

IN THE MATTER OF an arbitration under the *Ontario Labour Relations Act, 1995*.

BETWEEN:

Toronto Transit Commission

(The Employer)

- and -

Amalgamated Transit Union, 113

(The Union)

AND IN THE MATTER OF the termination of the employment of Patrick Plummer.

Heard before: Daniel A. Harris

Heard at: Toronto, Ontario by Videoconference

Heard on: June 24, 2021; November 29, 2022; February 9, July 11, August 22,
December 12, 2023; November 20, December 10, 2024; January 8, 2025.

Decision Date: May 28, 2026

APPEARANCES

For the Employer: Daryn Jeffries, Counsel, Laura Myers, Thomas Kim, Alfred Choy, TTC

For the Union: Andrea Wobick, Counsel, Pino D'Armiento, ATU, 113, Patrick Plummer,
grievor.

Decision

The Proceedings

1. This decision relates to the termination of Patrick Plummer's employment with the Toronto Transit Commission (the "Employer"). Mr. Plummer (the "grievor") was employed as a track patroller. His employment was terminated on February 1, 2021, at a meeting called to discuss allegations that he had engaged in serious misconduct while on duty. In the course of the meeting, the Employer concluded that termination of the grievor's employment was justified, and it terminated the grievor's employment for reasons of breach of trust, time theft and violation of Conditions of Employment. Amalgamated Transit Union, Local 113 (the "Union") grieves on behalf of the grievor that his termination was unjust and thereby contrary to the collective agreement between the parties. There were no objections to my jurisdiction to hear and determine this matter. For the reasons that follow, the grievance is dismissed, and the discharge is upheld.

Overview

2. The job of track patroller is done in teams of two. They were historically based at Dundas West Subway Station (hereafter "Dundas West") on the Bloor-Danforth subway line (Line 2), in the City of Toronto. Satellite locations were created at the McGowan and Wilson Garages, with four Track patrollers stationed at each. During the COVID-19 pandemic two more locations were created, one at each of Davisville and Greenwood Yards.

3. At all material times the grievor's supervisor was Lindon Badenoch. There is evidence before me, from both the Union and the Employer, that Mr. Badenoch and the grievor did not always see eye-to-eye. It was Mr. Badenoch's evidence that the grievor did not like how Mr. Badenoch managed the Track patrollers. Mr. Badenoch asked the grievor on two occasions whether he would prefer to work out of the Greenwood Yard (hereafter "Greenwood"). On those two occasions the grievor chose to stay at Dundas-West even though his partner, Adam Panagopka, had relocated to Greenwood. When the grievor asked to move to Greenwood he was allowed to do so. At a subsequent point Mr. Panagopka relocated to the McGowan Garage.
4. During the time they were all based at Dundas West, the teams of track patrollers would receive their assignments each day directly from Mr. Badenoch. Quite simply, the teams were assigned a portion of the subway system's track to walk while looking out for any hazards that might interfere with the safe operation of the trains. After completing that task, they were to return to Dundas West and file their reports. Not surprisingly, the track inspection was known colloquially as "walking the beat". Depending on the length of the beat and the speed of the walkers, the time spent was generally between three to five hours. After completing their beat and digitally filing their reports using a networked computer, the track patrollers remained at Dundas West until the end of their shift, at the ready, in the event that they were needed for other work assignments.
5. Dundas West also had a lunch room for the use of the track patrollers. There was some disagreement in the evidence about the grievor's practice of picking up lunch from a

patty restaurant on Eglinton Avenue and bring it to Dundas West. The grievor testified that he would call the base and ask if anyone wanted some food; he said that had happened five to ten times. In the grievor's view it was a notorious practice of which Mr. Badenoch was aware. Mr. Badenoch testified that on one occasion he allowed the grievor to go from the base to get an order of patties; he was unaware of any such notorious practice. In my view, nothing turns on this disagreement in the evidence. In either event, the grievor was returning to Dundas West to eat lunch with the others at their base of operations. Mr. Badenoch said that he spent most of his time in his office at Dundas West. Generally, the beats would have been completed, and the track patrollers would spend the rest of their afternoon shift after lunch awaiting any further work assignments. Accordingly, it is more likely than not that Mr. Badenoch would know where the track patrollers were while they were stood down waiting for any additional assignments.

The Relocation of the Grievor to Greenwood Yard

6. After the grievor relocated to Greenwood, Mr. Badenoch would send the grievor's assignment to a foreman at Greenwood to give to the grievor the following day. The grievor would report to the foreman there and then be in contact with Mr. Badenoch to confirm that no changes had been made to his assignment. The track patrollers were allowed to go to track level at 8:00 am. The grievor's shift was from 7:00 am to 2:30 pm. Having received his assignment and confirmed it with Mr. Badenoch, the grievor would leave right away to meet up with his partner at the location where their beat was to start and be there on time to go to track level at 8:00 am.

7. The Employer has in place a reporting mechanism called “The Integrity Program” by which it receives complaints against its employees. Two such complaints were received regarding the grievor, one on August 8, 2020 and the other on September 9, 2020. Each of these complaints is detailed in *Integrity Reports* numbered 9945301 and 9483272 respectively.
8. The first complaint resulted in an investigation being commenced by the Employer’s Investigative Services. Prior to instituting surveillance of the grievor regarding the first complaint, the second complaint was received. The Employer’s Investigative Services conducted surveillance of the grievor over a six-day period. Its *Investigative Report* is dated November 25, 2020.
9. Mr. Badenoch testified that he was not aware of the *Integrity Reports* until these proceedings. He said that he had received the *Investigative Report* shortly before the meeting of February 1, 2021, being the meeting at which the grievor’s employment was terminated. Mr. Badenoch said in his testimony that when he first read the *Investigative Report*, he found it to be shocking if true. The *Investigative Report* is dated November 25, 2020, and it includes at page seven the following *Summary of Surveillance* and *Conclusions*:

Summary of Surveillance

Plummer attended a residence at [*****] on four of the six days of surveillance, spending a total of three hours and forty minutes, which does not include travel time to and from the residence.

Plummer repeatedly engaged in non TTC related activity for extended period of times. This activity included grocery shopping, several visits to a residence in Scarborough, and on one occasion, Plummer spent 90 minutes sitting in his personal vehicle while parked on Greenwood Avenue.

Plummer consistently parked his vehicle inside Greenwood Yard and utilized his vehicle for the entirety of the surveillance conducted.

Conclusion

After conducting six days of surveillance the following allegations were substantiated.

- Although it was not determined if Plummer's mother resides on [*****], based on the time Plummer spent at the residence, the activity observed at the residence and the fact the address is listed as Plummer's mailing address, the evidence strongly suggests that his attendance at the residence was of a personal nature.
- Plummer went grocery shopping and engaged in non-TTC related activity while on shift.
- Plummer utilized his personal vehicle for the duration of the surveillance.

10. There is no dispute that the grievor's mother resided at the property where the grievor was seen by the investigators to be parked.

11. The meeting of February 1, 2021 was attended by Lyndon Badenoch, Tauqeer Qurashi and Laura Myers, representing the Employer, and by Adam Panagopka and the grievor, the Union. At the meeting the grievor was asked general questions about his work habits and then specific questions about the observations of his behaviour resulting from the covert surveillance and as set out in the *Investigative Report*. Suffice it to say that in the general questions he answered that any errands he might run, during the hours of his shifts, were completed on breaks or on his lunch period. As for the observations that resulted from the covert surveillance, he answered that if he was followed and he was seen engaging in various activities, "then it must be true." Notes of the meeting were taken by Laura Meyers, from the Human Resources Department and by Mr. Badenoch.

Mr. Badenoch authenticated his notes as accurate. Laura Myers was not called as a witness. It is my understanding that Ms. Myers was no longer a TTC employee at the time of the hearing.

12. Mr. Badenoch testified with respect to his expectations of the grievor while working out of the Greenwood Garage. Mr. Badenoch said that there was never any issue with the quality or quantity of the grievor's work product. He said that he expected the grievor to return to Greenwood upon completion of his beat and remain there at the ready to respond to any additional directions, as had been the situation at Dundas West. He said that if the grievor was not where he belonged he, Mr. Badenoch, could not know whether the grievor was safe. Further, if the grievor was not at Greenwood, response times could be reduced. Mr. Badenoch said that the requirement to return to their home base to await any further instructions had been made clear to all the track patrollers no matter their home base location. He said that the grievor had never been given permission to engage in the activities set out in the *Investigative Report*. He testified that he had never been told by the grievor that there was any problem with his being idle at Greenwood, and, further, it would have been open to the foreman at Greenwood to assign duties to fill up the grievor's time.

13. Mr. Badenoch also said that he had reviewed the Conditions of Employment with all of the employees reporting to him, including the grievor. The grievor had signed his copy on June 7, 2011 when he commenced his employment. The grievor had agreed to comply with those Conditions, which, ultimately, he failed so to do.

14. Mr. Badenoch said that there was zero tolerance for using a personal vehicle while at work. He said that he had refused such requests many times. There was no reason for the grievor to have used his personal vehicle and he, Mr. Badenoch, would not have agreed to it. Further, it was not acceptable for the grievor to sit in his vehicle, which he had been seen to do for many hours at a time. Mr. Badenoch also said that it was totally unacceptable for the grievor to have done his mother's grocery shopping while on the clock.
15. Under cross-examination, Mr. Badenoch agreed that there were no set times for the track patrollers to take their breaks, including that for lunch. He denied being aware that while working out of Dundas West the grievor had not promptly returned to that base after completing his beat. He agreed that he may have authorized the use of TTC vehicles to do a lunch run, but that the track-patrollers required his permission for any deviation from normal procedures. Mr. Badenoch said that the track-patrollers who were stationed at locations other than Dundas West were required to check out with the foreman there when they left for their beat. Although Mr. Badenoch agreed that the grievor was reachable on his personal cell-phone, he could also be paged or reached on the Tetra radio. He said that he was not always able to reach the grievor, but the grievor would call right back if he had missed Mr. Badenoch's call.
16. Mr. Badenoch clarified that the grievor worked out of the Greenwood Yard not the Greenwood subway station. He said that from the yard it was a short walk to either the Greenwood or Donlands subway stations where the grievor was to catch a train to the

location of his beat. He believed that the Donlands station was the closer of the two. At the yard, the grievor was stationed in a trailer a bit north of the main entrance. There was a lunchroom in the trailer for the grievor to use. The grievor was to receive his daily schedule from the gatehouse, proceed to the trailer and call Mr. Badenoch to confirm whether there had been any changes to his assignment.

17. Mr. Badenoch agreed that during the time that the grievor worked at Greenwood Yard he could be reached and that he and his partner completed their work assignments.

18. As for the meeting on February 1, 2021, at which the grievor's employment was terminated, Mr. Badenoch testified that he had come up with some of the questions on the template he and Ms. Meyers used at the meeting. He said that the grievor's answers as set out on the notes were not a summary but, rather, were the actual answers given by the grievor. He said that the grievor kept his answers to the bare minimum. Mr. Badenoch relied upon his notes in giving his testimony. He said that his recollection of the event did not extend much past his notes due to the passage of time. He said that he signed the letter of termination. He had provided the information used in the letter, but had some help with spelling and grammar.

19. The grievor gave evidence of his work history, duties as a track patroller, and the working conditions when he worked out of the Dundas West subway station including the restrictions and conditions that controlled when he could be at track level to walk his beat. It was his evidence, contrary to that of Mr. Badenoch, that Mr. Badenoch had told him that as long as he was accessible Mr. Badenoch did not care where the grievor was.

Accordingly, after completing his beat he might return to Dundas West or stop for a bite to eat. When he did return to Dundas West, he would download his report and wait for the shift to end, then go home. He did not remember ever seeing an “Operating Excellence” document which sets out the Employer’s expectations, although he did allow that he was familiar with the title. It was Mr. Badenoch’s evidence that the document had been reviewed with the track patrollers in February 2020. Notwithstanding that the document sets out that permission of the supervisor was required to leave the assigned work location or alter the assigned work schedule, the grievor reiterated that he had been told by Mr. Badenoch that “as long as you do your job and I can reach you by cell phone, I don’t care where you are”. Further, he said that his personal cell phone was essential to performing his duties. This was in response to commenting on the cell phone policy which reads as follows in the Operating Excellence document:

DON’T ...

- use cell phones for personal calls during paid work hours other than during designated break times
- use personal cell phones, personal electronic devices and non-work related reading while operating a vehicle, or working near moving equipment or high voltage (e.g. rail yards, bus roadways, machinery, etc.)
- use personal electronic devices or read non-work related material other than during designated breaks, unless authorized by your Foreperson

20. He testified that they also had pagers, radios, and were starting to get Tetra radios in the pre-Covid period.

21. The grievor was asked whether he ever took more than one hour of breaks when at Dundas West in the pre-Covid period. He said that he assumed that he did, because he

was just waiting for the shift to expire. He said that Mr. Badenoch was aware that not all the track patrollers would return to Dundas West Station. Some that did played cards until quitting time. He said that at the end of the shift he would show his face and wave good-bye to the guys.

22. The grievor said that he would always work over-time if there was an opportunity. On those occasions when there was no supervisor available, he would check out at the Greenwood Yard by "showing himself" and then going home.
23. He was asked about using his car for work purposes. He said that he would do so if covering a night shift.
24. Regarding his move to Greenwood Yard, the grievor said that at first he declined the opportunity. He said that a few things happened at Dundas West, intimating, without explaining, that they were factors in his change of mind. However, Mr. Badenoch stood in the way such that the grievor went over Mr. Badenoch's head to Mr. Badenoch's foreperson, Tauqeer Qurashi. He said that he had had to go over Mr. Badenoch's head a few times on different issues. He said that Mr. Badenoch was six months senior to him. Further, although they were cousins, Mr. Badenoch "had aspirations and was a person who talks at you rather than to you." After the grievor went to Mr. Qurashi. to complain about not being able to go to Greenwood, it was Mr. Badenoch who told the grievor that he could move to the Greenwood Yard as his home base.

25. The grievor gave evidence regarding procedures at Greenwood Yard. The start time was 7:00 am. Some days the gatekeeper would allow him to park on TTC property. He would usually park on the south side of the shop or alongside the shop along the fence. The shop was where he received his daily briefing from the foreperson. The forepersons' office was just north of the entrance gate. They would come down to the Shop to give their briefings to the grievor and his partner. The grievor said that he was always visible, as he is tall, so hard to hide. The grievor and his partner met in the Shop, got their briefings and would call Mr. Badenoch to see if there were any changes to their assignment; they would use the grievor's cell phone. Sometimes, if there were double-shifts to be done, Mr. Badenoch would call to ask the grievor whether he was interested in the over-time. After the grievor's partner, Adam Panagopka, moved to the McGowan Yard, the grievor would get his beat assignment and call Mr. Badenoch to determine whom he was partnered with, then speak to that person to arrange to meet. Accordingly, he testified that he would speak to Mr. Badenoch every day, and, by inference, was no longer always partnered with Adam.

26. The grievor testified that he would use his own car to drive from the Greenwood Yard to either Greenwood or Donlands stations. At times he would drive to the location where his beat was to start. He said that in pre-pandemic times, all the track patrollers would take the train to start their beat. He testified that one-time he asked for a TTC vehicle, was told to talk to Mr. Badenoch's boss, did so, and never heard back, so he just drove his car. He also testified that both he and Adam would individually go to their beat location and then jump on their beat. He said that when he drove to Greenwood or

Donlands station he did so because he would be walking his beat and sought to reduce the overall distance he would have to walk.

27. The grievor said that in the afternoons he would return to the forepersons' office at Greenwood Yard to download his reports. He and Adam would then return to the shop. He testified, without being specific as to the date, that the foreperson would come and tell him that it was bad for the foreperson's employees to see the grievor just hanging around the shop. He said that he started hanging out at Greenwood Station where the drivers sit. He testified that they started to complain so he went to Kennedy Station, then to Donlands Station. He testified that there were still complaints so he would just stay in his car. Also, because he could not easily get lunch because of line-ups, he started going to his mother's house for lunch.

28. The grievor was asked if he raised the problem with a foreperson. He said that he did not but the foreperson at Greenwood Yard, "told us not to come back to the yard". When asked why he did not tell Mr. Badenoch, he said, "Many times Lyndon said he did not care where we were, just be accessible." He was asked who "we" referred to. He said, "The track patrollers, including me". He said that at the end of his shift at Greenwood Yard he would return at 1:30 pm, do his downloads and leave at 2:00 pm after "the foreman waved to us to go".

29. Regarding having spent time at his mother's house, the grievor said that she was located near Kennedy Station. He never spoke to a foreperson about going there for lunch. On

other occasions, rather than return to Greenwood Yard, he sometimes sat in his car, sometimes bought groceries, or went to Shoppers Drug Mart, or to Randy's for lunch patties.

30. The grievor had no recollection of his activities on the dates covered by the *Investigation Report*, nor any reason to doubt the accuracy or veracity of the investigators' observations on the dates and times set out in the report, all of which questions were put to him. He said that he knew at some point that he was being followed, but not by whom. He said that he did not change his practices after concluding that he was being watched because he did not think that he was doing anything wrong.
31. The grievor also testified that he had reviewed the notes taken by Laura Myers at the meeting of February 1, 2021, and they were "pretty much accurate" compared to his memory of the meeting. He went on to comment on Mr. Badenoch's evidence that the grievor had not been remorseful, had a high sense of entitlement and had been nonchalant throughout the interview. His answers in his testimony were on the pugilistic side. He asked if Mr. Badenoch was psychic; did Mr. Badenoch know he was not remorseful because he did not cry; he said that he had answered the questions to the best of his abilities saying, "As I am now". With respect to having been nonchalant, he again said that he was just being truthful, "Same as now; it's his opinion; I can't answer for him."
32. The grievor said that he was shocked at the meeting when told that he was discharged. He said that he had done what he was told; it was COVID, and he had done what he had

been asked to by the foreman; that is, not returning to Woodbine Yard because of the complaints from co-workers who saw him as being idle.

33. The grievor gave his testimony over two days, with a gap of forty-two days between them. On the resumption of his direct examination, following that gap, he was asked whether he had anything to add regarding the investigation meeting held on February 1, 2021. He said that he would do a lot of things differently, including always communicating with the foreman, seeking permission and making sure things are clear if he was going to be at a different location. He was asked if he would have any issues working with Mr. Badenoch, to which he replied that he would have no issues working with Mr. Badenoch. That is, he said, work is work and he would stay focussed on getting his work done.

34. The grievor was cross-examined on his second day of giving evidence. He said that at the time he did not think that he had done anything wrong, but, looking back, he had lost his job. So, yes, he must have done. Although the grievor reiterated that he should have notified his foreman of his location after finishing his beat, he emphasized that he should have clarified Mr. Badenoch's instruction that Mr. Badenoch did not care where he was, as long as he could be reached. Although he had completed his work assignment by walking his beat, he said that he had not met the standard expected because he had been fired. He nonetheless added that he did follow what he was told and could only go by what Mr. Badenoch gave to multiple people; that is, to just remain available. It was put

to him that others had followed the rule of returning to their home base. His answer was to, "Ask them."

35. The grievor agreed that the Employer may make rules and employees must follow them.

He again agreed that he had breached the TTC rules, but at the same time he said that he followed what the Greenwood foreman said to him, which was not to return to Greenwood yard after finishing his beat.

36. The Conditions of Employment document was reviewed with him. He agreed that he had signed it and was responsible for knowing and complying with those conditions. He also acknowledged that not complying with the conditions might result in disciplinary action up to and including dismissal.

37. The Union called Frank Kirk to testify. He was a TTC employee for thirty-two years, for about fifteen of which he was a track patroller. He was retired at the time of the hearing. Mr. Badenoch was Mr. Kirk's supervisor for about two years.

38. Mr. Kirk said that the grievor and Mr. Badenoch would "butt heads", which he put down to them having similar personality traits. For all of his time as a track patroller Mr. Kirk was based at Dundas West Subway Station. His evidence was consistent with others as regards the duties of a track patroller. He said that he and the grievor walked at the same pace. That is, he was as quick as the grievor. He testified that after completing their beat the track patrollers could return to Dundas West or stop first for lunch elsewhere. His practice was first to go get something to eat, perhaps do some shopping. He did not have

a regular routine with regard to the timing of his return to Dundas West. He said that he would not ask permission to delay his return, and that the only requirement was to be available to be contacted when needed. He would return with enough time to do his down-loads, that being 2:45 to 3:00 pm, where he would see some of the others, but not many. However, he did not know what the others did because they were spread out across the system. He said that they were a very independent group with no contact amongst themselves.

39. Mr. Kirk said that his practices were no different pre and post COVID, which included being contacted by pager or, if he was at track-level, by radio. He also said that he would sometimes use his personal vehicle, usually on weekends and that it was not unusual for track patrollers to use their own vehicles. His shift was 7:00 am to 3:30 pm, with days off that rotated on a nine-day cycle.
40. Under cross-examination Mr. Kirk agreed that having a job required doing a day's work for a day's pay. He said that he did the duties assigned to him. H agreed that he was unsupervised while working out of the Dundas West base and he was trusted to complete his duties and obey the rules and regulations. He was asked about the "Operating Excellence" document, which he did not remember ever seeing. He said that he was never told not to use a cell phone and never had to advise a foreman if he was leaving the work location unless he was "booking off sick or something." He was asked about entitlement to breaks and time for lunch. His evidence was generally that it was not possible to comply. He said that he did not usually eat lunch.

41. In redirect examination Mr. Kirk said that he did not own a cell phone at the time.
42. The Employer called Noah Gordon Foley in reply. He started working at the TTC as a janitor in 2012 and by 2019 he had become a track patroller, which position he held until 2022. At the time he gave his evidence, he was an assistant supervisor in the same section, same department. He reiterated much the same evidence as others regarding hours of various beats, job duties and the like. He said almost everyone would take lunch after completing their walk. If he brought his lunch from home, he would return to Dundas West. Otherwise he would stop to buy lunch along the way. Accordingly he might reach Dundas West between 1:30 and sometimes after 2:30. He would download his reports, perhaps, but not often be asked to do something in the yard or be asked to do something at track-level. He said that Mr. Badenoch had never said he could go shopping, hang out at home or his mother's house, not be at Dundas West nor had Mr. Badenoch ever said that he did not care where he was. He said that all that had changed as a result of COVID was that the track patrollers were allowed to go to track level at 8:00 am rather than at 10:00 am, giving him more time at the end of his shift, but he was still required to be on stand-by with the same expectations as before COVID.
43. Under cross-examination Mr. Foley said that, pre-COVID, his partner, who was based at the McGowan Garage, would sometimes start work at Dundas West for the morning briefing. During COVID Mr. Foley moved his home base to Davisville Station. He said that there were no material differences in walking his beats before or during COVID. He

said that breaks are uniformly taken after completing the track patrollers' beats. He said that if a serious problem was discovered while walking a beat he would stay until a foreman arrived. Someone would bring a blue caution light, and trains would be slowed or stopped.

44. Mr. Foley reiterated that one of the partners of the team was responsible for the downloads which would free up the other partner. He said that he had no knowledge of what the grievor was asked to do, unless if partnered with him, nor did he know whether the grievor had a locker at Greenwood Yard. Mr. Foley also said that he lived close to Spadina Station and had on occasion told the grievor that he was going home for lunch. In re-direct examination Mr. Foley said that if he went home for lunch, he would only take the allotted time.

The Submissions of the Parties

45. The Employer said that the grievor was evasive, not forthright and inconsistent in giving his evidence and during the investigation into this matter. Further, the grievor repeatedly said in his evidence that his behaviours were acceptable. The Employer submitted that the caselaw supports the conclusion that in such circumstances discharge for time-theft is upheld. The grievor's work was unsupervised, which is a position of trust, and that trust in the grievor has been irrevocably broken. The grievor was said not to have accepted that his behaviour was wrong and be remorseful. In such a situation reinstatement would be inappropriate.

46. The Employer surmised that the grievor's behaviour while working from Dundas West Station was more likely than not similar to the evidence here related to working from Greenwood Station. It submitted that the grievor's evidence that work patterns had changed because of the impact of COVID-19 were not credible and contrary to the evidence of other witnesses.
47. When the grievor was told by a supervisor at Greenwood that it looked bad for him to return to the yard at 10:00 or 11:00 am, the grievor ought to have sought guidance from his supervisor, Mr. Badenoch, not simply gone shopping, visited his mother, or otherwise take three hours off every day. It seems that the grievor lived by his own rule that as long as no one says anything such behaviour is fine. When he got caught by the investigation he showed no remorse; he merely justified his behaviour as compliant with his responsibilities as an employee.
48. The Employer reviewed the evidence, highlighting the facts of the investigators who were said to have reported witnessing large gaps in the grievor's work day which were taken up with personal activities. The Employer reviewed the grievor's evidence, submitting that he was evasive, argumentative, inconsistent and not accepting of any responsibility for his behaviour nor showing any remorse for having whiled away large parts of his workday on personal pursuits. The Employer said that the grievor seemed to vacillate between accepting that his behaviour was unacceptable and saying that there was nothing untoward in his behaviour. Further, without the grievor accepting that his

behaviour was wrong, there is no prospect that his behaviour would improve if he were returned to work. That trust has been irrevocably broken.

49. The Employer relied upon the following authorities: *Enbridge Gas Inc. v Unifor, Local 975*, 2023 CanLII 2937 (ON LA) (Luborsky); *United Steelworkers and Grand & Toy Ltd (Gonzales Grievance)*, (unreported, November 13, 2007 (Trachuk); *Surrey (City) v Canadian Union of Public Employees, Local 402 (Saliken Grievance)*, [2007] BCCAAA No 8, (Foley); *Regional District of Central Okanagan and Staff Assn. of the Regional District of Central Okanagan (Re)*, 2003 CanLII 89599 (BC LA) (Chertkow); *Invista (Canada) Company v. Communications, Energy and Paperworkers Union of Canada, Local 28-0*, 2006 CanLII 29816 (ON LA) (Barrett); *C.E.P. v. Bell Canada*, 1996 CarswellNat 2740 (Burkett); *C.U.P.E., Local 503 v. Ottawa (City) (Baumert), Re*, 2010 CarswellOnt 16291 (Dissanayake); *O.E. Inc. and USWA, Local 9185 (Lalji), Re*, 1993 CarswellOnt 5639 (Kennedy); *Murdoch v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 21 (CanLII) (Jaworski); *Waste Management of Canada Corporation v Labourers' International Union of North America, Local 493*, 2017 CanLII 66348 (ON LA) (Gauthier); *Coca Cola Bottling Ltd. and Teamsters, Local 213 (Whiles), Re*, 2005 CarswellBC 4046 (Thorne); *CUPE Local 1483 v Dufferin Peel Catholic District School Board*, 2024 CanLII 48607 (ON LA) (Beatty); *Vancouver (City) v Canadian Union of Public Employees 1004, (Grant Grievance)*, [2010] BCCAAA No 34 (Sullivan).

50. The Union submitted that the grievor's termination of employment was unjust, and as such he should be reinstated and be made whole. It said that he was an honest and forthcoming witness, which included unfavourable admissions. In the result, it submitted that his evidence was credible and balanced.
51. The Union said that this case is not about time theft, but rather about his having taken extended breaks. Further, even if the case is seen as one of time-theft, there are many mitigating factors that accrue to the grievor's benefit. The grievor was said to have always completed his full day's work assignments.
52. The Union submitted that the Employer's authorities relate to cases where those grievors had lied about their behaviours, whereas the grievor here had not done so. Although he had not provided more detail than required, that is not in itself evidence of a breach of the trust necessary to prevent his reinstatement. The Union said that had the grievor offered an apology after testifying that he had honestly believed his behaviours were appropriate, it would have been said that he was only seeking to get his job back.
53. As to the Employer's submission that it believed it was more likely than not that the grievor had engaged in these same behaviours of taking extended breaks while based at Dundas-West Subway Station, the Union said that there was no need to guess. The grievor admitted that he had taken lengthy breaks while based at Dundas-West. Further, the grievor had not sought to move his base to Greenwood to escape the watchful eye of his supervisor, Mr. Badenoch. Mr. Badenoch had asked the grievor twice to make the

move, and it was only after his partner moved from Dundas-West that the grievor agreed to go to Greenwood. He testified that pre-COVID-19 he had taken lengthy breaks while co-workers went back to Dundas-West to play cards.

54. The Union submitted that the grievor had been a track-patroller for approximately eight years and had a clean record at the time he was terminated. He described the duties of the track-patroller as being actual time walking the assigned beat, or specified length of track, and the travel time to get to and from the assigned beat. The latter portion was variable depending on distance from the base, and it might take as long as two hours. The Union said that this is a rather unique case, because the evidence is that completing their beat and reporting the results might take from two to five hours, and there is scant evidence of what the track-patrollers were expected to do with the remainder. Further, the evidence was said to establish that personal phones were used by Mr. Badenoch to contact the track-patrollers and there is no indication that the reasons for his termination included his unauthorized use of his personal automobile. Further, it said that there was no evidence that the grievor was contacted and asked to complete any task but did not do so.

55. The Union submitted that the relationship between Mr. Badenoch and the grievor was strained at times, but Mr. Badenoch testified in his cross-examination that the grievor was a good track-patroller in terms of his work product. The Union submitted that it was Mr. Badenoch's animus to the grievor that triggered the unjust termination.

56. The Union said that the grievor was told by Mr. Badenoch that he did not care where the grievor was, so long as he could be reached in order to be assigned work duties in addition to his assigned beat. The Union submitted that part of the uniqueness of this matter is that the work location is not as straightforward as submitted on behalf of the Employer. The grievor testified that after completing his beat and filing his reports he was usually waiting to go home, and that Mr. Badenoch knew that to be the case.
57. The Union submitted that the grievor was candid in his evidence, and that candor goes to his credit. He said that the supervisor at Greenwood had told him not to return so early, so he did not. He said that he did not ask Mr. Badenoch what he should do with the time. He said that he knew he was under surveillance, but he did not change his behaviours because of that. He did not ask permission to do as he did; he did not communicate his activities to his foreperson. Nor did he make sure that his activities were clear. The Union disputed the Employer's submission that the grievor was less than honest at the interview stage and at the hearing. It said that there is a considerable difference between concise answers and being untruthful. It said that the grievor did not lie. It submitted that the notes of the interview recorded by Ms. Myers were more reliable than those of Mr. Badenoch because of Mr. Badenoch's attitude towards the grievor. Ms. Myers' notes were said to be more in accordance with the grievor's evidence, which included admissions that were not necessarily favourable.
58. The Union submitted that the track-patroller job has flexible timelines and considerable downtime, unlike the jobs in the jurisprudence relied upon by the Employer. Those cases

often include evidence of assigned duties not being completed, which is not the situation here. It said that the looseness at play in these circumstances is not indicative of the intentional behaviour necessary to establish that the trust required in an employment relationship is irrevocably broken. It said that when the investigation's results were put to Mr. Badenoch, he came down too hard on the grievor because he had a vested interest in showing his own superiors that he was effective in improving the workplace.

59. The Union reiterated that the grievor's use of his personal vehicle was not articulated as part of the reasons for termination. It said that the grievor's failure to get instructions about how to react to the Greenwood Supervisor's request not to return to Greenwood too early was not an irreparable mistake. Further, it said that this is not a theft of time case because it lacks the quasi-criminality of those cases. The situation here was said to be more in the nature of neglect of duty or misuse of time than theft of time. That is not to say it is not wrong, but it should not result in termination of employment. The Union also said that, in principle, the grievor was in breach of the standard Conditions of Employment, but there is no evidence that he was shirking any actual duties on his extended breaks, including those spent at his mother's house. Other track-patrollers were likely playing cards or doing who knows what.

60. The Union submitted that the grievor's actions were condoned and that condonation took place at two levels. First, the patterns set at Dundas-West indicated that there was an expectation that there would be periods of extended down-time during which the track-patrollers were to be available for other assignments. The grievor was always so

available. Second, at Greenwood Yard the supervisor told the grievor that it looked bad to return early and just hang out at the Yard. The grievor then took to sitting in his car and no one complained. The Union said that when the grievor's behaviours came to light it was a disproportionate reaction to terminate his employment. He ought to have been given direction as to how he should have reacted to the Greenwood supervisor's request in the context of the behaviours expected and approved at Dundas-West.

61. The Union submitted that the grievor's actions gave rise to discipline. The discharge from employment was excessive, and I should substitute a just and equitable penalty.
62. The Union relied upon the following authorities: *CUPE Local 109 and City of Kingston*, 2016 CanLII 19081 (Nyman); *City of Hamilton and CUPE Local 5167*, 2015 CanLII 22664 (Slotnick); *Trillium Health Partners and CUPE Local 5181*, 2019 CANLII 128924 (White); *Horizon Plastics Company Ltd and UFCWC, Local 175*, 2010 CanLII29972 (Stout); *UFCW Local 109 and Sobeys West Inc. - Safeway Operations*, 2019 CanLII103840 (Chankasingh); *Teck Highland Valley Copper v. United Steelworkers, Local 7619*, [2017] B.C.C.A.A.A. No. 159 (Shapansky Grievance) (Sullivan); *Health Employers' Assn. of British Columbia v. Health Sciences Assn. of British Columbia (Cheema Grievance)* [2011] B.C.C.A.A.A. No. 125 (Glass); *Frito-Lay Canada Ltd Milk & Bread Drivers, Dairy Employees, Caterers, & Allied Employees, Local 647*, 1975 Canlii2059 (Beatty, Brown, Smith).

63. In reply the Employer submitted that the Union's submissions boil down to the grievor having, at the material time, an honest but mistaken belief that his behaviour was acceptable. Now he knows it was wrong, leaving us only with the import of failing to consult Mr. Badenoch.
64. The Employer said that there has been no acknowledgement by the grievor, nor the Union that the things he was doing, shopping, spending time at his mother's house and using and sitting in his car for extended periods of time, were wrong in and of themselves. It said that the grievor ought to have known that he was deliberately flouting the rules. Further, if it was a mistaken belief that the grievor now knows was wrong, why is there still no expression of remorse. He had justified his actions both in the investigation and continued to do so at the hearing.
65. The Employer said that the jurisprudence breaks one of three ways: the grievor is reinstated because the time theft was not proven, the grievor is reinstated after admitting to the conduct, providing compelling remorse, or, the grievor's discharge is upheld because there is no acknowledgement of wrongdoing and no remorse. It said that whatever it is called, the cases treat the behaviour the same way. The behaviour is the taking of massively extended breaks where the grievor is not working.
66. The Employer said that it takes the grievor's testimony quite differently than does the Union. It said that he was neither honest nor a straight shooter. Further, the extent to which the grievor got away with it at Dundas-West was not acquiesced in by the

Employer. The fact that the grievor thought that the down-time at Dundas-West was just “killing time” equates neither to the Employer’s view that it is necessary to have the track-patrollers available nor to the grievor deciding that he can just go home, go shopping or play computer games at his mother’s house.

67. The Employer submitted that the preponderance of caselaw deals with the lack of forthrightness not outright lying. The grievor was said to have demonstrated in the investigation and in his evidence that he cannot be trusted in a position where he is unsupervised. As for condonation, it said that there is no evidence that Mr. Badenoch ever knew of the grievor’s actions, either at Dundas-West or at Greenwood, with respect to his taking extended breaks and not being immediately available to work. It said that it is time theft to not be where you are meant to be.

68. In reply, the Employer relied upon: *Dalhousie College & University v. C.U.P.E., Local 1392*, 1996 CarswellNS 623, 42 C.L.A.S. 419.

Analysis

69. The most objective evidence of the grievor’s use of his time while at work is from the surveillance recorded in the *Investigation Report* dated November, 2020. The investigator, Zac Nettleton, testified and authenticated the contents of that report.

70. The grievor was under surveillance for six days in October 2020. The times and dates may be summarized into five categories, being the amounts of time the grievor spent

getting to the geographic location of the start of his beat, the length of time to complete his beat, the time that he spent at his mother's house, the time during which he sat in his car while parked on Greenwood Avenue outside of Greenwood Yard, and the time that he spent in Greenwood Yard prior to the completion of his shift.

71. The Employer did not express any concern with the amount of the time that the grievor took to get to his beat nor to the time taken to walk his beat. The concern centers on what he did with his time after completing his beat.
72. The collective agreement provides for a one-half hour lunch period and two fifteen minute breaks. The evidence supports the finding that the job of the track patroller is such that once they start walking their beat there is no practical way that they can take any of their breaks until they are finished. To take a break they would need to notify Transit Control each time they go down to or come up from track level. The practice is that they take a one-hour break after finishing their beat. On that basis, there can be no objection to where they take their break, so long as they adhere to the time allowed.
73. On four of the six days that the grievor was monitored, he was observed to have spent time at his mother's residence. On day one he spent one hour there. On day two he did not spend any time there. On day three he spent one hour at his mother's house. On day four he did not go to his mother's house. However, on day five from ten-fifteen to approximately 1:00 pm, he drove from McCowan Yard, spent time at a strip-plaza at Brimley Road and Eglinton Avenue East, stopped at a No-Frills grocery store where he

obtained a full cart of groceries, which he loaded into his car, stopped at a Shoppers Drug Mart, refueled his car, drove to his mother's house and took the groceries inside. The grievor then spent an hour inside the house. On day six, the grievor spent forty minutes at his mother's address, following which the surveillance ended at 1:00 pm. There was no account of his parking at Greenwood Avenue that day.

74. Day three was the first day on which the grievor was seen sitting in his car while parked on Greenwood Avenue. That day, after spending an hour at his mother's house, he parked on Greenwood Avenue south of the yard and stayed in his vehicle there for 90 minutes before driving into the Yard. The next day, day four of the surveillance, the grievor was seen parked north of the entrance to Greenwood Yard, reclined in the driver's seat, for 80 minutes before driving into the Yard. On the grocery shopping day, day five, the grievor left his mother's house and drove to Greenwood Avenue, parked north of the security gate and stayed inside his car for thirty minutes before driving into the Yard. Add to all that, on each day, the driving time between each stop.

75. The Union submitted that this type of behaviour was notorious to the degree that management should be taken to have condoned the behaviour. However, other than the grievor's testimony, the only other witness called to support the grievor's sworn testimony was the retired, former, co-worker Frank Kirk.

76. Mr. Kirk's evidence was very helpful in terms of putting forward the context within which the track patrollers discharge their duties and the grievor's place within that context.
77. Mr. Kirk corroborated that the grievor and Mr. Badenoch had a less than ideal relationship. As Mr. Kirk described it, they would "butt heads". Contrary to the grievor's evidence that he was faster than others, Mr. Kirk said that he was as fast, and he described the job as being one where the track patrollers were trusted to perform their duties and obey the rules and regulations. He testified that the job had flexibility in that there was no pressure on returning to Dundas West. In his direct-examination Mr. Kirk said that he might first get lunch, although he also testified in his cross-examination that he did not usually eat lunch. He said that he might do some shopping, and he had no regular routine regarding his return to Dundas West. The thrust of his evidence was that there was scope within the time taken to return to do some *ancillary* personal chores on the way back to Dundas West.
78. The grievor's behaviours, as detailed in the *Investigation Report* described above, were an order of magnitude different than that described by Mr. Kirk. The grievor would go far out of his way while returning to Greenwood Yard. For example, and in addition to the behaviours described above, on day four, prior to his 80 minutes reclined in the driver's seat while parked on Greenwood, after finishing his beat at St. George Station on Bloor Street, he drove to Eglinton Avenue West and Oakwood Avenue, presumably to his favourite patty shop. He was described in the *Report* as having that day, "entered a

food establishment on two occasions during his tenure in the area and returned to his vehicle both times carrying a plastic bag of items. Plummer remained in the area of Oakwood Avenue and Eglinton Avenue West for an hour.”

79. The grievor reiterated many times in his evidence that he had nowhere to go because the foreman at Greenwood Yard had told him that others had complained because of his idleness. The grievor also reiterated many times that Mr. Badenoch had told all the track patrollers that he did not care where they were, so long as he could reach them. Mr. Badenoch’s evidence was that he had said no such thing, and he did need to know where they were to know that they were safe and to be able to send them in a timely fashion to any location where they might be needed.

80. The grievor spoke with Mr. Badenoch every day in order to confirm that there had been no changes to his work assignment. Even assuming that the Greenwood Yard supervisor actually said what the grievor many times insisted that he had heard, the only reasonable course of action was for the grievor to have asked Mr. Badenoch, his supervisor, what he should do. It is most unlikely that Mr. Badenoch would have told him to go and do the grocery shopping for his mother or to spend excess time driving to Oakwood and Eglinton for an extended lunch period, which were only two of the culpable choices that the grievor made.

81. I am troubled by the absence of witnesses that might have corroborated the grievor’s evidence regarding both the alleged instruction of the Greenwood Yard supervisor and

Mr. Badenoch's purported direction giving free rein to all the track patrollers that they might do whatever they pleased so long as they could be contacted. With respect to the former, the grievor testified that he and his partner, during the time that his partner Andy Panagopka was at Greenwood, were both told to be scarce at Greenwood Yard after completing their beats. I am not formally drawing a negative inference at the absence of such evidence. These are just added concerns that chip away at the grievor's credibility.

82. As regards credibility, I am left to assess whether the evidence of Mr. Badenoch and Mr. Foley are to be preferred rather than that of the grievor and Mr. Kirk.

83. In *Enbridge Gas (supra)* Arbitrator Luborsky succinctly summarizes the general approach to assessing credibility in paragraphs 78 to 80 as follows:

[78] In assessing the credibility of witnesses, I have been guided by Arbitrator MacDowell's approach in *Re Windsor (City) and C.U.P.E., Local 82 (Automotive Service Technicians)*, 108 C.L.A.S. 309, 2011 CLB 3075 (Ont. Arb.) (MacDowell), who wrote at para. 22:

To the extent that I have had to assess the "credibility" of the various witnesses, I have adopted the approach outlined in cases such as *Farnya v. Chorny*, [1952] D.L.R. 354, at pages 356-358 (B.C.C.A.) and *Landry v. Pratt & Whitney Canada*, 1996 CanLII 10409 (AB QB), [1996] 8 W.W.R. 511. Accordingly, I have taken into account such factors as: the demeanour of the witnesses when giving their evidence; ***the firmness of their recollections; the clarity, consistency, and overall plausibility of that testimony when tested by cross-examination; the ability of the witnesses to resist the tug of self-interest or self-justification when framing their answers; the inclination of a witness to prevaricate, make excuses, or alternatively, to candidly admit facts that might put him/her in a poor light; the consistency or otherwise with whatever documentary material is available; and what seems to me to be most likely in all the circumstances.*** I have also taken into account the fact that witnesses were being asked to recall the details of events

that happened some years ago and that were not considered to be legally significant at the time. In the circumstances, no one could expect an untrained witness to recall those details with precision.

[Emphasis added]

[79] The reference to the British Columbia Court of Appeal's decision in *Faryna v. Chorny*, [1952] D.L.R. 354, is noteworthy for O'Halloran, J.A.'s oft-quoted test for assessing credibility where he writes at p. 357: "The credibility of interested witness, particularly in cases of conflict of evidence, ***cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the 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" (emphasis added).

[80] Focusing on "demeanour" in assessing the relative credibility of witnesses, I have also been influenced by Arbitrator Surdykowski's view in *Henniges Automotive v. U.S.W., Local 455*, 2008 CarswellOnt 8984, 178 L.A.C. (4th) 432, 95 C.L.A.S. 301 (Ont. Arb.) (Surdykowski), who wrote at para. 42:

This case presents the classic "he said, (s)he said" situation and raises the usual credibility issues in that respect. In assessing credibility, I agree with the approach of the British Columbia Court of Appeal in *Faryna v. Chorny* (1951), 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) (and *Landry v. Pratt & Whitney Canada*, 1996 CanLII 10409 (AB QB), [1996] 8 W.W.R. 511 (Alta. Q.B.)). However, credibility is a complex thing, and like many tests or principles, the test in *Faryna v. Chorny*, *supra*, is easier to state than to apply. ***Although I have considered demeanour, I do not consider it to be a reliable indicator of credibility and I give it little weight. The clarity, consistency and plausibility of the testimony as tested in cross-examination in the context of the evidence as a whole, and the apparent ability of the witnesses to resist the self-justification or the influence of self-interest are far more significant indicators.***

[Emphasis added]

84. Like Arbitrator Surdykowski in *Henniges*, as cited within *Enbridge*, I too have a classic “he said (s)he said” situation and do not find that demeanour is a reliable barometer of truthfulness. I have noted the grievor’s sometimes combative insistence in giving his evidence on issues such as what he fashioned as directions/instructions from Mr. Badenoch and the supervisor at Greenwood Yard, but I give that demeanour little weight. More to the point is that it beggars belief that his supervisors intended that the grievor drive his car at all, drive long distances to buy lunch and thereby grossly overstay his allowed breaks, do his mother’s shopping and spend hours nesting in his car rather than be available at his expected and required place of work. I find as facts that he did those things contrary to his Conditions of Employment and contrary to what he knew or ought to have known, were the expectations of his supervisors. His explanations are entirely unreasonable, and I reject them.
85. Wherever the evidence of the grievor and Mr. Kirk conflict with that of Mr. Badenoch or Mr. Foley, I prefer the evidence of Mr. Badenoch and Mr. Foley as the more reasonable and truthful account.
86. It is true that the grievor performed his track patrolling duties as assigned, but he was also required to be at his assigned location, Greenwood Yard, after completing his duties.
87. The Union, while acknowledging that some discipline may have been warranted, says that the penalty of discharge from employment was excessive.

88. In *Enbridge Gas*, supra, Arbitrator Luborsky was dealing with a termination grievance in circumstances involving Gas Technicians. Prior to COVID-19 two technicians would travel to service calls in pairs. One might provide the service while the other sat in the vehicle completing administrative tasks. As part of its response to the pandemic each of the two Gas Technician workers drove separate vehicles. The grievor took to not attending scheduled calls, leaving his partner to do the actual work, while he purportedly completed the administrative work. The historic GPS co-ordinated use of that grievor's vehicle showed large amounts of his time at home and in parking lots. He claimed that he was either doing administrative work or "just trying to kill some time, waiting for the next call to come in". The grievor claimed full-days' pay even though he had not attended the job sites. As is the case in the matter before me, the grievor thought that he had done nothing wrong in leaving his partner to do the work because he was available if his partner called him to come and assist. Paragraph 30 of the report reads as follows:

[99] Consequently, I find notwithstanding the Grievor's cumulative 23 years of seasonal and permanent employment by the Company with a relatively minor disciplinary record; that the deliberative nature of his misconduct over an extensive period of time, its seriousness, his deception afterwards, and particularly the absence of any personal recognition, responsibility or remorse for his misconduct coupled with a sincere commitment to improve, has so undermined any confidence that one can reasonably have in the Grievor's rehabilitation potential, that I must conclude it is not appropriate to exercise arbitral discretion to reinstate the Grievor without compensation and/or on terms, despite the legitimate fear and anxiety he, and many other workers may have felt during the first year of the COVID-19 pandemic.

89. The supervisor's evidence was that the two Gas Technicians were both expected to travel to each call in their individual vehicles. The grievor testified that the supervisors had told the Gas Technicians who lived close-by to their base of operations that they could wait

for assignments or do computer work at their homes (at paragraph 29). The supervisor denied ever giving such directions. Paragraph 34 reads as follows:

[34] Mr. Milotte disputed the Grievor's claim of insufficient work or ever telling the Grievor that he could stay in the SMOC yard to do computerized training inside his vehicle, stating that "no computer work was assigned to [the Grievor]". Instead he confirmed he met with the Grievor (and all his direct reports) every morning in the SMOC yard at the start of their shift to review issues related to the work schedule but didn't often see the employees at jobsites during the day unless they were responding to an emergency, which Mr. Milotte typically attended as well, although he occasionally communicated with the floater crew by telephone, e-mail, or text messages. He never received a report that the Grievor failed to attend an emergency call (which the Company concedes the Grievor never missed).

90. The grievor in *Enbridge* was expected to be on site with his partner. For many of those calls he might very well have sat in his truck while his partner did the servicing work. That is what he was expected and told to do. Claiming paid time for doing that would have been consistent with management's expectations and would have been a legitimate claim. Being at home or parked at the Nepean Sports Complex or the Tim Hortons coffee shop, as he was also wont to do, resulted in his discharge, which was upheld by Arbitrator Luborsky as contrary to company policies of which the grievor was aware (see paragraphs 23 and 41). The grievor here was expected, and told, to be available at the Greenwood Yard. The grievor's Greenwood location had been a matter of some contention. If the grievor needed to be somewhere else than idle at Greenwood, he knew or ought to have known that any alternative location needed to be directed by Mr. Badenoch or Mr. Qurashi if the grievor felt the need to go over Mr. Badenoch's head. The grievor was well aware of the applicable chain of command.

91. Although many of the cases helpfully reviewed by Arbitrator Luborsky involve the falsification of time sheets, the situation before me is different without distinction. The discharge in this current matter was for the reasons set out in the memorandum to the grievor from Mr. Badenoch dated February 8, 2021, which reads in part as follows:

The TTC relies on the integrity and the trust established with employees. You seriously breached this trust. Therefore, in consideration of the information and your responses, you are terminated from the TTC for the following reasons:

- breach of trust
- time theft
- violation of Conditions of Employment

92. The grievor's actions in this matter, in treating the Employer's time as his own, was indeed a very serious matter that strikes at the heart of the trust an Employer must be able to place in the grievor. This is particularly true when the employee is largely unsupervised as is the situation here.

93. The grievor had no compunction, regret or hesitation in conducting his personal business on TTC time nor in whiling-away hours of TTC time shopping, at his mother's home or seemingly sleeping in his car. The review of the jurisprudence in *Enbridge*, and that submitted here, uniformly recognizes such behaviour as being subject to discipline and views termination of employment as being a reasonable response. Here the Union properly concedes that discipline was warranted, but it objects to the discharge as excessive.

94. In *Grand and Toy Limited*, supra, Arbitrator Trachuk upheld the discharge of an employee who had others clock out for him and who spent time at home or at his girlfriend's house when he was supposed to be doing deliveries. Arbitrator Trachuk says at the penultimate page that, "The grievor has engaged in a scheme of dishonest and fraudulent conduct which is unquestionable cause for discipline. The real question before me is whether I should exercise my discretion to substitute a penalty short of discharge." That is also the situation before me in this matter.

95. The jurisprudence also clearly recognizes that the exercise at this stage is to determine whether there are mitigating factors that support the exercise of my discretion to reinstate the grievor. That is, can the employment relationship be restored? Key factors in that determination are noted in paragraph 108 of *City of Surrey* as follows:

108 The arbitral authorities support the principle that the degree to which there is an admission of guilt and an expression of remorse, and the content and timing of any such admission of guilt and expression of remorse, are key factors in determining whether an employment relationship can be restored.

96. The lack of any admission of guilt and genuine expression of remorse is a sufficient consideration here of the usual mitigating factors to be considered in determining if discretion should be exercised to alter the penalty of discharge, such as the factors reviewed by Arbitrator Stout on *Horizon Plastics*, supra.

97. The grievor in this matter showed no appreciation that what he did was wrong at either the interview that resulted in his discharge nor at the hearing itself. As for the interview, to read the notes of the interview tells that story. Further, the grievor seemed quite

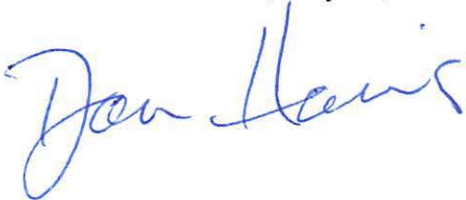
agreeable to the facts alleged in the *Investigation Report*, and at the hearing he firmly, and repeatedly, defended his actions as being within the acceptable scope of behaviour. He never agreed that what he had done was wrong, so, he could not express remorse. He agreed that he had behaved as described, but he said that there was nothing untoward in his actions.

98. The closest the grievor came to accepting that the behaviours were fraudulent and dishonest, which is the first step on the road to remorse, was saying in his testimony that he must have done something wrong because his job had been terminated and he was now here at arbitration.
99. Most tellingly was the second day of the grievor's testimony. The grievor's direct examination began on July 11, 2023 and continued on August 22, 2023, for a scant few minutes with a handful of questions. The second to last question dealt with whether he had anything to add to his previous evidence relating to the investigation meeting. He said that he would now do a lot of things differently if he was put back to work. He would ask permission to be away from the work location, always communicate with the foreman and seek permission and make sure things are clear if going to a different location. There was no recognition in his answer that what he had done was fraudulent and dishonest. Instead, as was consistent with all of his previous testimony, he focused on his opinion that it was the fault of Mr. Badenoch who had not been clear enough in his instructions.

100. The last question that he was asked dealt with his thoughts about working again with Mr. Badenoch. His answer was curt and measured. He said simply that he would have no issues working with Mr. Badenoch. Union counsel threw him this one, last lifeline to show that he cared about the dishonesty of his actions, that he cared about his rocky relationship with Mr. Badenoch, and that he cared about what he might do to make restorative amends. He was unable to show remorse and repeated that he still thought that he had nothing for which to be sorry. I have no belief at all that the employment relationship is in any way salvageable. Accordingly, I decline to exercise my jurisdiction to substitute a penalty short of discharge.

101. For all the reasons above, I find that the Toronto Transit Commission had just cause to discharge Mr. Plummer, did not violate the collective agreement, and there is no basis for me to exercise my statutory discretion to substitute a lesser penalty. The grievance is denied.

Dated at Toronto, May 28, 2026.



Daniel Harris, Sole Arbitrator