his e-mail of January 5, 2006, which confirmed, among other matters, that effective December 12, 2005, he would be responsible for payroll/fleet/telecom budgets. Accordingly, the Grievor viewed Mr. Reid's e-mail of February 17, 2006, which deferred any change to the Grievor's portfolio assignment, but confirmed a change in his reporting relationship (from the immediate Supervisor to the Manager), to be a regression from the Minutes of Settlement of November 4, 2005. In addition, in his e-mail of February 17th, the Grievor confirmed his willingness to perform the purchasing and administration back-up duties (parking administration, purchase order releases and telecom administration), as he had been the Acting Telecom Supervisor in 2002 – 2003 and had continued to perform telecom administration for some time thereafter, in order to accommodate the year-end, until February 15, 2006. He also indicated his preference for switching portfolios based on his seniority.

Some 15 months later, on May 14, 2007, the Grievor sent an e-mail to Mr. Nalwala ostensibly in respect of a dispute resolution meeting which was convened at the Grievor's request on November 30, 2006. While the Grievor described this meeting as a further follow-up to the Minutes of Settlement dated November 4, 2005, the e-mail purports to expand upon the content of the Minutes of Settlement, raising such matters as two letters of expectation, which postdate the Minutes by 12 and 18 months, respectively, and, in any event,

would seem to be inarbitrable as they are non-disciplinary. While the Grievor attempted to refute the allegations contained in the letters of expectation, they do not properly come within the scope of a grievance alleging a violation of Minutes of Settlement from 2005. More apparently relevant to this grievance, but equally inarbitrable within the scope of a grievance alleging a violation of the Minutes of Settlement, is the Grievor's complaint respecting a change in his portfolio effective May 14, 2007 and that, as the most senior Budget Analyst, his preference for a particular portfolio (an obvious reference to the payroll portfolio) had not been accommodated. Aside from some other ancillary issues, which also do not properly come within the purview of a grievance complaining about a violation of the Minutes of Settlement, the Grievor concluded the May 14, 2007 e-mail by making an "official" request "[p]ursuant to the terms of the [c]ollective [a]greement" for another dispute resolution meeting. Although the City would appear to have accommodated the Grievor's request for a dispute resolution meeting on two prior occasions (December 6, 2005 and November 30, 2006), on this occasion, his request was denied.

In Paragraph 11 of the Minutes of Settlement, the City effectively agreed to reassign the Grievor to another portfolio by a deadline (November 10, 2005), which was extended by agreement of the parties (to December 12, 2005). Pursuant to that agreement, the Grievor continued to engage with the City, and Mr. Reid, in particular, until February 17, 2006 respecting his "NEW portfolio" (emphasis in original). Although it has been established that the Grievor was

assigned a "new portfolio" (which was reassigned to Bosco Wong in May 2007), it is unclear when the assignment was made (although it must have been made prior to the date complained of by the Grievor in the e-mail of May 14, 2007; namely, the date the payroll portfolio was assigned to Mr. Wong). More to the point, it is unclear that it was not assigned to the Grievor on February 17, 2006, being the date on which he declared this to be his assignment in an e-mail to Mr. Reid ("my NEW portfolio is Payroll/Telecom/Fleet budgets" (emphasis in original)). If he was not given this assignment on that date, it was incumbent upon the Union to establish that fact. As the Union failed to do so, I am unable to find a violation of Paragraph 11 of the Minutes of Settlement.

But, even if there were a violation (which would have been a technical violation, as the City made best efforts to comply with Paragraph 11 and indeed satisfied the substance of the paragraph by assigning the Grievor a new portfolio), and only because the City exceeded the time limits for providing written confirmation of the Grievor's new portfolio, the grievance is inarbitrable as being untimely.

Under the collective agreement (Clause 16.07(i)), the obligation to convene a dispute resolution meeting arises at Step One of the grievance procedure where Local 79, through its Steward, requests a meeting with the employee's immediate Supervisor within 20 working days following the

circumstances giving rise to the dispute, in order to give the Supervisor an opportunity to address the issue before a grievance is filed.

As noted, the City advised the Grievor by e-mail dated February 17, 2006 of its position that, by reassigning him to report to the Manager, and not the Supervisor, it had complied with its obligation under Paragraph 11 of the Minutes of Settlement and, by e-mail of the same date, the Grievor took issue with that position. Nonetheless, the Grievor was made aware of the City's position and ought to have invoked Step One of the grievance procedure by requesting a dispute resolution meeting within 20 working days of the circumstances giving rise to the dispute; namely, the City's advice that it had complied with Paragraph 11 of the Minutes of Settlement, which was provided on February 17, 2006.

As indicated, in response to a request made by the Grievor (presumably acting in his representative capacity), a dispute resolution meeting was held on November 30, 2006. While that meeting was untimely, clearly, time limits were waived by the City in scheduling the meeting. However, as there would appear to have been matters which remained outstanding from the earlier meeting, as indicated in the May 14, 2007 e-mail, the Grievor made an "official" request for yet another dispute resolution meeting, some six months after the previous meeting.

Although the Union claimed that the Grievor was waiting for certain redress as a result of the November 30, 2006 dispute resolution meeting before filing a grievance, when that redress was not forthcoming, the Union was obliged to proceed to the next step of the grievance procedure (a grievance in writing signed by the Grievor and filed by the Union) within 10 working days following the Step One meeting (the dispute resolution meeting) (Clause 16.07(ii)). It could not wait 10 months (from November 30, 2006³⁸ to September 28, 2007, excluding the period from February 17 to November 29, 2006, which must be found to have been waived) for the Grievor's dispute to be resolved. Nor could the Grievor unilaterally cede to the Union an extension of time for filing a grievance complaining about a violation of the Minutes of Settlement by writing an e-mail on May 14, 2007. As there was no suggestion that the time limits were neither mandatory nor had been waived in respect of the 10-month delay, I must conclude that a grievance filed on September 28, 2007 was untimely.

Nonetheless, the Union requested that I exercise my discretion under Subsection 48(16) of the *Labour Relations Act, 1995* (the "Act") to extend the time for "the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator ... is satisfied that there are reasonable grounds for the extension and that the opposite party

³⁸Technically, the period that was waived would have been from February 17, 2006, the date on which the City advised the Grievor of its position that it had complied with Paragraph 11 of the Minutes of Settlement, until the date on which the request was made for a dispute resolution meeting, which was not established but presumably was some time prior to November 30, 2006. For ease of reference, however, that date will be referred to as November 30th.

will not be substantially prejudiced by the extension." While no jurisprudence was provided in support of the Union's request, it is clear on its face that in order to exercise my discretion to extend time limits under the *Act*, there must be *both* reasonable grounds for the extension *and* the absence of substantial prejudice to the opposite party. As to the first issue, "reasonable grounds for the extension," in my view, there were none. As noted, the eight-month delay between February 17 and November 30, 2006 must be deemed to have been waived. There was then a further 10-month delay (from November 30, 2006 (or thereabouts) to September 28, 2007), for which the Grievor was solely responsible, both in his personal and representative capacities, before filing a formal grievance at Step Two of the grievance procedure. And, aside from the fact that the Grievor was waiting for a resolution to his dispute (which is precisely the reason for which a grievance is designed), there was no reason proffered for the delay. Finally, while no grievance is insignificant to the affected employee, the nature of this grievance, claiming, as it does, a violation of Minutes of Settlement executed in 2005, is not so compelling that it demands to be heard (as might be the case had the grievance involved termination of employment). In the result, I am not satisfied that there are reasonable grounds for extending the time limits.

As there must be *both* reasonable grounds for the extension *and* the absence of substantial prejudice to the opposite party, it is not necessary to address the issue of prejudice, as the Union failed to establish reasonable

grounds for the exercise of discretion under Subsection 48(16) of the Act to relieve against time limits for invoking the grievance procedure in this case.

Principally, however, I find there was no violation on the merits of Paragraph 11 of the Minutes of Settlement, with which the City substantially complied.

Finally, the parties agreed in **Paragraph 12** that the Grievor would "not be required to provide a medical note should he leave the workplace due to illness." However, the Paragraph goes on to provide, "should the [G]rievor establish a pattern of leaving the workplace early due to illness, the City will [reserve] its right to require a medical certificate." Although the Union claimed a violation of Paragraph 12, as there were no submissions on the matter, I was unable to discern any basis for the claim. While there is evidence of one occasion in 2007 (May 24th) when, following a rather fractious meeting, wherein Mr. Nalwala refused to provide written confirmation of the change in the Grievor's reporting relationship, as he had considered the matter to have been dealt with in an earlier (May 11, 2007) e-mail, the Grievor left work early claiming he was "not feeling well and need[ed] to leave for the day." Although the Grievor was required to produce a medical certificate to substantiate his absence, the Union did not advance this, or any other, instance as a basis for complaint. And, while the Grievor testified that he was required to produce a medical note "every time" he left the workplace due to illness, which he claimed was in violation of

the Minutes of Settlement, there is no evidence of another occasion on which the Grievor was required to produce a medical note when he left the workplace any time between the execution of the Minutes of Settlement in November 2005 and the filing of the grievance in September 2007. In fact, given the paucity of evidence, the City responded, in the context of its submissions on timeliness, in respect of one occasion on which the Grievor left work early in 2009 (presumably because it had no information as to what occasions were being relied upon by the Union in support of an alleged violation of Paragraph 12 of the Minutes of Settlement). In these circumstances, where the Union made no argument (aside from the assertion that Paragraph 12 had been violated), it seems patently unfair to find a violation of this Paragraph of the Minutes of Settlement.

In the result, and for the reasons set out above, I find no violation of the Minutes of Settlement dated November 4, 2005. This grievance is, therefore, dismissed.

III. Harassment

As to the allegation of harassment, the Grievor believed that his difficulties with the City began around the issue of accrued vacation³⁹. Up until the end of 2003, the Grievor testified, he had used very little of his vacation leave entitlement and so, he had a significant number of accrued vacation days as well as a floating holiday from 2002. Therefore, the Grievor asked to be paid out for accrued vacation and holiday pay to the end of 2003. However, the Grievor was advised that City policy precluded a monetary payout and so, he would have to take the accrued vacation time off. The Grievor disputed the City's interpretation of the policy, even quoting to the City from its own policies, and escalated the dispute to Labour Relations. Following an exchange of e-mails with Labour Relations, which became personal and fractious, he was permitted to carry over his accrued vacation into the following year (2004). Although it was never clarified, this issue would appear to have been dealt with in one of the grievances resolved by the Minutes of Settlement.

As a result of his experience in relation to vacation payout, the Grievor testified in cross-examination that he believed he needed more knowledge and more effective representation and so, he decided to become involved with the Union. He became a Union Steward in 2003, an office he continued to hold until

³⁹ While the City objected to being confronted with allegations of harassment which were subsumed by the Minutes of Settlement, as I was unable to discern what those allegations might have been, and as harassment is generally demonstrated by a pattern of conduct, I have not excluded from my consideration evidence, such as it was, of alleged harassment which predates the Minutes of Settlement.

his discharge in 2009. However, later in cross-examination, he testified that the first discussions he had with anyone in management, apparently Mr. Fernandopulle, about vacation payout were in 2004, which undermines his claim that he was impelled to become a Union Steward because of his experience with management over the issue of vacation payout. When confronted with the fact that the discussions over vacation payout took place *after* he became a Union Steward, the Grievor attempted to obfuscate by suggesting that his interaction with management over the issue of vacation payout was *one* of the reasons he became involved with the Union and, further, that he did not recall when he became a Union Steward in relation to when he engaged in discussions with management over the issue of vacation payout. The Grievor believed that from the time of the altercation over his vacation payout, "management" (whom he did not identify) documented everything he did. And, for his part, the Grievor has retained all of the e-mail correspondence from the City from his date of hire to his date of discharge.

As to the particulars of the alleged harassment, although the first point was not entirely clear, it would appear that the Grievor was claiming that he had been harassed by Mr. Nalwala since he was appointed Acting Supervisor in Etobicoke in 2002. According to the Grievor, Mr. Nalwala asserted that, as the senior employee, he should have been given the acting appointment, even though supervisory positions were outside the bargaining unit and, therefore, seniority was not taken into account in making such appointments. For his part,

Mr. Nalwala, who understood that seniority was not a factor in making appointments outside the bargaining unit, denied both the assertion attributed to him and the allegation that he had harassed the Grievor since his acting supervisory appointment was made. In fact, at the relevant time (2002), the Grievor and Mr. Nalwala were not even working in the same location, as the Grievor was assigned to Etobicoke and Mr. Nalwala, to Metro Hall.

Nonetheless, the Grievor alleged that since 2002, "[t]here has been constant intimidation, harassment, defamation and deceit which amounts to cause *[sic]* a lot of personal injury" leading to "severe depression and stress induced diabetes on account of this prolonged exposure to toxic work environment." Moreover, "[u]nreasonable work demands have inflicted severe mental distress" such that, the Grievor said, he has "just simply 'stopped functioning' many a times," a claim substantially similar to the one made in his e-mail of May 14, 2007, following receipt of (i) a letter of expectation dated May 1, 2007, which identified particular areas of concern in relation to the Grievor's work performance; and (ii) confirmation from Ms. Cunningham on May 11, 2007 of the change in his portfolio from payroll to purchasing. At that time, the Grievor complained of ongoing harassment by Mr. Nalwala in terms which presaged the complaint recorded in his particulars provided in July 2010:

... I cannot work with you as your demands are totally unreasonable. ... I am now reasserting that your condescending behaviour is tantamount to abuse and absolute harassment in the worst form. The work environment

is totally intolerable and has inflicted such mental duress that at times during the day I 'simply stop functioning'. Under your perceived threat all the time, I simply 'can't get anything done'.

And, indeed, although the explanation was diametrically opposed, there was unanimity between the parties that, subsequent to the change in portfolios, the Grievor's productivity dropped exponentially, which management attributed to a refusal to work, or a deliberate decision to "work to rule," on the purchasing portfolio (and which led to the requirement for the Grievor to submit a daily work log to his Supervisor), and the Grievor attributed to harassment, abuse and unreasonable demands.

Although the Grievor testified that "on numerous occasions, [he had] been prescribed anxiety, depression and other related medication for work related stress and harassment," there was no medical evidence produced of any medication or other treatment he claimed to have been prescribed. Nevertheless, the Grievor asserted that "[t]he job environment is intolerable ... as the manager is 'authoritarian, impatient and intolerant'; that "[t]he Manager's (abuser's) motive has been discriminatory and violates human rights"; and that he had "been tormented long enough ... six years now." While the Grievor could have been referring to almost anything, as there were unrelenting complaints against Mr. Nalwala, there were allegations but no evidence in support of these allegations or, at least no link between the evidence and the allegations. In

these circumstances, I would be guessing as to the basis for the allegations, which would clearly be inappropriate on my part.

Moreover, overall, I find no fault with the manner in which the Grievor was managed by Mr. Nalwala, who seems to have exercised extraordinary forbearance and restraint toward a rude and arrogant employee:

(a) an employee who insisted upon:

- i. written confirmation of the change in his reporting relationship (from Mr. Nalwala to Ms. Cunningham) although he had been advised of the reporting relationship by other means (in a public meeting, a private meeting and by e-mail); and
- ii. a detailed, step-by-step work procedure of which he was fully aware, because he had done the work (releasing of purchasing documents) for at least four years. Nonetheless, he claimed he was not comfortable exercising this responsibility as a bargaining unit member (Budget Analyst) without a step-by-step procedure although, inexplicably, he did not experience the same level of discomfort exercising this responsibility as an Acting Supervisor; and

(b) an employee who felt that a person in his position should not have been questioned about "trivial" amounts of lateness.

The second allegation in the Grievor's particulars would appear to be a reference to the Grievor's failure to obtain a permanent Budget Analyst position in November 2001. Although the Grievor testified in examination-in-chief that the test was graded by Darrel Fernandopulle, who ran the competition, by cross-examination, he was unable to recall who made the determination that he had failed the test, which he attributed simply to "management" whom he accused in the particulars he compiled of "[trying] to fail [him] in the Budget Analyst exam and the Director intervened." While there is not an iota of evidence of any attempt to fail the Grievor on the Budget Analyst test, the Grievor took the opportunity to review the test results and, on the evidence before me, took no steps to challenge those results. Nonetheless, when the Grievor expressed doubts as to the fairness of the test, as he acknowledged, the Director of Facilities & Real Estate, Keiko Nakamura, agreed to look into the matter. And, shortly thereafter, presumably through the intervention of Ms. Nakamura, he obtained a permanent position as a Budget Analyst and Acting Supervisor, Accounting & Administration in Etobicoke for a period of one year effective February 2002 (or thereabouts).

Even if it had been argued that failure to appoint the Grievor to a permanent position in 2001 formed the initial stage of some developing "pattern" of harassment, on the only evidence before me, he did not obtain a permanent position because he failed the written test that was part of the job competition process, and not because he was harassed or discriminated against. Indeed,

the fact that the Grievor was appointed as a permanent Budget Analyst and Acting Supervisor in Etobicoke, as a result of managerial action is indicative of the contrary.

Further to the allegations of harassment, the Grievor claimed that there were instances of Mr. Nalwala's shouting and intimidating him in the presence of other employees and that there were grievances filed against Mr. Nalwala by other employees as well. Although the Grievor claimed that in response to his request for confirmation of his reporting relationship, Mr. Nalwala said that if he did not understand the instruction to report to Ms. Cunningham, he should "pack [his] bags and leave," which he characterized as an example of Mr. Nalwala's lack of respect for his subordinates and "ongoing proof of [his] daily harassment," the Grievor's claim was not corroborated by any other employee and there were no harassment grievances by other employees against Mr. Nalwala produced in these proceedings. In fact, Mr. Nalwala testified that he was unaware of *any* grievances filed against him by employees other than the Grievor and, notably, no such grievances were submitted in evidence. Moreover, Mr. Nalwala and Ms. Fleming denied allegations of shouting and intimidation of the Grievor or of any other employees, for that matter. With respect to the Grievor, in particular, Mr. Nalwala expressly denied that directing him to desist from sending and disseminating e-mails accusing Mr. Nalwala of preferential treatment in compensating Mr. Wong at the Budget Coordinator rate of pay for performing the same duties the Grievor had performed in relation to

the payroll portfolio at the lower, Payroll Analyst, rate (although the Grievor had never done the duties of Budget Coordinator) constituted harassment, intimidation or a threat of any sort. While the Grievor most probably was disappointed in having not been selected for the Budget Coordinator assignment (for legitimate reasons explained at p. 17 herein), he was not thereby harassed.

He was also not harassed, I find, because he was not granted a transfer. While the Grievor testified that he submitted annual requests for transfer, some of which the City did not have on file, from 2003 (or 2004) to 2009, his requests were not granted, even though his family doctor certified *verbatim* on October 27, 2007 and again on October 21, 2008 that he was "unable to return to work in the current work environment, indefinitely" and, further, that "[h]e is fit to return to full duties immediately only if place [sic] in an alternate work environment that is totally distinct from his current environment," and added, on October 21, 2008, that "[h]e can return to full duties without restriction as long as [the City] provide[s] alternate division/unit." Notwithstanding the Grievor's statement in his particulars that in November 2008, "Dr. Litsas, provided his final assessment to City of Toronto, asking for change of Work environment as a condition for return to work," following an assessment on November 4, 2008, Dr. Litsas revised his medical opinion and certified the Grievor to be fit to "return to regular work" on November 10, 2008, and expounded upon that opinion by stating, "I feel now, that a trial to return to work in the former environment is reasonable. We will reassess the impact on

his health monthly.” However, as no further medical opinion was provided, including an opinion that it was medically necessary for the Grievor to be relocated, Dr. Litsas’s opinion of November 4, 2008 must be considered to be his final assessment. In any event, based on the revised medical opinion, the Grievor declared his intention to return to work on Monday, November 17th.

Leaving aside the medical opinions proffered by the family doctor⁴⁰, which advocated, at least initially, for a change in work environment, there were requests for transfer, some of which were denied and which I accept without reservation were filed, given the Grievor’s antipathy for Mr. Nalwala, but for which no records could be found. Had the Grievor wished to pursue the matter, he could have filed a grievance (or grievances) under Article 14, the transfer provisions of the collective agreement. Although the Union suggested that there was, in fact, a transfer grievance, of which I am seised, no such grievance was put in front of me and no argument was made in respect of such grievance. If there is a grievance of this nature that bears upon this arbitration, the onus is on the Union to establish it, and I will remain seised for this purpose; i.e., to determine whether I am seised thereof. However, it should be stated that I am

⁴⁰ Although Dr. Litsas’s opinions were proffered in the context of the Grievor’s requests for transfer, the Grievor indicated for the first time in his particulars that he “[h]ad to take a year off to get away from the harassment,” whereas he testified in oral evidence that he required a one-year leave of absence to deal with issues attendant upon the death of his grandparents in India. Yet another reason for the leave of absence, which was given in a newspaper article written by his brother-in-law and which the Grievor denied, was that he was went to the United States to pursue a business opportunity on an E-2 Visa.

unable to appreciate how failure to accede to the Grievor's request(s) for transfer amounts to harassment.

In any event, when a transfer was not forthcoming, an attempt was made to address the matter in the Minutes of Settlement executed on November 4, 2005, and Paragraph 11, in particular, which dealt with the Grievor's work assignment, but not his reporting relationship, which was addressed subsequently in a dispute resolution meeting convened on December 6, 2005 to take effect December 12, 2005. However, as the term "work environment" was not defined in the Grievor's particulars and, as the Grievor complained about being "put back to the same environment ... under even worse situation with even more aggressive monitoring," although the reporting relationship was not addressed in the Minutes of Settlement, in fairness to the Grievor, I have considered both his work assignment and his reporting relationship under the rubric of "work environment."

Although referred to in the harassment grievance, these matters were principally addressed in the context of the grievance alleging a violation of the Minutes of Settlement. And, in that context, by his own admission, the Grievor was assigned a "new portfolio" no later than February 17, 2006 (the date upon which the Grievor declared, "my NEW portfolio is Payroll/Telecom/Fleet budgets reporting to the manager directly" (emphasis in original)). And, indeed, the Grievor *did* assume the new portfolio until May 2007 when, because of perceived

problems within the payroll portfolio, the City assigned another Budget Analyst, Bosco Wong, to prepare a report recommending efficiencies and improvements to the portfolio, which was then assigned to Mr. Wong on a permanent basis. Furthermore, the City fulfilled its commitment to change the Grievor's reporting relationship from the Supervisor to the Manager, which effectively removed him from Mr. Nalwala's supervision until April 2006, when Mr. Nalwala was promoted to the Manager's position, and the Grievor was again reporting to him. However, these exigencies, which were not anticipated either in November 2005, when an agreement was made to change the Grievor's work assignment, or in December 2005, when the Grievor's reporting relationship was changed from the Supervisor to the Manager, did not constitute harassment but rather the legitimate exercise of managerial rights and responsibilities. Finally in relation to this allegation, the Grievor complained about "more aggressive monitoring," which was also not explained but which has been used throughout this award in relation to lateness, although for reasons set out below, I have found that monitoring of the Grievor's persistent lateness did not constitute harassment.

As to the allegation that the Grievor was monitored more closely than other employees, Mr. Nalwala assumed that the Grievor was referring to Ms. Fleming's monitoring of his persistent lateness, and, aside from an allegation in argument that the Grievor had been "micromanaged", the preponderance of the evidence would support that assumption. Although the matter of the Grievor's lateness took up a considerable amount of hearing time, a number of points

relating to this matter were raised only in the Grievor's particulars and/or were contradicted by the oral evidence. For instance, the Grievor claimed in his particulars that Ms. Fleming changed her schedule in order to monitor his arrival times. However, in oral evidence, the Grievor complained *both* that Ms. Fleming was not coming to work until some time between 8:00 a.m. and 8:15 a.m. *and* that she was coming to work at 7:30 a.m. to monitor his arrival times. Indeed, Ms. Fleming testified that although she did not have fixed hours, she was often in the common area conferring with clerical staff at around 7:30 a.m. However, she expressly denied that she made a conscious effort to be in the common area at 7:30 a.m. in order to monitor the Grievor; nor did she inquire as to the Grievor's arrival time if he was already at work by the time she arrived. However, she acknowledged that at the end of the Grievor's shift, she positioned herself in the common area doing paperwork or talking to staff for the express purpose of checking on his departure times.

In addition, presumably to excuse his lateness, the Grievor made reference in his particulars to the time taken up coming into the building, proceeding to his work station, logging onto his computer (which he estimated at "a full three to five minutes") and "normal settling down," none of which would appear to have any relevance either to the times recorded by the clock on the wall (which was the measure used by Ms. Fleming to gauge the Grievor's arrival times) or the swipe card data (which were generally more favourable to the

Grievor, in part, because these data did not take into account the time to get to his work station).

For his part, Mr. Nalwala testified that the Grievor was expected to report for work on time and take his breaks, including his lunch break, at the scheduled times, although it would appear that there were employees who were allowed some flexibility in that regard, including one employee, Rebecca Pamor, who left early on at least two occasions to accommodate a Wheel Trans pickup but made up the time at lunch. Although the Grievor testified to the contrary; namely, that Ms. Pamor complained to him in his capacity as Union Steward that she was not allowed to make up the time at lunch, apparently Ms. Pamor was allowed to make up for the time she left early by taking a half-hour lunch break, but could not forego her entire lunch break, which the Grievor would not have known, as Ms. Pamor was dealing directly with Ms. Fleming without Union involvement. As well, there were two other employees, Kulbir Gill and Jag Gill, who worked flexible hours and if, on occasion, they were late, also made up the time at lunch. This is a very confusing area, as the Grievor claimed that if he were late, he made up time as well (although he gave no indication as to when that might have been, as he was *not* required to make up the time in respect of February 24th, the date of the subway delay). Nevertheless, when confronted with a pattern of lateness (14 occasions in the period between February 13 and March 24, 2009, as gauged by the clock on the wall), the Grievor was told that

he would be required to make up the time. However, there was no indication as to whether the City followed through with that requirement.

In any event, although Ms. Fleming was monitoring the Grievor's arrival and departure times on her own initiative, it seems not an unreasonable action for her to have taken given that the Grievor requested, and was granted, an earlier start time and yet consistently came in late and/or left early, which suggests that the subway train he took did not allow for a 7:30 a.m. start time. And, while the Grievor contemplated taking the GO Train that arrived at Union Station at 7:44 a.m., when confronted with the fact that this means of transportation also would not have allowed for a 7:30 a.m. start, the Grievor revised his response to suggest that he would have taken the GO Train that arrived half an hour earlier (at 7:14 a.m.). In any event, this retort is academic, as the Grievor never actually took the GO Train, but rather continued with the subway, which resulted in his being late most days. Moreover, Ms. Fleming's monitoring of the Grievor's arrival and departure times, which was not selective, but included days when he arrived and left work on time, as well as days when he was late, did not constitute harassment, but rather the legitimate exercise of the City's managerial/supervisory rights.

Furthermore, Mr. Nalwala acknowledged that effective May 30, 2007, the Grievor was required to submit a work log to his Supervisor, Ms. Cunningham, via e-mail prior to leaving work each day because, following the

change in his portfolio (from payroll to purchasing), he refused to work on the new portfolio, aside from releasing purchasing documents, in respect of which he expended an excessive amount of time and asked unnecessary questions. Nonetheless, Mr. Nalwala testified that, as the Grievor made a conciliatory gesture, this requirement was not reinstated upon his return to work, following a one-year unpaid leave of absence, in November 2008.

Closely related to the allegation of excessive monitoring, the Grievor asserted that it was understood in the workplace that if he were "[kept] in check, everyone else [would] fall in line," which both Mr. Nalwala and Ms. Fleming roundly disputed, as it was contrary to Ms. Fleming's approach to supervision and diametrically opposed to Mr. Nalwala's belief in fostering a positive relationship with employees. Accordingly, it was not their managerial/supervisory style that employees needed to be "kept in check" or that if the Grievor were "kept in check," it would have a salutary effect on other employees. And, while he agreed that, as an Acting Supervisor, Ms. Fleming took direction from him, Mr. Nalwala was deeply disturbed by the allegation that he was "firing the gun from [Ms. Fleming's] shoulder." For her part, Ms. Fleming denied ever having made such an egregious statement attributed to her by the Grievor. She further denied having told the Grievor that, as she was working in an acting capacity, she was only following instructions as to how to deal with him.

This is not to suggest that Ms. Fleming's evidence is entirely consistent. But it is, for the most part, credible. Where Ms. Fleming fell down was in her supervisory skill, which was less than optimal. She was an inexperienced Supervisor who might have made some errors in judgment, but none that, in my view, would constitute harassment.

Aside from deleting a voice mail message, which would have confirmed whether or not the Grievor gave any indication of the duration of his absence when he called in sick on March 3, 2009, and castigating the Grievor for "theft of time," which was ill-advised, there was nothing in Ms. Fleming's supervision of the Grievor that warranted serious censure. While she monitored his arrival and departure times, as noted, there was nothing untoward in her doing so, given that, on her evidence, as soon as the Grievor secured an earlier (7:30 a.m. to 3:30 p.m.) shift, he started arriving late on a regular basis and leaving early, on occasion⁴¹. And, in an inversion of facts for which there was little explanation or support, the Union claimed that the Grievor had been "micromanaged" by Ms. Fleming and Mr. Nalwala in a manner that was designed to "break" *him*. Aside from lateness, which was dealt with in exacting detail, as indicated, the Grievor was required to submit a daily work log to his Supervisor essentially because of a lack of productivity. Although they disagreed as to the

⁴¹ Although there was an assertion in the letter of expectation of November 23, 2006 that the Grievor was consistently late even on the 8:00 a.m. to 4:00 p.m. shift ("You are consistently late for work"), there was no *proof* of lateness at any time on the 8:00 a.m. to 4:00 p.m. shift (up to February 2009). What was proven, in meticulous detail, was a robust record of lateness on the 7:30 a.m. to 3:30 p.m. shift.

reason, the parties appeared to agree that, once the Grievor became the dedicated Purchasing Analyst (or, in other words, was removed from the payroll portfolio), his productivity dropped exponentially. Certainly, he was insistent upon receiving detailed, written instructions for tasks, most prominently, releasing purchasing documents, with which he was intimately familiar. In any event, the requirement for a daily work log was not reinstated following the Grievor's return to work at the conclusion of a one-year unpaid leave of absence in November 2008. Finally, the Union claimed that the Grievor was required to produce a medical note for every absence due to illness contrary, it was submitted, to Paragraph 12 of the Minutes of Settlement, as a further example of "micromanagement". Leaving aside that Paragraph 12 does not address the requirement for a medical note for every absence due to illness, but only in circumstances of leaving the workplace due to illness, as noted in relation to the grievance alleging a violation of the Minutes of Settlement, there was only one occasion (May 24, 2007) on which the Grievor was required to produce a medical note when he left the workplace in the 23-month period between the execution of the Minutes of Settlement on November 4, 2005 and the filing of the grievance in September 28, 2007, which hardly represents "micromanagement".

The Grievor further claimed in his particulars that in 2004 and 2005, the City Human Rights Office made a recommendation to change his work environment based upon an agreement that had been reached between the parties in 2005, but which the Grievor alleged the City; specifically, "subsequent

management," did not honour. In fact, he claimed that he was put back in the same environment in a "worse situation with even more aggressive monitoring." In the absence of further explication, I am not sure precisely what the Grievor was referring to in this claim, although I assume it relates to matters which have already been dealt with: his requests for transfer and, when a transfer was not forthcoming, attempts made to address the Grievor's "work environment" in the Minutes of Settlement dated November 4, 2005 and a subsequent dispute resolution meeting convened on December 6, 2005. With respect to transfers, in particular, the Grievor further contended that although he submitted requests for transfer to another area annually from 2003 (prior to Mr. Nalwala's appointment as Acting Supervisor) to 2008, there have been "numerous Local 79 appointments at [his] Wage Grade but [he has] not even been called for an interview." However, the evidence indicates that the Grievor was the successful applicant on a job posting for a temporary position in another Division (Children's Services) in 2006⁴²; that he accepted the position of Acting Budget Coordinator, but after consultation with the Manager, Andres Hachard, declined it, as once the temporary assignment ended, he would have reverted to his base position.

⁴² This might well be the position the Grievor applied for in 2005 (referred to at p. 22 herein) or there might have been another position of Budget Coordinator in Children's Services for which he applied in 2006. In any event, nothing turns on whether the Grievor applied for the Budget Coordinator position once or twice. The important point is that he applied for the position and, therefore, knew of its existence. Furthermore, he knew from SAP that, for a brief period (three- to five-month) in 2007, there was a position of Budget Coordinator in Facilities & Real Estate.

Moreover, although the Grievor was advised by the Occupational Health Nurse, Ms. Baycliffe, that transfers were arranged between the Manager and the Director, the Grievor testified that he submitted requests for transfer to Human Resources, which is consistent with the advice provided by Ms. O'Reilly and Mr. Nalwala: see footnote 17 herein. Furthermore, Mr. Nalwala testified that the Manager of an employee's workplace plays no role whatsoever in whether the employee secures a transfer to another workplace. Requests for transfer are submitted to Human Resources and, if there were an opportunity for transfer, Human Resources would contact the employee directly. In any case, Mr. Nalwala testified that there were no employees in the same wage grade in another classification who reported to him (although, even if there were, it likely would not have satisfied the Grievor, who presumably initiated his requests for transfer in order not to work with Mr. Nalwala) and, further, Mr. Nalwala would not contact an employee for an interview who did not report to him. Nonetheless, the Grievor focussed on the fact that his request for transfer was never accommodated. To reiterate, the disposition of the Grievor's requests for transfer did not constitute harassment, but were properly the subject of transfer grievances.

As to further particulars of alleged harassment, the Grievor complained that at the April 20, 2009 meeting, at the conclusion of which he was suspended pending investigation with pay, which was convened for 3:00 p.m., there was no recognition of the fact that he missed his afternoon break.

According to Mr. Nalwala, however, there was no loss of pay, as the 15-minute afternoon break is a paid break. Moreover, an agreement was reached to compensate him for half an hour of overtime, as the meeting did not end until 3:50 p.m. or, on the Grievor's evidence, 3:55 p.m., some 20 to 25 minutes after the end of his scheduled shift. However, it would appear from the payroll records that the Grievor never received the overtime pay. In a similar vein, the Grievor complained that management representatives were 18 minutes late for the April 23, 2009 meeting, at which time the Grievor was given the letter of discharge and which was convened for 1:00 p.m., the start of his lunch break. While I fail utterly to appreciate how either of these instances could constitute harassment, I will ensure that the Grievor is compensated for any losses incurred as a result of any delay or detriment to the Grievor attributable to the timing of these meetings.

For his part, Mr. Nalwala denied the more incendiary allegations; namely, that he was biased against the Grievor; that he was "authoritarian, impatient and intolerant" or that he treated the Grievor "with incivility, unfairness [or] disrespect" or sought to intimidate, harass or defame him. Moreover, Ms. Fleming testified that at no time during the six-week (or so) period she supervised the Grievor, did she ever witness "intimidation, harassment, defamation [or] deceit" toward the Grievor by Mr. Nalwala. And, Mr. Nalwala emphatically denied that he had a "personal vendetta" against the Grievor because he is a Hindu and Mr. Nalwala is a Muslim (or for any other reason, for

that matter). Aside from the *fact* that the Grievor and Mr. Nalwala are of a different faith, the Grievor offered no proof to support his assertion. There is not a scintilla of evidence that the issues between the Grievor and Mr. Nalwala were rooted in religion, and I find it offensive and irresponsible for the Grievor to make assertions of this nature that he could not substantiate. When pressed in cross-examination, the best the Grievor could do was offer up speculation and innuendo that Mr. Nalwala had a personal vendetta against him, and that it was "possible" that this vendetta, for which no foundation was ever established, was grounded in religious differences. This is a serious allegation, which, if it were true, merits strict censure. However, to make such an allegation with no factual base is repugnant and intolerable. In fact, aside from the allegation made by the Grievor in evidence, at no time was it argued that the Grievor's harassment claim (or any other grievance) was rooted in religious affiliation or any other prohibited ground enumerated in the *Human Rights Code*. Accordingly, although no legal authority was provided (aside from reference to the collective agreement on the face of the grievance), the harassment grievance would seem to be based on what might be characterized as workplace harassment, a serious matter, to which I have given serious consideration. In any case, I find no evidence of harassment on any basis.

IV. Two-Day Suspension

The circumstances leading to the imposition of the two-day suspension effectively for insubordination were precipitated by the decision to reassign the payroll portfolio from the Grievor, who was the Payroll Analyst, to the Budget Coordinator, a management position, which was given to Bosco Wong, a Budget Analyst who had been responsible for another portfolio (DCAP) in the Business Support Unit. When the payroll portfolio was assigned to Mr. Wong as Budget Coordinator, the Grievor was assigned the purchasing portfolio as the Purchasing Analyst. While it would appear that prior to the reassignment of the payroll portfolio from the Grievor as the Payroll Analyst to Mr. Wong as the Budget Coordinator in May 2007, the Grievor had been responsible as a Budget Analyst for both the purchasing and payroll portfolios, it is unclear how long the Grievor assumed this dual responsibility.

In any event, the Grievor objected to the appointment of Mr. Wong to the Budget Coordinator position, which was paid at a higher rate than Budget Analyst, a generic classification, which encompasses the Payroll Analyst. While it is neither necessary nor desirable to a resolution of this grievance to repeat the rationale for creating a temporary assignment as Budget Coordinator in the Business Support Unit, as this was a management position, the appointment could be made without reference to the seniority provisions of the collective agreement.

In any case, when the Grievor became aware of the creation of the Budget Coordinator position, on his own evidence, he raised the issue with the other Budget Analysts who, he contended, were concerned that it was the City's intention to convert all of their positions into management positions. No other Budget Analyst was called as a witness to confirm this contention. In fact, no other Budget Analyst or Union official, for that matter, was called to testify on the Grievor's behalf on any of the grievances.

After ascertaining that the Union had no involvement in the conversion of the Payroll Analyst position, the Grievor posited a number of inconsistent theories, for which there was no support: either (i) there was no position of Budget Coordinator on the organization chart for Facilities & Real Estate and so, the City unilaterally created a management position in order to justify paying Mr. Wong a higher rate than had been paid the Grievor for performing the same duties; namely, the duties of the payroll portfolio; or (ii) there was no position of Budget Coordinator on the organization chart for Facilities & Real Estate and the City did not create a management position, but simply referred to Mr. Wong as a Budget Coordinator in order to justify paying him the higher rate in order to circumvent the seniority and other provisions of the collective agreement.

Although the first position is untenable (as the evidence establishes that Mr. Wong was performing a discrete task; namely, preparing a report

recommending efficiencies to the payroll portfolio, which differed from the duties of the payroll portfolio and from the duties the Grievor had performed), the second is illogical. By his own admission, when the Grievor became aware of the creation of the Budget Coordinator "position", he contacted the other Budget Analysts who, he claimed, were concerned that it was the City's intention to convert their positions to management positions. Moreover, on May 2, 2007, the Grievor sent an e-mail to the Union seeking confirmation as to whether it had "unilaterally given approval to the conversion of a Local 79 Budget Analyst position to a newly created management *position* to be formed within the Business Support section of Facilities & Real Estate." After expressing concern regarding this matter, the Grievor requested an immediate intervention as "the final management *position* approval" had been escalated to the City Manager's office. If the content were not sufficiently explicit, the subject of the e-mail, authored by the Grievor, is "Local 79 to Management – *position* conversion" (emphasis in this paragraph added).

Nevertheless, as noted, the Grievor resolutely refused to acknowledge the existence of a position of Budget Coordinator within Facilities & Real Estate. While the Grievor knew there was a position of Budget Coordinator within the City's corporate structure, in general, as he had applied for the position in another Division (Children's Services), he claimed that he knew from SAP that there was no position of Budget Coordinator within Facilities & Real Estate. Although the Grievor offered no convincing explanation as to why he

had accessed SAP, and Mr. Wong's confidential payroll information, in particular, when confronted with an excerpt from SAP, which indicates that for the period from May 9 to September 30, 2007, Mr. Wong was assigned to the "position" of Budget Coordinator within the Facilities & Real Estate Division, the Grievor remained intransigent. Notwithstanding the Grievor's intransigence, the written record - both the excerpt from SAP, which is a record created in the ordinary course of business, and the Grievor's e-mail to the Union dated May 2, 2007, which was created before the submission of a grievance (or even the imposition of discipline) - confirms that, for the period from May 9 to September 30, 2007, there was a "position" of Budget Coordinator within the Facilities & Real Estate Division.

Notwithstanding that the Union did not file a grievance with respect to the creation of the Budget Coordinator position or even respond to the Grievor's e-mail of May 2, 2007, wherein he claimed that the creation of the Budget Coordinator position was of "grave concerns" [sic] to all of the Budget Analysts and requested that the matter "be escalated immediately and intervention sought" to prevent the creation of such position, a position which I note parenthetically, the Grievor denied even existed. Nevertheless, the Grievor, who was the Union Steward, claimed that he was "goaded" by the other Budget Analysts into sending an e-mail on June 14, 2007 alleging that Mr. Wong had been accorded "preferential treatment" in being compensated at the Budget Coordinator rate of pay (although earlier, the Grievor testified that the concern

expressed by the other Budget Analysts was not about compensation but rather that their positions would be converted to management positions). As noted, the e-mail was disseminated widely, including, as the Grievor testified, to Mr. Nalwala's boss (Mr. Towers) and to his boss's boss (Mr. Donohue) and to the Grievor's Supervisor (Ms. Cunningham), the Budget Coordinator and all but one of the other Budget Analysts.

Although the Grievor was directed by e-mail dated June 22, 2007 to desist from sending such inappropriate e-mails and disseminating them widely, he was invited to discuss the matter with Mr. Nalwala. In flagrant disregard of Mr. Nalwala's direction, the Grievor responded on June 27, 2007 by sending an even more incendiary e-mail (alleging that Mr. Nalwala had threatened him and that "[s]pecial financial arrangements, inducements, enticements" had been made) to a similar distribution list (adding one Budget Analyst and deleting the Budget Coordinator).

Both in content and in coverage, the Grievor's e-mails were, as Mr. Nalwala noted with respect to the first e-mail, inappropriate. Moreover, by ignoring the admonition to desist from sending and disseminating such inflammatory e-mails and even escalating the vituperative content (making unfounded allegations of financial improprieties and threats by Mr. Nalwala, which is patently absurd, given the restrained nature of Mr. Nalwala's response), I find that the Grievor was insubordinate to management personnel and Mr.

Nalwala, in particular. Accordingly, I cannot accept the characterization of the e-mails proffered by counsel for the Union as being "completely true"⁴³ or "fair comment"⁴⁴. As noted, the Grievor never performed the job of Budget Coordinator and, in any event, as Budget Coordinator was a management position, in his role as Union Steward, the Grievor knew or ought to have known that seniority had no application to the assignment, which the Union appeared to appreciate by refraining from filing a grievance respecting the creation of the Budget Coordinator position. While counsel claimed, in his submissions, that the Grievor was neither insolent nor insubordinate toward his Manager, but rather expressed a legitimate and long-standing opposition toward the use of alternate-rated assignments⁴⁵ to circumvent the constraints of the collective agreement, the manner in which the Grievor addressed the Manager, in conjunction with the Union's refusal to address the issue of the creation of the Budget Coordinator position, when raised by the Grievor in his e-mail of May 2, 2007, or to file a grievance respecting the matter, would suggest otherwise.

⁴³ a reference to the first paragraph of the initial (June 14, 2007) e-mail, which states, in its relevant portion, "special arrangements have been made to compensate the new payroll analyst as a 'Budget coordinator' rate of pay. For the last six plus years that I have done this portfolio, no such consideration was made in my case," which conflates the Budget Coordinator and Payroll Analyst positions.

⁴⁴ a reference to (i) the first and second paragraphs of the initial e-mail, which refer to the payment of the "new payroll analyst" (although Mr. Wong was not initially appointed as a Payroll Analyst) at the Budget Coordinator rate of pay as "preferential treatment"; and (ii) the second sentence of the last (June 27, 2007) e-mail, which alleges that "[s]pecial financial arrangements, inducements, enticements have definitely been made to circumvent the issue of [overtime] compensation and secondly seniority has been blatantly overlooked in this special treatment."

⁴⁵ (the evidence being that Mr. Wong was alternate-rated into Budget Coordinator position).

Nevertheless, the Grievor claimed immunity from discipline because of his status as a Union Steward. While employees who use intemperate language directed toward members of management may be disciplined for insubordination, union officials are generally given latitude (characterized as being "some" latitude to "significant" or "broad" latitude, depending on the formulation in the particular case or commentary)⁴⁶. In any event, that latitude does not extend to statements that are malicious in nature or knowingly or recklessly false.

In *DHL*, the grievor, a union official, sent a series of intemperate and profane e-mails, which were contemptuous of authority, to management personnel, copied to many union officials and other management personnel. While the facts in *DHL* are more egregious than in this case, the penalty (a 30-day suspension), which was upheld, was exponentially greater than the two-day suspension imposed on the Grievor. In any event, the facts are instructive for the instant case and, furthermore, the same principles apply; namely, that employees acting in their capacity as union officials are accorded more latitude than other employees in confronting management personnel; that this latitude provides union officials with immunity from discipline in certain circumstances.

⁴⁶ Additional formulations include "some latitude" (Brown & Beatty, *Canadian Labour Arbitration* (4th ed.) at para. 9:1530; "more latitude" (*Re DHL Express (Canada) Ltd. and C.A.W.-Canada, Local 4215 (Rae)* (2010), 200 L.A.C.(4th)263 (Ish) ("*DHL*")); "a wide range of latitude," "this broad right," and "the broad scope of activity afforded to union stewards" (*Toronto (Municipality) v. Canadian Union of Public Employees, Local 79 (Votsch Grievance)* (1997), 68 L.A.C.(4th)224 (Sarra)); "a wide latitude" and "significant degree of protection" (*Toronto (Metropolitan) v. Canadian Union of Public Employees, Local 79 (Dalton Grievance)* (1998), 70 L.A.C.(4th)110 (Burkett)) (emphasis in this footnote added).

Accordingly, intemperate language or invective directed toward a member of management might not attract discipline for insubordination if uttered by union officials acting within their representative capacity. However, this immunity is not absolute and, as noted, does not extend to communications that are knowingly or recklessly false or malicious in nature.

In this case, as in *DHL*, I find that the Grievor acted in a reckless, if not intentional, manner in sending e-mails to Mr. Nalwala, which contained unsubstantiated allegations of financial improprieties and of a purported threat, which he disseminated widely, contrary to his Manager's direction to desist from doing so. And, he used "intemperate language in several of his emails which were contemptuous of authority and ... overstepped the bounds of acceptable discourse, even though [he] was acting in his union representative capacity." By failing to substantiate the allegations of impropriety levelled against his Manager and also making baseless and unfounded allegations⁴⁷, the Grievor acted recklessly and beyond even the broadest scope of immunity that is extended to Union officials acting within their representative capacity. I find, therefore, that the Grievor was insubordinate and that there is no basis upon which to grant him immunity from discipline or even to mitigate the penalty.

⁴⁷ apart from improperly accessing SAP in order to obtain Mr. Wong's confidential payroll information, which, I note, led him to the wrong conclusion; namely, that Mr. Wong was being compensated at a higher rate for doing the same duties the Grievor had been performing in the payroll portfolio.

Aside from there being no mitigating factors, arguably there were aggravating ones. While the Grievor's service was not insubstantial (nine years inclusive of a one-year unpaid leave of absence); he did not have an unblemished disciplinary record. A written warning issued on May 30, 2007 for "challenging and insubordinate" conduct (a reference, it would seem, to challenging supervisory and managerial authority, and failing to respond to the requests of management in relation to a variety of job performance and attendance issues) culminated in the admonition that repeated insubordination would result in progressive discipline and a suspension, in particular (which, in fact, was imposed a short six weeks later). And, in a letter of expectation, which was not disciplinary, but which was issued on May 1, 2007 in respect of particular areas of concern relating to performance and attendance issues (detailed at pp. 33 – 35 herein), the Grievor was put on notice that failure to adhere to managerial directives "may be construed as insubordinate conduct and be subject to disciplinary action" (which had not yet been imposed).

In addition, the Grievor's misconduct was not spontaneous (or "spur-of-the-moment," as it is sometimes referred to in the arbitral jurisprudence). Some six weeks after he contacted the Union about the creation of a management position of Budget Coordinator in Facilities & Real Estate, the Grievor issued the first of the two intemperate e-mails which, of themselves, were not spontaneous, but rather spanned a two-week period (from the issuance of the first e-mail on June 14 to the last, on June 27, 2007), which afforded him

ample time for reflection. There was no apology, expression of remorse or even insight into the impropriety of the Grievor's misconduct, as he continued to maintain he had done nothing wrong. Quite simply, there is no basis for ameliorating the penalty, which, I find, was measured and reasonable in all of the circumstances. In the result, the grievance is dismissed.

V. Discharge

On November 17, 2008, following the expiry of a one-year unpaid leave of absence, the Grievor returned to work. While the narrative was somewhat different, both the Grievor and Mr. Nalwala agreed that, although there were grievances being held in abeyance, there was a conciliatory return to work following the Grievor's leave of absence and an expression of interest in starting with "a clean slate."

Upon his return to work on November 17th, the Grievor was assigned to work with Leslie Fleming who had replaced him during his absence. Shortly thereafter, Ms. Fleming was appointed Acting Supervisor effective February 1, 2009 (or thereabouts). Although Ms. Fleming became the Grievor's direct Supervisor, she was required to copy the Manager, Mr. Nalwala, on all e-mails. While there was some suggestion that this requirement was imposed because Ms. Fleming was in an acting position, a similar requirement was imposed on her predecessor, Ms. Cunningham. And, as with Ms. Cunningham, although the Grievor found Ms. Fleming to be rather pleasant prior to her appointment as Acting Supervisor, subsequently, he claimed, her demeanour changed. Moreover, from his perspective, she appeared to have very little autonomy. On "a couple of occasions" when the Grievor sought permission to change his lunch break or shorten his paid breaks (presumably to facilitate his leaving early), Ms. Fleming was required to seek Mr. Nalwala's approval before granting his

request. And, in other matters as well, she appeared simply to be carrying out Mr. Nalwala's instructions.

Although tensions rose between the Grievor and Ms. Fleming as Acting Supervisor, one of the most contentious issues related to the Grievor's hours of work. Some time in February 2009, shortly after Ms. Fleming's appointment as Acting Supervisor, the Grievor requested a change in hours of work. As noted in the facts, this was initially a change in hours to facilitate his leaving early on Fridays in order to accommodate daycare arrangements for his child, as well as his decision to take the GO Train rather than the subway. When the Grievor's request was denied, he modified his request to change his hours of work for the entire week. Although his initial request in this regard was to change his hours from 8:00 a.m. to 4:00 p.m. to 7:00 a.m. to 3:00 p.m., Monday to Friday, this request was also denied. Ultimately, it was agreed that the Grievor would work from 7:30 a.m. to 3:30 p.m., Monday to Friday, with a one-hour unpaid lunch break and two 15-minute paid breaks, one in the morning and one in the afternoon. It seems that this arrangement was agreed to on a trial basis.

To the extent the Grievor's request to change his hours of work was motivated by the exigencies of his daycare arrangements, as noted, the change was unworkable. And, to the extent the change was motivated by his intention to take the GO Train rather than the subway, the Grievor testified that he intended

to take a train that arrived at Union Station at 7:44 a.m., which would not have allowed him to start work at 7:30 a.m. When the discrepancy was pointed out, the Grievor testified that he would have taken the GO Train that arrived at Union Station at 7:14 a.m., which would have facilitated a 7:30 a.m. start. Although the Grievor's story strains credulity, particularly as it was offered up for the first time in cross-examination, it is noteworthy that he never followed through with his intention to take the GO Train to work. Nonetheless, his request for a change in hours of work (from 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m.) was granted. As to the suggestion that Ms. Fleming simply adhered to Mr. Nalwala's direction respecting matters relating to the Grievor, the evidence is quite the opposite; namely, that, pending receipt of documentation that the Grievor had initiated the request, Mr. Nalwala deferred to Ms. Fleming's decision to grant the Grievor's request for a change in hours of work effective February 13, 2009.

Nevertheless, subsequent to the change in hours of work, the Grievor seemed to be arriving late or leaving early almost every day⁴⁸. Following an e-mail reminder on February 17, 2009 of the need to report for work at the start of his shift and remain at work until the end of his shift, to which she received no response, Ms. Fleming made the decision to monitor the Grievor's arrival and departure times. Although she advised Mr. Nalwala of her decision, this was another decision she took on her own. While the Grievor sought to ascribe

⁴⁸ As noted at footnote 41, if the Grievor were consistently late on the 8:00 a.m. to 4:00 p.m. shift, which would not have inured to his benefit in any event, it was not proven by cogent evidence. The only *verifiable* evidence was in respect of the 7:30 a.m. to 3:30 p.m. shift.

nefarious motives to Ms. Fleming's decision to monitor his arrival and early departure times, in my view, there was nothing untoward in Ms. Fleming's decision, because, on the only verifiable evidence, as soon as the Grievor secured permission to change his hours of work in favour of earlier arrival and departure times, he was habitually late arriving at work (and leaving early, on occasion). In fact, Ms. Fleming recorded 14 late arrivals and two early departures in the period between February 13, when the Grievor started working a 7:30 a.m. to 3:30 p.m. shift, and March 24, 2009, and 20 late arrivals (15, by five minutes or longer) out of 23 working days⁴⁹ based on the more objective swipe card data, which record arrival, but not departure⁵⁰, times. And, these arrival times reveal a pattern of persistent lateness, which was not ameliorated by the plethora of excuses offered up by the Grievor.

While occasional lateness in the range of five or 10 minutes, even if predictable, might not be consequential, depending on the circumstances, persistent lateness, especially in the context of a request for an earlier shift, is entirely unacceptable. However, the Grievor was not disciplined for lateness until the issue was raised in the discharge letter. Even if an employer were entitled to wait for a pattern of lateness to emerge prior to imposing discipline, in

⁴⁹ And, there were 23 late arrivals, of which 16 were for five minutes or longer, out of 28 working days, if the later period (March 25 to April 20, 2009) were included.

⁵⁰ Although Ms. Fleming recorded only two early departures, gauged according to the clock on the wall, in the same period, as amplified in the facts (p. 66), if the clock on the wall were running fast, as it would appear to have been, then the Grievor likely left early on the days Ms. Fleming recorded him as having worked to the end of his shift. However, as there is no objective measure of departure times, as there is with arrival times (the swipe card data), it is sufficient to focus on late arrivals, rather than early departures, to support the conclusion that the Grievor was habitually late.

this case, the Acting Supervisor, Ms. Fleming, had identified the pattern by March 24, 2009, when she issued an e-mail wherein she reviewed the Grievor's record of lateness from February 13, 2009 and advised that, in future, he would be docked pay for the time he was late. (The evidence indicates that up to that point, the Grievor had not been docked pay for the times he was late.) No mention was made of discipline even though the City adverted to the misconduct. Accordingly, notwithstanding that discharge was imposed barely a month later (and that the Grievor was on vacation for over half that time), Ms. Fleming's advice to the Grievor effectively disposed of the matter and cannot be reopened. Therefore, the City is precluded from relying on the pattern of lateness in support of the discharge.

Aside from lateness, the City referred in the letter of termination to other heads of discipline since the Grievor's return from a one-year leave of absence on November 17, 2008, which were discussed in the investigatory meeting of April 20, 2009; namely, leaving work without permission, which was neither explained nor expanded upon, but was evidently a reference to (i) leaving work early without prior permission on one occasion, which was apparently a reference to March 13, 2009, as this date was discussed in the April 20th meeting; and (ii) absence from work without authorization, which was presumably a reference to March 20, 2009 when the Grievor absented himself during working hours without permission to attend a dental appointment for which I have accepted he had no prior notice. There was also a reference in the

letter of termination to "various performance issues, and constant insubordination," for which further explication was not provided. While the Grievor's disciplinary record included a written warning and a two-day suspension for insubordination (upheld in this decision) within the sunset period, based on the discussions in the April 20th meeting, the reference to insubordination would appear to have been to the Grievor's refusal three times to leave Ms. Fleming's office and three times to leave Mr. Nalwala's office, when requested to do so, on April 17th, as well as to the allegation that he referred to Ms. Fleming, or her actions, as "stupid" (which is also addressed in the following paragraph).

But the gravamen of the decision to terminate the Grievor's employment was the threat to "break" his Acting Supervisor, Ms. Fleming, as he had "broken" other Supervisors, characterized in the letter of termination as a violation of the City's Workplace Violence Policy, as well as his harassment and intimidation of Ms. Fleming, characterized as a violation of the City's Human Rights and Anti-Harassment Policy. In addition, it was alleged that the Grievor was rude and insulting toward his Acting Supervisor; that he referred to her actions as "stupid" and threatened that there would be "consequences", which would appear to be a reference to the threat to "break" her.

The threat, I have found, was made in a meeting, which the Grievor had requested with Ms. Fleming, on April 17, 2009. The Grievor, who had

returned from vacation a day late due to a flight delay, wished to discuss a number of issues, including converting that day into a floating holiday, as well as the deduction of pay when he was absent due to illness for less than half a day and when he left work to attend a dentist's appointment (as described above). In the course of this meeting, Ms. Fleming raised issues regarding the Grievor's lateness, contending that he was habitually late in arriving at work (which indeed he was). Although it might have been untimely to rely on his lateness as a ground for discharge, his recurrent lateness was consequential. The importance for this meeting, however, was not the fact of the lateness but rather the Grievor's insistence on finding a resolution to the issue, notwithstanding Ms. Fleming's express desire to terminate the conversation. So intent was the Grievor on resolving the issue that he ignored Ms. Fleming's imprecations to defer the discussion to a time when Mr. Nalwala could be in attendance, culminating in his refusal of a direct order to leave Ms. Fleming's office and return to his work station.

Prior to refusing a direct order (or orders, as the order was issued more than once), the Grievor objected to Ms. Fleming's monitoring of his lateness (which he characterized as "minor" – one or two minutes of lateness, although, as indicated, on any measure, the Grievor was routinely at least five minutes late) and made some inane and baseless claims about the effects of

monitoring⁵¹ and, on Ms. Fleming's evidence, said she was either "stupid" or "acting stupid" in monitoring his lateness. While the Grievor did not deny having used the word "stupid", he claimed that he used the word in relation to the lateness issue ("this stupid thing"), and not to Ms. Fleming, a specious explanation designed, in my view, to fit Ms. Fleming's evidence. While I reject the Grievor's account as being improbable, I do not find there to be material discrepancies in the two accounts because, while one makes express reference to Ms. Fleming and the other, to her actions (another example of a distinction without a difference), both are transparently critical of her monitoring of the Grievor's lateness.

Nonetheless, the exchange escalated with Ms. Fleming's accusing the Grievor of insubordination (insolence, to be more accurate). In the course of this exchange, as indicated, the Grievor objected to being monitored for instances of minor lateness (which, as noted, were often not so minor but, in any event, were persistent). The Grievor's pattern of persistent lateness led Ms. Fleming to accuse him of "theft of time," an accusation, Ms. Fleming testified, which resulted in his becoming confrontational and threatening that there would be "consequences" and that "this was done with Mr. Nalwala," which Ms. Fleming did not understand. She seemed to think that the Grievor was threatening to

⁵¹ These included "driv[ing] up [his] blood pressure" and possibly causing him to "have an accident some day." And, he claimed, this type of work environment was going to make him "go insane" and "certainly make [him] non productive." Aside from his productivity, which could be measured, there was no basis for these dubious claims.

slow down or stop working altogether, although, as it evolved, in actuality, the threat was to "break" Ms. Fleming as he had "broken" other Supervisors, including Mr. Nalwala.

The Grievor testified that he was provoked or entrapped (a very odd and inapposite concept for him to have introduced) into responding to Ms. Fleming, rather than following her direction to leave her office, by her referring to his lateness pejoratively as "theft of time" and suggesting that he was intent on "sitting around" and being unproductive. While Ms. Fleming denied the latter statement attributed to her, she acknowledged having asked the Grievor if he intended to slow down or stop working altogether. More importantly, she acknowledged having referred to the Grievor's lateness as "theft of time," a poor choice of words from an inexperienced Supervisor. While theft is a concept drawn from the criminal law, and requires intention, among other elements, it is not necessary to find theft of time (which was alleged by Ms. Fleming, but not pursued by the City in its submissions) in order to find misconduct, i.e., recurrent lateness, which was present in this case, but did not support discipline because it was not acted upon in a timely fashion. However, the significance of the accusation of theft of time is not so much in relation to the Grievor's lateness, but rather to the reaction it provoked in the Grievor, who, I have found, threatened to "break" Ms. Fleming, as he had "broken" other Supervisors. For reasons already

articulated, I find that the Grievor's denial⁵² that he had threatened to "break" Ms. Fleming, a term which he claimed was devoid of meaning, as well as his claim that there was incessant discussion around break periods (short periods of lateness, in this context), which was going to cause him to have a "breakdown", to be utter nonsense.

Moreover, as to the suggestion that Ms. Fleming did not feel threatened because she waited three hours (or so) to report the threat to Mr. Nalwala who was out of his office attending training, Ms. Fleming immediately sought the assistance of the Senior Budget Analyst, Mr. Cuoco, whom she had advised the Grievor only four days earlier was to be considered to be a Supervisor in her absence. Together, they devised a plan for Ms. Fleming to implement; namely, that she would document the incident in her labour journal and wait for Mr. Nalwala to return. (Although the letter of discharge, as drafted, invokes the City's Workplace Violence Policy, the City maintained that there was no allegation that the Grievor had threatened Ms. Fleming with physical violence, although it conceded that reference to the Policy could reasonably be interpreted in that manner.) In any event, the evidence does not support the conclusion that Ms. Fleming was threatened with imminent physical harm. Therefore, there would have been no reason for her to call Security or Labour Relations or even

⁵² Although the Grievor testified that he did not deny that he had threatened to "break" Ms. Fleming, as he was not confronted with the allegation in the April 17th meeting at which Mr. Nalwala was in attendance, Mr. Nalwala testified that the Grievor was confronted with the allegation, but that he deflected the issue. Thereafter (in the April 20th meeting and in these proceedings), the Grievor consistently denied having threatened to "break" Ms. Fleming.

to summon either Mr. Nalwala, who was in the building attending training, or Mr. Towers, who walked past the Grievor and into his own office, which was adjacent to Ms. Fleming's, at around 8:07 a.m. In any case, the fact that she did not seek assistance, aside from Mr. Cuoco, and that she waited for Mr. Nalwala to return, is no indication that Ms. Fleming did not feel threatened. Having analysed the evidence and observed the Grievor's demeanour, I have no difficulty accepting that he threatened to "break" Ms. Fleming, albeit not with physical harm. And so, the fact that Ms. Fleming sat beside the Grievor in the meeting convened by Mr. Nalwala on April 17th is of no moment.

Rather than repeat the reasoning, which is set out at pp. 107 – 110 herein, it is appropriate to address the matter of credibility. Many elements factor into the assessment of credibility. These factors are articulated, most notably, in the seminal case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), wherein it is stated:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility ... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness

is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say 'I believe him because I judge him to be telling the truth', is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

Nonetheless, the application of these factors is not a formulaic exercise, and the weight to be given to particular factors will vary with each witness, the context in which the witness is testifying and the content of the testimony. In other words, the factors that enter into the calculus in assessing credibility are specific to the particular witness⁵³.

⁵³ While this point is made in other cases as well, for full disclosure, I note that the foregoing paragraph is drawn from *Re St. Joseph's Health Centre and C.U.P.E., Local*

Applying the factors to the case at hand, I find, for the most part, the Grievor not to have been a credible witness. Not only does his evidence not accord with the preponderance of probabilities; but, as noted throughout this award, it is riddled with half-truths, inconsistencies, improbabilities and skilful manipulation of the facts. And, the Grievor told many different stories - so many stories that his evidence presented a challenge even to follow. As only one example among many, when confronted with the allegation that he threatened to "break" Ms. Fleming, which he adamantly denied, the Grievor offered up the improbable explanation that he *would not* have uttered the threat because it is devoid of meaning, and two diametrically opposed, but equally implausible, explanations as to why he *did not* utter the threat: because the discussion was about "break periods" pursuant to the collective agreement (although break periods were not discussed in the April 17th meeting in which, I have found, the Grievor threatened to "break" Ms. Fleming), and because the incessant discussion of break periods (which he then acknowledged were discussions of lateness, and not break periods mandated by the collective agreement) was going to cause him to have a "breakdown".

In any event, as noted, a meeting was convened on April 20th with union representation in attendance. Although the Union submitted, in effect, that the City must not have considered that a serious threat had been made, as it

1144 (*Rubaj*) (2011), 205 L.A.C.(4th)170 (Saltman), a decision of the majority of a Board of Arbitration which I chaired.

was not at the top of the agenda, which was prepared for the meeting by the alleged victim, Ms. Fleming (although it is unclear from the evidence who actually prepared the agenda). Indeed, the item was added in by hand, as it would appear not to have been on the original agenda. In my view, the placement of the threat on an agenda, which Mr. Pringle did not necessarily adhere to, is no indication of the seriousness with which the City viewed the matter. In any case, this submission is too picayune to be given serious attention. Moreover, although the minutes of the meeting and the agenda contemplate that certain measures might be taken in future (such as a change in shift and reinstatement of the requirement to e-mail the Supervisor as to the Grievor's arrival and departure times), these measures were tentative and contingent upon the outcome of the investigation, which was conducted following the conclusion of the April 20th meeting and which resulted in the decision to terminate the Grievor's employment.

While I have considered the **jurisprudence** submitted by both parties, each case is factually distinct from the case at hand. As to the cases relied upon by the Union, in my view, *Dough Delight Ltd. v. Bakery, Confectionary and Tobacco Workers International Union, Local 181 (Abdirahman Grievance)* [1997] O.L.A.A. No. 475, 64 L.A.C.(4th)74 (Beck) and *International Assn. of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 805 (Shipmen's Union) and Canam Steel Works (Nguyen Grievance)* [1998] A.G.A.A. No. 93, 76 L.A.C.(4th)396 (Moreau), involving insubordination in the form of insolent and

intemperate language toward various levels of management and contempt of managerial authority, but not involving a threat, are inapposite to the instant case.

Threats were involved in *Re Public General Hospital Society of Chatham and S.E.I.U., Loc. 210* [1996] O.L.A.A. No. 67, 52 L.A.C.(4th)153 (Hinnegan) ("*Public General Hospital*"), also relied on by the Union. During a meeting convened to discuss his work performance, the grievor, a hospital cleaner, refused to perform a perfectly proper work assignment (cleaning the emergency room floors), which amounted to insubordination. When the supervisor pointed out that refusal to carry out an assigned duty would result in an automatic suspension, the grievor, an 18-year employee with an essentially unblemished record, responded that he had "the power to put her out of her chair." The supervisor understood this to be a physical threat and said that she had the power to call the police, in response to which, the grievor said that if she tried to make him clean the emergency room, "accidents could happen." When the supervisor asked what kind of accidents, the grievor replied that she was "a smart lady and could figure it out." He then inquired as to the ages of her children. Although the Arbitrator accepted the grievor's explanation that his comment about having "the power to put [the supervisor] out of her chair" might have been a reference to his taking steps to have her removed from her supervisory job on the basis that she had no previous experience in housekeeping (which was factually incorrect and, in any event, as the Arbitrator

commented, no business of the grievor). However, he declined to give the grievor the benefit of the doubt with respect to his inquiry about the supervisor's children, particularly in the context of an accident happening. While the Arbitrator found that the grievor "did not have any real intention to actually visit harm on the [supervisor's] children," he did find that the grievor had threatened her, referring as he did, to the grievor's "clumsy attempt at intimidating or bullying his supervisor." Given his long and relatively unblemished record, the Arbitrator substituted a three-month suspension for the discharge, which amounted to reinstatement without compensation augmented by an additional three weeks' loss of compensation. And, reinstatement was conditional upon the grievor's written acceptance of a one-year probationary period "during which period any repetition of the kind of conduct for which the discharge was imposed shall be grounds for termination."

In *OSF Inc. v. United Steelworkers of America, Local 5338 (Keefe Grievance)* [2000] O.L.A.A. No. 428, 89 L.A.C.(4th)52 (Kirkwood) ("OSF"), wherein the grievor, who had previously been reinstated on condition that he participate in an anger management programme and who appeared aggressive in an interaction with two co-workers on the shop floor (which the company ultimately agreed did not merit discipline), was summoned to a meeting by the plant superintendent who had observed the interaction. When the superintendent raised the issue of anger management and advised that he had been instructed to report the interaction to Human Resources, the grievor

perceived that his job was in jeopardy, at which point, he responded, "If anything happens to me or I lose my job as a result of this, I am coming after you"; "I am going to get you"; "You can take this as a threat"; and "It is your word against mine." Although the grievor was a short-service (two and a half year) employee with a substantial disciplinary record within the 12-month sunset period – a one and a half day suspension and a one-week suspension (reduced from a discharge on condition, among other matters, that he continue his participation in an anger management programme), both for instances of violent or abusive behaviour, the Arbitrator found that while the grievor flouted managerial authority, he did not do so intentionally. Moreover, the Arbitrator did not find the grievor credible, as he falsely accused the superintendent of having threatened and harassed him, and as he did not admit to having threatened the superintendent. Although the Arbitrator found serious misconduct, she concluded that the circumstances under which the grievor had uttered the threats (namely, that he reacted defensively, as he perceived his job was in jeopardy even though there was no basis for discipline; that his perception was exacerbated by the superintendent who escalated the matter to Human Resources; that he uttered the threats impulsively; and that, in any event, there were no tangible threats to the superintendent) did not warrant discharge and substituted a four-month suspension without pay (effectively reinstatement without compensation) on condition that the grievor continue his participation in an anger management programme.

For its part, the City relied on cases in which not dissimilar threats to those in this case were issued:

(i) *Re Ontario (Greater Toronto Transit Authority - GO Transit) and A.T.U., Loc. 1587 (Sharpe)* (2005), 145 L.A.C.(4th)68 (Fisher) ("G.T.A.A."), in which a bus driver with 16 years' service and a six-day suspension on his record for similar misconduct, left a note for a female co-worker who had left a bus strewn with garbage, which the grievor was required to clean, stating, "If you EVER leave me a bus in the same state as today's ... again, I'll see you live to regret it. A friendly warning from a fellow union-member" (emphasis in original), leaving the co-worker fearful and physically shaken. Although this was not a threat of physical harm, it was premeditated and intended to intimidate the co-worker, and as an apology tendered immediately prior to the hearing was deemed to be ill-timed and perfunctory, discharge was upheld;

(ii) *Re Quality Meat Packers Ltd. and U.F.C.W., Loc. 175/633* (2002), 108 L.A.C.(4th)310 (Abramsky) ("*Quality Meat Packers*"), wherein a short-service employee (two and a half years, inclusive of a one-year medical leave) with a substantial disciplinary record (two verbal warnings, a two-day suspension and a one- and a three-day suspension for insubordination) directed profanity at his supervisor to whom he also said, "I'll get you" and "I'll fix you," which the Arbitrator found could reasonably be perceived as a threat but, in any event, constituted insubordination worthy of significant discipline. As it would appear

that the grievor was unresponsive to progressive discipline; that the apology tendered at the hearing was, for the most part, lacking in remorse and, to the extent it was sincere, was offered too late to be meaningful; and that he failed to appreciate that his actions constituted misconduct and that he had to take direction from, and answer to, supervision, discharge was upheld; and

(iii) *Re Hendrickson Spring, Stratford Operations and U.S.W., Local 8773 (Czapor)* (2008), 175 L.A.C.(4th)376 (Verity) ("*Hendrickson Spring*"), wherein the grievor, a 14-year employee with a clean disciplinary record, who was unable to confirm his request for a long-term leave of absence or change of shift with the Plant Manager, asserted, "[Y]ou might be very busy with me soon." When confronted as to what was meant by this assertion, the grievor threatened to make spurious health and safety complaints to the Ministry of the Environment and/or the Ministry of Labour, if his request were not granted. As the grievor neither expressed remorse nor apologised for his audacious threat, the Arbitrator concluded that the employment relationship was no longer viable and dismissed the grievance.

Finally, reference was made by both parties to *Re Sun-Rype Products Ltd. and Teamsters, Local 213 (Moriarty)* (2010), 191 L.A.C.(4th)129 (McPhillips) ("*Sun-Rype*"), wherein the grievor acted in a rude and insolent manner toward supervisors and managers in each of four incidents and during investigatory interviews which followed. In each incident, progressive discipline was upheld

for insolence and insubordination. In the first, the grievor was angry and disrespectful toward a supervisor on the plant floor (in relation to an operational issue) and again during an investigatory meeting. Of note, during the investigatory meeting, the grievor referred to the supervisor as "a puppet" who was issuing a "recorded verbal warning" because "someone told him to do it," which is strikingly similar to the denunciation in this case of Mr. Nalwala as "firing the gun from [Ms. Fleming's] shoulder."

In the second incident, the grievor again behaved in a rude and insolent manner toward a (different) supervisor whom the grievor had asked to investigate a problem with the acid levels in a product on the production line. Although there would appear to have been some degree of provocation on the part of the supervisor who admonished the grievor for not exercising due diligence (although one of the problems was attributable to the supervisor's error), nonetheless, the grievor was found to have been angry, confrontational and generally disrespectful toward the supervisor, whom he accused of being "on some kind of power trip," resulting in the issuance of a written warning for insolence and insubordination.

In the third incident, the grievor was instructed to clean up product that had accumulated on the floor in his work area. After making arrangements for another employee to relieve the grievor on his job so that he could do the clean-up, the supervisor discovered that the grievor had redirected the relief

employee to do the clean-up contrary to the supervisor's instruction. Although the grievor ultimately performed the clean-up, instead of placing the garbage on top of a piece of equipment on the other side of the conveyer and then into the garbage receptacle, in an angry gesture, he tossed the garbage over the equipment and onto the floor. In the result, it was held that the grievor's refusal to follow the supervisor's instructions constituted insubordination and his actions in disposing of the garbage were insolent. Moreover, in the subsequent investigatory meeting, the grievor displayed an attitude of indifference while the supervisor was speaking and made "inappropriate and disrespectful" remarks toward him. In response to an ill-chosen remark by the supervisor that he was "having to bite [his] tongue" (presumably in relation to the comments and gestures made by the grievor throughout the meeting), the grievor stated "I hope you bite it off then," or words to that effect. In respect of this remark, the Arbitrator said, "I do not at all accept [the grievor's] absurd explanation that he simply meant that a grievance would be forthcoming from the [u]nion. This was a particularly rude and demeaning remark to [the supervisor]," on the order, I would suggest, of some of the specious explanations offered by the Grievor in this case⁵⁴. In any event, given the progressive discipline already meted out, a short suspension of just over a day (one day plus the balance of the shift – 1.5

⁵⁴ For instance, when in response to what he perceived to be Ms. Fleming's "excessive monitoring of his brief periods of lateness" or her ill-advised characterization of his persistent lateness as "theft of time" (or perhaps both), the Grievor threatened that there would be "consequences", it seems clear that he was referring to his intent to "break" her. However, not unlike the third grievance in *Sun-Rype*, the Grievor tried to introduce another "spin", an improbable explanation; namely, that by referring to "consequences" he intended to raise the spectre of grievances being filed which, he claimed, would "not be pleasant for both parties."

hours) was upheld.

In the fourth, and penultimate, incident, which was of the same ilk, but arguably more egregious than the first three, the grievor was called in order of seniority to cover a last-minute vacancy when another employee called in sick. As the scheduler (known as the "Resource Planner"), Darwin Bates, who was making calls in an attempt to fill the shift, was unable to reach the grievor, he left a message and proceeded to call the next person on the seniority list who answered the phone and accepted the shift. It was undisputed that there was no policy which required that an employee be given a grace period of even a minute or two to call back to claim a shift before a call was made to the next person on the list.

In any case, the grievor, who heard the message, called back promptly but was unable to reach Mr. Bates (presumably because he was on the phone with the employee who accepted the shift). Accordingly, the grievor left a message wherein he accused Mr. Bates of intentionally not picking up the phone to answer his return call. He then uttered an expletive, which, it was agreed, was not directed at Mr. Bates. Moreover, when the grievor called back two minutes later, he reached Mr. Bates and indicated that he was available to work the shift. Although he was advised that the shift had already been filled by the next employee on the list, the grievor declared his intention to report for the shift in any event and directed Mr. Bates to notify a manager to that effect. Although

Mr. Bates tried calling several managers, he was unable to reach anyone. When Mr. Bates advised the grievor that he had been unable to reach a manager, the grievor accused him of having made no attempt to contact anyone, of being "two-faced" and of "playing games." Mr. Bates denied "playing games" and "chuckled" because the grievor effectively lost control over a routine matter (filling a last-minute vacancy), which occurred on a daily basis. For his part, the grievor responded that Mr. Bates, whom he believed was laughing at him, "would be laughing out of the other side of [his] face," which ostensibly meant that the grievor intended to file a grievance. He then hung up the phone.

When he finally reached a manager at home, Mr. Bates was instructed to call the grievor back and reiterate that there was no shift available, which resulted in the grievor's again accusing him of being "two-faced and playing games." Shortly thereafter, another employee called in sick and the grievor was offered the shift, which he refused, as he claimed he was feeling ill from the interaction⁵⁵ and, in any case, preferred not to do the work that was offered. He also said that he "would be happy when Mr. Bates was gone."

At the investigatory meeting, the grievor referred to Mr. Bates as "a liar," even though there was no real factual dispute between them. He also

⁵⁵ (a response of the nature given by the Grievor in this case on at least two occasions: May 24, 2009, when he asserted that he was "not feeling well and need[ed] to leave for the day" when Mr. Nalwala refused to accede to his request for written confirmation of the change in his reporting relationship (which, I find, the Grievor was well aware of) and June 27, 2007, when the Grievor left work due to illness when his Supervisor advised of his intention to "job shadow" him for the day "to determine why it [was] taking [him] so long to complete [his] tasks.")

called him a "weasel", suggesting that he "ratted" the grievor out to management and would say whatever was necessary to cover himself. The grievor followed up with another insolent remark about Mr. Bates and complained that management failed to properly investigate scheduling grievances. Although management offered to convene another meeting to discuss scheduling practices, the grievor made a rather repugnant remark to the effect that management would act "under the cover of darkness" to do whatever it wished. At no time did the grievor apologise for his comments to the manager in the investigatory meeting. Moreover, although he seemed to suggest in evidence that Mr. Bates had provoked him, the Arbitrator made no finding to this effect.

Given the grievor's refusal to address the circumstances of his interaction with Mr. Bates, which was the purpose for which the investigatory meeting was convened, but rather engaged in "broad character assassination" against Mr. Bates and members of management whom he referred to in a contemptuous manner, the Arbitrator found the grievor's behaviour in the initial interaction, as well as in the investigatory meeting, to have been rude and insolent and that his actions amounted to insubordination. As three prior incidents of discipline were deemed to have had no salutary effect on the grievor, the Arbitrator found a three-day suspension and presumably the final warning issued concurrently⁵⁶ not to have been excessive in the circumstances.

⁵⁶ Although the final warning was not addressed, as the grievance was dismissed, presumably the final warning was upheld.

The fifth, and final, incident is the most apposite to the case at hand. This incident arose in the context of the grievor's discharging his representational responsibilities as a union steward to investigate the grievance of a probationary employee (referred to in the decision as "J.K.") whose employment had been terminated, and in so doing, brought about his own termination. In the course of carrying out his investigation, the grievor secured permission to interview a number of J.K.'s co-workers, one of whom was Val Harder. Broadly stated, the grievor was terminated for disobeying a direct order not to interview Ms. Harder and, further, for effectively intimidating Ms. Harder in the course of that interview. In this regard, the evidence indicates that in response to a question from the grievor, Ms. Harder expressed a negative opinion about J.K. and advised that, when solicited by a supervisor, she had expressed the same opinion. According to Ms. Harder, the grievor berated her for betraying a fellow employee and proceeded to intimidate her by asking how old she was, calling her immature, accusing her of jeopardizing J.K.'s livelihood, and, when she began feeling dejected and angry, suggesting she might have anger management issues. He also stated that she needed further training, and threatened to report her to the Business Agent at the stewards' meeting that evening.

The grievor's conduct had a profound emotional impact on Ms. Harder, causing her to leave the assembly line, and, to a lesser degree, on the employee who replaced her on the line whom the grievor tried to implicate in this

matter as well. The following day, Ms. Harder reported the matter to the union and, when confronted by the Production Manager, acknowledged that she felt harassed by the grievor.

While the Arbitrator expressed doubt as to whether the Production Manager had the right to issue an order restricting access to Ms. Harder, he concluded that the order was unclear and, therefore, declined to find that the grievor was insubordinate when he interviewed Ms. Harder while she was working. The more salient issue for that case, and for our purposes, is whether, in the course of the interview, the grievor conducted himself "in a manner such that he went beyond the ambit of the protection afforded to an employee acting in his/her capacity of a union steward." In this regard, the Arbitrator found that even if union officials acting in their representative capacity were afforded a limited immunity from discipline in interacting with bargaining unit employees during working hours, bullying, intimidating and/or harassing other employees (and managerial personnel, for that matter: see also *DHL, supra*) are outside the scope of such immunity. Accordingly, the grievor's harassment, bullying and intimidation of Ms. Harder, even if in the course of investigating a grievance, gave cause for discipline.

Although the grievor was an 11-year employee, he had an unenviable record of five disciplinary incidents within an 18-month sunset period. Given that the five incidents revealed a repeated pattern of "rude, disrespectful, challenging

and insolent" behaviour for which no provocation was found, and absent an apology or other expression of remorse or contrition, the Arbitrator concluded that the employment relationship had been irreparably damaged. Therefore, based on the culminating incident (harassment, bullying and intimidation of a bargaining unit member), as well as the grievor's prior disciplinary record, termination was upheld.

In the case at hand, I have concluded without doubt that there was a threat to "break" Ms. Fleming who was the Grievor's Acting Supervisor. While it was not a threat of physical violence, it was, nonetheless, of grave concern. Although the threat was not the only misconduct relied upon by the City, it was the most egregious, and, against the background of an impressive array of disciplinable offences (including, but not limited to, insolence, insubordination and intimidation of his Manager and Acting Supervisor⁵⁷) and a disciplinary record of a written warning and a two-day suspension for not dissimilar misconduct ("challenging and insubordinate conduct"), would seem sufficient to uphold the discharge. In fact, the second paragraph of the letter of discharge, which admittedly is lacking in detail, but reflects the discussions in the investigatory meeting of April 20, 2009, reads like an encyclopedia of misconduct, even though the attendance-related offences: lateness (which the City identified, and but failed to act on in a timely manner), leaving work without permission and absence without authorization did not result in the imposition of

⁵⁷ presumably a reference to the Grievor's refusal of a direct order to leave Ms. Fleming's and Mr. Nalwala's offices on April 17, 2009, and to Ms. Fleming, or her actions, as "stupid".

discipline.

However, the threat, which formed the basis for the Grievor's termination (exacerbated by other misconduct), is a serious matter in respect of which the jurisprudence is split. In some cases, a threat of a similar nature has been deemed sufficient to justify termination: see *Quality Meat Packers* ("I'll get you" and "I'll fix you," directed toward a supervisor); *Hendrickson Spring* ("[Y]ou might be very busy with me soon," effectively notifying the Plant Manager that the grievor would be making spurious health and safety complaints to the Ministry of the Environment and/or the Ministry of Labour should his request for a leave of absence or change of shift not be granted); and *G.T.A.A.* ("If you EVER leave me a bus in the same state as today's ... again, I'll see you live to regret it. A friendly warning from a fellow union-member" (emphasis in original), directed at a female co-worker who had left a bus strewn with garbage, which the grievor was required to clean). In none of these cases was there a threat of physical violence.

On the other hand, reinstatement without compensation and a suspension amounting to "time served"⁵⁸ were ordered in *OSF*, wherein the grievor, believing his job to be in jeopardy (even though, to that point, there were no grounds for discipline), said to the plant superintendent, "If anything happens

⁵⁸ Additional penalties were imposed in both of these cases (continued participation in an anger management programme in *OSF* and a one-year probationary period and loss of compensation extending beyond the date of reinstatement in *Public General Hospital*).

to me or I lose my job as a result of this, I am coming after you"; "I am going to get you"; "You can take this as a threat"; and "It is your word against mine"; and in *Public General Hospital*, wherein the grievor stated "accidents could happen" if his supervisor tried to make him clean the emergency room. In response to an inquiry from the supervisor as to what kind of accidents, the grievor replied that she was "a smart lady and could figure it out," and then asked the ages of her children.

Apart from the jurisprudence, which is fact-driven, and, therefore, weighs neither heavily in favour of, nor against, reinstatement, certain aspects of employer conduct militate in favour of mitigation of penalty. Although the Grievor was rude and disrespectful toward his Acting Supervisor and his Manager even prior to uttering the threat, I find he was provoked, at least in part, by Ms. Fleming's (an inexperienced Acting Supervisor) referring to his persistent lateness as "theft of time." As noted, theft requires intention and I have no reason to believe that the Grievor intended to purloin money from the City. And, while I find it somewhat disingenuous for the Grievor, who hurled unsubstantiated accusations of financial improprieties, among other matters, against management with impunity, to claim he was provoked by Ms. Fleming's admittedly intemperate remark, nonetheless, I am prepared to give him the benefit of the doubt and accept his claim.

However, I find no provocation in any other employer conduct cited by

counsel for the Union⁵⁹; neither in the requirement for the Grievor to provide proof of his claim that his flight from India on April 15, 2009 had been delayed; nor in his discerning that deductions had been made from his pay (presumably a reference to deductions made for absences due to illness of less than half a day and to an absence during working hours to attend a dental appointment); nor in Ms. Fleming's refusal to discuss these matters, as the evidence indicates, in the absence of Mr. Nalwala. Finally, even if Ms. Fleming remarked that the Grievor was intent on "sitting around" and being unproductive, I am unable to accept that this remark, which Ms. Fleming denied having made, could reasonably have constituted provocation for the threat to "break" her.

Aside from Ms. Fleming's ill-conceived remark, although this case is not based on a physical threat (nor need it to have been, as the precedents clearly establish), the Employer chose to characterize the threat in the letter of discharge as a violation of the City's Workplace Violence Policy. Although the Employer maintained that there was no allegation that the Grievor had threatened Ms. Fleming with physical violence, Mr. Meagher, with his usual candour, acknowledged that on a strict reading, the Policy could be interpreted in that manner⁶⁰. Had this characterization been the Employer's only misstep, it

⁵⁹ By contrast, the Grievor, who experienced the provocation, claimed only to have been provoked by the characterization of his lateness as "theft of time" and the assertion that he was intent on "sitting around" and being unproductive.

⁶⁰ The City also referred in argument to a "careless" threat, a characterization which the Union chose to adopt. However, that reference cannot be taken out of context, as the allegation was not that the Grievor had made a "careless" threat, *simpliciter*, but rather, that he had made a "careless" threat, which was *intended to intimidate* the Acting Supervisor.

would not have been fatal to a dismissal of the grievance. But, given the provocation, in my view, the threat itself, although particularly odious, did not provide a sufficient basis upon which to uphold the discharge. And, although there were ancillary causes (insolence, insubordination and intimidation, in particular) relied on by the City, which cumulatively gave me pause, they were either entwined with the threat or lacking in specificity (although specificity in the letter of discharge is important only to the extent necessary to identify the misconduct). In any case, as noted, the major misconduct for which the Grievor was discharged, a threat to "break" his Acting Supervisor, while warranting a significant disciplinary response, especially in light of a prior disciplinary record for insubordination, fell short of providing just cause.

While the Grievor was reinstated without loss of seniority, for two reasons, reinstatement is without compensation. First, the outcome of this case was "close to the line." Because of the egregious nature of the Grievor's misconduct (a threat against his Acting Supervisor and his intransigent refusal to leave his Supervisor's and Manager's offices when repeatedly directed to do so, among other matters), in my view, and having regard to the arbitral jurisprudence submitted by the parties, discharge was well within the range of reasonable disciplinary responses to these circumstances and without even considering his disciplinary record effectively for insolence and insubordination. However, because of aspects of employer conduct already adverted to, I was persuaded to

exercise my discretion under Subsection 48(17) of *Labour Relations Act, 1995* to reinstate the Grievor in employment with no loss of seniority but without compensation.

An additional, or perhaps, the primary, reason for the denial of compensation was the dissimulation of facts proffered by the Grievor. As I have adverted to throughout the award, the Grievor simply lacked credibility. Rather than reiterate findings, I can do no better than commend the reader (or those who might still be reading) to the excruciatingly long list of findings throughout this award and to the admonition in the seminal decision of the British Columbia Court of Appeal in *Faryna v. Chorny* that a Court (equally applicable to a tribunal) effectively scrutinize with care the evidence of "those shrewd persons adept in the half-lie and ... in combining skilful exaggeration with partial suppression of the truth," as well as my own finding specific to the facts of this case, which attempts to apply that admonition:

... I find, for the most part, the Grievor not to have been a credible witness. Not only does his evidence not accord with the preponderance of probabilities; but, as noted throughout this award, it is riddled with half-truths, inconsistencies, improbabilities and skilful manipulation of the facts.

Nonetheless, I am mindful of the admonition of the Ontario Court of Appeal in *College of Physicians and Surgeons of Ontario v. Gillen* (1993), 13 O.R.(3d)385 that a denial, or as I have found in this case, a dissimulation, of the facts ought in no circumstances "serve to increase what would otherwise be an

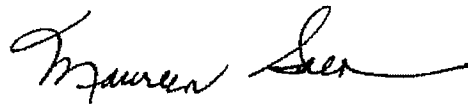
appropriate penalty." However, it is the proper basis for the denial of compensation. While I might have considered compensation in lieu of reinstatement for such a recalcitrant employee, reinstatement is the presumptive remedy and the argument for compensation in lieu of reinstatement simply was not made. In the result, and for the reasons set out above, I ordered that the Grievor be reinstated in employment.

Shortly after reinstating the Grievor, I received correspondence from counsel for the Union seeking clarification, among other matters, as to "whether [I] intended [the Grievor's] reinstatement into the same position without loss of seniority as there is a transfer grievance already pending before [me]." As indicated, I have no information as to any such grievance. However, as noted at p. 183 herein, I have retained jurisdiction for the purpose of determining whether there is such a grievance of which I am seised. I do not know if there is any other basis upon which this request was made, as there were no submissions as to this matter in final argument. For this reason, and as the harassment grievance has been dismissed, as of the date of issuance of my decision reinstating the Grievor in employment with no loss of seniority, but without compensation, I had no reason to consider reinstatement other than to the Grievor's former position. However, I am seised for purposes of implementation and, as noted, to determine if I have any jurisdiction on a transfer grievance. Absent such jurisdiction, I have no further authority to deal with this matter.

I also undertook to ensure that, if has not already been paid, the Grievor would be compensated for any losses incurred as a result of any delay or detriment attributable to the timing of the April 20 and April 23, 2009 meetings. Therefore, I remain seised for this purpose as well.

Aside from this specific retention of jurisdiction, the disposition of the grievances is as set out above.

DATED AT TORONTO, this 18th day of June, 2015.

A handwritten signature in black ink, appearing to read "Lauren Lee", with a long horizontal flourish extending to the right.

Sole Arbitrator