II. Awarding Damages in Lieu of Reinstatement: Valuing the Benefit of the Collective Agreement and Other Factors

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Introduction

This paper provides a brief overview of the nature and calculation of the quantum of damages that may be awarded to a grievor in lieu of reinstatement to employment. This issue appears to be arising more frequently, no doubt due to the decision of the Supreme Court of Canada in *Lethbridge Community College and Alberta Union of Provincial Employees*.[1] The arbitral jurisprudence has now identified specific elements to be considered in the calculation of such damages. In addition, the question of whether or how the conduct of the employee is relevant to an award of damages has also been commented upon in arbitration decisions.

Background

Awarding damages in lieu of reinstatement is not a common remedy in British Columbia. This is likely because of the significant British Columbia Labour Relations Board decision in *B.C. Central Credit Union*.[2] In that decision, the B.C. Labour Relations Board set aside a decision of an arbitrator who had awarded damages in lieu of reinstatement. The Board concluded that the award of damages was inconsistent with the principles expressed or implied in the Labour Relations Code, in particular the just and reasonable cause standard under Section 84 of the Labour Relations Code. Arbitrators may now, however, be facing this issue more, as employers argue that the Supreme Court of Canada in *Lethbridge Community College*, *supra,* has recognized that an arbitrator's decision to award damages in lieu of reinstatement is a reasonable exercise of its remedial jurisdiction.

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[1] [2004] 1 S.C.R. 72.

[2] B.C.L.R.B. No. 7/80; application for reconsideration dismissed, B.C.L.R.B. No. 299/84.

Some concern has been expressed as to how the previously established jurisprudence can be reconciled with this direction.[3] As set out in *Langley Memorial Hospital and BCNU (Spangberg) Grievance*[4]:

> Admittedly not without some hesitation, the conclusion I have reached is that the penalty of dismissal was excessive in the circumstances. As noted at the outset of this award, the hospital's first alternative argument is that were I to reach that conclusion, I should make an award of damages, but not reinstatement. No doubt, an arbitrator under a collective agreement has a discretionary jurisdiction to make such an award. But presumptively, a finding that a dismissal was not for just or proper cause, including a finding that the dismissal was excessive in the circumstances, leads to an award of reinstatement, with or without intermediate discipline. An award like the one envisaged by the hospital's first alternative argument is reserved for quite a narrow range of cases: see, for example, Argo Road Maintenance [1977] B.C.L.R.B. Decision No. 85, in which it is said that fundamentally, "....the question [in cases where there is an argument for damages in lieu of reinstatement]...is whether it is realistically possible to restore the [employment] relationship upon appropriate terms." Here, the primary factors leading me to the conclusion that dismissal was excessive in the circumstances are precisely the factors why the remedial outcome of the case should include the usual direction for reinstatement.

Employers may argue that *Lethbridge Community College, supra,* mandates a more liberal application of the remedy of damages in British Columbia. Unions, however, maintain that the right of reinstatement is fundamental, as expressed in *B.C. Central Credit Union*, and should not be diluted by a more liberal use of this remedy. This paper does not, however, deal with or seek to resolve the tension between these two view points and/or *B.C. Central Credit Union*.

Beyond a general statement of the applicable principles as to when damages may be awarded instead of reinstatement, the focus of this paper is on the calculation of the quantum of damages once this decision has been made.

Awarding Damages in Lieu of Reinstatement

An arbitrator's remedial authority arises from his or her statutory obligation to finally and conclusively settle a difference arising out of the discharge.[5] *B.C. Central Credit Union* sets out

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[3] See Kinzie, *Remedial Authority of the Arbitrator—Damages in Lieu of Reinstatement—Labour Arbitration* (Continuing Legal Education 2005).

[4] [2005] British Columbia Collective Agreement Arbitration Awards No. 116 (Munroe).

[5] [Reserved.]

the circumstances where an arbitrator could exercise remedial authority to award damages where "it would be inevitable that the contract of employment, if reinstated, would legitimately come to a conclusion shortly thereafter."[6] Factors considered included circumstances in which the grievor had no position to which he or she could return, did not seek reinstatement, or was incapable of doing the job.

In Ontario, an oft-quoted decision as to when damages are appropriate is *Re DeHavilland Inc. and CAW-Canada, Loc 112 (Mayer)*.[7] That case enumerated factors to be considered in assessing whether reinstatement was possible:

1. The refusal of co-workers to work with the grievor.
2. Lack of trust between the grievor and the employer.
3. Inability or refusal of the grievor to accept responsibility for any wrongdoing.
4. The demeanor and attitude of the grievor at the hearing.
5. Animosity on the part of the grievor toward management or co-workers.
6. The risk of a "poisoned" atmosphere in the workplace.

The jurisprudence on the calculation of the amount to be awarded for damages can be said to be settling into a conceptual framework in Ontario. The cases continue to demonstrate, however, that this is very much a developing area. Parties are raising issues and arguments unique to the particular circumstances, which will continue to inform the development of an essential framework in this area. Some differences, however, appear to be present between cases in Ontario and British Columbia. The reality and depth of these differences is not yet fully evident. That will no doubt become apparent as cases arise.

Ontario Jurisprudence—Recent Cases

Lately, cases in Ontario have been utilizing a general framework in awarding damages in lieu of reinstatement. As recently as the decision in *Nav Canada and IBEW Local 2228 (Coulter)*,[8] the lack of

[6]B.C.L.R.B. No. 7/80; application for reconsideration dismissed, B.C.L.R.B. No. 299/84.
[7][1999] 83 LAC (4th) 157 (Rayner).
[8][2004] 131 LAC (4th) 429 (Kuttner).

an articulated framework for the calculation of damages was commented upon:

> …In much of the traditional jurisprudence the rationale for determining an appropriate quantum of damages in lieu of reinstatement has been unarticulated, and we find formulae for a person of the grievor's length of service in the range of 5–6 months wages at most. *Re Deigan* and *Re Slocan Forest Products*…, *supra,* are examples. The Employer urges that I follow this approach, which appears to be loosely based on the common law of wrongful dismissal, although not always fully articulated. The more recent approach is exemplified by the two decisions in *Re DeHavilland* and *Re Municipality of Metropolitan Toronto.* These move away from an approach to the issue of damages which mirrors the common law or employment standards legislation in favour of one tailored to the unionized sector, which is characterised by collective agreements that provide a wide range of benefits simply non-existent in the non-unionized sector. Many are easily quantifiable in monetary terms, e.g. overtime and premium pay benefits, sick leave benefits, disability benefits and health care benefits. Others are not so easily quantifiable, the most important of which is the concept of seniority which enhances both the security and quality of employment. Nevertheless they are of an economic value and should be taken into consideration in quantifying damages to be paid in lieu of reinstatement.

In addition to setting out factors to be considered in deciding whether to issue an award of damages, Arbitrator Rayner in *DeHavilland Inc., supra,* recognized the concept of an economic value to being a member of the bargaining unit in awarding that compensation. He ordered 1 month's wages for every year of service, plus an amount of 15 percent for the loss of fringe benefits. This view was also reflected in *Re Metropolitan Toronto (Municipality) and CUPE Local 79.*[9] The arbitrator in that case stated:

> Lately there has been a perceptible change in the approach taken to this issue both by counsel and arbitrators. They appear to be questioning the rationale for slavishly following the common law doctrine. Instead, arbitrators are beginning to look more closely at the collective agreements with the concomitant protections and benefits they provide to members of the bargaining unit who fall within the ambit of protection. There is a growing realization and acceptance of the view that collective agreements contain a value to a bargaining unit member separate and apart from what he would be entitled to if he was not covered by a collective agreement.

In this case, the arbitrator awarded the grievor 1.25 months' salary per year of service plus a fringe benefit factor of 15 percent.

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[9] [2001] 99 LAC (4th) (Simmons).

The arbitrator in *Nav Canada* adopted the rationale set out in these two leading cases, *Re DeHavilland, supra* and *Metropolitan Toronto, supra,* both of which indicated the economic value to being a member of a bargaining unit that should be taken into account in assessing damages. The remedy took into account the loss of the value of being in a bargaining unit and the resulting protections from that and the collective agreement.

This line of authority was further developed in the recent case of *Canvil, a Division of Mueller Canada Ltd v. International Ass'n of Machinists and Aerospace Workers, Lodge 1547 (Stone Grievance),*[10] where a machine operator with 31 years of employment was fired after an altercation with a supervisor. Arbitrator Marcotte found termination too harsh and substituted a 30-day suspension without pay. He concluded, however, that the employment relationship was damaged such that compensation should be awarded in lieu of reinstatement. The parties were unable to settle the damage claim and the matter returned before the arbitrator. The union claimed an amount of $453,259.12 under a variety of headings, including lost wages ($161,788.80), severance and notice under the *Employment Standards Act* ($28,189.20), loss of rights and benefits under the collective agreement ($21,728.52 or 15 percent of salary per year of service), damages in lieu of reinstatement ($144,856.80 or 1.5 months' salary per year of service), and aggravated damages for pain and suffering of other losses ($76,499.01). Interest of $20,196.79 was also claimed. The employer argued there was still no clear guiding principle in the case law to determine damages in lieu of reinstatement. It pointed out that some awards were made without articulation of the reasons and others were simply based on the grievor's length of service. The employer argued, as a result, that the appropriate measure would be the grievor's entitlement on a permanent layoff under the collective agreement and applicable *Employment Standards Act* provisions. Given the grievor's evidence and demeanour at the hearing, the employer said that it was extremely unlikely if the grievor had been reinstated that his employment would have continued indefinitely. Consequently, the employer argued the grievor should receive an award of only 68 weeks of wages (twice what he would receive on permanent layoff), plus 15 percent representing the loss of fringe benefits and interest. This amount totaled $56,522.96.

[10] [2006] Ontario Labor Arbitration Agency No. 413.

As part of his analysis, Arbitrator Marcotte specifically adopted the comments in *Re Metropolitan Toronto (Municipality)* and went on to note:

> I concur with the approach to the matter at hand that is reflected in the *Metropolitan Toronto* and *Nav Canada* cases, to the extent that both awards recognize (as does arbitrator Rayner in the *DeHavilland* case) that the collective bargaining regime is separate and different from the common law regime. Significantly, under a collective agreement an employee who is found to have been unjustly discharged has the right to reinstatement to his or her employment, while under the common law an employee who has been unjustly dismissed, is not so entitled and remedy may be said to be limited to compensation in lieu of notice *Re Alberta*. When a bargaining unit member is not reinstated, he or she no longer has entitlement to the rights, benefits and privileges under the collective agreement, and which rights, benefits and privileges usually increase with seniority, in turn calculated on the basis of years of service. (For example, in the instant case, the amount of vacation time entitlement increases based on years of service and under schedule "B".) Thus, I agree with arbitrator Rayner in *Re DeHavilland* on this point and, also, agree that the grievor's conduct which might have influenced the decision by the employer and the arbitrator not to reinstate the grievor is irrelevant cf. *Re Deigan, Re Loyer*. In the *Re DeHavilland* case, arbitrator Rayner addressed an appropriate arbitral approach to remedy in lieu of reinstatement in light of the party submissions on the issues. Relevant to our purposes, he states at page 158:
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> > That compensation is for the loss of employee's rights, privileges and benefits under the collective agreement and the question is not to be coloured in any way by the conduct of the employee which might influence the decision not to reinstate it.
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> Further, I agree with arbitrator Simmons that "The remedy is to compensate the grievor an amount of money representing as closely as possible, the monetary value for his loss of employment." See also *Re Nav Canada*, where arbitrator Kuttner adopted the approach in *Metropolitan Toronto*. I also agree in the view that the remedy "does not represent an ongoing loss from the time of termination which would require mitigation. . . . The employment relationship has come to an end as a consequence of the employer's breach of the collective agreement."
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> Aside from the manner or method that forms the basis for determination of the amount of compensation, I note that in all the above awards the arbitrators take into account the years of service of the grievor at the time of dismissal. Also, in the *Loyer, Deigan* and *DeHavilland* cases, the grievor's future employment prospects (including ability to replace the wages earned with the employer *DeHavilland*) were considered by the arbitrator. The grievor's age at the time of dismissal was taken into account in *Re Metropolitan Toronto, Re DeHavilland, NAV*

Canada, *Deigan*, and *Loyer*. The grievor's personal circumstances were considered in the DeHavilland (financial difficulties) and *NAV Canada* (mental status).[11]

Although finding that he did not have jurisdiction to award aggravated or punitive damages, Arbitrator Marcotte ultimately set out eight principles to be considered in assessing an award of damages:

> Based on all the foregoing, I find that an appropriate approach to determination of the amount of damages awarded the grievor in the instant case includes consideration of the following, in no particular order:[8]
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> - The remedy is to compensate the grievor for his loss of employment and loss of rights, benefits and privileges of the collective agreement.
> - The remedy does not represent on-going loss of wages from the time of termination of employment; accordingly mitigation is not a factor in determining the amount of damages.
> - The common law regime in cases of unjust dismissal under collective agreement does not apply.
> - The grievor's conduct leading to the decision to discharge in the decision not to reinstate him to his employment is not a relevant factor.
> - The remedy is not to replicate any notice period or monies in lieu of notice under the *Employment Standards Act*.
> - The grievor is entitled to monies that he would receive under the relevant provisions of the *Employment Standards Act*.
> - The remedy includes a percentage factor related to loss of fringe benefits available under the collective agreement.
> - The grievor's personal circumstances, including but not limited to his years of service and age at the time of dismissal, education and employment prospects, are relevant factors to be considered.[12]

Arbitrator Marcotte then awarded the grievor, who was 49 years old with 31 years of service with the company and a Grade 12 education, wages in the amount of 31 months ($89,627.20), plus 15 percent of that amount representing the loss of collective agreement fringe benefits ($13,444.00), and *Employment Standards Act* entitlements of notice and severance being $5,782.40 and $18,792.80, totaling $127,646.40. Interest was also calculated

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[11] *Ibid.*, at para. 33–35.
[12] *Ibid*. at para. 39.

from the date of dismissal. In total, Arbitrator Marcotte awarded the grievor $143,302.10. He followed the comment in *Metropolitan Toronto* that "mitigation ought not to play any role in the final outcome." Conduct was also not found to be relevant.

In another recent Ontario case, *Cassellholme Home for the Aged v. CUPE Local 146* (*Morabito*),[13] the arbitrator assessed damages for an employee with 20 years' seniority who was 45 years old, married, with three dependent children. The arbitrator had ruled that the grievor was dismissed without just cause, but given the circumstances of the case awarded a compensation package in lieu of reinstatement. The union asked for compensation totaling $362,374.60 plus interest. That amount included a retirement allowance of 1.5 months for each of her 20 years of service, 30 months' pay ($84,708.00), 15 percent on top of that figure to account for benefits ($12,706.20), and severance pay of three weeks per year of service or 60 weeks paid ($39,036.00). An education training allowance of $10,000, personal debt reimbursement $10,000 and damages for pain and suffering of $200,000 were also claimed. The employer argued that the grievor's actions at the hearing in failing to acknowledge her misconduct was the main reason she was not reinstated and should be taken into account in deciding on compensation. As a result, the employer argued, the grievor should be compensated only as if she was being laid off. The collective agreement contained no provision for severance pay, so the employer argued that the notice provisions of the *Employment Standards Act* (the maximum of eight weeks) and severance (one week per year of service) should apply. The employer argued that a compensation of award of 28 weeks pay or $18,244.80 was appropriate.

The arbitrator referenced many of the cases set out in *Canvil* adopting the approach in *Metropolitan Toronto*. She noted:

> The arbitrator in this case awarded 1¼ month's salary for each year of service in addition to a fringe benefit factor of 15 per cent, plus interest. Similar, although not always identical, approaches were taken in the *Canvil, Health Sciences Centre, DeHavilland, and Nav Canada* cases cited above. In basing the compensation primarily on years of service—which at first glance seems not to differ much from the usual reasonable notice approach in the non-unionized setting—some arbitrators have pointed to the key role of seniority in unionized workplaces, noting that job security and other rights and benefits are increased as an employee's seniority grows. In effect, a long-service employee is

[13] [2007] Ontario Labor Arbitration Agency No. 102.

losing more than a short-service worker when he or she is not reinstated, and not just in job security.

The arbitrator awarded compensation as follows:

- A retiring allowance of 1¼ months' pay for each of her 20 years of service or 25 months' pay, totaling $70,720.
- 15 percent on top of that figure representing the loss of benefits, for a total of $81,328.
- Interest from the date of discharge to the date of payment at 4 percent.
- Payment to be made within 60 days of the date of the award.

A conceptual framework appears to be developing in the Ontario jurisprudence as most recently expressed by *Canvil, supra.* Both *Canvil* and *Cassellholme* confirm that a value is to be accorded to the benefit of a collective agreement as articulated in the earlier case of *Metropolitan Toronto.* In addition, mitigation was not found to be relevant nor was the conduct of the employee. The personal circumstances of the employee including the length of service and age are taken into account in assessing the damages to be awarded. *Canvil* provides a useful summary of these factors and others to be generally considered in calculating damages awarded in lieu of reinstatement.

British Columbia Jurisprudence—Recent Cases

The cases in British Columbia, although referencing the Ontario cases, have not definitively addressed the same issues. In addition, although the Ontario jurisprudence is consistently cited, differences due to the facts at issue and/or conceptualization appear to be identified. One exception may be that of *Canadian Blood Services v. Hospital Employees' Union (Bagley),*[14] which appears to be generally more consistent with the Ontario authorities. In that case, Arbitrator Jackson concluded that dismissal was an excessive response but declined to order reinstatement. The issue of compensation was dealt with separately. The grievor was a 46-year-old, 4-year, permanent part-time employee when she was discharged. The union claimed damages in excess of $108,000. This included an amount equal to 24 months' wages as well as 2 months' severance pay and 35 percent of those two amounts for the loss of

[14] [2004] B.C.C.A.A.A. No. 308.

collective agreement benefits; it also sought exemplary damages and interest. The employer argued the appropriate amount was 4 months' wages plus 20 percent on account of lost benefits for an approximate total of $11,000.

Arbitrator Jackson set out a general approach consistent with that expressed in the Ontario jurisprudence:

> When discharge has been determined to be excessive but reinstatement is not appropriate, it is my view that the proper approach in awarding compensation is one that considers the rights and benefits that an employee enjoys as a bargaining unit member covered by a collective agreement. The reasonable notice requirement that applies to wrongful dismissal at common law is not a comfortable fit in the unionized sector since the bargaining unit employee who is not reinstated loses the benefits and protections of the collective agreement including, most significantly, security of employment. Nor should mitigation be considered a relevant factor. Instead the employee is being compensated for a loss of prospective employment: see, *inter alia*, *DeHavilland Inc.; Metropolitan Toronto (Municipality).*

Arbitrator Jackson declined to award damages for bad faith but awarded more than the 4 months' wages proposed by the employer. She noted that the grievor, a 46-year-old single parent, had lost the security of employment she had attained as a member of the bargaining unit covered by the collective agreement. The compensation award must recognize the loss of this economic value. Arbitrator Jackson also agreed that past conduct should not affect the calculation of the compensation. She did note, however, that an employee's disciplinary record could affect the employee's security of employment and is a factor to weigh in determining, as best one can, the economic value of the protections of a collective agreement. After considering these factors, she directed that the grievor be compensated by damages calculated at 1¾ month's salary for each year of service, or 7 months. She concluded that the grievor was not entitled to severance pay as there was no such provision to the collective agreement. Further, Section 3(2) of the *Employment Standards Act* specifies that Section 63 providing severance does not apply to employees covered by a collective agreement if the collective agreement contains provisions respecting seniority retention, recall, termination of employment, or layoff. This collective agreement did. With respect to benefits, although the union argued for 35 percent and the employer asserted 20 percent, due to the difficulty in determining this, Arbitrator Jackson awarded 28 percent. Interest was awarded on the entire amount.

The leading Ontario cases were commented upon in *B.C. Ferry and Marine Workers' Union*.[15] In that case, the parties had agreed that reinstatement would serve no useful purpose. The union argued that the appropriate compensation in lieu of reinstatement included severance pay pursuant to Article 12.05 of the collective agreement as well as compensation for the grievor forgoing her rights under the collective agreement. This latter amount, the union claimed, was $77,129.06, representing 12.5 years of employment at 1.5 months per year at $3,577 plus a top up of 15 percent for fringe benefits. The arbitrator found first that as there was no cause for discharge, at a minimum severance pay, which had been agreed to under the collective agreement, was owing, finding "the appropriate level of severance pay to be paid to an employee has been established by the parties themselves." The grievor was entitled to 6¼ months' salary under Article 12.05. The employer had argued that the conceptual framework set out in the Ontario arbitration decisions should not be followed. In dealing with the claim for loss of collective agreement rights, although the arbitrator reviewed arbitral comments in the Ontario decisions, he found that the grievor would never have of her own accord returned to work (she had already taken off one year without pay). He accordingly concluded that she would never have been in a position to avail herself of the benefits of the collective agreement and thus it would be inappropriate to grant compensation for the loss of those rights.

Two recent British Columbia cases also referenced the Ontario jurisprudence. *Vantel/Safeway Credit Union v. CUPE, Local 15*[16] considered *B.C. Ferries* and much of the jurisprudence cited in that case. After concluding that the employment relationship was incapable of restoration, the arbitrator ordered damages in lieu of reinstatement. In considering the amount of damages to be awarded, the arbitrator noted, consistent with the Ontario case law, that mitigation efforts would not factor into his deliberation, as "we are not dealing with a case of wrongful dismissal at common law. The Grievor is to be compensated for not being reinstated to a job having all the benefits associated with the collective agreement."[17] He went on to find, however, that had the grievor been reinstated, "she would have been at the doorstep of dis-

[15] [2005] B.C.C.A.A.A. No. 68 (McPhillips).
[16] [2006] CLAD No. 250 (Blasina).
[17] *Ibid.* at para. 168.

charge." He then looked to the collective agreement to find any provision that indicated the value the parties themselves would place on the loss of a job. Pursuant to the technological and severance provisions of the collective agreement, an employee would receive 1 week for the first 5 years of employment and 2 weeks per year after that. The grievor, a 14-year employee, was awarded 23 weeks on this basis. No compensation for interest was awarded. In both *B.C. Ferries* and *Vantel*, the grievor was not provided with compensation for lost collective agreement benefits on the basis that the employment relationship was perilous and/or the grievor had no desire or intent to return.

In *Catalyst Paper Corp. (Crofton Division) v. PPWC Local 2*,[18] many of the relevant Ontario cases were also cited to address the matter of damages in lieu of reinstatement. The grievor was 43, and had 16.73 years of service with a rate of $28.08 per hour. The union sought four headings of claim for damages, namely compensation for loss of collective agreement rights, benefits, severance, and interest. It also argued that common law notions of appropriate notice or mitigation were not applicable, and that the conduct or culpability of the grievor was entirely irrelevant. In quantifying the amount claimed, the union sought 1.5 month's pay for 17 years of service ($120,316.14), 15 percent for loss of collective agreement benefits ($18,047.42), severance pay as claimed under the collective agreement provision ($30,029.48), and interest at 3 percent ($5,051.75), totaling $173,444.79. The employer relied upon *Vantel/Safeway Credit Union* to argue that the parties had ascribed a value to the loss of rights and benefits under a collective agreement, and that determination ought to prevail. It argued that there was no authority for both damages for the loss and for severance pay under the collective agreement.

Arbitrator McDonald disagreed and concluded that severance pay and damages for the loss of collective agreement rights and benefits are separate and distinct. He concluded that severance pay was an earned or banked benefit. He also found, however, that the value of the loss of rights and benefits under the collective agreement was contained in the severance provision, agreeing with the employer in part that "there is no better indication of the calculation of that loss than that found in the collective agreement." The grievor was awarded severance pay under the collective agreement, that same amount again as representing the loss

[18] [2006] B.C.C.A.A.A. No 212.

of rights and benefits under the collective agreement, and interest; this amounted to 2 weeks' pay for each of the grievor's first 10 years of service and 1 week's pay for his last 7 years. The arbitrator did not, however, order a percentage claim for benefits, traditionally 15 percent in Ontario.

This case shows some departure from the Ontario jurisprudence as most recently expressed in *Canvil*. It would appear that Arbitrator McDonald adopted the comment in *B.C. Ferries* pointing to a collective agreement provision that best encapsulated the loss of collective agreement rights. But that argument was not accepted in *Canvil*:

> ....I, also, do not agree with the Company position that guidance in determining the amount of damages can be obtained from provisions of the collective agreement. In the instant case, there is no provision in the agreement that expressly addresses the issue of calculation of damages in the case of non-reinstatement in the context of the Company's breach of the just cause provision, Article 5.01(b). In that respect, Article 12.08(a) speaks to the circumstances of "indefinite layoff" but which circumstance is not the case at hand.[19]

As a result of these conclusions, the amount awarded in *Catalyst* was significantly lower than those awarded in the Ontario cases.

Most recently, in *Canadian Forest Products Ltd and PPWC, Local 25*,[20] an arbitrator dealt again with an award of damages in lieu of reinstatement. In doing so, he summarized the jurisprudence as follows:

> ....this is not a normal case as the grievor has requested he not be reinstated but instead be provided with damages in lieu thereof. The first point to be acknowledged is that arbitrators do have the authority to award damages in lieu of reinstatement. *Alberta Union of Provincial Employees vs. Lethbridge Community College* [2004] 1 SCR 727 [SCC]; *B.C. Central Credit Union*, BCLRB No. 7/80; *Fox Ready-Mix* 22 LAC (4th) 156 (Brent); *Cassellholme Home for the Aged* 153 LAC (4th) 278 (Slotnick), supplemental award [2007] OLAA No. 102.
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> However it is also true that historically that authority has been exercised in only the most limited or exceptional of circumstances: *Alberta Union of Provincial Employees v. Lethbridge Community College, supra; Chaumiere Retirement Residence* 37 LAC (4th) 86 (Roberts); *Westmin Resources* 63 LAC 134 (Germaine); *Vancouver General Hospital* 7 LAC (4th) 106 (Monroe). It must also be noted that our situation is not one where the parties have agreed that the relationship is destroyed and that damages are appropriate: *B.C. Ferries* [2005] BCCAAA No.

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[19] *Ibid.* at para. 27.
[20] (Oct. 24, 2007) (David McPhillips).

68 (McPhillips); *Honeywell Protection Services* [1992] BCCAAA No 380 (Chertkow) (at p. 380).

....In examining when it is appropriate to award monetary damages, Arbitrator Simmons in *Municipality of Metropolitan Toronto* 99 LAC (4th) 1 observed at page 11, the purpose of monetary damages is "to compensate the grievor with an amount of money representing, as closely as possible, the monetary value for his loss of employment. That remedy represents, in large measure, the loss of the value of the collective agreement." This assessment has been adopted by other arbitrators and the courts: *DeHavilland Inc., supra, Catalyst Paper Corp (Crofton division)* [2006] BCCAAA No. 272 (McDonald); *Canadian Blood Services* [2004] BCCAAA No 308 (Jackson):

In this case, the loss of the value of this collective agreement to Mr. Marinus occurred as a result of the grievor changing careers and becoming an apprentice carpenter. The employer has not caused Mr. Marinus to lose the benefit of the collective agreement. That benefit was there for him once he was successful in having his termination overturned. However, Mr. Marinus has decided a change in careers had far more potential, both in monetary terms as well intrinsic interest, and it is clear from his testimony he was not at all excited about the content of his job at *NCP*. As a result, it is Mr. Marinus that has brought this relationship to an end and has elected not to avail himself of the continued benefit of the collective agreement. For the above reasons, it is opinion of this board that damages in lieu of reinstatement are inappropriate in the circumstances of this case.

Although this case appears to deal with whether damages should be awarded, the Ontario cases dealing with the value of the collective agreement were once again referenced in coming to a conclusion. As in *B.C. Ferries* and *Vantel/Safeway Credit Union*, the grievor was not provided with compensation for lost collective agreement benefits.

Conclusion

A review of the cases confirms that Ontario jurisprudence is establishing some settled areas, as expressed most recently in *Canvil*. Other aspects, however, are still in the developmental phase, particularly in British Columbia. Although Ontario cases have been referenced in British Columbia, they cannot yet be said to have been substantially adopted into British Columbia jurisprudence. One of the notable aspects of the cases remains the significant difference in perspective of employer and union representatives, who are often arguing hundreds of thousands of dollars apart when seeking compensation, clearly working from a differ-

ent conceptual analysis. Although the Ontario cases have been argued before British Columbia arbitrators, differences appear in the application of that jurisprudence in British Columbia. British Columbia awards to date do not appear to have awarded the large amounts of compensation set out in Ontario.

Recent British Columbia cases have not provided compensation for lost collective agreement benefits on the basis that the employment relationship was perilous and/or the grievor had no desire or intent to return. This does not appear to have been a factor consistently addressed in the Ontario cases, which have granted larger awards and noted that conduct is not relevant. The arbitrator in *Cassellholme* commented on this when pointing to the low amount of compensation awarded in *Vantel/Safeway Credit Union*. As a result, it remains unclear to what extent the Ontario jurisprudence will be followed or applied in British Columbia. Arbitrators in British Columbia may be able to further develop or flesh out the definitive analytical principles. Once the parties have had more of a chance to grapple with the issues, the appropriate framework for awarding damages in British Columbia may be clarified.