IN THE MATTER OF AN ARBITRATION
<u>PURSUANT TO A COLLECTIVE AGREEMENT</u>

BETWEEN:

HOMEWOOD HEALTH CENTRE INC.

("the Employer")

-and-

ONTARIO NURSES' ASSOCIATION

("the Association")

<u>AWARD RESPECTING DAMAGES</u>

Sole Arbitrator	**Christopher White**
For the Employer	**Andrew Reynolds** **Mathews, Dinsdale & Clark LLP** **Jessica Visser** **Mathews, Dinsdale & Clark LLP** **Angela Slade** **Director of Human Resources**
For the Association	**Rebecca Lee Birtwistle** **Legal Counsel**

INTRODUCTION

1. This decision arises out of a Grievance filed by the Association on behalf of its member, the Grievor, that proceeded to arbitration before me. In my decision, found at *Homewood Health Centre Inc. v. Ontario Nurses' Association*, 2020 CanLII 93693 (ON LA), I made the following determination respecting remedy:

> *142. In conclusion, the Grievor's termination is hereby rescinded and a five (5) day suspension shall be substituted for the misconduct associated with the complaint of Patient #1. For greater certainty, there is no finding of misconduct in connection with the complaint of Patient #2. The Grievor shall be paid damages in lieu of reinstatement and the question of quantum is referred back to the parties. In the event the parties are unable to reach agreement on damages, I remain seized.*

2. The parties, having been unable to agree on the damages to be awarded, that issue has been referred back to me. In an initial conference call with counsel, I advised, while it was open to the parties to argue the basis on which damages should be calculated, that absent compelling legal argument I would be inclined to use the "fixed term approach" articulated in *Hay River Health & Social Services Authority v. P.S.A.C.*, (2010) 201 L.A.C. (4th) 345; [2010] C.L.A.D. No. 407 (Sims) as opposed to the method that assesses the employee's damages based on a common law wrongful dismissal model. The analysis stated by Arbitrator Sims reads:

> *127. The right violated in a common law action for wrongful dismissal of an indefinite term contract is the right to reasonable notice. The right violated where the contract is for a fixed term is the right to have worked that term. The loss of a job under a union contract, where reinstatement is withheld due to appropriate but exceptional circumstances falls somewhere between the two. It is not like the former in that the contract (usually) expressly precludes the right to dismiss upon notice except for just cause and expressly provides for reinstatement which (as a form of specific performance) is unavailable at common law.*
>
> *128. However, the reality, for the employee, when they are [sic] dismissed without just cause, but denied reinstatement, is that they suffer a loss similar in some ways to that of the dismissed common law employee. The assumption, at common law, is that the employee will be able to find a similar job after the reasonable notice period and that the parties, as a result, must have intended this to be the limit of the employee's [sic] liability. In both situations, the employee, predictably but not inevitably, will suffer at least some transitional period of unemployment while they [sic] look for alternative work. However, for the unionized employee, what they [sic] expected was to return to and keep their original job.*
>
> *…..*
>
> *140. What is missing in such an approach is that it focuses on how much time the employee put in with the former employer but not how much time the employee might, but for the decision not to reinstate, continue to serve. The loss of a collective agreement's benefits for an employee with just one year to go to retirement is not likely to be the same as for an employee with 15 years to go. The period of service to date may alter one's view of the contingencies; a short service employee is probably far more likely to move on to other work than a long service employee. Their accrued benefits including the "golden handcuffs" benefits like pensions, and increased vacations and so on will be higher. Those with more years left in the workforce also have more years to regain some of those seniority based benefits elsewhere.*

3. Based on my discussions with the parties, it was agreed that this matter would be argued on the basis that the "fixed term approach" would be utilized in the assessment of the Grievor's damages.

THE FACTS

4. The parties provided a Report from RSM Canada Consulting LP ("RSM") that had been jointly commissioned by them. The mandate given to RSM was "…to calculate the employer-paid employee benefit and pension losses suffered by [the Grievor] as a result of a dismissal on October 3, 2018". In the section titled "Background", RSM stated as follows:

> *9. Based on our review of the documentation provided as summarized in the Scope of Our Review section of our report, we understand the relevant facts and circumstances to be as follows:*
>
> *a) [The Grievor] was terminated from her full-time employment at Homewood effective October 3, 2018 ["the Incident Date"].*
>
> *b) Born on August 16, 1960, on the Incident Date she was approximately 58.1 years of age.*
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> *c) She was employed at Homewood since June 21, 1999. As a unionized worker and member of the ONA, she received employer contributions towards employee benefits, including extended health and dental, semi-private, group life, AD&D and long-term disability, and a defined benefit pension plan.*
>
> *d) Her annual pension accrued to the date of termination from Homewood is approximately $22,861 and is payable commencing on her normal retirement at the age of 65.*
>
> *e) Shortly after the termination of her employment at Homewood, she started employment through OPSEU, working at the Ontario Correctional Facility and at Hamilton Wentworth [Detention Centre].*
>
> *f) She received 6% in lieu of benefits to approximately May 2019, and thereafter was entitled to employer contributions towards a group benefits plan, including basic life insurance, dental, supplementary health and hospital insurance, vision and hearing aid, and LTIP protection, and a defined benefit pension plan under OPTrust.*
>
> *g) Absent the Incident, [the Grievor] intended to retire at age 65. We understand that she is currently on schedule to do so.*

5. The RSM report then went on to state the actuarial assumptions that were utilized together with an analysis of the Grievor's past and future Group Benefit and Pension losses between the date of her termination by the Employer and her intended date of retirement calculated as of the day of the hearing. In summary those losses were valued at $46,734 exclusive of pre-judgment interest. The parties each accepted the accuracy of those calculations.

6. Following the termination of her employment, I was advised that the Grievor commenced part-time employment at the Ontario Correctional Institute ("OCI") located in Brampton, Ontario in October 2018, moving to full-time employment in May 2019. The Grievor subsequently transferred to the Hamilton Wentworth Detention Centre for some period prior to returning to OCI. In each case the Grievor was employed pursuant to a collective agreement between that employer and OPSEU. Accordingly, the parties were largely in agreement respecting the difference in wages although the value of future wage losses were at issue. Similarly, the parties were in basic agreement on the value of premium payments although the question as to whether that should be a factor in any calculation of damages was disputed.

THE JURISPRUDENCE

7. The parties provided me with the following caselaw for consideration:

i) *Hay River Health & Social Services Authority v. P.S.A.C.*, (2010) 201 L.A.C. (4th) 345; [2010] C.L.A.D. No. 407; 2010 CarswellNat 5733; [2010] A.G.A.A. No. 66; 104 C.L.A.S. 204 (Sims) – hereafter "*Hay River*"

ii) *George Brown College of Applied Arts & Technology v. O.P.S.E.U.*, [2011] 214 L.A.C. (4th) 96; 2011 CarswellOnt 9945; [2011] C.L.A.S. 79 (Bendel) – hereafter "*George Brown*"

iii) *Regional Authority of Greater North Central Francophone Education, Region No.s and CEP, Local 777 (Monterrosa) Re*; 2012 CarswellAlta 1379; [2012] A.W.L.D. 4292, [2012] A.G.A.A. No. 41; 112 C.L.A.S. 44; 223 L.A.C. (4th) 135 (T. Jolliffe) – hereafter "*Regional Authority*"

iv) *Children's Hospital of Eastern Ontario and OPSEU, Re*, (2015) 260 L.A.C. (4th) 178; 124 C.L.A.S. 150; 2015 CarswellOnt 14005 (Parmar) – hereafter "*Children's Hospital*"

v) *Extendicare (Canada) Inc. and Unifor, Local 302*, 126 C.L.A.S. 128; 2016 CanLII 8578 (ON LA); 2016 CarswellOnt 3149 (White) – hereafter "*Extendicare*"

vi) *Lakehead University and LUFA (Bernard), Re*, [2018] 297 L.A.C. (4th) 244; 2018 CarswellOnt 20446; 138 C.L.A.S. 148 (Surdykowski) – hereafter "Lakehead"

vii) *Toronto Catholic District School Board and OECTA (De Santis), Re*, [2019] 301 L.A.C. (4th) 209; 2019 CarswellOnt 5261; [2019] O.L.A.A. No. 102; 139 C.L.A.S. 160 (Stephens); application for judicial review dismissed 2020 ONSC 5953 – hereafter "TCDSB"

viii) *First Canada ULC v. International Union of Operating Engineers, Local Union No. 955*, 2017 CanLII 86407 (AB GAA) (Casey) – hereafter "*First Canada*"

EMPLOYER SUBMISSIONS

8. The Employer commenced by reviewing the process I set out in a previous award involving other parties in *Extendicare* as follows:

> *We respectfully endorse Arbitrator Sims' approach. In our view, it describes more accurately the loss suffered by a grievor, and it allows for appropriate elements to be factored in for a particular grievor so as to result in a more focused assessment of the loss. This does not mean that the compensation due to a grievor can be calculated with precision since there are so many incalculables. As Arbitrator Sims stated in his award, quoting from common law decisions: "One must try to assess. One cannot calculate."*
>
> *Based on arbitrator Sims' award, we intend to proceed as follows:*
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> *Step 1: calculate the maximum income the grievor could have received if she had not been wrongly discharged;*
>
> *Step 2: add to that amount the value of benefits attached to her position;*
>
> *Step 3: reduce that sum to reflect the various contingencies that might have prevented her from continuing in employment; and*
>
> *Step 4: further reduce that sum to reflect her obligation to mitigate her loss.*

9. In applying the four step process set out above, the Employer submitted as follows:

Step 1

i) The calculation of the Grievor's earnings between the date of discharge and the date of retirement should be based on her hourly rate at termination and her regularly scheduled hours per week.

ii) It was submitted that this amount should not be increased to reflect increases in the hourly rate because there is value in the Grievor receiving the payment in a lump sum that allows for some increase through investment, referred to as the benefit of "present value". In this regard, the Employer referenced *George Brown* and *Extendicare* in which I stated with reference to Step 1, as follows:

> *It should be noted that as the damages to be awarded are a lump-sum payment it would not be appropriate to increase this amount to reflect subsequent wage increases under the Collective Agreement as the Grievor also has the benefit of any investment income earned on the lump-sum amount payable at present.*

iii) The Employer argued that there should be no increase at Step 1 based on some premium pay provisions that were more generous under its Collective Agreement when compared to those available under the OPSEU collective agreement. It was submitted that there is some form of premium pay at both employers in respect of overtime work and that it cannot be assumed that they will not "equalize" at some point over the balance of the Grievor's employment period. Further, the Employer stated that it was unaware of any prior arbitration award calculating damages using the fixed term approach that had included premium pay as part of the calculation at either Step 1 or 2 of the process. In the alternative, if it were found that premium pay should be included, the parties had agreed on the math and based on current differential for the Grievor this would create a value of $200 per pay period or $35,400 between the date of termination and the Grievor's retirement at age 65.

iv) On the Employer's analysis, the Grievor's income at Step 1, based on her regularly scheduled hours at her hourly rate as at termination and exclusive of interest, would be $621, 323.50. If the parties' premium pay calculation were added it would be $656,723.50.

Step 2

i) The Employer's primary position is that there should be no increase to the Step 1 number in respect of benefits. The Employer submitted that the Grievor has secured unionized employment with many of the same entitlements that she enjoyed in its workplace. It further stated that in its review of the cases where a gross-up for benefits was provided, the terminated employee did not obtain new employment benefits, let alone unionized employment.

ii) Alternatively, the Employer submits that the RSM report valued the Grievor's net loss of benefits and pension as a result of her termination at $46,734.

iii) As the parties had exchanged their positions prior to the hearing, the Employer was aware that the Association would be arguing that there should be compensation as a result of the Grievor's loss of entitlement to weeks of vacation by virtue of her years of service with the Employer. In this regard, the Employer submitted that the Grievor may have lost the benefit of some vacation <u>time</u> but that she would continue to have the <u>earnings</u> for the period that might have been paid vacation but for her dismissal. It was the Employer's position that the analysis being undertaken in this exercise is a determination of the Grievor's financial loss and that there should not be an attribution of monetary value to non-monetary loss. To award compensation in this calculation for the loss of vacation time would be to grant the Grievor a windfall based on her double-recovery for a period of time when she is earning income from her new employer. The Employer referred to *George Brown* and *Extendicare* in which the calculation at Step 2 focused on pecuniary loss, as well as *Children's Hospital* in which Arbitrator Parmar stated as follows:

> *13 In my view the* George Brown *approach, with its prospective focus, is the favourable one. It is more likely to arrive at <u>a monetary amount that reflects what is actually lost by the employee</u> in not being reinstated to their former job. It also takes into account the specific circumstances of each case. As noted by Arbitrator Newman in* North Bay Regional Health Centre*, the damages calculation isn't meant to "unduly reward the employee or punish the employer, but to place the employee in the position that best replicates <u>his actual monetary loss</u>". The* George Brown *approach does just that.*
>
> *(emphasis added)*

iv) Similarly, the Employer addressed an argument to be advanced by the Association that the Grievor should be compensated for the additional travel time and expense associated with her commute to her new place(s) of employment. It was the Employer position that this was a consideration that simply does not appear in the caselaw and, further, that consistency in the jurisprudence should be encouraged so as to provide parties with greater certainty. With respect to actual travel costs, the Employer submitted that mileage allowances for commuting are not provided under any of the collective agreements under review. With respect to the time spent in commuting, it is neither appropriate nor feasible to attempt to place a value on this factor. It was asserted by the Employer that some individuals actually enjoy and look forward to their time commuting. Finally, it was the Employer's position that the Grievor made choices where she wished to work and live. Those personal choices should not create an entitlement to monetary damages.

v) Accordingly, the Employer submitted that at Step 2 the calculation would result in one of the following:

a)	\$621, 323.50 (Step 1) + \$0.00 (Step 2)	=	\$621,323.50
b)	\$621,323.50 (Step 1) + \$46,734 (Step 2)	=	\$668,057.50
c)	\$656,723.50 (Step 1) + \$0.00 (Step 2)	=	\$656,723.50
d)	\$656,723.50 (Step 1) + \$46,734 (Step 2)	=	\$703,457.50

Step 3

i) The Employer commenced its argument on this step by submitting that the reduction of the product of the Step 1 and Step 2 calculations in virtually of the caselaw is set between 75% and 90%. On its review of the cases, the lowest reduction to reflect the contingency that an employee would not have continued in employment if reinstated was the 50% figure reflected in *Children's Hospital*. Further it should be noted that in the foregoing case, the 50% reduction was, in fact, simply the number proposed by the employer as the union was advocating for the common law notice approach and appeared not to have made submissions on the fixed term method preferred by Arbitrator Parmar.

ii) In this case, the Employer submitted that a reduction of 90% should be applied as recognition of the risk that the Grievor would not have remained in employment for the full term under consideration had she been reinstated. The Employer noted that the Grievor had three (3) day and five (5) day suspensions on her record following my prior award and pointed to Article 9.13 of the Collective Agreement governing the parties in support of its position that she would at been at significant risk of termination in the event of further disciplinable action had she been reinstated. Article 9.13 provides as follows:

> *9.13 Any letter of reprimand, suspension or other sanction will be removed from the record of a nurse eighteen (18) months following the receipt of such letter, suspension or other sanction provided that such nurse's record has been discipline free for one year. Leaves of absence in excess of sixty (60) continuous calendar days will not count towards either period referenced above.*

iii) Further, it was the position of the Employer that the Grievor's record as reflected in my prior award supported its conclusion that the possibility of her engaging in such misconduct was a real and foreseeable risk. In the view of the Employer, the Grievor's actions that resulted both in the discipline that was imposed as well as the findings that resulted in damages being awarded in lieu of reinstatement, demonstrate that a return to employment would have resulted in a subsequent termination in any event. The Employer, noting the serious flaws found to have existed in its investigation of the Grievor, stated that the these would have been addressed in any future such circumstance and that the Employer would no doubt have been keeping an "eagle-eye" out for transgressions by the Grievor who would be on its "radar". The Employer stated that the Grievor's circumstance was analogous to that of the grievor in *Lakehead University*, in which Arbitrator Surdykowski reduced the fixed term damages based on his assessment that the Grievor, if reinstated, "…would very soon have been in workplace hot water again…" and successfully terminated. While Arbitrator Surdykowski's decision will be examined in greater detail below, for the purposes of this portion of the Employer's argument it is sufficient to say that it appears that the learned arbitrator reduced the grievor's fixed term damages for the period from the date of the award on remedy to the date on which the grievor intended to retire by some 83.75%.

iv) The Employer further referenced the following cases in support of its position:

Case	**Factors Considered**	**Reduction**
George Brown	*33. The second factor we wish to address is that the grievor was viewed by her supervisors as incompetent. The employer attempted to terminate her employment on this basis in 2008, leading to this grievance. In allowing her grievance, this board of arbitration did not conclude that the grievor's performance had been satisfactory, but rather that the employer had failed to establish clear standards of performance for her to meet. At the same time, we noted "there was substantial evidence of performance problems". If we had ordered her reinstatement in employment, there is thus every reason to believe that the employer would not have been reconciled to her continued employment, would have attempted once more to sever her employment, and might well have been successful the second time.*	80%
TDCSB	*27 While it is true that the only performance appraisal on the grievor's file is positive, I do not agree that this leads to the conclusion that the grievor would have been likely to successfully hold an LTO or gained a permanent assignment had she been reinstated. The grievor's record is described in the main decision in this case, and it is not a record of an employee who was likely to succeed. As is set out in the main decision, she has been unreliable in her attendance and job performance, unwilling to accept direction with respect to her duties and responsibilities, and aggressive in her dealings with others, including her supervisors. Most unfortunately, and significantly in my view, it appears that she cannot acknowledge her shortcomings or accept meaningful responsibility for her actions. As a review of the entire*	80%

	narrative in the main award attests, the grievor has denied most if not all criticisms of her behaviour, and has falsely accused many coworkers of dishonesty, including those to whom she reported. Since the grievor cannot acknowledge her weaknesses, and instead falsely accuses others of wrongdoing, there is little basis upon which I could reasonably conclude that she could change her approach or her behaviour in a meaningful way. ..... *29 One factor to be weighed is that after her prior termination and reinstatement by this Board the grievor went for a period of seven years without major employment problems. While this suggests the grievor has the ability to respond to discipline, it is my view that, whatever may have been the case after the last termination, this time the grievor displayed an intransigence with respect to criticism of her behaviour that included accusing others of fabricating evidence, as well as resorting to dishonesty during her testimony, as is set out in the main award. There was little in the evidence that would support a finding that, had she been reinstated, the grievor would have behaved much differently from the way she behaved prior to her termination or during the hearings into this matter. It is my view that the opposite conclusion is more reasonable.*	
Extendicare	*In making my assessment of the contingencies to be applied in this case, I have had particular regard for the discipline on the Grievor's record together with judgment issues that contributed to my decision not to reinstate her to active employment. The discipline on the Grievor's record includes a five (5) day suspension and the fifteen (15) week suspension imposed by this Award. These two disciplinary events took place within a seven (7) month period. It seems clear that any further incidents for which discipline might properly be imposed by the Employer would almost certainly result in the Grievor's termination for cause. Having regard to that disciplinary record, together with her demonstrated history of poor judgment and decision-making in this particular work environment, I am reducing the Step 2 amount by 90% to represent this contingency.*	90%

v) The Employer submitted that, in consideration of the various factors considered in the applicable jurisprudence, the Grievor’s entitlement under the first two Steps should be reduced by 90%. Utilizing that percentage, the Grievor’s entitlement at this Step would be no less than $62,132.35 and no greater than $70,345.75.

<u>Step 4</u>

i) Step 4 of the process would see the damages reduced by the Grievor's earnings in mitigation. The Association provided the Grievor's mitigation information to the date of the hearing on remedy. Using that information, together with a calculation of the Grievor's future earnings to her retirement date based on her current hourly rate on a full-time basis without premium pay, the Employer assessed her total mitigation to retirement at $538,759.01.

ii) If the damages amount available to the Grievor at Step 3 is accepted, it is clear that she has fully mitigated any damages to which she might be entitled on this analysis. In such a circumstance, the Employer referenced my *Extendicare* decision in which I wrote, as follows:

> *37. However, that does not end the matter. Having found that the Employer did not have just cause to terminate the Grievor but that it is not appropriate to reinstate her back to the workplace, the Grievor has certain statutory entitlements under the Employment Standards Act, 2000 ("ESA") that are owed to her. These entitlements are termination and severance pay ("the Statutory Entitlements"). The Statutory Entitlements are not in addition to the damages payable to her in lieu of reinstatement as calculated above, as those damages are intended to be payment for the period up to the point that the Grievor might otherwise have been expected to retire (which would not result in an Employer obligation to pay her the Statutory Entitlements). While the damages have been adjusted for contingencies, the most significant contingency in this case was the possibility of a future termination for just cause that, similarly, would not have resulted in an Employer obligation to pay her the Statutory Entitlements.*
> *38. While the parties will need to perform an exact calculation it appears that the Statutory Entitlements (e.g. 37.5 hours x 20 weeks x $20.68 = $15,510) are likely to exceed the damages in lieu of reinstatement. Accordingly, the Grievor is entitled to the greater of either her Statutory Entitlements calculated as of the date of this Award or the sum of $11,089.65 as damages in lieu of reinstatement.*

iii) The Employer calculated the Grievor's ESA entitlements as $47,782.88 based on eight (8) weeks' notice and 19.25 weeks' severance pay. It submitted that this amount should be awarded to the Grievor in this case.

10. The Employer further took the position that this is not an appropriate case for the award of interest, stating that it took some time to gather the mitigation information from the Association. In summary, the Employer submitted that the reasons for the decision not to reinstate the Grievor were her actions, lack of candour and post-hearing conduct towards an Employer representative. The Grievor quickly found secure, unionized employment following her dismissal. In these circumstances, the Grievor should not be provided with a windfall. In this regard, the Employer urged that I not lose sight of the reality that determining the damages in lieu of reinstatement is purely a calculation of the Grievor's actual financial loss. In the

result, the Employer submits that the Grievor should be awarded her ESA entitlement as calculated above.

ASSOCIATION SUBMISSIONS

11. The Association started its analysis with reference to *Lakehead* in which Arbitrator Surdykowski introduced a new component to the calculation of damages. Here the learned arbitrator found that damages should be calculated separately for the period to the point at which it was determined that just cause did not exist for termination (the “pre-merits period”) and the period falling the arbitrator’s decision that damages should be substituted for reinstatement as remedy (the “post-merits period”). Arbitrator Surdykowski’s reasoning on this point is set out in the following paragraphs:

> *115. I disagree with the proposition stated in paragraph 136 of Hay River (and in the Metropolitan Toronto , NAV Canada and Government of Alberta decisions cited), and applied in cases such as De Havilland , Canvil , and Humber River Hospital , that all damages in lieu of reinstatement run from the date of the discharge determined to be contrary to the collective agreement. I do not agree that awarding damages based on an assessment of the grievor's lost wages and benefits between the date of discharge plus damages for the loss of collective agreement employment going forward from the date of the decision determining that the grievor's employment had been terminated in a manner contrary to the collective agreement is counterintuitive or inappropriate. I am satisfied that the opposite is true. In principle it is appropriate to make one assessment of collective agreement damages from the date of termination to the date of the decision (which with appropriate evidence is relatively easily done), and a second assessment of damages for the loss of collective agreement employment going forward from the date of decision (as the point at which reinstatement would have occurred in the usual case).*
>
> *116. I disagree with the notion that awarding damages for the period between the date of discharge and the date of the determination of the grievance on the merits brings irrelevant factors into play or somehow punishes the employer who had no control over how long it took the grievance arbitration process to produce the determination. Why as a matter of principle should an employee who an arbitrator has determined should not be returned to the workplace notwithstanding that the employer did not have collective agreement cause for discharge be denied the same compensation as an employee who is reinstated? Why should the grievor who has been found not guilty of behaviour justifying discharge, and who would probably have been very happy to have had his grievance determined more expeditiously be penalized by the delay? Why on the other hand should an employer who has violated the collective agreement not pay the full price of doing so?*

117. In the consensual grievance arbitration process a grievance must (subject to the applicable statutory expedited arbitration provisions) be processed through the collective agreement grievance settlement process before it can be referred to abitration. Once the collective agreement grievance settlement process is exhausted and the grievance is referred to arbitration, control over the process rests in the hands and depends on the mutually agreeable availability of the union and the guilty (in the sense that it has been found to have discharged the grievor in a manner contrary to the collective agreement) employer. The parties must first agree to a suitable arbitrator, which they often do in consultation with counsel. After the parties agree to an arbitrator (with or without regard to the arbitrator's availability or any realistic assessment of how many days of hearing are likely to be required), a hearing date or dates mutually agreeable to the parties, counsel, and the arbitrator (i.e. dependent on their availability) are scheduled. Although the employer does not exercise sole control over the process, it is simply not true that the employer has no control. The employer has control over its availability, over the selection of counsel retained to present its case at arbitration (who may have a full schedule), and over selection of the arbitrator agreed to (who may not be available for many months). The employer does not lose all control even after the hearing begins. If more hearing dates than originally scheduled are required they are scheduled in consultation with the parties based on mutual availability. The grievance process being one that belongs to the parties (as opposed to proceedings before an administrative tribunal like the Ontario Labour Relations Board), it is the rare arbitrator who will schedule hearing dates without regard to the parties' (who are the union and the employer - not the grievor) professed availability. The delay inherent in the process is obvious. The grievor (i.e. the employee who has been fired and is "on the street") typically has no control over any of this. Why should the employer, who does and who has been found to have violated the grievor's collective agreement rights but has nevertheless succeeded in ridding itself of what it considers to be a troublesome employee, derive any benefit from a delay in the process?

118. The delays inherent in the grievance arbitration process inevitably operate to the detriment of the grievor employee who has been fired and is without income except to the extent that he can obtain alternate employment in the interim, and to the benefit of the employer who carries on with business as usual until the grievance is determined - however long that takes. Why should the employer who the arbitrator has determined violated the collective agreement escape the consequences of the delays inherent in the process engaged to the detriment of the grievor, "bad actor" or not, whose collective agreement rights were violated? Why should the grievor employee whose collective agreement rights were violated but who has been denied the usual remedy of reinstatement also be denied the usual remedy of compensatory damages for the period between the date of discharge and the date of the decision determining the merits of the grievance? In the usual case of a grievor whose discharge grievance is allowed and who is granted the usual remedy of reinstatement, that grievor also receives full compensatory damages for the period between the date of discharge and the date of the decision (subject to deduction for any discipline substituted by the arbitrator) without *deduction or even consideration for how long it took for the grievance to be determined. Why should it be any different for a grievor whose discharge grievance is allowed but who is denied the significant remedy of reinstatement? Why should such a grievor also be denied the usual remedy of compensatory damages for the period between date of termination and date of decision allowing the grievance? I am not satisfied that there is a principled reason to deny such a grievor that compensation.*

12. Using this analysis, the Association argued that no reduction for contingency should be applied to the Grievor's damages in the period from the date of her discharge to the date of my Award on the merits. For the period following the date of the Award on the merits, the Association agreed that the method set out in *Hay River* is appropriate subject to the following considerations:

i) Premium Pay – The Association submitted that, with the exception of *Hay River*, it appears that no evidence respecting premium pay was lead and it is simply was not a consideration. The Association argued that *Hay River* stood for the proposition that premium pay was a form of compensation that was easily calculable based on the actual experience of the terminated employee. In this case, the parties have been able to put a value to the reduction of premium pay (e.g. shift differential) the Grievor has, and will, experience in her new position (absent changes to the provisions of the collective agreements being compared).

ii) Vacation Time – The Association reviewed the Employer's Collective Agreement with that governing the Grievor at OPI and noted that she would have enjoyed between five (5) and seven (7) weeks of paid vacation over the balance of her employment with the Employer but for her termination while she will receive three (3) weeks of paid vacation per year over the balance of her employment with OPI. It was submitted that the purpose of this remedial Award is to make the Grievor whole and to not grant damages reflective of this loss of vacation time is to disregard an earned benefit associated with her service and seniority with the Employer. To the extent that Arbitrator Bendel addressed this specific issue in his award, finding that no value should be attributed to the loss of vacation time, the Association disagrees with that analysis and submits that it ought not to be followed. For ease of reference, on this issue Arbitrator Bendel wrote as follows:

28. As regards Step 2, we note that the awards have generally added 15% to 20% in respect of benefits. We received no submissions on the value of benefits under this collective agreement. However, we would caution that the only benefits that should be included in this calculation are those which lead to employees receiving income over and above their wages or salary. In particular, vacation leave, which is obviously a major cost for employers, does not lead to any increase in employees' incomes (since their annual salaries or wages include their vacation pay), but merely relieves them of having

> *to work on the days in question. The same can be said for other forms of leave, public holidays and disability income. If these items are excluded from the calculation, as, in our view, they should be, we doubt that benefits would even come close to 15% of wages.*
> (emphasis added)

iii) Travel - The Association submitted that to make the Grievor whole, the time and expense of her increased travel should also be taken into consideration. The Association stated that the Grievor was required to travel an additional one (1) hour and forty (40) minutes to attend work for each shift at OPI (and, presumably Hamilton Wentworth Detention Centre). It pointed to a Letter of Understanding in the parties' Local Appendix to the Central Collective Agreement that sets out terms and conditions for nurses working in the Assertive Community Treatment Team (ACTT) who may required to work in the community from time to time. Section 3(e)(ii) of that LOU states as follows:

> *Nurses on standby who perform telephone work, or who must leave their residences to make a service call, shall be entitled to compensation in accordance with the following:*
>
> *(ii) When an ACTT nurse is required to leave her/his home while on standby to make a service call(s), the nurse shall be compensated in accordance with Article 14.06, including travel time to and from the nurse's work location and/or the site in the community where the work is to be performed. The nurse shall be compensated for such work in time or in payment, and shall be compensated for mileage at the rate of $0.47 per kilometer for the first 8,000 kilometers per year and at the rate of $0.43 for each subsequent kilometer.*

The Association submitted that this provision of the Collective Agreement between the parties represents a reasonable mechanism to value the Grievor's loss as a result of her additional travel time. It was stated that such payment should be added at Step 1 of the *Hay River* process or, in that alternative, at Step 2.

iv) Benefits – The Association noted that in most of the cases employing the fixed term process, the arbitrators do not indicate how they arrive at a gross-up for the value of lost benefits. While this case is somewhat different due to the Grievor's ability to mitigate, nevertheless, the Association submitted that there should be some recognition of the intangible benefits lost as a result of her termination by the Employer. These would include benefits associated with her accrued seniority and service such as protection against layoff, choice of shifts, choice of vacation times and the value of her time lost as a result of the longer commute.

13. The Association further argued that this Award on remedy should not have the effect of punishing the Grievor twice. While it was accepted the trust relationship between the Grievor and the Employer had been broken, the Association submitted that some of the blame for this lay with the Grievor's supervisor. It was asserted that, prior to the events that resulted in the Award on the merits, the Grievor did not have a long history of discipline. The Association referred to *First Canada ULC* in which Arbitrator Casey stated as follows:

> *[5O] It is circumstances such as these in which I conclude that it may be appropriate to take into account the grievor's misconduct in assessing the quantum of damages. However, I accept the caution from other cases that one must be careful not to over-penalize the grievor for misconduct. If the arbitrator has already in essence penalized the grievor for misconduct by finding that reinstatement is not appropriate because the employment relationship is not viable, then the arbitrator must carefully consider whether a further reduction in the quantum of damages is also appropriate or not. This assessment will depend on the circumstances of each case.*

14. Turning to the reduction of Step 1 and Step 2 damages to reflect the contingency of the Grievor's continued employment had she been reinstated, the Association submitted that it should not be 80% or 90% as suggested by the Employer. This is a circumstance in which it would have been unlikely that the Grievor would be laid off, there was no evidence of any medical issues and there was no motivation for the Grievor to have taken an early retirement as the pension available pursuant to this Collective Agreement was through a defined contribution plan. It was submitted that the Grievor enjoyed and valued the work environment and there was no basis to suggest that further discipline was likely. In the result, the Association submitted that the reduction for contingencies should be no greater than 25%.

15. The Association further submitted that, in any event, the Grievor's post-merits damages should not be less than her ESA entitlements. In support of this argument, the Association referenced *Lakehead* in which the learned arbitrator stated:

> *120. I agree with Arbitrator White in* Extendicare Canada Inc. *that statutory severance or termination pay entitlements (under the* ESA *in Ontario, and under the* Canada Labour Code *in federal jurisdiction) are not payable in addition to damages in lieu of reinstatement.* <u>*The purpose of the going forward component of damages in lieu of reinstatement is the same as the purpose of statutory employment standards severance and termination pay.*</u> *The statutory entitlements are guaranteed minimums for employees whose employment is terminated without just cause, and they are only payable if the fixed-term calculation of damages yields a smaller amount, in which case the legislation mandates the minimum payment-again regardless of "bad actor"*

> *behaviour which did not justify termination. Regardless of the point damages are measured from, in lieu damages are in the nature of a one basket non-statutory severance and termination payment. That is, a grievor whose employment is terminated without just cause but who is not reinstated is entitled to the greater of non-statutory and statutory severance/termination pay, not to both.*
>
> *(emphasis added)*

16. In the result, the Association submitted that the Employer's calculations were too low in a number of respects. The Employer did not include compensation for the cost and hardship experienced by the Grievor in respect of her travel, lost premium payments, vacation time, seniority and service-related entitlements. It was submitted that the Grievor also suffered hardship as a result of having to deal with a report made to the College of Nurses of Ontario (the "CNO") in the wake of her termination. Further, the Employer proposed a reduction for contingencies that the Association argued was inappropriate. The Association asked that the Grievor be made whole for all these losses and submitted that she was entitled to both pre-merit and post-merit damages pursuant to the *Lakehead* analysis. Additionally, it was argued that, in the event that post-merit damages were found to be less than her ESA entitlements, that she should receive ESA in addition to any pre-merit damages that might be awarded. Finally, the Association asked that pre-judgment interest be awarded together with post-judgment interest on all amounts awarded.

EMPLOYER REPLY SUBMISSIONS

17. In reply, the Employer reiterated its position that only monetary losses should properly be considered. It was submitted that the fixed term approach does not take matters such as "pain and suffering" or their analogues into consideration. Further, in mitigation the Grievor is able to make choices about where she will live and work thus negating the necessity to consider the impact of any commuting she may undertake. With respect to the CNO report respecting the Grievor, the Employer stated that it was required by statute to make its report.

18. With respect to the Association argument respecting the Grievor's vacation time, it was the Employer's position that "time off" may have value but it is not a monetary value which is the only matter under consideration in the jurisprudence in which the fixed term model is used. The Employer submitted that ultimately arbitrators do not ascribe value to the non-monetary items identified by the Association. In part, that is because terminated employees make choices how to govern their affairs following their dismissal.

19. With respect to the Association's submission based on the decision in *First Canada*, the Employer sought to distinguish this award, noting that it was a case in which the employee was

not reinstated because he did not wish to return to the employer. Further, the Employer argued that the arbitrator in *First Canada* did not carry out a full fixed term analysis but rather stated a number of principles followed by a damages award. The Employer emphasized that in a fixed term analysis one of the significant contingencies is the possibility that the Grievor would have been terminated again had she been reinstated to employment in this workplace.

20. With respect to the decision in *Lakehead*, the Employer submitted that no other award employs the pre-merits and post-merits analysis articulated by Arbitrator Surdykowski. The Employer argued that this analysis is flawed and that the proper role of the arbitrator is to put the employee in the position he or she would have been in on the day of termination on the basis that the dismissal had not proceeded. It was the Employer's position that the length of time between the date of the termination and the date of the award on the merits should not be a factor. The proper question is what would have happened but for the unjust dismissal and, accordingly, what damages should be awarded based on that analysis. While in *Lakehead*, the case took some five (5) years to litigate, why should the damages analysis be any different than if it was found that a terminated employee should not be reinstated in a one (1) day proceeding following an expedited hearing application pursuant to section 49 of the *Labour Relations Act, 1995*? To treat the Grievor's damages in the "pre-merits" period as if she were reinstated up to the date of the remedial award, ignores the fact that the Grievor was, in fact, not reinstated.

21. Finally, the Employer disagreed with the Association's position that the *Lakehead* award stood for the principle that ESA entitlements should only be compared to the post-merits analysis. On the Employer's reading of the case, ESA entitlements are owed as of the date of termination and, accordingly, must be deducted from a pre-merits analysis as well. In the result, the Employer asked that its analysis be applied in the assessment of damages.

DECISION

22. The initial question to be determined in this phase of the hearing is the process by which the damages to be substituted in lieu of the Grievor's reinstatement are to be calculated. Both parties made their argument using variations of the "fixed term approach" but disagreed as to how that method should be expressed and applied. With the greatest of respect for Arbitrator Surdykowski's reasoning in *Lakehead*, I must disagree with his approach. I consider that the correct method in these cases is to make a determination of the damages using the *Hay River* analysis as of the date of the Grievor's termination from employment. In cases where it is found that an employee was terminated without just cause, the theory of the fixed term approach is that such employee is to be notionally reinstated as of that date. It may then be

presumed that, but for the wrongful termination, the employee had the potential to continue in employment until the date when he or she might reasonably have been expected to retire ("the Notional Period"). The value of that employment is then calculated at Step 1 (wages) and Step 2 (benefits) to arrive at the damages for the Notional Period. Those damages are then discounted at Step 3 to reflect contingencies that the employee, if reinstated, not have continued to be employed for the Notional Period.

23. It is at this point that I part company with the reasoning in *Lakehead*. In that decision the learned arbitrator frames the issue as one of who should bear the burden for delays in the arbitration process. He sets out the rhetorical question that is fundamental to his reasoning as follows:

> *116. I disagree with the notion that awarding damages for the period between the date of discharge and the date of the determination of the grievance on the merits brings irrelevant factors into play or somehow punishes the employer who had no control over how long it took the grievance arbitration process to produce the determination. Why as a matter of principle should an employee who an arbitrator has determined should not be returned to the workplace notwithstanding that the employer did not have collective agreement cause for discharge be denied the same compensation as an employee who is reinstated? Why should the grievor who has been found not guilty of behaviour justifying discharge, and who would probably have been very happy to have had his grievance determined more expeditiously be penalized by the delay? Why on the other hand should an employer who has violated the collective agreement not pay the full price of doing so?*

24. I do not think that the methodology to be used in determining the Grievor's damages to be on that hinges on whether one party or the other will be "punished" by the period of time it takes to issue a decision on the merits. If a terminated employee has their grievance dismissed there are no damages. If the terminated employee is reinstated (with or without the substitution of any wages or benefits for the period prior to reinstatement), the employee receives full entitlement to his or her damages subject to any mitigation. But the determination that an employee has been wrongfully terminated in circumstances where reinstatement is not appropriate constitutes a different category. What the *Hay River* method requires is an assessment of what the terminated employee might have earned during the Notional Period and then a reduction of that amount having regard to the possibility that the employee might not have continued to be employed throughout that Notional Period. I see no basis for distinguishing whether that employment might have been discontinued in the period between the date of termination and the date on which it is determined that just cause did not

exist as opposed to the period following that date. This is not a question as to who bears the burden of any delay in the arbitration process – it is simply an assessment of notional damages and then a reduction to reflect contingencies. There is no need to split this into “pre-merits” and “post-merits” periods.

25. Put another way, in *Lakehead* the terminated employee was made whole for the period between his termination and the award on the merits, a period that appears to have been approximately 4.5 years in duration. The grievor’s evidence was that he had intended to work until age 71, another eight (8) years following the date of the award on the merits. With respect to the grievor’s ability to continue his employment if reinstated, the following assessment was made:

> *135. I am satisfied that if I had reinstated the grievor it is a virtual certainty that he would very soon have been in workplace hot water again, and that the University would have successfully terminated the grievor's employment long before he reached age 71. I am satisfied that if he had been returned to the workplace the grievor would not only have continued his "bad actor" behaviour, he would likely have perceived reinstatement as vindication and doubled down in his pursuit of his crusade against what he perceives to be the evil University Administration. At the same time, the University is likely to have kept a close watch on the grievor's conduct and taken the first opportunity to take the grievor to task for new bad behaviour. I consider it likely that the University would have taken a lesson from the Merits Award and taken extra care to ensure that it did things properly, with the result being that the grievor would probably have been successfully discharged for cause in relatively (for an academic workplace) short order. I consider it more probable than not that the grievor would not have lasted more than 12-16 months had the Merits Award resulted in reinstatement. Even with the benefit of any doubt, I think it unlikely that the grievor would have survived in the workplace beyond age 64.*

26. In the result, the grievor in *Lakehead* was awarded post-merits damages based on the sixteen (16) month period that was assessed by the arbitrator as the upper end of the range of how long he would have remained employed if reinstated. The difficulty I have with this approach is that there appears to be no reason why that same range would not have been equally applicable to the grievor had he been treated in some appropriate manner by his employer other than termination or, alternatively, if terminated, he had been reinstated following a one (1) day proceeding commenced as an expedited hearing pursuant to section 49 of the *Labour Relations Act, 1995.* At any point in the pre-merits or post-merits periods under consideration in *Lakehead*, the grievor was still the same “bad actor”, in the arbitrator’s assessment, who could not be reinstated to employment.

27. Having rejected the methodology advanced in *Lakehead*, I turn to the process contemplated in *Hay River*. I agree that the four-step approach is a reasonable and rational manner of assessing the Grievor's damages in this case. Prior to applying that process, it is first necessary to address a number of issues raised by the Association. In turn, these are:

i) <u>Premium Pay</u> – I accept the Association submission that premium pay should properly be included at Step 1. The challenge in other cases may be making a determination of how much premium pay should be included in an employee's income as opportunities for some types of premiums such as overtime, call-in, double-time for certain shifts etc. may vary depending on the availability of those opportunities in a given workplace and the employee's willingness to avail him or herself of such opportunities. Here, I understand that the premium pay opportunity may be related to a shift differential available on an ongoing basis to the Grievor and the parties have agreed that the value of that premium pay for the period in question is $35,400. Accordingly, this amount will be included at Step 1.

ii) <u>Vacation Time</u> – The Association argued that the Grievor has lost the benefit of the vacation <u>time</u> she would otherwise have enjoyed had she continued her employment with the Employer. The Employer argued that the jurisprudence is clear that the *Hay River* analysis is one that assesses the pecuniary loss of the terminated employee. Reference was made to both *George Brown* and *Children's Hospital* in support of this position. Accordingly, it was submitted that no damages should be included at either Step 1 or Step 2 of the *Hay River* process in respect of lost vacation time.
I must agree with <u>both</u> parties on this question. The Association is correct that the Grievor has lost something of real value to her in the loss of entitlement to paid vacation time at her new employer. And the Employer is correct that the *Hay River* process is one that assesses the pecuniary loss of an employee found to have been terminated without just cause but who is not reinstated. I consider the issue of the Grievor's loss of vacation time to be one of non-pecuniary loss for which damages may be payable in addition to any amount owing for her pecuniary losses.

This question appears not to have been considered in detail in any of the decisions provided to me by the parties. That may be because the parties were focused on the issue of which method should be used to assess damages in lieu of reinstatement (e.g. *Children's Hospital*) or because of the particular post-termination circumstances of the employee (e.g. *George Brown* in which the terminated employee had not worked nor applied for any jobs following her dismissal). In other cases, the issue might not arise due to the relatively short service of the terminated employee such that vacation entitlement is simply not a live issue for the parties.

In this case, however, the Grievor was a relatively long-service employee who had an annual vacation entitlement that ranged between five (5) weeks at the time of termination and, potentially, seven (7) weeks had she remained employed to age 65. Further, the Grievor was able to achieve substantial mitigation almost immediately to the obvious benefit of the Employer. That new employment provided her with three (3) weeks' annual vacation should she remain employed to age 65. I think it is fair to say that this is representative of the best vacation entitlement the Grievor would have been able to receive in <u>any</u> new employment as a registered nurse.

The challenge, of course, is to put a value on the non-pecuniary loss of the Grievor in this regard. Further, it is appropriate to consider the contingency that the Grievor might not have continued in her employment with the Employer had she been reinstated which would, of course, put her in the same position of a lower vacation entitlement with any new employment that she might obtain thereafter. In consideration of all the foregoing, I have determined that the Grievor should be paid the sum of $2,500 as non-pecuniary damages in this respect. Such payment is in addition to any pecuniary damages assessed as owing.

iii) <u>Travel</u> – I am not prepared to award any damages, either pecuniary or non-pecuniary, for the Grievor's travel commuting to her employment at OCI. This is not to say that such an award would always be inappropriate but, in this case, I consider the Grievor's employment to be one of choice on her part. I take judicial notice that throughout the period in question, registered nurses have remained in high demand throughout the province and there is no evidence to suggest that she was required to take up employment at OCI or Hamilton Wentworth Detention Centre. I do not give any weight to the Employer's argument that the Grievor elected not to move closer to her new job but it I do consider its position that it ought not to be required to pay damages for an election made by the Grievor to be determinative.

iv) <u>Benefits</u> - The Association argued that there should be some recognition for the loss of other intangible benefits associated with the loss of the Grievor's service and seniority such as protection from layoff, choice of shifts and preference in vacation scheduling. There was no evidence to suggest that layoff is a possibility in the Grievor's employment at OCI and I note that she has now accrued seniority to the date of the hearing on remedy. Further, the Grievor moved from part-time to full-time employment that would suggest job security is not a significant factor. While the loss of other entitlements such as choice of shifts and preference in vacation scheduling are intangible losses, there was no evidence to suggest the degree to which this impacted the Grievor and that, combined with any reduction to reflect the contingency that the Grievor might have found herself seeking new employment in any event, leads me to conclude that an award is not appropriate for this head of damages.

28. That brings me to the determination of pecuniary damages in this case. The calculations at Step 1 and Step 2 are as follow:

<u>Step 1</u>

As noted above, I am including the parties' calculation of premium pay at this stage and, accordingly, the Grievor's income between the date of her termination and her age 65 retirement date is $656,723.50.

<u>Step 2</u>

I must reject the Employer's primary position that there should be no gross-up for loss of benefits simply because the Grievor obtained unionized employment in fairly short order following her termination. The parties are to be commended for their cooperation in commissioning the RSM report on the calculation of the value of lost benefits and pension over the period between the Grievor's termination and age 65. Accordingly, the amount at Step 1 will be increased by the amount of $46,734.

<u>Step 1</u> + <u>Step 2</u> = $703,457.50

29. Step 3 is obviously of critical importance to the parties. The Employer argued that the amount at Steps 1 and 2 should be reduced by 90% to reflect the contingency that the Grievor would have been subsequently terminated successfully had she been reinstated. The Association argued that the Grievor would have been unlikely to be terminated for cause and asserted that any reduction should be limited to 25% at most. I think that it is important to review the factors that lead to the decision not to reinstate the Grievor as part of the Step 3 analysis. I emphasize that the purpose of doing so is not to subject the Grievor to a second penalization for the prior conduct that led to the discipline imposed pursuant to the award on the merits. Rather, it is to consider the circumstances of the Grievor's prior employment relationship as a predictor of future issues that might impact the length of her tenure had she been reinstated. The award on the merits states:

> *140. That does not end the matter. The Association asks that the Grievor be reinstated and made whole. I have grave concerns that the trust relationship between the parties is not reparable. I have considered the following factors. First, while I have been at pains to set out my concern that the Employer's delay in dealing with the complaint of Patient #1 contributed to the Grievor's lack of forthrightness (and, by extension failure to express remorse), it remains the fact that I have found that she was not candid in admitting that*

she made the statements in question. There was no suggestion anywhere in the Grievor's evidence that she considered that she might have done anything wrong or that she might consider acting differently in the future. Second, while I have found that there was no just cause for discharge, it is also the case that I have substituted a five (5) day suspension, which is at the high end of the progressive discipline continuum. Third, I have noted that, following her termination, the Grievor filed a complaint about Ms. Gordon with the College of Nurses of Ontario. If, in fact, the Grievor believed that Ms. Gordon had failed to meet her obligations as registered health professional, it was her obligation to have made the complaint at the time of the events that she alleges would substantiate that complaint. The evidence suggested that the complaint was unfounded. The timing of the Grievor's complaint raises serious concern about her ability to put the past behind her and reintegrate successfully into the workplace. Fourth, while Ms. Gordon is no longer in a role in which she would be the Grievor's supervisor, it was stated that in her new position she handles all patient complaints and there is a real possibility that the Grievor and Ms. Gordon will cross paths again on matters that are highly contentious. Neither appeared prepared to compromise in their assessment as to the correct way to deal with individuals such as Patient #2. All in all, I consider reinstatement of the Grievor to be a recipe for future strife and conflict to the benefit of no one (including patients).

30. Having regard to the foregoing, I consider a number of factors are particularly relevant to a determination respecting what reduction represents the contingency of the Grievor being successfully terminated at a later date had she been reinstated. First, the Grievor would have been operating with three (3) and five (5) day suspensions on her record. The next step in a progressive discipline process would normally be termination. Second, both suspensions relate to the manner in which the Grievor interacts with others in the workplace. As such, these were situations that are more likely to be repeated than if the discipline was related to some discrete act(s) that might be seen as unusual in her work history. Third, I found that "[*t]here was no suggestion anywhere in the Grievor's evidence that she considered that she might have done anything wrong or that she might consider acting differently in the future".* In other words, part of the assessment that reinstatement was not appropriate was a finding that history was likely to repeat itself. Fourth, the Grievor's actions in filing a CNO complaint against her supervisor after her termination bespeaks a poor prospect for re-establishing a manageable working relationship in the future.

31. I have also considered the Employer's point, reflected in the caselaw, that had the Grievor been reinstated she would have been returning to a workplace with enhanced scrutiny of her actions and conduct. Further, in the future were the Employer to believe that the Grievor had misconducted herself, it is likely that any investigation would have seen correction of the deficiencies identified in the award on the merits. Whether heightened attention to the

Grievor would be fair is a different matter but it would also be unrealistic to suggest that his would not occur.

32. There is no complete list of the factors to be taken into consideration at Step 3. I have considered the factors above together with the caselaw in this area and determined that a reduction of 80% appropriately represents the contingency that the Grievor might be successfully terminated in future. In doing so, I also note that the very reason why this type of analysis is required in these cases in the first place is generally that there has been a determination that reinstating the employee would not be successful for some reason.

33. Accordingly, at Step 3, the amount from the Step 1 + Step 2 calculation is reduced by 80% with the following result:

<u>Step 3</u>

$703,457.50 x 20% = $140,691.50

34. Finally, Step 4 of the process requires the deduction of the Grievor's mitigation for the period in question. As noted above, the Employer's calculation of the Grievor's mitigation income to age 65 based on continued employment at OCI equals $538,759.01. The Association's calculation for the same period was approximately the same. In any case the Grievor's mitigation income far outstrips the damages calculated at Step 3, above.

35. Of course, the Grievor's ESA entitlement was calculated by the Employer as $47,782.88 and I did not hear any suggestion by the Association that this was not accurate. It was acknowledged by the Employer that this amount represented the Grievor's minimum entitlement even were the fixed term calculation determined to be less. Accordingly, the Grievor is awarded the sum of **$47,782.88** in respect of her ESA entitlement, subject to those deductions required by law. In this respect I direct the Employer to work with the Association should the Grievor wish to receive these funds in a more tax-advantageous fashion (e.g. direction to an RRSP etc.).

36. In addition, I have determined that the Grievor is entitled to the sum of **$2,500** as damages in respect of her non-pecuniary loss arising from the reduction of vacation time in her new position.

37. I can see no principled reason why the Grievor should not be entitled to interest on these amounts. Accordingly, she shall be entitled to pre-judgment interest in the amount of

$2,220.75 calculated pursuant to the *Courts of Justice Act*. If the Employer provides payment within thirty (30) days of this Award (or within thirty (30) of such longer period as may be necessary to accommodate a request by the Grievor to direct the payments in accordance with the last sentence of paragraph 35, above), there will be no award of post-judgment interest.

38. I continue to remain seized in the event of any issues arising out of the interpretation, application or enforcement of this award.

DATED this 14th day of June, 2022.

Christopher C. White