IN THE MATTER OF an Arbitration under the *Labour Relations Code* and Grievance SD85 15-4 dated October 16, 2015 filed on behalf of Naomi Allen, alleging unjust termination.

BETWEEN:

B.C. PUBLIC SCHOOL EMPLOYERS' ASSOCIATION/ BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 85 (VANCOUVER ISLAND NORTH),

Employer,

and

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 401,

Union.

AWARD

Appearances

- Peter Csiszar, counsel for the Employer.
- Maxine Copeland, National Representative and Natasha Morley, counsel, for the Union.

Introduction

The grievor Naomi Allen was employed for 19 years by School District No. 85 and her record was unblemished. She worked as a First Nations Support Worker (FNSW) at Eagle View Elementary School (hereafter "the School") in Port Hardy,

B.C., where aboriginal students comprise 30-40% of the school population. She lives in the local community and has two young children of her own. She described herself as passionate about the work and dedicated to supporting students, families, colleagues and the School. The Vice Principal said she was always a good employee, she was professional and she followed the rules. But early on the evening of September 9, 2015, it is alleged, the grievor telephoned a parent at home and made false statements about discussion that supposedly took place during a staff meeting earlier that same day concerning the parent's family. The parent was extremely upset and lodged an immediate complaint with the School.

Because of this accusation and the grievor's denial of any wrongdoing throughout the ensuing investigation, the grievor was terminated on October 15, 2015, as follows (Ex. 2-22):

> This letter is a follow up to the meetings held with you and your Union representative on September 11 and 15, 2015. The purpose of those meetings was to review a complaint from a parent (whose identity was shared with you) who alleged that on the evening of September 9, 2015 you telephoned her at home and told her that Eagle View Elementary School administration was making specific references to this parent's family in a Student Services meeting, and minimizing the seriousness of the concerns that the parent's family had previously raised related to a previous incident.
>
> In the meeting with you on September 11th, 2015 you denied making the alleged phone call to this parent. In the September 15th meeting with you, you were adamant that you did not make the alleged telephone call. In the September 15th meeting you suggested that maybe someone else called this parent claiming it was "Naomi Allen". You were shown a Telus telephone record indicating that a call was made from your home telephone number at 5:43 p.m. on September 9th to this parent's home telephone number. You stated that you knew this parent through community activities. Notwithstanding the telephone records showing that a call had been made from your home telephone number to this parent's home telephone number you stated that you "never called her".
>
> We have considered all of the available information gathered in our investigation in this matter. The parent making the complaint reported your phone call to the school on September 10th, the very next day following the day of the call. The parent was very

upset that an employee of the School District had called her about confidential matters discussed at the school. The parent stated that you told her that the Vice-Principal of the school had stated that a previous incident involving her family had been "blown out of proportion" and that it wasn't really a "big deal". The parent specifically identified you as the person who made the call to her on September 9th.

The parent in her complaint felt that your phone call was intentionally hurtful and upsetting to her and that you gave her the impression that the school did not take the significance of the previous event involving her family seriously. The parent also questioned how someone like you was able to get her unlisted telephone number.

We have concluded that you made a telephone call to this parent on the evening of September 9th. We have also concluded that the content of the September 9th telephone call was as described by the parent in her complaint. In that regard, this parent referred to you telling her that the Vice-Principal had stated that a previous incident involving her family was "blown out of proportion". It is inconceivable that the parent would have known about such a comment in the staff meeting unless she was advised by someone who had attended the meeting. We have concluded that you were the one who advised the parent of the above statement made at the staff meeting. You also led the parent to believe that the previous incident involving this parent's family was specifically identified in the staff meeting. This was not truthful as neither this parent nor her family were specifically identified at the staff meeting. The Vice-Principal referred to something that happened years before as an example of the need to respect confidentiality of events occurring at the school. Further, the reference to "blown out of proportion" was a reference to the media blowing that previous event "out of proportion," it was not a comment or reflection of the school's perspective of that previous event.

In summary, in view of all of the information gathered in the investigation, we have concluded that:

You made a telephone call to this parent on the evening of September 9th;

You disclosed confidential discussions to this parent that occurred at the school level in the staff meeting;

You misrepresented the nature of the staff meeting discussions to this parent with the intent of discrediting administration;

You violated your duty to keep confidential events that occur at the school, including discussions at staff meeting;

Your comments to the parent were intentionally hurtful to her and caused her distress and upset;

> You have refused to take responsibility or accountability for your behaviour by adamantly denying that you called this parent on September 9th;
>
> You have been dishonest and untruthful with the employer in denying that you telephoned this parent on the evening of September 9th. By denying that you made the telephone call to this parent and by failing to take responsibility for your conduct, you have breached the high level of trust placed in you as an employee of the School District.
>
> Your conduct in telephoning this parent as described in this letter and then denying that you called this parent in the face of compelling evidence otherwise, constitutes gross misconduct and violates the core values of our School District.
>
> Telephoning this parent on September 9th and telling her what you did as outlined in this letter is inappropriate and constitutes serious misconduct. That conduct alone justifies your termination. Your dishonesty in denying that you made the call exacerbates that misconduct and makes that misconduct even more serious and reprehensible and further supports your termination.
>
> Finally, your dishonesty and untruthfulness with the School District in the course of the investigation by denying that you called this parent on September 9th constitutes an independent act of misconduct which on its own merit justifies your termination.
>
> The School District has serious concerns about your refusal to admit making the telephone call to this parent and thus your failure to acknowledge and understand the seriousness of your actions.
>
> For all of the above reasons, we have concluded that you have knowingly breached your fundamental obligations as an employee of the School District. As a result of your actions, the School District has lost the requisite trust in you as an employee.
>
> In view of all of the above, the School District has no alternative but to terminate your employment effective immediately.

The complainant (hereafter "the Parent") testified as the Employer's first witness and stated she was "pretty sure" it was the grievor who called. The caller identified herself as Naomi. The Parent and the grievor had occasional contact in the community over the previous few years through their children. The Parent testified "I think I could identify her voice." The Parent was extremely upset, immediately called a friend for advice and made a complaint the next morning to the Principal. The Parent was requested to contact Telus Communications in order to obtain

verification of the source phone number and she did so promptly. The following day, the Parent provided an email apparently from Telus, listing two incoming calls between the hours of 4 pm and 8 pm, including a call at 5:43 pm from the grievor's home land line number (Ex. 2-4, hereafter "the Telus email").

The grievor testified that she did not make the phone call. A Senior Security Investigator from Telus Corporate Security reviewed the Telus email and concluded it was a fake. In her testimony, the investigator cited a number of grounds, but primarily relied on the fact that Telus does not track local phone calls, which are unbilled, so the Parent could not have obtained a listing of incoming calls from a Telus representative as she claimed.

Thus, the central issue in the present case became the credibility of the Parent versus the credibility of the grievor. Neither was shaken from her story under cross examination but both were problematic witnesses. The Employer pointed to numerous inconsistencies and deflections in the grievor's denial during the investigation and her subsequent testimony. At arbitration, she raised new points that were not put to Employer witnesses, contrary to *Browne v. Dunn*. In the Employer's submission, the grievor committed an egregious breach of confidentiality by calling the Parent and has lied about it ever since. As for the investigator from Telus, she herself committed errors and omissions, and her opinion deserved little weight. It was technically possible that the Telus system could have generated the unbilled local call history, which supported the validity of the Telus email. The Parent should be believed.

For its part, the Union said the grievor's inconsistencies were simply signs of an employee under great stress, struggling to cope with an inexplicable accusation that

may destroy her career. The grievor was sincere and honest in her testimony. The Union insisted that no weight should be placed on the Parent's evidence since she clearly presented a fabricated document in support of her complaint. In the end, said the Union, it was unnecessary to determine the truth about what happened but only to decide whether there was clear and cogent evidence to establish the grievor's guilt. As stated in final argument (para. 8-9):

> … in some ways the case is quite simple. In other ways it is not. And that is because, as was stated in my opening, you are being presented with two competing truths. In the Employer's truth, Naomi phoned a school parent and disclosed confidential discussions that occurred at a staff meeting. In Naomi's truth, the phone conversation between herself and [the Parent] never occurred and [the Parent] learned of the information discussed at the staff meeting from another source.
>
> The Union admits that neither of these truths is completely satisfactory. There remain unresolved questions and unclear motives.

According to the Union, the Employer failed to complete a proper investigation before issuing the termination. The Employer knew there was serious doubt about the validity of the Telus email but stopped making inquiries that would have resolved the issue. As a result of undue haste and a failure of due diligence, the Employer discharged a long term employee in reliance on a forged document.

The Employer bore the burden of proof and failed to prove cause for discipline pursuant to Question 1 under the *Wm. Scott* framework, said the Union. On this basis, the grievance should be upheld and the grievor reinstated with full redress. The Union conceded that if the allegation is found to be established, Question 2 need not be considered as the penalty of termination would not, in those circumstances, be excessive.

The grievance was filed on October 16, 2015 and referred to me under the collective agreement on February 17, 2016. The hearing was conducted in Port Hardy, B.C. on November 8-9-10, 2016 and January 12-13, 30-31, 2017, with teleconference evidence taken on February 2, 2017 and final argument delivered in Victoria, B.C. on February 23, 2017.

The evidence

Witnesses

The Parent lives in Port Hardy with her spouse and two children. She is an aboriginal person. In 2015 her children attended the School but now they are enrolled elsewhere in School District No. 85.

Four staff members of the School testified on behalf of the Employer. **Kelly Amodeo ("Amodeo")** was Vice Principal of the School in 2015 and also worked 0.7 EFT as a Learning Assistance Resource Teacher (LART). She managed Support Workers at the School. She has 21 years of service with the District and is now Vice Principal of a different school. **Tanya Carlson ("Carlson")** is an LART at the School, a position she has held for three years. She has worked in the District for 10 years in various schools. **Pam Quinten ("Quinten")** appeared under summons and is a bargaining unit member, working as a Special Educational Assistant (SEA). She has worked at the School for eight years and worked at other schools previously, also as an SEA. **D'Arcy Deacon ("Deacon")** began working as Principal of the School on August 1, 2015. Previously he was a Principal in Port Alice and taught senior grades in Port Hardy and Port McNeil. The School serves about 260 K-7 students. There are 17 teachers and 15 Support Workers (SEA's, First Nations

Support Workers, First Nations Home School Coordinator and First Nations Language/Cultural Tutor).

By consent, Amodeo, Carlson and Deacon were re-called to testify after the grievor gave her direct evidence but before cross examination of the grievor by Employer counsel. They addressed matters raised in the grievor's testimony but not put to them by the Union in cross examination.

John Martin ("Martin") is Secretary-Treasurer of School District No. 85. He played a role in the factual narrative but was not called as a witness. Deacon reported to Martin during the investigation of the grievor.

Three witnesses testified for the Union. **Cindy Bennett ("Bennett")**, Senior Security Investigator, Corporate Security, at Telus Communications (based in Vancouver), appeared under summons. She has been employed by Telus for 22 years and has appeared in court and before labour arbitrators many times, dealing mostly with criminal charges and employee terminations. She works regularly with law enforcement agencies. When Telus records are subpoenaed, she appears to explain the company's record keeping. She confirmed that she was authorized to represent Telus and that Telus management was aware of her participation in the present arbitration.

Judy Fyles ("Fyles") is a Library Clerk and on-call SEA employed by the District. She has 10 years of service and has worked at the School since 2007. On September 11, 2015, she served as a Union Representative to assist the grievor in an investigative meeting conducted by Deacon at the School.

The **grievor Naomi Allen** joined the District in 1996 as a First Nation In-School Support Worker and continued in that capacity until her termination, although the position title has changed over time. At the beginning, she was the only support worker for aboriginal students but now there is a team serving approximately 114 First Nation students. She said the duties have evolved as the social and political fabric of the community changed. Now the role of a FNSW is to support the student's academic progress as well as providing social and emotional support. The grievor was one of three FNSW's at the School.

Port Hardy is a small community of around 4,000 people located at the northern end of Vancouver Island. Many people know each other by name and people talk regularly, either face to face or on social media. Deacon said this means "few people are unaware" of local issues.

The September 9 staff meeting

Students returned to the School for the new year on Wednesday September 9, 2015, with an early dismissal at 11 am that day after meeting their teachers. There was some local controversy about the fact that school did not begin promptly the day after Labour Day, which was Monday September 7. A staff in-service day was held on Tuesday September 8. There were numerous comments on Facebook for and against the delayed start (Ex. 13). The grievor posted a message on September 8 supporting the in-service as "a great way for us to connect and move forward with common understanding," adding that she was "Looking forward to smooth transitions for our students and families tomorrow."

On Wednesday September 9, after the students had left, a meeting was held at the School with all the support workers, led by Vice Principal Amodeo. The meeting was planned by Amodeo together with Carlson. The purpose was to build capacity and provide a refresher on various topics. The first subject discussed was confidentiality. This choice was made to set a tone for the year and because confidentiality is such an important expectation in doing support work. Employees may become aware of sensitive personal information in the course of their work and Carlson testified that they are instructed that it must "go no further", whether in the staff room or sidebar conversations or in public. There is a "huge" degree of trust placed in employees to protect confidentiality, she said. Generally, support workers have limited or no access to students' personal files ("red files") and are cautioned about use of any information that is shared. Carlson also noted that staff are constantly reminded not to have home contact with student families as this is a function of the LART or an administrator. Amodeo made the same points in her testimony, adding that it is a matter of maintaining the dignity and privacy of students and their families. Breach of the confidentiality policy can cause serious harm to families. These were the messages planned for the meeting.

Amodeo testified that in presenting this portion of the meeting, she used an example of an unnamed family that had an experience made worse by lack of confidentiality and gossip in the community. It showed what can go wrong. The media became involved and things were blown out of proportion. It was painful for the family. The key message, she said, was to maintain confidentiality so that families are not traumatized any more than they may be already. Amodeo thought the message was clear and well received. She did not expect anything discussed at the meeting to be shared outside the school staff.

According to Amodeo, the grievor was in the audience and did not ask any questions or express any concerns. Amodeo did not recall "a buzz in the room" or any sidebar conversation when she mentioned the incident. She said some people may have known about the incident and some would not, but it was not her purpose to target a specific incident. The family in question was the Parent's family, she confirmed.

When recalled as a witness, Amodeo stated again that she did not notice small conversations breaking out with people talking among themselves, although she agreed that this happens in staff meetings. She did not remember the grievor raising an incident on the school grounds in which the grievor had been involved and had gone to the administration. She did not recall the grievor speaking about how advance notice of media would be helpful. Her comments were not a response to the grievor. Amodeo denied saying the incident she was describing in her presentation was "no big deal", as media involvement *is* a big deal and she would not suggest otherwise. Neither did she recall the grievor raising a 15-year old incident in which a student was restrained with tape, resulting in a story on the national news. Finally, she was not aware of a "shift in the conversation" during the meeting.

As Carlson described it in her testimony, Amodeo referenced a situation where information was leaked to the media and blown out of proportion, citing it as an example of why confidentiality must be maintained. No names were mentioned but Carlson assumed it referred to an incident that was reported on the news 4-5 years earlier, before she joined the School. There was an interview with a mother whose face was blurred to prevent identification but the School was mentioned. Amodeo told the staff meeting that media reporting can be inflammatory and can make a situation worse than it needs to be. There can be a negative effect on children and

families. There was no belittling or minimizing of the incident during Amodeo's presentation and no reference that it was "no big deal."

Under cross examination, Carlson confirmed an investigative statement in which she said there was "a sidebar conversation during the meeting that during a previous event the media 'blew things way out of proportion which was detrimental to the family'". Yes, she said, this referred to the incident Amodeo cited in her presentation. Carlson said that Amodeo was talking about confidentiality and someone raised an issue about something in the past. Amodeo then used that as an example of the magnitude of the impact when confidentiality is lost. Carlson could not recall who raised the question.

Carlson saw nothing negative in the presentation. It was a reminder that we are surrounded by social media and it doesn't take long for comments to circulate, with detrimental effects on those involved. The message was clear. It could not be taken any other way. "Don't share what you shouldn't share."

When recalled as a witness, Carlson said she was seated at a table in the back of the meeting room (Ex. 12). As the meeting progressed, there were one or two conversations going on but she wasn't privy to a lot of it, she stated. She conceded that periodically at these meetings there are side conversations or sidebars going on. She did not recall any particular "shift in the conversation" during the meeting. She did not recall the grievor raising an incident that the grievor had been involved in. However, she said that something came from one of the front tables, closest to Amodeo, and Amodeo addressed it. She didn't know who it was. But this was the example Amodeo was using about people not keeping confidentiality. "Kelly [Amodeo] picked something up and came back with this example."

Pam Quinten attended the September 9 staff meeting and testified she sat up in the front row. The grievor was at a back table "with everyone else." Amodeo gave an example of an incident getting blown out of proportion by the media when confidentiality was not maintained. That was all she said. She may have said it was leaked. No names were used. The message Quinten took was that "you don't say anything, so they don't get anything they can blow out of proportion." Quinten wondered if this was about a 2015 incident at the high school involving a machete, which was all over Facebook and was picked up by the media. During the meeting, she heard other staff members sitting behind her in the back, talking about something.

Fyles also attended the staff meeting. Confidentiality was discussed and it was said that breaches could cause harm to families. One example, said Fyles, concerned the Parent's family, although the Parent was not named during the meeting. It was said there had been an incident on the playground with a student. Staff need to be vigilant and aware when supervising. It was discussed how the media can blow an issue out of proportion if information is not kept confidential. Families can be traumatized. Fyles agreed the message was clear – it is important to maintain confidentiality.

The Parent's complaint

The Parent testified that she and the grievor first met when her son was in Kindergarten. Now he is in Grade 5. They have seen each other occasionally since then, including in 2015 when her son had a birthday party attended by one of the grievor's children. The Parent said she has an unlisted phone number at home, but in 2013 she provided her number to the grievor during a Facebook message exchange

(Ex. 3-26). The Parent did not remember the exchange until October 2016 when she was being prepared for her arbitration testimony by Employer counsel. The Parent stated that based on her interactions with the grievor, she felt she could identify the grievor's voice.

The Parent testified as follows. Around dinner time on September 9, 2015, she received a phone call at home from the grievor. It was between 5 and 6 pm. The caller said "This is Naomi," so she knew who it was. The Parent was not expecting to hear from the grievor, especially since she has an unlisted number. The grievor told the Parent about a School meeting during which an incident involving the Parent's young daughter was discussed. It was suggested in the meeting that what happened to her daughter was blown out of proportion. At this point in her testimony, the Parent began crying and had to compose herself. It was obvious that the subject was emotionally fraught for the Parent, even in November 2016, long after the events in question. Later, when asked in cross examination what happened in the incident, the Parent refused to answer, and the Union did not insist on a response.

The Parent continued her direct testimony, stating she was told by the grievor that at the School meeting, it was said "we can't have that happen again." It was stated at the meeting that the incident was blown out of proportion but it was not a big deal that it happened. The Parent testified that hearing this report made her feel horrible. The original incident with her daughter had a big impact on her and she still feels it every day. The phone call resurrected these feelings. She could not remember the conversation with the grievor word for word but she felt the impact.

The Parent testified "I'm pretty sure it was her, I think I recognize her voice." They had never before spoken on the telephone and there was not really any reason for the grievor to call her. The call ended with the grievor saying goodbye. Afterward the Parent was upset and crying. "I was really angry."

The Parent then called Quinten who is a friend she has known for a while. It was after 6 pm. They had a short conversation and she told Quinten about the phone call. She needed to know what to do. Quinten said she should go to the School in the morning and talk to Deacon, the Principal.

In her testimony, Quinten confirmed that she was called by the Parent on the evening of September 9. They have been friends for about five years. Quinten said they spoke twice by phone that evening. Quinten testified she came home after school that day around 3:25 pm and watched her regular soap opera program on TV, the Young and the Restless. Quinten tutors the Parent's son on educational and social issues. They had not yet arranged a schedule for the new school year so she needed to speak with the Parent to set it up. Usually she tutored him on Mondays and Wednesdays. It was a paid private arrangement outside of School programming. Quinten recalled that she phoned the Parent around 5 pm on the Parent's home number. Later the same evening, after supper, the Parent called back and was upset about what she had been told concerning the staff meeting discussion at the School. The Parent did not identify the caller. Quinten tried to calm her down but responded that due to confidentiality, she could not say anything about what happened at the School meeting. She recommended a meeting with the Principal.

Quinten testified the Parent was crying on the phone, "bawling". She brought up "all the stuff" from the old incident again. She seemed overwhelmed and couldn't

deal with it. Quinten felt badly for the Parent but there was nothing she could do except steer her to someplace she could get help. Quinten had no doubt that the Parent received a phone call as she described.

Quinten testified that she herself has not shared the content of the staff meeting with anyone: "I'm not into this gossip stuff."

The Parent testified she went to the School as usual the next morning (Thursday September 10) and approached Deacon. At 8:50 am, she met with Deacon and Amodeo in the Principal's office. In her testimony, the Parent reviewed notes made by Deacon (Ex. 2-2) and confirmed they were accurate. Deacon recorded that the Parent was very agitated and angry. She wanted to make a complaint. She described how an employee called her the previous night and referred to a past incident involving her family. She was upset that an employee called to talk about confidential discussions at the School. In particular, the employee told her that the Vice Principal (Amodeo) said things were blown out of proportion regarding the severity of the incident. At that point, Amodeo explained that the phrase "blown out of proportion" as used in the meeting referred to the media and community response, which increased the trauma to the family, and not the severity of the incident itself. She told the Parent that the discussion with staff was about confidentiality and the effect of leaked information. The Parent responded that the caller told her the Vice Principal said the incident was blown out of proportion and wasn't really a big deal.

The Parent testified she was unwilling at first to identify the grievor as the caller. She felt the call was not meant to hurt her and she wanted to protect the grievor. She saw it as a warning about what was being said at the School. But after she heard the explanation from Amodeo, and when Deacon said it was a severe breach of

confidentiality, she provided the grievor's name. Now she believed the call was intentionally hurtful. It had given her the impression that the School didn't take the significance of the incident seriously. Also the Parent questioned how the grievor got her phone number since she had blocked it after media issues related to the incident. She told Deacon there was no reason for the call. She testified she was not looking for anything to be done as a result of her complaint. She just wanted people to stop talking about it. She described how she called her friend Pam Quinten the same evening and Pam clarified that "blown out of proportion" referred to the media and community response, not the school's perspective. Pam told her that due to confidentiality, she couldn't discuss it further.

In his evidence, Deacon confirmed the meeting with the Parent as described in his notes. He testified she was visibly upset, her face was flushed, she was breathing heavily and her tone was angry. There were tears. The particulars of the past incident were not mentioned but Amodeo and the Parent recognized what the likely incident was, said Deacon. He himself had no knowledge of the incident or its severity.

Amodeo testified that the media and community response to the incident involving the Parent's family had increased the family's trauma at the time. This was Amodeo's purpose in talking about the matter with staff at the meeting – to prevent this sort of thing from happening again. Amodeo testified that at the time of the incident, the Parent was hounded by media and camera crews and the community was divided about the incident. Amodeo had little information about the incident itself but felt that the phone call from the grievor had re-traumatized the Parent. In addition, the grievor's action had eroded the Parent's trust in the School, Amodeo believed.

Amodeo said she was bewildered and could not imagine the grievor's purpose in making the call. She was "put out that despite having a conversation on confidentiality, a staff member would breach it so quickly, over a matter that makes no sense to me." She had concerns about past practice at the School and had been hoping the presentation she made would help "tighten things up".

After the Parent identified the grievor, Deacon asked about their past relationship. The Parent answered that she and the grievor had no significant prior relationship but they had children of similar age and were Facebook friends. Deacon told the Parent there would be an investigative process and reminded her that the whole matter was highly confidential. It was two minutes before the opening school assembly and he left to meet the student body. He was "surprised if not shocked, and deeply deeply concerned" by what he heard. He was curious to learn exactly what had happened.

Deacon testified that he assessed the Parent's concerns as sincere. He believed her. He took it as a genuine allegation and therefore decided to investigate. A parent could not have information of this kind about a staff meeting unless someone in attendance at the meeting had disclosed it. He notified John Martin, Secretary-Treasurer of the District, in accordance with standard practice.

Deacon followed up the next day (Friday September 11, 1:30 pm) and asked the Parent if she had the Caller ID feature on her home phone but she did not have it. Then he asked her if she would contact Telus and inquire whether they could track the numbers for incoming calls. The Parent agreed.

The interaction between the Parent and Telus at this point became a significant factual issue in the case. The Parent testified that she called Telus and asked them to track any calls received and provide a copy. She had to verify herself to Telus by birthdate and phone number, as well as providing her father's personal information, as he was also on the account. The Telus employee replied they "usually don't like to do this" but the Parent insisted she needed the numbers. The Telus representative said she would email the numbers as soon as she could. The Parent left her home at Storey's Beach around 2:30 pm to pick up her son at school. It's a 10-15 minute drive but she always goes a little early in case she has problems. School is out at 3 pm and she stopped to see Deacon. His notes record that she reported receiving a return call from Telus with two numbers, one of which Deacon knew matched the grievor's home phone number. The Parent left for home and arrived about 3:30 or 3:35 pm.

The Parent testified she received the Telus email (Ex. 2-4) at 3:31 pm listing two calls received on her home phone between 4 pm and 8 pm. Strangely, the email did not indicate the date of the calls in question, only the times. The Parent was unable to explain this omission. One number was her boyfriend. The other was the grievor's number at 5:43 pm, although at the time the Parent did not recognize it. Another anomaly was that Quinten's 5 pm phone call about tutoring was not on the list the Parent said she received from Telus. This was not raised in cross examination of the Parent, presumably because the Parent testified before Quinten. In her investigative statement (Ex. 2-7), Quinten referred to *receiving* a call from the Parent about tutoring but in oral testimony, she was clear that *she* made the call to the Parent around 5 pm.

The format and content of the email in its totality was as follows:

From: TELUS My Account <donotreply@telus.com>
Date: September 11, 2015 at 3:31:36 PM PDT
To: **-**@hotmail.com
Subject: Customer Request

Hi [Parent]!

As requested at 1:57:12pm September 11, 2015. The following are incoming calls to (250)902-1177 between the times of 4:00pm-8:00pm. If you require any more information please call us 1-888-811-2323 Toll free
Mon. – Fri.: 7:30 am – 9 pm
Sat. – Sun.: 8 am – 9 pm

4:12:37pm (250)902-8483
5:43:12pm(250)949-8609

Thanks,
The TELUS Team

During the hearing, various issues were raised concerning aspects of the Telus email format, including spacing, underlining, colour and bullets. At the conclusion of testimony, the Union stipulated that none of these points were in issue. It was demonstrated that forwarding the email resulted in format changes.

Returning to the narrative, the Parent forwarded the Telus email to Deacon at 4:04 pm (Ex. 3-17). The Parent was asked in direct examination for her response to the suggestion that the Telus email was fabricated. No, she replied, it was the email she received from Telus. She testified that the original email is no longer available because she has an auto-delete function that deletes emails after a month. This became significant in the Employer's investigation because, to authenticate the email, the Telus Internet Abuse Team required the full header with IP address information that only appears in the original email. The only version currently available is the forwarded message, which Deacon retained on his iPhone (Ex. 16). Deacon asked the Parent to authorize the District's lawyers to forward the email to Telus for verification and she readily agreed, signing a consent on September 18, 2015 (Ex. 2-14).

In forwarding the Telus email to Deacon, the Parent asked whether her name would be mentioned in his final report as "I really don't want any conflict. Obviously it will be known by the individual but would rather not have her have hard evidence which can be used against me in our community. It's been hard enough living here lately without judgement even more (*sic*)" (Ex. 3-17).

In cross examination, somewhat surprisingly, the Parent was not pressed on the authenticity of the Telus email. Before the hearing commenced, the Union had a written memorandum (Ex. 3-26) from Bennett, the Telus Security Investigator

certifying the email as counterfeit. It was not directly put to the Parent that she had faked the email or had somehow arranged for the creation of a fake document. Nothing was asked about her skills in using the internet and email. Possible hostile motives were not probed. It was not suggested to her that she was lying to the arbitrator. She was not queried about her wish to avoid "hard evidence" of her complaint. However, prior to the close of cross examination, the Parent was offered an opportunity to comment on the testimony that Bennett was expected to give, namely that the email was forged and that Telus does not keep records for unbilled calls to landlines. The Parent responded, "I'm pretty sure this is what I got from Telus in my inbox. That's why I gave Telus permission."

The Parent testified that the incident with her daughter continues to affect her today. She added that it is not the grievor's phone call, but the incident itself, that impacts her.

Investigation by the Principal

Deacon testified that the School seeks to project a highly professional image to the community, which includes the maintenance of utmost confidentiality and trust. He said expectations for employee conduct in this regard exceed the demands in many other sectors because of the need to ensure the care and safety of children. A breach of the public's trust can erode confidence in the District and its ability to provide high quality service to families. Given the nature of the work, teachers and support workers may become aware of various intimate and personal family matters. Unauthorized sharing of such sensitive information can have a negative impact on families or students. There is one newspaper in the North Island region, but broadcast media from Victoria have sometimes sent out news crews to the District.

One of the most potent and potentially damaging forms of media communication is social media, and the impact is exacerbated in a small community, said Deacon. This was the context in which he responded to the Parent's complaint and undertook his investigation. It was a very serious matter. None of the foregoing considerations were disputed by the Union.

After he received the Parent's complaint, Deacon prepared a script for conducting employee interviews, including a standard form of introduction to explain the process to each interviewee and scripted questions dealing with the September 9 staff meeting. On the morning of Friday September 11, he gave written notice to the grievor of an investigation into alleged misconduct and then proceeded to interview Carlson, Quinten, Amodeo and the grievor. Notes were taken by Kaleb Child, Director of Instruction for the First Nations program and the accuracy of the notes was generally not challenged by the Union.

At 9 am on September 11, Deacon met briefly with the grievor and handed her a notice pursuant to the collective agreement (Ex. 2-5). The allegation was stated as follows:

> That during the evening of Sept. 9, 2015, you telephoned a parent directly at home breaching trust and confidentiality to suggest that administration was making specific personal references and minimizing the seriousness of a previous family concern in an open meeting.

Fyles said the meeting was very general and Deacon did most of the talking. He stated the concerns being raised and the fact that there would be an investigation. The name of the complaining parent was not shared. Under cross examination, Fyles

conceded the specifics of the allegation were stated and the name wouldn't make much difference.

Carlson was interviewed at 9:20 am. Her description of the staff meeting and the confidentiality discussion matched what Deacon had heard the previous day from Amodeo, but differed from what the grievor had allegedly told the Parent during the phone call. The notes of Carlson's interview indicate she said there was a "sidebar conversation" in the meeting that during a previous event, media "blew things way out of proportion which was detrimental to the family." Quinten was interviewed next at 9:41 am and gave the same description of the meeting. She did not mention a sidebar. Amodeo was interviewed at 10:38 am and confirmed the intent and conduct of the meeting. She was upset about the apparent breach of confidentiality. Having spoken to three witnesses, none of whom verified the version of the meeting conveyed to the Parent on the phone call, Deacon called in the grievor at 11 am. Fyles attended as the Union Representative.

The grievor's first reaction to the allegation was not a straight denial and this was suspicious to Deacon. He read her the text of the notice provided at 9 am and asked for her response. The notes of her answer were as follows: "I'm bewildered. I don't recall a phone call. Fairly uncertain, who would I have phoned?" Deacon asked, "So you don't remember making this call?" The grievor replied, "Not that I remember." Deacon testified he found this vague and potentially evasive, especially since they were discussing events only two days old. He expected the grievor to recall whether or not she phoned a parent. Later in the interview, Deacon asked again whether she called a parent about the meeting. She responded, "I don't remember. I'm 98% sure I didn't. I'm perplexed. No I don't think I did. I can tell you all the details of what I did that night." Fyles asked Deacon to name the parent

but he refused. Pressed under cross examination that it would have been easier for the grievor to respond if the identity of the Parent had been revealed right away, Deacon disagreed. "This was an explicit allegation. I felt she could answer directly." Deacon also noted that the grievor had been given notice of the allegation two hours earlier.

The meeting notes say the grievor shifted the conversation to the Facebook posts about School startup. Then the grievor said the following:

> I'm feeling very stressed and my medical condition can cause me to forget things. This is making it difficult for me to breathe. This will take weeks for me to get over. I'll have headaches for weeks; stress.

The grievor became emotional and continued as follows:

> I went to the grocery store, went to the bank, cooked for the kids, bathed the kids, talked to my husband, phoned my mom, the custard wouldn't set. I was very busy. I can't see when I would have had time to do so. I have receipts to prove that I was out doing things and what I was buying at the grocery store using my own money.

Deacon queried how the grievor could remember all these details yet not be sure about making a call to a parent from the School. She answered, "I'm not sure. I guess if I have to state one way or the other, then I remember not making the phone call." Deacon tried to sum up her position: "You are stating that you clearly remember not making the call." The grievor did not answer. There was more discussion about the Facebook posts but it was determined that the grievor's post was dated prior to the staff meeting and had no relevance. Again Deacon tried to review the grievor's responses for clarity – bewildered, don't recall, can't remember, I'm perplexed, 98% sure I didn't call, I remember I didn't call. Again the grievor

did not respond. She also declined a final opportunity to make a statement before the interview closed.

Deacon interpreted the grievor's answers during the interview as vague, not fully responsive, shifting and inconsistent. He took it as a deflection of responsibility on her part. He testified that during the course of the entire investigation there was never an explanation for the grievor's unusual behaviour in the first interview.

Deacon's next step was to follow up by phone with the Parent. He called her at 1:30 pm the same day (Friday September 11) (Ex. 2-3). He quizzed her about how she knew it was the grievor who called. He asked her to contact Telus to obtain her incoming call numbers if possible. Later that day, at 3 pm, he met with the Parent again at school and she said she had been given two phone numbers by Telus. When she returned home, she sent Deacon the Telus email, which is marked at 3:31 pm (Ex. 3-17; Ex. 2-4). One of the numbers was the grievor's home phone number. The email from Telus seemed genuine, Deacon thought at the time.

Deacon noted that he lives in Storey's Beach, like the Parent, and he confirmed that it takes about 15 minutes to drive from there to the School. This was relevant because an issue arose as to whether the Parent had enough time on September 11 to fabricate the Telus email, or have someone else do so. Her travel time and schedule for the day were matters addressed in final argument.

Deacon met with Martin to review the status of the investigation. It was decided to conduct another interview with the grievor on the afternoon of September 15, 2011. Fyles again assisted the grievor. Notes were taken by Vice Principal Rena Sweeney from North Island Secondary School (Ex. 2-10). The meeting began at 2:10 pm.

This time Deacon opened the meeting by identifying the Parent for the first time to the grievor and the Union. After preliminary comments outlining the purpose of the meeting, Deacon said, "You have previously stated that you did not make the alleged phone call. Do you want to make any changes to your response to this allegation?" The grievor responded, "I absolutely did not. Further, now that you have given that name, I am relieved. I absolutely did not call this parent. If this is still an investigation on me, I need to know my rights."

In cross examination, Deacon acknowledged that this time, the grievor was very clear in her denial. He wondered why. His reaction was to present his evidence and challenge the denial, as part of his investigative role. Fyles testified that when the grievor learned the identity of the complaining parent, her demeanor changed. Previously the grievor had been perplexed. Once the Parent was named, she said, "Oh this is who complained? I still deny it." Fyles could not describe any particular way in which the grievor's demeanor changed.

The grievor went on to say that she had checked her home phone for the call history but could not figure out how it worked. Deacon was skeptical and as it turned out, she never provided a call history. She asked, "… is someone impersonating me? Is this bullying and harassment related to something else? I have been walking with confidence that I know I did not make the call. Waiting for you to call me in." Deacon noted this did not match her first set of responses on September 11 and it was a deflection to bring up possible harassment. The grievor told Deacon the process had caused her to consider all her conversations with staff, parents and students. She saw improvements she could make in her conversations with staff. She speculated someone has something against her and called the Parent using her name. Then Deacon told the grievor he had found information that she did in fact

make the call. Did she still deny it? Yes, she answered, she denied it. He showed her the Telus email but she stood by her answer. Asked if she wanted to change her statement, the grievor said, "If this happened I need to go to the Doctor."

Fyles testified that the Telus phone record was passed around briefly. "We read it and we were more confused."

Deacon pressed his questions. He asked the grievor to explain the Telus call record and the Parent's accusation against her. The grievor's answer was not relevant to the discussion, he felt. She made a series of points in succession. She said she had the luxury of a nap that day and just woke up at that time (not mentioned in the prior interview). Does someone have technology to make it look like the call came from her home? She does not make calls from home about work. She is busy with two children and a sick husband. She referred to noon hour supervision and the incident with the Parent's daughter. It didn't happen in the grievor's area of the school yard, she said, but it made her question herself. "Other than that, I would have nothing to call that mom about. I never called her. We know each other through community things, like birthday parties."

Deacon told the grievor "The evidence says that you did. It's strong evidence." But the grievor was adamant: "No. I absolutely did not make that call." Deacon was not convinced. He noted in testimony that many of these answers differed from her previous statements. He handed the grievor a letter of suspension with pay pending investigation (Ex. 2-11). She replied that this was "astounding." She said she had been upset all weekend but arrived at the thought that she didn't do this and it would be ended when he called her back. She said she would call Telus and added, "This is serious. Do I phone a lawyer or the police?" She wanted to spend time with her

children after school "but this is very stressful." Deacon noted the grievor made no mention of a medical condition causing her to forget things, as she did in the first interview.

The grievor had made notes to herself in journal style (Ex. 4) over the weekend before the September 15 interview. They were not disclosed to the Employer until after the termination so Deacon did not review them during the investigation. Deacon testified that the personal notes showed both consistency and inconsistency with the grievor's interview statements. In her personal notes, the grievor expressed doubt about her own memory: "What if I truly have forgotten a specific event such as this … ?"

The grievor went home under suspension. Deacon received a call from her at 2:45 pm the same day telling him she had checked with Telus and they don't keep track of local calls, only chargeable or billable calls (Ex. 2-12). He responded that he would take that into consideration. In cross examination, it was put to Deacon that this was information calling for investigation. He agreed and pointed to the steps he took. He began his own inquiries with Telus. He did not ask the grievor for her own phone records as he said he was unaware that she had any relevant records. Moreover, the grievor had told him Telus does not keep local calling records so there seemed no point in asking if she had any such records.

Unfortunately, over the next three days Deacon was given a series of contradictory answers by various Telus representatives from different branches of the company. Three Telus staff said local calls are tracked. Staff in Billing and in the Privacy Request Centre said local call numbers are *not* kept. When told a customer had been sent an email with the source numbers for local calls to her home, one staff person

(Cynthia) told Deacon. “This is absolutely a fake document” (Ex. 2-12). Deacon made the following note to himself at the time: “Wow. Ok. Is there any explanation for the document beyond falsifying?” Cynthia at Telus suggested that if the customer was being completely transparent, they would authorize Deacon to be on the account and then Telus would verify to him what action was requested and taken in this case. If there had been a contact with Customer Service, there would be a stamp on the account. Deacon took this suggestion and asked the Parent to sign an authorization, which she agreed to do “without hesitation” (Ex. 2-14). The District’s legal team pursued the Telus issues after that point (Exhibits 2-15, 2-16, 2-17, 2-18, 2-19).

The lawyers contacted a sales and marketing agent used by the law firm, who said the email looked legitimate. They then contacted Telus Customer Service and were referred to the Telus Internet Abuse Team. They asked whether the email provided by the Parent was a true email from Telus, or was it fabricated? The Abuse Team responded that without the full header on the email, they could not be sure. On September 18, the Abuse Team said they would contact the Privacy Department, who usually handle these types of requests. The response from Privacy was the same, however. They needed the original message with the full headers. The lawyers obtained the original email with full header and forwarded it. On September 21, the Abuse Team responded that this was not the full header and gave instructions on what they required. Finally, on September 23, an Abuse Team member advised, “I am not able to see the email header in the information you supplied. Please provide the email header so that we can assist you further” (Ex. 2-19). There is no evidence of any further communication by the lawyers with Telus.

Under cross examination, Deacon said he did not know if the request for a full header was answered after September 23. He said he and Martin discussed the Telus responses. It was put to Deacon that there was a need for "further digging." He replied, "There was continuing conflicting feedback from Telus."

The lawyers prepared a memorandum dated September 24, 2015 to Martin summarizing the efforts made to verify the email provided by the Parent (Ex. 2-20). Deacon received a copy. It was concluded that the email seemed legitimate but could not be verified due to the email header problem. The memorandum did not consider earlier information received by the grievor on September 15 and provided to Deacon that Telus does not track unbilled calls. Deacon himself had been told the same thing by some Telus representatives, as well as the fact that there should be a stamp or notation on the file if the Parent had made an inquiry. No request was made, using the Parent's authorization, to check for a stamp.

Under cross examination, Deacon was asked whether he should have gone back to the Parent if questions were arising about the email she provided. He answered that he did follow up by securing her authorization for release of information on her Telus account, but thereafter it was left to the District's legal team: "It's not my role to pull this apart legally. I'm running a school."

The Union pressed further in its questioning. Given the unresolved verification of the email by Telus, was there a sufficient basis to terminate a long service employee? Deacon responded that the Telus email was only part of the evidence taken into account in making the termination decision. He did not communicate with the lawyer who prepared the memorandum. When Deacon and Martin discussed it, they

concluded there was uncertainty, such that the email could not be authenticated, but much of the information appeared to be from Telus.

In cross examination, Deacon was also asked about the 5 pm call made by Quinten to the Parent, which should have appeared on the list of calls received at the Parent's home between 4 pm and 8 pm. Quinten testified that she called to discuss tutoring arrangements for the new school year. As incoming calls, the Telus email listed the grievor's home number and a call from the Parent's boyfriend, but not Quinten's call. Deacon confirmed that Quinten's call does not appear on the Telus email.

The Union suggested to Deacon that he should have considered whether the grievor was an employee in need of help rather than aggressively accusing her of misconduct as he did. Deacon replied that if he had seen odd or unfamiliar behaviour on the grievor's part, he would have offered help, but he saw evasion and dishonesty. He agreed there was no apparent reason for conflict between these two individuals. So, was it not odd that the grievor would allegedly make such a phone call to the Parent? Deacon answered that the thought did cross his mind in the early stages of the investigation when the grievor's responses were vague and changeable. However, as she became adamant in her position, this line of thinking receded. He concluded the grievor was in "straight denial".

The decision to terminate

The decision to terminate the grievor was made jointly by Deacon and Martin. In the end, while taking into account the grievor's denials, they concluded that the grievor was the person who called the Parent. They did not believe the grievor. She spoke of checking her call history but never provided it. She knew there would be

serious consequences if she admitted making the call, so her denial was less than credible. While referring to a medical condition, the grievor provided no medical report. On the other hand, there was nothing to indicate an ulterior motive on the Parent's part and her story stayed consistent. She identified the grievor without ambiguity. The Parent's story was corroborated by Quentin's account of the emotional request for help later the same evening. The Parent was cooperative in the investigation. She showed no hesitancy. The Parent could not have known details of a closed staff meeting unless one of the staff disclosed them, and all the evidence pointed to the grievor. There was nothing to indicate that someone may have impersonated the grievor in making the phone call.

The termination letter (Ex. 2-22) listed the investigative findings. There had been a serious breach of confidentiality, misrepresentation of staff discussions, intentionally hurtful behaviour toward a School family, refusal to take responsibility and dishonesty during the investigation. Deacon said that the District had lost all trust in the grievor. The letter stated in part:

> … You were shown a Telus telephone record indicating that a call was made from your home telephone number at 5:43 p.m. on September 9th to this parent's home telephone number. … Notwithstanding the telephone records showing that a call had been made from your home telephone number to this parent's home telephone number you stated that you "never called her."

The letter was handed to the grievor at a meeting held on October 15, 2015. Jodi Welch ("Welch"), Unit Vice-President for the Union, attended to assist the grievor. After taking some time to review the contents of the letter with the grievor, Welch asked for a copy of the "alleged phone bill". Deacon refused on the basis that it belonged to a third party but stated, "We verified where the call came from by that printout." The grievor interjected that she had contacted Telus and they said such

information does not exist. Deacon replied that he had received that information from the grievor and documented it, as well as following up with Telus. The grievor asked, "If Telus doesn't provide that kind of information how did she get it?" Deacon responded that he understood the concerns but six weeks had been spent investigating and he had reached a conclusion "based on the evidence we have" that this did occur.

In cross examination on this point, Deacon was asked how he could say the call was verified by the Telus email. He replied, "Some folks said it was valid, others said it was not, so we did not rely solely on that email."

At the termination meeting, the grievor repeated that she did not make the call. "I am not a phone person," she stated. "I feel too confined and stuck in one place on the phone." She referred to a medical condition that has stress as a factor, and explained she had been highly stressed by the accusation and lengthy investigation. She said she would seek legal counsel. The grievor then made a lengthy statement, recorded in the meeting notes as follows (Ex. 2-21):

> From day one, I had full confidence that you would be pulling me aside when I came back to work that day and saying that this had all been a misunderstanding. I also want to share that the situation where people insinuated that I made comments about- that was in that meeting with Kelly Amodeo. I was under the impression that day that a child had been severely sexually assaulted on school grounds in a zone I was responsible for. It was much much much later that I was made aware that it was much less serious that I had been led to believe. The whole thing about saying that the school district minimized it doesn't even fit. By no means am I saying that the school district minimized it. It doesn't fit. I made another reference prior that involved the media and I'm wondering if my comments made about that got tangled with my comments about this. I spoke to the other family eighteen years ago. When I came to school on that day, I said to the then administration is there something going on that I need to know about and they said no. But the staff were buzzing and the kids were agitated. Later I went out and the school was surrounded by media. I came to administration and asked if there was anything going on that I needed to know about. I said to administration that

> in the future if something happened maybe it could be communicated more clearly. Those comments may be tied to these ones.

During the termination meeting, the grievor asked for all documentation including the Telus email. She questioned the authenticity of the email, which she had seen only briefly at the September 15 interview. From what she could remember, she was concerned. The Parent's name was in fancy lettering and the style of the document seemed "artistic". Deacon responded that he understood the concerns about authenticity but would not be turning over any documentation until he consulted with senior administration. He acknowledged there would be a process moving forward. Welch reiterated the request for documents and said a grievance would be filed.

Evidence of the Telus investigator

Cindy Bennett testified that the email provided by the Parent to Deacon on September 11, 2015, purporting to show a call from the grievor's landline number to the Parent at 5:43 pm, was counterfeit. Following service upon her of a summons to appear at the arbitration hearing and produce any relevant documents, Bennett prepared a memorandum (Ex. 3-26), as follows:

> Date: October 31, 2016
> Subject: [Parent] Document
>
> Document is counterfeit as evidenced by the following:
>
> 1. Document claims to contain local records. TELUS does not retain records of incoming calls to landline numbers or local call records on landlines.
>
> 2. Telephone number (250) ***-**** is registered to [X] with authorized person on account of [Y]. No other parties authorized on account.

> 3. Document allegedly sent to **-**@hotmail.com – This email address is not on the account –
>
> 4. TELUS employees are highly aware of customer privacy and confidentiality and would not send confidential account records to a non-account holder to an email address not on record with TELUS Communications Inc.
>
> 5. Document states "as requested at 1:57:12pm September 11, 2015". This is a very specific time frame, which is not standard format for TELUS letters.
>
> 6. Document does not provide the supposed date of the calls referred to.
>
> 7. Two different text styles in document.
>
> 8. TELUS retains records of client requests in the customer account. There is no record of a request for calls or this letter being generated.

On the matter of local call records, Bennett's memorandum repeated information previously supplied by Telus representatives to the Union and to the grievor. In September 2016, Union legal counsel had an email exchange with Telus Privacy (Brendan) and made the following request:

> Can you please confirm that Telus does not retain call detail records for any period of time after a non-billable call is made or received. In other words, please confirm that Telus would not be able to provide a customer with call details about the non-billable calls that were made to their landline on the previous day.

On September 9, 2016, Brendan replied (Ex. 3-24), "That statement would be correct. TELUS does not retain call detail records for landline service under any circumstance."

The grievor had made the same inquiry herself on September 15-16, 2015 (a year earlier) and had been given the same response by Telus Privacy (Karen) (Ex. 3-13): "On your TELUS residential home phone we don't collect local calls only billable calls (long distance calls)."

Like the School District's lawyers, Union counsel had an apparently inconclusive exchange with Telus about confirmation of authenticity using the email header (Ex. 3-21 to 3-23).

In her testimony, Bennett repeated that Telus does not retain records of local landline calls and therefore the Telus email was "patently false" in showing the grievor's home number as an incoming call to the Parent's landline.

Reviewing the other itemized points in her memorandum, Bennett said she looked for the Parent as an authorized name on the account but the Parent was not listed as the client. Telus staff will not discuss accounts with third parties. Also the recipient email address on the Telus email (**-**@hotmail.com) was not recorded on the account and staff would not send personal information to such an address. Bennett said Telus employees are highly aware of privacy rules and face termination for a breach of policy. However, under cross examination, she revised her evidence and acknowledged that there was a Telus Mobility account in the Parent's name with the email address in question (Ex. 6). It was possible, though highly unlikely, that a landline representative could access the Parent's email address.

Bennett pointed to the time stamp format on the Telus email (hour-minute-seconds) as atypical for communication by the company. She said she had never seen this before and it stood out when she examined the impugned email. In cross examination, she conceded that it *could be* done this way and there was no Telus policy on the point. She also confirmed that an email she herself sent to Employer counsel self-populated with the same time stamp format (Ex. 6), although she noted the Telus email was hand-typed. She agreed a Telus representative might have typed

out the content of the impugned message. At this juncture, counsel suggested to Bennett that she was "searching for ways" not to authenticate the Telus email. Bennett denied it: "I have no dog in this game." She repeated that she can give a conclusion about the email because "we do not have the content in the Telus system." The Abuse Team can verify a document if they have the necessary header information, "but on content alone, I can say it's not authentic."

Bennett also noted that the Telus email omitted the date of the supposed incoming calls.

As for the appearance of the Telus email, Bennett observed that there were two different text styles in the document. The introduction "Hi [Parent]" is a larger font and a different type. This is contrary to company practice. Representatives have a template for email communication and a drop-down menu to select messages. They do not hand type emails to customers, as this message appears to have been done. The block image at the bottom of the Telus email, containing links to the corporate privacy statement, contact information and other Telus information, appeared legitimate, said Bennett. It may have been copied from a genuine Telus document and pasted into the impugned email**.** In a demonstration conducted by Deacon later in the hearing using his forwarded copy of the Telus email (Ex. 16, 17), it was shown that these links are operational. When recalled, Bennett stated that this fact did not alter her opinion. If the block image at the bottom of the Telus email had been copied as part of constructing a fake document, the links would still be functional.

Finally, Bennett testified she checked the Parent's account to see if any customer interaction had been recorded for September 11, 2015, as would be standard practice. Notations remain on the file indefinitely. There was nothing in the file to document

the request supposedly made by the Parent for a list of incoming calls. She said it was possible the representative sent an email and neglected to make a notation but this would be unusual. She acknowledged that Telus employees have acted outside corporate policy in the past. Above all, said Bennett, she was confident the email could not have been provided to the Parent by Telus because unbilled local calling information is simply not captured for landlines.

Asked to comment on the conflicting information provided by various Telus employees to Deacon (Ex. 2-12), Bennett testified that those individuals who said local calls are tracked by Telus gave wrong information. They may have been trying to be helpful to Deacon. Admittedly, this explanation was speculative on her part. Yes, she agreed, ideally customers should be able to rely on information they receive from Telus employees. That is the company's goal. She added that local calls can be captured only with a lawful police wiretap or by using *57, a service which allows harassing calls to be traced by Telus Security. Wiretapped calls are recorded only once the court order has been made and the recording process is in place. It cannot capture historical calls. The *57 service is widely available to landline customers and does create a call record, but only Corporate Security has the capacity to access the records.

In addition, Telus engineers perform system switch testing with a tool called Geo-Probe, which can capture some local calls but not all calls. The call record is kept for five days. Bennett stated that Customer Service staff would be unaware of Geo-Probe. "It's buried in the bowels of Telus." In any event there is very limited access by this means and Customer Service staff have no training in the use of Geo-Probe. It was suggested to Bennett that a Telus employee could attempt to get call information from an engineer who has Geo-Probe access. "It is possible," she

answered, but highly unlikely. Employees are aware of the sensitivity of such information and receive training about maintaining confidentiality.

Finally, Bennett reviewed the Employer legal team memo prepared for Martin on September 24, 2015 (Ex. 2-20). She agreed that verification of the email's authenticity could only be done by the Abuse Team and required access to the original email header, which apparently was not available. The sales agent, who was quoted as telling the lawyers that the email looked valid, was wrong. He was not a Telus employee. The question was outside his knowledge and expertise.

Under cross examination, Bennett said she did not see most of the documents (Ex. 2-15 to 2-20) generated by the Employer legal team review. Nor did she see the exchanges between Union legal counsel and Telus staff (Ex. 3-22 to 3-24), although she was aware of some email messages embedded in those documents. She rejected the notion that it would have been useful to have seen all that material in the course of preparing her memorandum and opinion. She stated she had the information necessary to reach a conclusion on the question put to her. Should she have spoken to all the other Telus employees who had given information to the Employer and the Union? No, she replied, it was not germane. "I know after 17 years what information Telus retains. Others may not know." She did make contact with several staff in the Privacy Office and the Abuse Team at certain points, and discussed the assignment with her manager as she normally does in ongoing cases. Also she spoke to Doug Cook, the corporate expert on Geo-Probe, but did not make a record of the conversation. She did not search for a recording of the Parent's call with Customer Service as these recordings are not retained beyond 30 days.

In redirect examination, Bennett stated that having reviewed all the exhibits to which she was referred in cross examination, including all the information provided at various times to Deacon and the Employer legal team, her conclusion was unchanged. She noted that none of the employees involved were security specialists.

In cross examination, Bennett was pressed to admit that it was *possible* the Parent had been sent the email by Telus. She disagreed. A Telus employee could not have prepared the document. A representative might have believed they could access local calling records but in fact they cannot. Geo-Probe might contain the numbers but Customer Service representatives have no access to that system. It is unlikely they are even aware of Geo-Probe. "To me, right there it's a full stop," said Bennett. However, later under cross examination Bennett agreed that it appears an email was sent by Telus at 3:31:36 pm, although it may have been modified or may even have been sent on a prior date. "We don't know something was sent by Telus on that date and at that time." Once an email has been received, parts can be deleted, overtyped or revised, and the changes cannot be detected. Again, without the full header verification was impossible.

Bennett agreed that Telus employees have at times been disciplined for improperly releasing confidential information, contrary to corporate rules and policies. She was shown and reviewed the following published decisions: *Telus Communications Inc. v Telecommunications Workers' Union (Lights Spencer Dismissal Grievance)*, [2009] C.L.A.D. No. 189 (Gordon); *International Brotherhood of Electrical Workers, Local 348 v Telus Corp. (Hennig Grievance)*, [1999] C.L.A.D. No. 709 (McFetridge); *Telus v Telecommunications Workers Union (Snape Grievance)*, [2009] C.L.A.D. No. 52 (Power); *Telus v Telecommunications Workers Union (Meyer Grievance)*, [2004] C.L.A.D. No. 546 (Warren); *International Brotherhood*

of Electrical Workers, Local 213 and 258 et al v BCT Telus Communications Inc., [2000] B.C.J. No. 1805 (B.C.S.C.)

Bennett confirmed that she testified in the *Lights Spencer Grievance*, *supra,* but did not recall the details. She said the corporate policies on ethics and security reproduced in the award (para. 25-26) were accurate. In that case, an install-repair employee was dismissed for misconduct that included altering an invoice for personal gain, using and reformatting a Telus computer for personal business purposes, using his company cell phone for personal business and sending offensive emails. These allegations were held to be proven (para. 100) and upon consideration of the proper penalty, the arbitrator upheld dismissal, stating in part (para. 153):

> … in the context of the Grievor's position of trust, the Employer's expectations, and the Grievor's employment history, which includes serious concerns about unethical conduct, the proven misconduct plus the Grievor's unbelievable justifications do not bode well in terms of the reparation of this employment relationship. His honesty and integrity have been compromised by his serious misconduct, and his justifications demonstrate an unwillingness or inability to acknowledge the impropriety of his conduct and a failure to take full responsibility for his actions. In my view, the absence of full and frank personal accountability and true remorse by the Grievor renders this employment relationship irretrievably breached.

In the *Hennig Grievance*, *supra*, a switch person who had access to 160,000 telephone lines used his position to listen in on numerous private phone conversations, simply out of curiosity and boredom. Bennett said that switch technicians and some repair crews do have this ability, but not Customer Service employees. In *Hennig*, the grievor's misconduct came to light as a result of an investigation into another employee who was caught listening to stockbroker phone calls in an effort to gain useful investment information (para. 13). The grievor admitted the allegations but said he was unaware of the gravity of his actions. The arbitrator concluded "the Company was remiss in its duty to make sure that all

employees knew how seriously it regarded this type of misconduct" (para. 59). There were several mitigating factors and a suspension was substituted for discharge.

In the *Snape Grievance, supra*, a Customer Service Representative working in the Inbound Call Centre was disciplined for inappropriate use of time and resources and breach of company policies. The grievor had a prior record of violations and termination was upheld by the arbitrator. Bennett commented that some employees do fail to adhere to corporate policies and there are a variety of reasons for these breaches. In the *Meyer Grievance*, a telemarketing employee emailed another Telus employee requesting confidential information about customers from a dealer activation system (para. 9-10). The grievor was a shop steward and was looking for information about employer contracting out. The grievor did not have the necessary access but the employee he contacted did have access. This scenario was put to Bennett in cross examination and she answered that it was possible an employee could seek access in such a manner. However, she noted that the events depicted in the above-noted awards took place in the period 2000-2009 and "the culture has evolved exponentially" since then. It is less likely that this kind of employee misconduct would occur now, in her view. She conceded these awards represent only a handful of the total employee discipline cases at Telus.

IBEW Local 213 and 258, supra, was a court action initiated by the unions against the company alleging wrongful interception of phone calls and wrongful diversion of emails and files by certain Telus employees for the purpose of undermining a union representation vote. The statement of claim asserted (para. 5): "Telus is aware that accessing the records and other information available in the records of BCT.Telus by BCT.Telus employees for improper and unauthorized purposes occurs on a frequent basis." Bennett said she began doing security work for Telus

in 2000 and was unaware of the events referenced in the court action, but she confirmed that it is possible for Telus to intercept phone calls. The decision in this case concerned a motion by Telus to stay the court action pending a parallel criminal investigation by the RCMP. The stay was denied (para. 32-35). No other information was provided as to the outcome of the litigation.

The grievor's direct testimony

The grievor testified that in September 2015 she was working 25 hours per week on a four-day schedule. For many years she did noon hour supervision, a role that supplemented her income and also allowed her to get to know staff and students better, which was helpful for her academic support function as a FNSW. She also worked in the Before School and Homework Zone programs. The grievor described her approach to her duties as conscientious. She has regularly taken professional education courses to improve herself and her practice.

The September 9 staff meeting

The Wednesday September 9, 2015 staff meeting discussed the importance of confidentiality. The grievor said that as often happens in these meetings, someone presents on a topic and it elicits a response. Here a number of little conversations broke out around the room when Amodeo stated that media involvement is one potential outcome. People were remembering examples when confidentiality was not maintained. These conversations were irrelevant to the presentation and were slowing down the meeting. According to the grievor, when this happens, "I opt in to bring the discussion back to the topic at hand." She did the same thing the

previous day during the meeting led by Deacon. "Often I'm the person who brings us back on point."

In this instance, the grievor spoke up and thanked Amodeo for her guidance. Speaking as a person with noon hour experience, she asked Amodeo to consider in future, if they know media may show up at the School, to give the staff a heads up. This allows the staff to be more capable. The grievor testified that she sensed she was "being a bit naughty" speaking this way to an administrator, but explained to Amodeo that 15-16 years ago there was a situation at the School where she went to administration because she could tell something was a bit off. The administrator said it was nothing. But there were media lingering outside the school yard. A student had been restrained by taping him to a desk and it made the national news. In her comments, the grievor made the point that with a heads up, everyone would have done better.

The grievor testified that in response to her remarks, Amodeo said she remembered that situation, it was blown out of proportion and it was no big deal. This incident did not involve the Parent or her child. The grievor said she was seated at a table at the front of the room.

The afternoon and evening of September 9

The grievor testified she did not recall the rest of the meeting in detail but when it ended, she returned to her classroom to deal with some odds and ends, and then left for home. The family had been away together for a memorial service and returned just before school started. A niece had committed suicide the previous weekend. The day after, a nephew was scheduled to go out on his fishing boat, but stayed home

because of the death, and that day the boat sank, with all hands but one lost. So it had been a trying week for the grievor. She was exhausted when she got home after work and found there were visitors in the house from across the bay who had come to check on the nephew. The grievor testified she was dozing on the couch as people talked and reminisced. The visitors left around 5 pm.

The grievor's husband (Johnny) could see she was tired and needed to rest. He took the kids across the street to play. He has mobility issues so they have a bed in the living room. She fell asleep in the bed and woke up around 5:30 pm, watched them playing outside for a while and was tempted to go back to sleep, but realized she had to make dinner. At about 5:45 pm, after a smoke on the deck, she put together leftovers and everyone ate dinner about 6 pm. Her older boy was cranky and needy but finally fell asleep. The grievor cleaned up the dishes and around 8 pm walked to the store with her younger son. By then, the older boy was awake and still cranky. Eventually everyone got to sleep. "That was my day," she said. She did not use the phone between 5:30 and 6 pm. She did try to phone her mother later that evening but could not reach her.

The grievor testified that the base for her phone is in the kitchen but the handheld is all over the place. "I don't like phones," she said. "I find them limiting. I don't sit around talking on the phone. When it rings, I'm – Gosh darn. It's not necessary to my life." The grievor said she has lived on a boat and in a cabin without electricity or phones. She communicates with people in person, by email and letter.

Thursday September 10

The next day, Thursday September 10, the grievor went to work as usual. Her day starts at 8:30 am but often she arrives at 8 am. This was a busy day with school resuming.

First investigative interview on September 11

On Friday September 11, the grievor was in her classroom at 9 am with the other team members when Deacon came to summon her for a meeting in his office. He told her to bring Fyles as a Union Representative. Kaleb Child was there as a note taker. Deacon handed her a notice of investigation into alleged misconduct and said he would speak to her again about it. She told him that sometimes people misunderstand and think she is upset when she is talking to them, but it's her health condition. Deacon stated the concern – that on Wednesday evening September 9, she breached confidentiality when she phoned a parent and shared family information from a meeting. She replied she had not done that. It was a brief session, only 7-8 minutes, and she went back to work.

At 11 am, Deacon convened another meeting and explained the procedure he intended to follow. He read the allegation. The grievor said she had "no idea". She couldn't place it in the context of her life. She was thinking and talking at the same time, and things did not come out in order. It was very confusing. It did not fit her recollection of the evening. She told Deacon she was 98% sure she did not call a parent, and when he asked about the other 2%, she told him she has a sleep condition that sometimes affects her memory. She was trying to figure it out, considering other possibilities to explain how someone could accuse her. She stood on the steps with

a parent the other day; was that it? Did she phone a doctor's office and a parent answered? She mentioned her Facebook post from a few days earlier and said it was possible that's how this happened, but it was not sent to a parent. Her post was trying to "calm the waters." She showed the post to Fyles and since it was sent on Tuesday, they realized it wasn't relevant and they didn't provide it to Deacon during the meeting. The grievor wanted to know the identity of the parent. She was not sure about the accusation.

The grievor testified that Deacon's investigative notes of her answers (Ex. 2-9) were reasonably accurate. In the meeting, she recounted the events of her evening, ticking them off. One confusion was that Deacon didn't say what "evening" meant in the allegation. The grievor said she only phones a parent in collaboration with someone else from the School. She takes direction from a class teacher or a coordinator or an administrator. She did make reference to a medical condition and said this would take weeks to get over. The grievor testified she was feeling great stress and wanted Deacon to understand. He was new and she never worked with him before. She was not trying to deflect by giving these responses. She was trying to think about the possibilities and contribute something useful. "I wanted to be clear, to be as open and honest as I could be."

Second interview on September 15

Deacon recalled the grievor on Tuesday September 15 for another interview. The grievor testified that over the weekend, she had thought about it and was clear in her own mind that there was no phone call. It must be a huge mistake and she was expecting Deacon to say so. But instead, he repeated the allegation. She denied it again, and when she realized it was the Parent, she said "absolutely" she did not call.

Deacon said he had a piece of evidence and shared a paper that appeared to be from Telus. The grievor looked at it closely and saw the Telus logo, but also a number of oddities in the format. She thought to herself: Wow, this is blowing me out of the water. It was obviously a serious allegation. She told Deacon it made no sense. She asked what were her rights here? Should she go to the police or a doctor? She asked for a copy of the Telus email but Deacon refused as it was confidential. She told Deacon she tried to check her home phone call history but was not able to access the menu.

The grievor testified that the investigative notes summarized what took place in the meeting (Ex. 2-10). She said once she knew the complaint was by the Parent, she was adamant "because I did not call her, I had no reason to call her." Prior to knowing who it was, "I expressed some uncertainty, maybe it was not a call but something was misunderstood. I did not phone [the Parent]."

Contact with Telus

The grievor testified that she was confused and scared. When presented with the Telus document, she wondered, "Have I really done this?" She phoned Telus as soon as she got home that day and requested a printout of all calls to and from her home on Wednesday September 9. She planned to take the list to Deacon. However, the Telus representative said the information does not exist. She called Deacon to pass on the information and he said he would consider it. She emailed Telus (Ex. 3-13) and called them again to get confirmation in writing. "My brain was a bit scrambled. I wondered if maybe she had a cell to receive the call. It seemed outrageous – a paper saying you did something you did not." She was frantic. On

September 18, Telus verified by email that the company does not keep local call records.

The grievor did not forward the message to Deacon since she had already informed him about the Telus information. She didn't want to keep "popping in and out." He could contact Telus himself and get the same response. "I felt it had nothing to do with me. Maybe D'Arcy would find out it was another staff member." In hindsight, did she regret not forwarding the message? She was unsure. She assumed he would be told the same thing. As time passed, the grievor wondered what was happening. She had no idea. She was in touch with the Union and felt that any information should be sent to the Employer through the Union.

The grievor's September 17, 2015 Telus phone bill (Ex. 3-13) showed 68 long distance calls totaling 341 minutes for the month. The landline was used by herself and her husband. The grievor's September 27, 2015 Koodo mobile bill (Ex. 3-13) for her personal cell phone listed 56 calls for the month, about two per day. Only seven calls were five minutes or longer. There was only one call exceeding 10 minutes – a 14 minute call. Billing is to the next minute and 26 calls were one-minute long.

Termination meeting on October 15

On October 15, 2015, the grievor was called to another meeting with Deacon and terminated. After reading the termination letter, the grievor asked Deacon if he had looked into the Telus information she gave him. He said he had considered it. She stated that some aspects of the Parent's document were not authentic. It was being

used to attack her. It suggested something that absolutely did not occur. Deacon answered that "it's over." He had never asked for her communications with Telus.

The grievor testified that she knows the Parent. They are both community members. She works at the School the Parent's children attended. They say hi occasionally. Sometimes they attend the same children's event. In February 2015, the grievor took her kids to the Parent's son's birthday party. They made a Facebook connection for Toy Buy & Trade. The grievor confirmed that in November 2013, the Parent gave her a home phone number when they were arranging a baby swing pickup (Ex. 3-25). Johnny was supposed to call and stop by to pick up the swing but the Parent dropped it off at the grievor's home. This was their only communication, according to the grievor, and they never struck up a friendship. Nor did they have any negative interaction.

The grievor reiterated that she did not phone the Parent on September 9, 2015 – "absolutely not." Phoning is not how she communicates. There was nothing in the staff meeting or in her job description giving reason to call the Parent. Nothing in the meeting dealt specifically with the Parent. The grievor testified that her involvements with people "are usually positive and sensitive to them". The alleged call would have been hurtful to the Parent by bringing up past difficulties. Moreover, said the grievor, she does not speak negatively in any School communications. "It's not in my nature to phone and hurt people."

Thoughts on the allegation

At the conclusion of her direct testimony, I asked the grievor if she had any thoughts on why the Parent testified as she did, naming the grievor as the person who called.

The grievor answered that she could only speculate and I allowed her to do so, given the unique circumstances of the present case. Her evidence was as follows.

Someone told the Parent what was said during the Wednesday staff meeting including the words used – "blown out of proportion" and "no big deal". On Thursday morning, the Parent said she went to the School because she was upset someone was talking about her family. That morning, the grievor was lingering around the front reception area of the School, greeting new families and students. The grievor said she spoke with the Parent briefly, just saying hello, as she did with many others. She noticed the Parent went in to see Deacon and assumed she was advocating to get extra services for one of her kids. "Go girl," was the grievor's thought at the time.

During the meeting with Deacon when he asked the Parent who was the caller, maybe "she just picked me", said the grievor. She had to name someone and was protecting the real caller. The grievor testified that the Parent has a number of friends on staff at the School. She named three staff members, one of whom was Karen Strussi. Whoever called the Parent must have missed the shift in the conversation during the meeting and mistakenly took it as a statement about the Parent. There were conversations going on around the room. Someone was not paying attention and mistook it. The grievor said that was the best she could say about what she thought happened.

Under cross examination, the grievor said she believed Strussi was at work the day of the staff meeting but was not certain. It was later established, and the parties stipulated, that Karen Strussi, a noon hour supervisor, was not at School the day of the staff meeting (Ex. 19).

The grievor made a lengthy statement about the hurt and stress caused to her family and herself by the allegation made against her and the decision to terminate her employment. She felt horrified that anyone would believe her capable of the misconduct alleged in this case. As a person who does not gossip or hurt others, she was cut by the fact that someone else's words have pulled her whole world apart. However, nothing in the grievor's statement was critical or derogatory toward the School District or any of its employees. She said she wants to return to work, if allowed to do so, and feels no anger toward the District. She can work under Deacon's supervision. By way of explanation, she said she has never seen troubles resolved by anger. In her career, when conflict has arisen, she always moved forward in a manner that honours and respects everyone involved. "My job is more than a job, it's an expression of who I am."

Further testimony by the Principal

By agreement, Deacon was recalled to testify prior to the start of the grievor's cross examination. He said when he handed the notice of investigation to the grievor at 9 am on September 11, there was no discussion, contrary to the grievor's evidence about a 7-8 minute meeting and comments back and forth about the allegation. It was five minutes and just for the purposes of collective agreement notification before an investigation commences.

Deacon listed a series of new facts put forward by the grievor in direct testimony that she did not mention when investigative interviews were conducted by him on September 11 and 15, 2015.

The grievor did not talk about a suicide in the family and the near loss of a nephew, and family visitors at her home, when she described what she did on the evening of September 9, 2015. She did not refer to "a trying week" or say her recall was affected by such events. She did not say she dozed on and off while visitors were reminiscing in the living room. While she did tell Deacon she had a nap, there was nothing about Johnny giving her some respite and taking the kids outside. She did not describe a bed in her living room. There was no reference to getting up, having a cigarette outside, her son being cranky or cooking and eating dinner by 6 pm. The trip to the grocery store was not described during investigation as it was in direct testimony.

Deacon said he was not told the grievor found telephone use limiting and that she communicates in person, by email or letter, rather than use the phone. There was no statement denying phone use between 5:30 and 6 pm. She did mention calling her mother but did not refer to any time frame. She did not say that in her work role she does not make phone calls.

The grievor did not say she had a health condition which causes people to think she is getting upset, as claimed in her direct evidence. She told Deacon she was feeling stressed and he answered she was doing alright.

Contrary to her testimony, the grievor did not immediately deny making the call to the Parent. She made a number of statements including being bewildered, not recalling, being fairly uncertain and not remembering. She did not say she "couldn't place it in the context of her life."

The grievor did not share any information from Telus other than the single phone call to Deacon after the September 15 meeting. Deacon was not aware of her further contacts with Telus. He would have considered this information, he said.

Under cross examination, Deacon conceded he never asked the grievor to outline the entire sequence of events at her home on the evening of September 9. At the start of the first interview on September 11, he told the grievor he was conducting an investigation and would ask her a series of questions. Yes, he agreed, the ball was in his court. During her lengthy answer to Question 5 (did she call the Parent), she ran through what she did that evening. This included calling her mother and Deacon did not follow up by asking when she made that call. He did not ask the grievor to check her home phone call history. He was unaware she had the feature. He did not pursue other details about her evening. When she contacted him after the September 15 interview to say Telus does not track local calls, he took the information at face value and proceeded with his own inquiries on the subject.

Deacon testified that at the first interview he did ask the grievor, "Can't you remember anything more?" If she had given more detail, he would have considered it.

Cross examination of the grievor

What was said at the staff meeting

The grievor said she was aware of the School District's policies on confidentiality and fully supported them. She agreed that there can be serious consequences to families if employees fail to maintain confidentiality. At the September 9 staff

meeting, Amodeo talked about confidentiality and referred to problems that can arise if media become involved in School issues. That was when the grievor made her own comments in the meeting. In testifying, she noted that 16 months have passed since the meeting and she cannot be sure she remembers exactly what she said at that time. Things do come back to her memory, she stated, so in an hour she might have something more to add. But she knows the gist of what happened at the staff meeting. Amodeo alluded to an incident where there was trouble with the media, which brought up responses by some people at the meeting, at which point the grievor responded as well.

The grievor disagreed with Amodeo's testimony. She said Amodeo talked generally about families but did not make a specific reference in her initial presentation to a family involved in an incident where things were blown out of proportion and made worse. Those remarks were made in response to the grievor's comment. As for Carlson's testimony, it was partially correct. The grievor noted that Carlson described a sidebar conversation during the meeting (Ex. 2-6, Question 2 & 3). The grievor said, "The sidebar was about – was me, saying what I said, and then Kelly (Amodeo) responded." The grievor said there were people talking over each other and they may not have heard what she said, so she did not want to generally contradict the other witnesses. She agreed she has memory problems at times but insisted that these events happened to her and she remembers them. During the weekend after the first investigative interview, she thought carefully about it.

The grievor admitted that at the first interview on September 11, she did not give this version to Deacon – that "blown out of proportion" was a response to *her* comment. However, she said that at the next interview on September 15, after trying to figure it out, she did put it together. Pressed to justify this statement from the

meeting notes, the grievor revised her evidence and said it was at the termination meeting on October 15 that she made this point. She told Deacon that her comments about the incident 15-16 years ago may have "got tangled" with the interaction in the staff meeting (Ex. 2-21, p. 2). She said maybe it did not come out clearly to Deacon and she didn't use those words, but she was trying to share it with him. "I haven't memorized this," she said.

It was repeatedly put to the grievor that the true sequence was Amodeo first making reference to an incident "blown out of proportion". This was the testimony of Amodeo, Carlson and Quinten. The grievor was unyielding. No, she said, she responded to Amodeo, after which Amodeo said it was blown out of proportion and no big deal. Everyone had their impression from what took place. There was "a bubble of words" with conversations around the room before the grievor made her comment, she said. She did not agree with the other witnesses if they said otherwise. She conceded not all the versions could be correct.

The grievor testified that when media was first mentioned by Amodeo, she thought it was about the Parent's incident. For other people, it may have been different, she said. But the grievor's comment was a reference to 15 years ago and the student who was restrained with tape. She knew the family. The grievor admitted that by the time of the termination (October 15), it was a month after the investigation had begun. The meeting that day was convened to indicate the results of the investigation. The grievor repeated that she had phoned Deacon on September 15 to tell him about Telus not tracking local calls, but otherwise she had no new information to offer. No one asked her for anything. In any case, she would not have contacted Deacon directly but would have gone through the Union. Pressed to admit that she had full opportunity to provide her input on September 11 & 15, the

grievor replied, “OK.” She did not put forward her version of the meeting “in those words.”

The grievor was asked why she was the only witness who stated that at the staff meeting, Amodeo used both phrases – “blown out of proportion” and “no big deal.” Larson, Quinten and Amodeo herself all testified that the statement made by Amodeo during the meeting related to media blowing the matter out of proportion. However, when the Parent filed her complaint, she reported being told that the Vice Principal used both phrases. Was it merely coincidental that the Parent heard the phrase “no big deal” and only the grievor mentioned those words? The grievor answered that it was not coincidence, it was just someone else misunderstanding it.

The grievor was directed to Question 4 in her September 11 interview. In that session, Deacon had asked her how examples of confidentiality were used in the presentation. The interview notes indicate the following answer by the grievor to Deacon (Ex. 2-9): “reference was made to a situation in the past; difficulties on the playground, and any talking of this outside can be blown out of proportion. … The incident was bad but that staff talking about it made the outcome much worse for family.” Counsel asked, was this the incident raised by Amodeo in the meeting, the Parent’s incident? Yes, replied the grievor. But the grievor’s testimony was that “blown out of proportion” referred to the student restraint issue 15 years ago that the grievor brought up with Amodeo. The grievor replied that words she used in the September 2015 interview were different than what she uses now. Maybe she did say that on September 11. It would have been more correct to answer Deacon’s question by saying, “Any talking can cause problems for the family.”

Counsel accused the grievor of reinventing history. No, she said. There are some gaps in the notes taken by Kaleb Child. She added, "Sometimes I speak past the question I am asked. This reflects my answer, this is where it ended, that things can get blown out of proportion." The 15-year old incident was an example she used during the staff meeting but admittedly she did not mention it during the September 11 interview. At the time of the first interview, she didn't have all the information and context. All she knew was that "a parent" had been phoned. Those words didn't seem pertinent in answering Deacon's question. But the grievor stood by her version of the staff meeting as stated in her direct examination.

After the termination letter had been delivered to her on October 15, the grievor said to herself, "Wow, now I get it – that I called the Parent and said 'no big deal' and 'blown out of proportion'. Oh, I see what happened." She testified that her level of understanding was very different before the termination. At the first meeting she didn't know *who*. At the second meeting, she got the name and said, no, it didn't happen. Counsel asked what difference the name made. The grievor answered, "I don't phone people, I was thinking, not me." Counsel repeated the question. The grievor replied that Port Hardy is a small community and she thought maybe it was about her Facebook post that was misunderstood.

Interaction with fellow employees

The grievor was asked about any negative interactions with her fellow employees. She mentioned two individuals with whom she had some past conflict but these were issues dating back to 2010 and 2012, and she had worked to resolve those matters. At the time, she felt attacked in the workplace. She made efforts to improve relationships. Afterward, said the grievor, they were not chummy but things did go

smoother. She did not claim these conflicts were related to the current problem but, when being interviewed by Deacon (September 15), wondered out loud if someone was impersonating her or engaging in harassment. Deacon responded that this was not the time and place to raise the issue. Cross examined as to whether she was asserting a link with past workplace conflict, she said no, but she still wondered about it. One employee was a witness at the arbitration and was not questioned by the Union on the point.

Relationship with the Parent

As for the Parent, there was nothing negative in their relationship, said the grievor. She has been to the Parent's home for a birthday party and has seen her at School. They Facebooked each other around baby stuff to buy. They know each other's voices. However, the grievor testified that she has been told her voice is very different on the phone. She said sometimes she phones her mom and her mom's husband doesn't know right away that it's her calling. He is 63 or 64 years old. She has never spoken to the Parent on the phone. The grievor was challenged on the truthfulness of this evidence. She maintained her testimony. It was put to her that, as the Parent said, she knew it was the grievor because the grievor identified herself at the start of the call and the Parent was familiar with her voice. No, replied the grievor, she did not call the Parent. The Parent was not telling the truth.

Admittedly the Parent was not cross examined on any motive to protect someone else by falsely accusing the grievor, as theorized at the end of the grievor's direct testimony. The grievor said she never brought up this theory during her preparation for the arbitration, although she said she probably talked about it with her counsellor or doctor, and her mother. When the arbitrator asked for her thoughts including

speculation, she answered. She denied making it up. She agreed that she had Union assistance and could have shared this idea with her Union Representative if she wanted to do so.

Counsel suggested there was no way the Parent could know the details of Amodeo's presentation unless someone at the meeting told her. The grievor pointed out that a staff person might have told someone else, who then spoke to the Parent about it. Again the grievor denied making the call.

Thursday September 10 before start of School

The grievor testified in direct examination that she did not remember everything she did the next day, Thursday September 10, but at the end of her testimony gave very detailed evidence about an exchange with the Parent in the morning by the School entrance. How was it she could recall this encounter in particular? She explained as follows. In her position as a FNSW, she speaks to aboriginal parents. That morning she helped a guardian connect with a coordinator and, because there were no other parents around the classroom, she went out to the lobby to interact. She tries to make contact especially with families who may have difficulties. The Parent was there so she approached her and said hi. Nothing much was said. She can remember what the Parent was wearing. Later the grievor was informed that the Parent was at the school to see Deacon and make her complaint. "My goodness, there I was welcoming her and comforting her, and she's going to the Principal." When she learned this, the grievor said she went back through her recollections of the prior week and remembered the interaction with the Parent. She spoke to her mother about it but didn't think it was relevant to share with anyone else.

It was put to the grievor that she was lying. She has a motive, namely, to protect her job. By contrast, the Parent has no motive to be dishonest. In response, the grievor said this was not the primary reason for her testimony. As for the Parent, protecting a friend is the only motive the grievor can suggest.

The September 11 interview

The grievor acknowledged that in her direct testimony, she was unsure when she received the notification letter from Deacon, but accepted that in fact it was handed to her at 9 am, as Deacon testified. She does not specifically remember receiving the notice. The initial session was only 7-8 minutes, she stated. She told Deacon her medical condition may cause people to think she is upset. She wanted him to understand if she appeared to be agitated. She also told him her condition can cause her to forget. The grievor described the notice as clear but not clear at the same time. It did not inform her who was called or what time.

Under questioning, the grievor conceded that when first interviewed about the allegation, she did not categorically deny it. She gave a number of answers including being 98% sure and being bewildered, as recorded in the September 11 meeting notes. Why? Because she didn't want to be categorical, said the grievor. She might have made some kind of call or had some interaction with a parent. But, noted counsel, the question posed by Deacon was extremely specific. Deacon referred to the evening of September 9, a call that breached confidentiality, family information from an open meeting and minimizing family concerns. The grievor acknowledged that the question was very specific. She could not remember making such a call. She went right back to work in the classroom after the brief 9 am meeting. She was thinking it made no sense but had no time to dwell on it. She had many questions

about the brief statement in the notice. So her response was honest. It was not vague and evasive, as Deacon testified. She was only reflecting what was going through her mind. Yes, the alleged call was only two days earlier so it was fresh, but still she felt she could not give a firm yes or no at the time.

Counsel pressed by asking why the grievor told Deacon "I can tell you all the details of what I did that night." She answered that she was thinking about it. In her mind, she went from "No" to "Someone in authority says you did something." She conceded her responses to Deacon were somewhat inconsistent. Obviously no one can really recount every detail of what they did over the many hours of an evening. The grievor agreed that Deacon allowed her to answer his questions fully. She said she was 98% sure because of what happens to her around her sleep times. If she has been in a deep sleep, she can experience a form of sleepwalking. She has fibromyalgia, which can result in what is called "fibro-fog", making recall difficult.

Counsel asked: So you were telling Deacon you may have called the Parent but you didn't remember? She replied, "Yes, when I said 98%, that was in my mind. But by the following week, I was confident I did not call." The grievor said that she was *not* in a deep sleep that evening. She said her medical condition has changed since her pregnancies so she was leaving room for changes in her condition. That was why she said 98% and told Deacon about her condition. It seemed like a very small possibility but by Sunday night she was sure she did not make the call. Admittedly she was pretty bewildered at first.

The grievor was asked why she raised the matter of her Facebook posts during the September 11 interview. She replied that she asked herself whether there was any other communication that might have been misunderstood as a phone call, after all

the talk around town. The Facebook post was the only communication she had been involved in relating to the School. Counsel accused the grievor of using this to deflect from the subject of the investigation. The Facebook exchanges had nothing to do with confidentiality. She denied she was deflecting and insisted she was just presenting ideas that came to her as she grappled with the accusation. It was all she could think of during the interview. She assumed there was a misunderstanding. She offered to open her Facebook page. Counsel asked why the next thing she said in the interview was that her medical condition can cause her to forget things. The grievor answered that she was very stressed and having trouble breathing, as she told Deacon. She was telling him how she felt since she realized her answers might seem weird. Also "a 2% tiny piece" of her was saying maybe her sleep disorder has shifted.

The grievor was questioned about her listing of activities on the evening of September 9 when she was interviewed on September 11 – grocery store, bank, cooking, bathing kids, talking to husband, phoned mom. She conceded she omitted bathing the kids in her direct testimony. She acknowledged not mentioning the guests who came over when she gave Deacon this list whereas she spoke in detail about the visitors in her testimony. She explained that Deacon's question was about "the evening" and the visitors left before dinner. "Evening is after 7 pm." She meant "dinner onwards" in her interview answer. Usually these friends leave about 4 pm as the winds can pick up. She agreed the winds can die down by 4 or 5 pm so they could have left later. She wasn't sure about the banking. It may have been just using the ATM. She confirmed the custard would not set. That's why she went to the store. Her point was that it was very busy. She did have the luxury of a 20-minute nap in the late afternoon, after dozing through the company in the living room. She

insisted her evidence was not inconsistent. She was busy from dinner onwards and could not see there was time for an evening phone call.

Deacon asked, seeking a straight answer as to whether she made the call, "Don't you think you'd remember?" The allegation was such a significant event, he added. In the interview, the grievor first said she wasn't sure and then, "I guess if I have to state one way or the other then I remember not making the call." In testimony, she admitted this was an inconsistent answer on her part. So you clearly remember not making the call, Deacon asked her next. The interview notes show that the grievor made no response. Why? "I felt pretty defeated and overwhelmed at that point," she testified. Yes, she said, Deacon invited an answer and she chose not to provide one. At the very end, when asked whether she wanted to make any statement or comment in regard to the investigation, the grievor declined, according to the notes. She confirmed this in testimony. She had no further comment at the time.

The grievor testified that during the meeting, she told Deacon she was perplexed because "this doesn't fit." In her job description, she does not phone parents. However, she said, in the last few years she has sometimes been asked by the coordinator to make a phone call to a family when she knows them better. In direct examination, she referred to wondering if she may have called a doctor. She was trying to piece it together. She was remembering interactions with parents. Once a parent walked into a classroom. So she was trying to figure out the possibilities but the allegation made no sense.

Personal notes written on the weekend

The grievor was questioned on her personal notes (Ex. 4) written on Saturday evening September 12. Admittedly she wrote "I remember no such call" rather than "I did not make the call." She was not definitive. Then she wrote to herself, "What if I truly have forgotten … ? … It's possible …". Yes, the grievor testified, she was "not walking with confidence here." She said she was fully stressed all weekend, pretty much like having a panic attack. "I was half-believing at some point, I was very concerned for myself." Counsel suggested that her position on September 15 during the second interview amounted to a "miraculous improvement" in her memory. Yes, she replied, because she had the whole weekend to think about it and this time, she knew the Parent's name and a specific time the call was made.

Counsel put it to the grievor that her account fit precisely with the time of the call. She awoke about 5:30 pm and was alone in the house. The call took place at 5:43 pm. She was the one who made the call. The grievor made a long reply. With fibromyalgia, it has to be a long deep sleep and there would be headaches long afterward. There can be sleepwalking, but not the specific act of getting a phone. She has never spoken during an episode, she testified. At one point she got scared. What if this happened? As she said to Deacon, if it happened she needs to go the doctor or the police. But on that day, it was not a deep sleep. The kids went out with Johnny, she watched them, usually she would get a cigarette on the back deck, go to the bathroom, have a cup of tea and then do the dinner preparation.

Counsel asked the grievor how she could be sure of the times she mentioned in her description of her activities that evening. Maybe she grabbed an iPad, she answered. She wasn't sure about being at the store at 8:15 but she recalled dinner was about

5:45 pm. She served hot pork from the previous night, frozen veggies and sliced potatoes.

It was put to the grievor that her personal notes (Ex. 4) were more reflective of her account given at the September 11 meeting than the second interview on September 15. Yes, she said, because over the weekend and on Monday September 14, she did a lot more thinking about what happened.

The grievor was questioned about her testimony that she finds the phone "limiting". What was her point in making this statement? She replied that the phone is not her prime communication. She uses the phone but has some trouble with it. Before cordless phones, she could not move around and talk. But she is not interested in talking about most of the things people call to discuss. Why didn't she tell Deacon about her phone attitude? The grievor answered that she told him this didn't fit with who she is, meaning the use of phones. No, she didn't explain to Deacon that she found the phone limiting, with these reasons. But on October 15 she did say that "I am not a phone person" (Ex. 2-12, p. 1), with further details about feeling confined and not dealing with sensitive issues on the phone.

The September 15 interview

Moving to the September 15 interview, where Deacon provided the Parent's name, counsel pressed the grievor to explain what difference it made to know the name. She was hesitant in her denial at the first interview. Now she said she "absolutely" did not phone the Parent. The grievor testified that she was confused at first but by Monday morning September 14 she was sure. Then, when she learned the name, she knew absolutely she had not called the Parent.

The grievor was probed about her efforts to check the call history on her home phone. She confirmed that the phone menu has a button for call history. She said she did not scroll through the history. Counsel put it to the grievor that she was avoiding disclosure of what she found. No, insisted the grievor, she could not make it work. Did she seek help to access the call history? No, she answered. Why not? "I might have done this Friday evening or Saturday, but when I came back to work on Monday, reflecting on it, I was confident I did not make the call. They'd say it was all a big mistake." The grievor conceded the call history could have exonerated her but said she didn't think of it at the time. She did try to view the history but the time and date had not been properly set on the phone. She saw some numbers – Johnny and her mother - but it didn't make sense to her. In the September 15 interview, she told Deacon there was a call history but she couldn't figure it out. Did she look at the calls listed at or around the time she called her mother on that evening? No, said the grievor. Again she denied she was avoiding information that could have hurt her. She said, "I didn't see that it could exonerate me."

The grievor acknowledged that she raised the possibility on September 15 that someone could be impersonating her without providing any details to Deacon. It was not the place to do so. Yes, she conceded, the investigation was ongoing and she could have followed up. Similarly, she said, Deacon could have followed up with her. But she added she would have felt bad mentioning names. She was not making any allegations. She was just wondering. It would have been inappropriate to put out names. She did offer to share names, she noted. The notes indicate (Ex. 2-10, p. 2): "Do I need to share my history with you regarding some employees I work with? There have been some issues in the past that I might need to share with you." Deacon responded, "Well this is being recorded by the notetakers, so we will

have that to come back to." Deacon did not return to the subject, the grievor said. If he had asked directly, she would have provided names.

Once Deacon produced the Telus email, which purported to show a call from the grievor's line at 5:43 pm, and asked "can you explain the evidence", the grievor gave him details of her evening, she testified. She said she was just waking up from a nap around that time. She had the luxury of a nap when Johnny took the kids out. Things can get foggy for her around sleeping. She can have a headache lasting for hours. She repeated that the visitors left about 5 pm, she was on the couch, the kids went out, she got in bed around 5:10 pm and she woke up about 20 minutes later.

Counsel asked why the grievor made reference to a doctor ("If this happened I need to go to the Doctor") and the police ("This is serious. Do I phone a lawyer or the police?"). She responded that the allegation left her feeling fragile and vulnerable. When the meetings ended and nothing seemed to be happening, she went to see a doctor. She did not share any medical information with the School District.

On Tuesday September 15, after the second interview, the grievor added to her personal set of notes. She supplemented them again on Thursday September 17 (Ex. 18), writing as follows (formatting corrected):

> Again, I am surprised not to have heard from them; surely they must have done a little checking around of their own by now. Again, my mind begins to falter, I lose faith in myself and wonder if I did do this. My recollection of having woken up around 5:30 and to be watching the kids with their dad across the street at approximately 5:45 leaves room to fit with her story of my phoning her at 5:43. Room for doubt, but then I remind myself of a couple of things. When I am in that state between awake and alert I think my eyesight is horrible. I imagine myself sifting through the pages of a phonebook. I cannot connect the image. Besides I looked both their family names up in the phonebook today and could find neither one. So where did I get the number from? Most of the time we can't even find a phone in our house. I'm pretty sure I would come

> to in the long, probably noisy process. I am clumsy and noisy during these phases. I try to imagine the conversation and can't figure out what it might be. What would I have said? How long was this supposed conversation? What did I do? Call up and say blah blah blah, ok I need to get off the phone to make this hot pork and pan fries?
>
> I think how maybe some of this could be clarified if someone had been present to witness whether or not I was on the phone. I was here by myself, with the rest of them across the street. No one to verify my version of events. I can only sit and wait for the outcome of the investigation. Surely this paper is fabricated; how else could it exist if Telus did not generate it? Who goes to such lengths to frame someone?

Analysis, findings and conclusions

Points in issue

At the outset, it bears repeating that by agreement of the parties, only Question 1 of *Wm. Scott* is before me for determination. Was there just and reasonable cause for discipline by the Employer? If the grievor phoned the Parent on September 9, 2015 as alleged, breaching the confidentiality of an internal staff meeting, there was cause for discipline. Question 2 of *Wm. Scott* asks whether dismissal was an excessive response in all the circumstances, but the Union conceded that if I find the grievor made the phone call, termination was not excessive. Thus, everything turns on whether or not the grievor phoned the Parent as alleged.

The Employer began its final argument by emphasizing the importance of honesty and trust in the employment relationship, especially in the present context where employees are responsible for the education and well-being of children. The Employer cited *Re B.C. Public School Employers' Association and B.C. Teachers' Federation (Deol Grievance)*, [2008] B.C.C.A.A.A. No. 218 (Hall) at para. 100: "It is trite law that honesty is the cornerstone of a viable employment relationship, particularly where the employee holds a position of trust. Arbitrators have

consistently held that dishonesty is grounds for discipline, and may in some circumstances justify dismissal: see *Alberta Wheat Pool and Grain Workers' Union, Local No. 333* (April 8, 1977), unreported (Korbin)." In *Re Health Employers Association of British Columbia and Hospital Employees' Union (Etty Grievance)*, [1997] B.C.C.A.A.A. No. 815 (Hope), the employer alleged that a nurse revealed confidential information about several residents of a care home. Even though the disclosure was made to the grievor's spouse and a co-worker at the facility, it was held that the employer was entitled to send a clear message "that any breach of confidentiality is conduct deserving of a significant disciplinary penalty" (para. 13).

In the Employer's submission, since the grievor's improper call to the Parent, the grievor has been repeatedly dishonest in her denial and her explanations during the investigation. A deliberate attempt to deceive the employer with a false and misleading explanation will be treated as a separate employment offence: *Re Fortis Energy Inc. and International Brotherhood of Electrical Workers, Local 213 (Komant Grievance)*, [2011] B.C.C.A.A.A. No. 145 (McConchie). When an employee persists in denial despite incriminating evidence, the employment relationship is severed: *Re Public Service Employee Relations Commission and B.C. Government and Service Employees' Union (EA Grievance)*, [2003] B.C.C.A.A.A. No. 161 (McConchie) at para. 130; *Re City of Kamloops and C.U.P.E., Local 900 (Ms X Grievance)*, [2014] B.C.C.A.A.A. No. 32 (Nichols) at para. 73; *Re Canada Safeway Ltd. and U.F.C.W., Local 2000 (Mastin Grievance)*, [2002] B.C.C.A.A.A. No. 169 (Chertkow) at para. 45.

The Employer referred to the somewhat similar facts in *Re Interior Roads Ltd. and B.C. Government and Service Employees' Union (Glen Grievance)*, [2003] B.C.C.A.A.A. No. 242 (Jackson). A snow plow driver had a near miss collision with

a pedestrian, leading to a complaint, which was resolved when a manager met with the complainant and apologized. Later the grievor (who was not the driver) left an anonymous phone message for the complainant, falsely stating that the driver and management were laughing about the incident, and urging him to contact the police because it was not an accident. The grievor denied making the call at first but later admitted it while seeking to explain he had good reason for the call. The arbitrator held the grievor breached his duty of fidelity by impugning both the driver and the employer. Termination was upheld, citing in particular the disparaging of the employer and the grievor's lack of remorse (para. 66). The present case is more serious, said the Employer, in that there has been no admission of any kind.

In response, the Union did not deny any of the basic principles cited by the Employer and acknowledged the importance of confidentiality and honesty in the present context. The Union noted that the termination letter listed seven grounds for discipline, beginning with the making of the September 9 phone call, but all the successive allegations (improper disclosure, misrepresenting the meeting discussion, intentionally hurtful comments, denial of responsibility, dishonesty during investigation) were premised on the fact of the phone call. All other issues are moot if the grievor did not phone the Parent as alleged. The Union therefore argued that this factual question must be addressed and decided first, keeping in mind that the burden of proof lies upon the Employer.

This is a sensible approach but two matters require attention before grappling with the question of the phone call. What is the proper standard of proof to be applied? Does the Union's failure to comply with *Browne v. Dunn* limit the scope of its argument in defence of the grievor, as argued by the Employer?

There is one other preliminary matter. At the conclusion of her testimony, the grievor gave evidence of significant personal hardship resulting from the termination. I have not included the full details in this award for privacy reasons. In argument, the Union said this evidence was relevant as context but the Union did not go further and rely on the grievor's personal circumstances as a factor in deciding the factual issue of whether she made the phone call as alleged. I confirm that I have considered the grievor's evidence on the limited basis suggested by the Union. The Employer did not object.

The standard of proof

The civil standard of proof applies in labour arbitration but the Union argued that there is a "more exacting standard" when the allegations constitute a significant attack on an employee's integrity and reputation, particularly in a small community. The Union referred to Brown & Beatty, *Canadian Labour Arbitration*, at 7:2500, where the authors review the development of the law in this regard. At one time, some arbitrators required proof beyond a reasonable doubt when the alleged misconduct might involve criminal liability, but this view did not prevail:

> … Instead, the civil standard became a flexible, variable formula that tried to take account of the circumstances of each case. As a practical matter, the degree of probability employers must meet in each discipline case is commensurate with the seriousness of the allegations and the severity of the consequences faced by the employee. As a result, unless the agreement specifies otherwise, in cases involving allegations of particularly reprehensible misconduct, such as criminal or quasi-criminal behavior, when an employee's reputation and future job prospects are at stake arbitrator's typically use words such as "clear", "cogent", "convincing", "substantial", and "reliable" to describe the quality of evidence employers must adduce to justify whatever sanction they imposed. …

Without diminishing the significance of the present proceedings for the grievor and her family, the fact is that the allegations relate to breach of an important School District policy on confidentiality. The alleged misconduct is serious but I would not characterize it as "reprehensible" in the same way that criminal misconduct violates fundamental norms of society. In any event, while evidence must always be clear and convincing to support a significant factual finding, it remains that there is only one standard of proof. Brown & Beatty added the following comment to the passage quoted by the Union in argument:

> The Supreme Court of Canada has now emphasized, however, that there is only one standard of proof in all civil cases, and that is proof on a balance of probabilities: *F.H. v. McDougall*, [2008] S.C.R. 41.

In my view, it is erroneous to speak of varying "degrees of probability" that must be met to prove just cause for discipline, given the decision in *McDougall*. Proof must be made on the balance of probabilities. I addressed this question in *Re Canada Post Corporation and Canadian Union of Postal Workers (Wittevrongel Grievance)*, [2012] C.L.A.D. No. 125 at para. 124-125 (included in the Employer's authorities):

> The parties agreed that since *F.H. v. McDougall* [2008] S.C.J, No, 54, there is only one standard of proof in all civil proceedings, notwithstanding a line of past arbitral authority suggesting that the degree of proof could be greater in those cases where illegal or reprehensible conduct was alleged against the grievor. *McDougall* confirmed that the uniform standard of proof is the balance of probabilities. However, the Union insisted that the evidence must still be clear, cogent and convincing to justify discharge, referring to *Re Canada Post and C.U.R.W. (Danroth Grievance),* [2008] C.L.A.D. No. 235 (Dorsey) at para. 166. *McDougall* supports this position (at para. 45-46):
>
> > To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence

> depending upon the seriousness of the case. There is only one legal rule and that is that in all eases, evidence must be scrutinized with care by the trial judge.
>
> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test...

Danroth was an award issued shortly after the court decision in *McDougall*. Arbitrator Dorsey reviewed the past authorities (para. 119-125) as well as the court's analysis (para. 126-128) and concluded as follows (para 129): "The direction I take from the Court is to carefully scrutinize the relevant evidence to determine whether the employer met its burden to prove that it is more likely than not that Mr. Danroth committed the alleged misconduct." I concur.

Based on the foregoing, I am obligated to consider whether it is more probable than not that the grievor made the September 9 phone call to the Parent.

Application of *Browne v. Dunn*

Testimony by the Parent was central to the Employer's case against the grievor. As noted earlier in my review of the evidence (p. 21-22), the Union's cross examination of the Parent was limited, even though the Union intended to take the position that the Telus email provided by the Parent was a fake. It was not suggested to the Parent that she or someone in her household had fabricated the email, potential hostile motives were not probed and it was not directly suggested that she was lying under oath. The Union did not ask whether the Parent had sufficient technical skills to concoct the Telus email. The Employer argued that in light of the foregoing, it would be unfair for the Union to suggest that the Parent had anything to do with the Telus email other than requesting call-record information from Telus and receiving the email. Moreover, it would be prejudicial for the Union to advance a theory of its case that had not been put to the Parent on the witness stand.

The Employer cited *Re Concordia Hospital and C.U.P.E., Local 1973 (Santos Grievance)*, [2015] M.G.A.D. No. 13 (Werier) at para. 154, where Arbitrator Sturdykowski's discussion of *Browne v Dunn* was quoted from his *Delta Catalytic Industrial Services* award, as follows: "A party that fails to put appropriate questions to a witness in cross-examination … may be precluded from calling evidence to impeach or contradict the witness, or from arguing that the witness's evidence should be rejected." It has often been said by arbitrators and courts that *Browne v. Dunn* represents a fundamental principle of fairness in the common law. In *Re Brewers Retail and United Food and Commercial Workers International Union (United Brewer's Warehousing Workers' provincial Board) (Closure Grievance)*, [2001] O.L.A.A. No. 524 (Ellis), the company lawyer argued that the plant closing occurred on a date not supported by the evidence. The arbitrator noted (para. 59) that "Counsel's assertions in argument are not evidence."

In reply, the Union rejected the Employer's contention that the Parent's evidence was not challenged. It was squarely put to her in cross examination that the Telus email was fabricated. She was offered an opportunity to respond, and did so. It was unnecessary for the Union to ask detailed questions about whether she or some other person had forged the document.

In my view, the Employer correctly articulated the general principles arising from *Browne v. Dunn*. Counsel filed a copy of the judgment in that venerable case from the House of Lords: (1893) 6 R. 67 (H.L.). Interestingly, it involved an allegedly fake document, not unlike the present case. On the facts, the plaintiff Browne sued Dunn, a solicitor, for libel, claiming that Dunn had drawn up a sham summons for several complaining parties accusing Browne of breaching the public peace. At trial, the complainants testified that they gave genuine instructions to Dunn to commence

the lawsuit against Browne. No questions were asked in cross examination to suggest otherwise. The court held (p. 70) that "if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him." Not having done so, it was not open to Browne's lawyer "to ask the jury to disbelieve all their stories" (p. 71). The rule is "essential to fair play and fair dealing with witnesses" (p. 71).

I agree with the Union that the Parent had an opportunity to respond to the accusation that the Telus email was not genuine. She was plainly told during cross examination that an investigator would say Telus does not keep local calling records and that the email was forged. She denied it, responding that she received the email in her inbox from Telus. The exchange was succinct but it met the essential requirements of *Browne v. Dunn*. It was fair to the witness. If the Union had attempted in final argument to advance a theory as to how the Parent may have fabricated the email, or if the Union had identified the Parent's partner or some other person as a possible accomplice, the rule would have been infringed. The Union did not do so. In argument, the Union restricted its submission to attacking the email as a fake based on Bennett's opinion evidence. Local calling information is not retained and could not have been accessible to a Customer Service Representative, so logically an email purporting to list local calls made to the Parent must be forged. This was the Union's reasoning.

By limiting itself to a fleeting cross examination on this point, the Union has foregone the potential benefits of a more searching challenge to the Parent's credibility. However, that was a choice made by the Union and it must live with the consequences. In any case, the rule in *Browne v. Dunn* is not absolute. It is "grounded in common sense and fairness to the witness and to the parties", and it is

a matter of discretion how the tribunal deals with a failure to confront a witness: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada, Fourth Edition*, at p. 1187, referencing *R. v. Lyttle*, [2002] 1 S.C.R. 205.

In the present case, it is significant that the Union stood on the burden of proof and asked that the grievance be upheld for a failure to prove that the grievor made the phone call. Contrary to usual practice, the Union did not advance a scenario to explain why the Parent did or may have made such a devastating allegation, threatening the grievor's career. As the Union stated in its closing, "There remain unresolved questions and unclear motives. … The Union will not be providing speculative theories as to who may have spoken with [the Parent], or why [the Parent] would accuse Naomi." (Argument, para. 9, 10). I therefore conclude that the Union is entitled to impeach the validity of the Telus email and is free to attack the Parent's credibility, to the extent that the Parent's credibility is damaged by any finding that the email was a fake.

Principles for the assessment of credibility

The Employer cited a series of authorities dealing with the credibility of witnesses and the Union did not dispute the principles therein. *Faryna v. Chorny*, [1951] B.C.J. No. 152 (C.A.) at para. 11 stated that "the real test of the truth of the story of a witness … 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" (para. 11). Moreover, a finding of credibility must be "based not on one element only to the exclusion of others" but "all the elements by which it can be tested in the particular case" (para. 12). In *Re Saputo Foods Ltd. and Teamsters Local Union No. 464 (Arthurs Grievance)*, [2009] B.C.C.A.A.A. No.

133 (Thorne), it was held that the version of events the grievor gave the company during the investigation was "implausible at best" and therefore it failed the *Faryna* test (para. 71). The Employer said the same applied in the present case. The grievor's account to Deacon and her subsequent testimony at arbitration was inconsistent, incomplete, deflective and evasive. In reply, the Union maintained that the grievor was reasonably consistent given her unique personality and the enormous stress to which she was subjected.

In *Re Royal Canadian Mint and Public Service Alliance of Canada, Local 50057 (Izzard Grievance)*, [2011] C.L.A.D. No. 427 (Peltz) at para. 151, it was stated that "credibility 'usually comes down to the inherent probabilities of the evidence and the overall impression created by the witness' … . Important considerations include the demeanour of the witness; the character of his or her evidence, *ie*, were they forthright and open or evasive and uncertain; the presence of bias, interest or other motive; and the inherent probabilities of the testimony …. As held in *Faryna v. Chorny* … , a finding of credibility does not turn solely on apparent sincerity in the witness box."

Re Alcan Smelters and Chemicals Ltd. and Canadian Association of Smelter and Allied Workers, Local 1, [1981] B.C.C.A.A.A. No. 15 (Hope) addressed the significance of evidence given under oath. The arbitrator considered the question of when sworn testimony may be disregarded, even in the absence of contrary evidence (para. 17-18):

> … In assessing probabilities an arbitrator cannot vindicate his responsibility if he simply shrugs aside the oath. Vital to the integrity of the system is the assumption that persons who swear to tell the truth will tell the truth. An arbitrator does no service to the process if he starts with the presumption that the oath will be taken lightly.

> Respect for the process commences with the tribunal itself and undue cynicism is an affront to the dignity of that process. An arbitrator is entitled to disbelieve evidence given under oath and unchallenged in any direct sense only in the solemn application of adjudicative principles. It is not sufficient to say that he does not believe the evidence, he must be able to say why he disbelieves the evidence and assign objective reasons for his doubt. …
>
> In bestowing respect for the sanctity of the oath an arbitrator is not required to be a damn fool. …

Amen to that. Exhaustive analysis, which is typical of labour arbitration awards, should never lose sight of basic common sense, applied to the facts at hand. In the present case, the Employer said there was simply no reason shown for the Parent to accuse the grievor, other than because her allegation was truthful and she was very upset by the phone call. Someone obviously gave her information from the staff meeting. The Parent was credible. The grievor was culpable. The Union responded with its own appeal to common sense. There is no record kept of local calls. The Parent could not have received the Telus email as she claimed so her evidence cannot be believed.

Finally, in *Bradshaw v. Stenner*, [2010] B.C.J. No. 1953 (S.C.), the court provided the following useful overview in a factually complex case (para. 186):

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the

> validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

Applying these principles, the Employer submitted that the Parent was truthful and the grievor cannot be believed. The Union argued the opposite.

Credibility of the Parent

The Employer argued that the Parent's testimony was consistent and plausible. She has known the grievor for about five years through their children. The grievor acquired her phone number during a Facebook exchange in 2013. Since the Parent's home number was unlisted, this means that the grievor is one of a limited number of persons who know the number. The Parent was familiar with the grievor's voice and identified the grievor as the caller on September 9, 2015. The Parent gave a clear account of the call and in particular, the grievor's statements that the incident discussed by School staff was "blown out of proportion" and "not a big deal". The latter phrase was especially significant, said the Employer, because only the grievor testified that such words were used during the staff meeting. Amodeo, Carlson and Quinten mentioned "blown out of proportion" only.

The Parent testified she was very upset by the phone call, a fact verified by Quinten's evidence that the Parent called her later that evening, upset and crying. Deacon observed that the Parent was flushed and teary when he interviewed her the next day. She was still emotional a year later when she appeared at the arbitration. The Parent initially sought to protect the grievor by declining to provide her name to Deacon. Thus, there was no apparent animus toward the grievor. The Parent only became angry when she was informed that the information she had been given during the

phone call was false. She concluded the call was intentionally hurtful and then her attitude changed, which was a reasonable reaction. The Parent was cooperative with Deacon during the investigation and readily authorized inquiries into her Telus account. This was not the conduct of a person with something to hide. Deacon asked her to retrieve her call record and in response to that request, she did so. She had very little time on the afternoon of September 10 to fabricate a document, given travel time back and forth to the School.

Nothing in cross examination cast any doubt on the Parent's credibility, said the Employer. She maintained her testimony that the grievor was the caller. She stood by her story that Telus sent her the email with two inbound calls listed, which included the grievor's home phone number. She stated she was not seeking any action against the grievor, wishing only that people would stop talking about the incident with her daughter. She denied any forgery even when told that an investigator would testify that the Telus email was counterfeit. Many obvious questions were *not* asked by the Union and no motive was suggested for an unfounded attack on the grievor. There was no allegation put to the Parent that some other person from School staff was the caller. In other words, said the Employer, the Parent's evidence was not shaken. Subject to what follows, I generally agree with these submissions about the demeanour of the Parent and content of her testimony.

The Union did not take issue with most of the foregoing but focused on the Parent's claim that Telus provided her with a call history. She claimed that an operator gave her the numbers verbally at first, while stating that normally the company doesn't like to give out that information. According to the Parent, she told the operator she needed the numbers and the operator agreed. The Union's primary argument,

relying on Bennett's evidence and other supporting documents, was that the Telus email must be fake because local calls are not tracked by Telus. The testimony that an operator gave the Parent the phone numbers verbally cannot be true. For some reason, not ascertainable on the available evidence, the Parent made a false complaint against the grievor, said the Union.

The Union emphasized another aspect of the Telus email that undermines its authenticity. The list of incoming calls between 4 pm and 8 pm does not include Quinten's call made to the Parent's home around 5 pm on September 9, a call Quinten testified she made to discuss tutoring for the Parent's son. If the Telus email was a genuine communication from Telus, providing accurate information from a company database of calls, then Quinten's call would have appeared on the list. In reply, the Employer questioned the timing of Quinten's phone call to the Parent and requested that I check my notes to confirm the evidence. Having done so, I confirm the version put forward by the Union. Quinten was quite clear in her recollection of the time based on her usual schedule of watching a favourite TV program after work. I agree with the Union that the missing Quinten phone log casts serious doubt on the veracity of the Telus email. No explanation was suggested by the Employer.

As for Bennet's opinion that the Telus email was counterfeit, the Employer launched a vigorous attack on Bennett's methodology and reasoning. She was extensively and aggressively cross examined. I acknowledge that she may have misapprehended the authorized persons and emails on the account (Memorandum para. 2, 3) and I agree with the Employer that she overstated the significance of the time stamp format differences (para. 5). The differing text styles (para. 7) appear to be a legitimate basis for doubt although the Employer demonstrated that some formatting changes were the result of forwarding the email. The Employer argued that the opinion was

undermined by Bennett's failure to contact all Telus employees who had given information to Deacon and her failure to review all the documentation associated with these exchanges in September 2015. I disagree. There was nothing to be gained by such an inquiry. It was obvious that some of the Telus employees who gave information to Deacon were ill informed. In any case, in redirect examination Bennett affirmed that upon review of these materials, her opinion was unchanged. I accept her point that she has the experience and knowledge to provide her opinion as she did.

Beyond that, I find that, as Bennett said under pressing cross examination, she had "no dog in this game", meaning she took an independent approach to the assignment and did not try to discredit the Parent's evidence. I note that Bennett appeared as a witness with the full knowledge of her superiors at Telus, as an authorized spokesperson for the company.

The evidence establishes without question that Telus does not track unbilled local calls and that a Customer Service Representative could not, as a matter of course, have given the Parent the two phone numbers she purportedly received verbally, and later in written form by email. In addition, Bennett stated that all Customer Service calls are noted to the file and retained indefinitely by Telus. The actual recordings are not kept. She checked and found no notation of the interaction the Parent claimed she had with a Telus Representative on September 11, 2015. It is conceivable that the Representative forgot to enter the notation but Bennett said this was unlikely. Moreover, there were actually two interactions between the Parent and the Representative, according to the Parent – first a verbal discussion during which the inbound phone numbers were provided to the Parent, and subsequently the email

confirming the numbers in writing. It seems especially unlikely that the notation would have been missed after two such interactions.

I find these to be especially significant facts, going directly to the Parent's credibility. As stated by the court in *Bradshaw, supra*, "The art of assessment involves examination of various factors such as … whether the witness' evidence harmonizes with independent evidence that has been accepted … [and] whether the witness' testimony seems unreasonable, impossible, or unlikely, … ." (para. 186).

Bennett testified that Telus engineers use a tool called GeoProbe when they do maintenance work on the switching system. GeoProbe collects some local calls and retains them for up to five days. Under cross examination, Bennett conceded it was possible that a Customer Service Representative could have approached an engineer and persuaded the engineer to retrieve local call records, in contravention of Telus policies. But Bennett insisted this was highly unlikely. First, she stated that Customer Service Representatives would be unaware of the GeoProbe tool. Second, she said that employees would not overtly breach company policy and procedure by handing over such information on request to a customer. To challenge this latter assertion, the Employer produced the reported Telus arbitration awards reviewed above (p. 41-44) in which employees violated employer policy for various reasons and were disciplined. Some employees listened to customer phone calls and some gained access to emails. Also produced was a court decision in which widespread employee abuse of privacy policy was alleged, but this was an interim procedural ruling and no determination of misconduct was made. Bennett responded that the awards (dated 1999 to 2009) reflect a past era in the company's history and privacy policies are now much more strictly enforced and adhered to by staff.

The Employer's submission that an operator may have known about GeoProbe and implored an engineer to find local call records for the Parent is entirely unsupported by evidence. To the contrary, the evidence establishes there was no notation of a Customer Service call with the Parent on September 11 and therefore, probably no call took place at all. The Employer's creative hypothesis is without any air of reality, given the overall evidentiary record in this case. It is theoretically possible local calls could be accessed in this way but I accept Bennett's evidence that such a scenario is highly unlikely.

The Employer urged me to consider the statements of several Telus employees, as recorded in Deacon's investigation notes, to the effect that local calls can be tracked (Takia from Repair, Jim from Repair and Jamie). None of these persons were called as witnesses. The Union properly submitted that this constitutes hearsay evidence which should not normally be admitted in proof of a central factual issue. The same limitation applies to the memo prepared by the legal team for the District, quoting the opinion of various persons about the validity of the Telus email. All these documents were admissible for the fact that the inquiries were made and the responses were given, but not for the truth of the contents. I prefer and accept Bennett's evidence.

The Employer further argued that there was insufficient time for the Parent to fabricate the email. In response, the Union noted the Parent had an hour between the time Deacon requested the call history (1:30 pm) and the time she had to depart for the school pickup (2:30 pm), and another half hour after she returned home from the School. There is no evidence to indicate how and when the Telus email may have been created or altered, so arguments about timing are inconclusive, but

certainly nothing in the evidence precludes the possibility that a fake email was produced.

The explanation provided by Bennett about local calling records was foreshadowed repeatedly in the narrative. On September 15, 2015, shortly after the second investigative interview, Deacon was told by the grievor that she had checked with Telus and learned the company does not keep track of unbilled local calls. He pursued the point himself over the next few days and received conflicting responses, but once an employee in the Privacy Request Centre told him vehemently that the Parent's document was a fake, it was incumbent on the Employer to get a definitive answer from Telus. Deacon's reaction was appropriate: "Wow. Ok. Is there any explanation for the document beyond falsifying?" This aspect of the investigation was then turned over to the District's legal team, who focused on efforts to forensically verify the Telus email in conjunction with the Telus Abuse Team. In the absence of an original version of the email header, this proved impossible. However, as Bennett demonstrated in her analysis, the authenticity of the email could have been tested by considering the absence of local calling records in the Telus data base. As the Union noted during cross examination of Deacon, there was a need for "further digging." When Union counsel made inquiries with Telus in August 2016, there was an unequivocal confirmation that local call records are not retained.

The Union was highly critical of the Employer for terminating a long service employee without finishing a proper investigation into the authenticity of the Telus email. The Telus email was put to the grievor during the September 15, 2015 meeting as proof that she made the phone call. Deacon called it "strong evidence" at that time. During the termination meeting on October 15, 2015, Deacon stated

that the Employer had verified where the phone call came from, using the Telus email. In retrospect, these were unfounded assertions and I agree that the investigation was flawed to the extent that the Employer never resolved the authenticity of the document provided by the Parent. For understandable reasons, Deacon initially perceived the Parent as a credible complainant, but she should have been faced with the damning evidence from Telus so that her truthfulness could be further assessed. I appreciate that Deacon was reluctant to confront the Parent. She appeared to be traumatized by the experience and investigators have an obligation to show sensitivity to victims. It was a difficult judgement call. Generally, I acknowledge the challenge facing School District management in this complex case and find there was a good faith attempt to gather the evidence, hear the grievor's side of the story and reach a fair conclusion.

In sum, I conclude that the Telus email presented to the Employer by the Parent was counterfeit. I am unable to make any finding as to the genesis of the document or the Parent's motivation in putting it forward in support of her complaint. However, without question, this finding is devastating to the credibility of the Parent. On the witness stand, she was confronted with the accusation that the Telus email was a fake. I cannot avoid the conclusion that in maintaining her testimony, she lied under oath. There was no suggestion that she may have been mistaken or confused about the validity of the email. She said she personally received it from Telus.

It is conceivable that the Parent lied about the Telus email but was still truthful when she said the grievor phoned her and talked about the staff meeting. On its face, this scenario seems inherently improbable, and the Employer understandably did not argue it as an alternative position. However, I agree with the Employer that the entirety of the evidence must be taken into account before reaching a final

conclusion, in accordance with *Faryna* and the other authorities reviewed above. A finding of credibility must not be based on one element only, to the exclusion of others. Therefore, I turn next to arguments relating to the grievor's conduct and testimony.

Credibility of the grievor

Notice of investigation and the grievor's initial response

Deacon handed a notice of investigation to the grievor at 9 am on September 11, 2015 after calling her out of class. The Employer argued that the notice "could not have been clearer" on the elements of the allegation and the nature of the investigation. This was a significant point because the grievor's response at the first investigation meeting was equivocal, and she did not deliver a definitive denial until the second meeting on September 15, 2015. The Employer cited this as one of many indicia of dishonesty. The Union responded that the notice was inadequate, which largely explained the grievor's hesitation in the face of a sudden accusation.

The allegation was stated as follows in Deacon's letter of notification (Ex. 2-5):

> That during the evening of Sept. 9, 2015, you telephoned a parent directly at home breaching trust and confidentiality to suggest that administration was making specific personal references and minimizing the seriousness of a previous family concern in an open meeting.

The Employer submitted that the grievor gave contradictory and bizarre direct testimony in which she mixed up the initial presentation of the notice at 9 am and the substantive investigation meeting at 11 am the same day. I do not attribute any

significance to her confusion. The grievor was testifying in January 2017 about events 16 months earlier. It is not surprising if her recall does not distinguish correctly between questions asked and statements made at 9 am versus 11 am on that day. Also I agree with the Union Representative that the grievor was thrown off track when the Representative herself misspoke in some of her questions during examination in chief.

More importantly, the Employer argued that the notice called for an immediate, definitive answer to the allegation once the investigative meeting commenced. The alleged call had taken place only two evenings previously and, according to the Employer, the notice specified enough detail for the grievor to identify the conduct in question – the date (September 9), the time of day (evening), the recipient (a parent), the content (administration minimizing a previous family concern during a meeting) and the violation (breach of confidentiality). The Union disagreed. The name of the Parent was not shared. This was key information the grievor needed to focus her attention on the accusation. The Union said that because no complainant was named at the time of the first interview, a confused and uncertain initial response was understandable. The grievor is a thoughtful and cautious person. She was reluctant to contradict her boss until she had given the matter greater thought.

Both arguments have some merit. Yes, the notice provided the essence of the allegation, the date and time. But there were two deficiencies. First, the notice referred to minimizing a family concern "in an open meeting". The particular meeting was not identified nor was it flagged as a staff meeting. The descriptor "open" was inapt. In fact, the staff meeting was closed, in the sense that it was not public and included a limited component of School staff. Second, the Parent was

not identified by name. Despite his intent to provide meaningful notice, Deacon omitted the single most important piece of information.

The wording of the notice has a generalized quality. Any reader's natural first question would be, "Who was called?" The grievor's answer to the question, "What is your response?" was recorded in the notes as follows: "I'm bewildered, I don't recall a phone call. Fairly uncertain, who would I have phoned?" The grievor appears to be a careful, cautious and anxious individual. A more self-confident person might have responded with a full throated declaration of innocence, but I do not find the grievor's initial statement unreasonable in the circumstances. She received the notice at 9 am and returned to class until she was recalled at 11 am to begin the investigative interview. She had no real opportunity to consider the accusation and as reviewed above, the notice was lacking in particulars.

In my view, once the Employer decided to investigate and give notice under the collective agreement, it should have named the complainant, barring exceptional circumstances such as personal safety concerns or fear of reprisal. There were no such elements in the present case. In the first investigative meeting, the Union asked for the name and was denied it. Again, I appreciate Deacon's intent to be sensitive to the Parent and I acknowledge this was a judgment call. However, having opted to protect the wishes and comfort of the Parent in this fashion, it was not open to the Employer to criticize the grievor for an equivocal first response. When the question was asked again midway through the meeting (Question 5, "Did you make a phone call to a parent … ?"), the grievor's response was more definite: "I don't remember. I'm 98% sure I didn't. I'm perplexed. No, I don't think I did." As soon as the Parent was identified at the second interview, the grievor made an absolute and unequivocal denial.

The Employer further questioned the grievor's credibility based on a discrepancy between her equivocal initial response to the notice, as described above, and her testimony in direct examination, when she said she, "I told him (Deacon) immediately I had not done that." The Employer accused the grievor of lying to the arbitrator when she gave this testimony. The Union disputed that the grievor made such a statement in her evidence and requested that I check my notes. Upon doing so, I affirm the Employer's version of the grievor's testimony. She also testified that at that time, she referred to a health condition and informed Deacon that sometimes people think she is upset when she is talking to them. I note that at this juncture, the grievor was confusing the 9 am meeting with the 11 am meeting. I accept the Employer's account that the notice was delivered at 9 am with little discussion, followed later in the morning by Deacon's fulsome interview. Was it a lie to say she told Deacon she "had not done that?" While there was some equivocation in the grievor's response once the meeting began, there was never an admission and the grievor told Deacon she was "98% sure." I do not find the discrepancy cited by the Employer to be significant. The grievor had a faulty recollection but I do not find she was lying.

Conduct and responses of the grievor during the September 11 interview

The Employer pointed to differences between the grievor's description of the staff meeting in her answers to Deacon's interview questions versus her testimony at arbitration.

In her response to Question 4 about the staff meeting discussion, as recorded in the investigation notes, the grievor said reference was made to a situation in the past

involving difficulties on the playground and "any talking of this outside can be blown out of proportion." No details were shared, she stated to Deacon. The incident was bad but staff talking in the community made it worse for the family.

At arbitration, in direct examination, the grievor testified that in the staff meeting she had raised a 15-year old incident during Amodeo's presentation, and in response to this comment, Amodeo said the situation was blown out of proportion and was really no big deal. The Employer noted that Amodeo and Carlson explicitly denied the grievor's version of the meeting in their testimony. Quinten made no mention of such a comment by the grievor. Moreover, when the Employer's witnesses first testified about the meeting, it was not put to them that the grievor was the one who triggered Amodeo's statement. This indicates that the grievor was untruthful and fabricated her version during the hearing, said the Employer.

Under cross examination about the discrepancy, the grievor said she didn't mention the 15-year old incident to Deacon at the interview because she didn't think she was being asked about her thoughts. Curiously, she said her language is different now than it was then. The Employer was extremely critical of these responses and argued they directly undermined the grievor's credibility.

In reply, the Union reiterated that the grievor was confused during the first investigative meeting. As she phrased it, she couldn't place it in her life. By this she meant that an accusation of breaching confidentiality by phoning a parent made no sense to her. Her reference to a medical condition was intended to explain that her memory can be foggy after she has been sleeping. However, the Union insisted that the grievor's version was supported in part by Employer witness testimony. Carlson agreed there was a sidebar conversation going on during the meeting in

which someone raised a past event as an example of a confidentiality problem. This was documented in the interview notes of Carlson's September 11 interview by Deacon. When recalled, Carlson testified that the sidebar was a question that came from someone at the front of the room but she could not say who it was. Significantly, said the Union, Carlson admitted that Amodeo's "blown out of proportion" statement was a result of the sidebar question. "Kelly (Amodeo) picked something up and came back with this example." Amodeo herself said she didn't notice if there were sidebar conversations but admitted it was a typical feature of staff meetings at the School. She did not deny that the grievor asked a question, saying only she did not recall. The Union emphasized that at the termination meeting on October 15, 2015, the grievor did raise the older incident as something that may have "got tangled" in other discussion during the staff meeting. Thus the grievor's account at arbitration was not concocted for purposes of her testimony, argued the Union.

I agree with the Employer that the grievor's depiction of the staff meeting may have changed over the course of time but the question I must address is whether this reflects dishonesty on the grievor's part or a muddled recollection. An inexperienced witness, participating in an investigation and an arbitration under great personal stress, should not be held to an unrealistic standard. When the September 9, 2015 staff meeting took place, it was a typical School event. No witness testified that anything remarkable was said or done, such that they had an especially detailed memory of the discussion. The evidence was clear that staff meetings were often marked by cross talk or sidebars. Apparently this was the case on September 9.

In the circumstances, I would expect participants to have a general recall of the subject matter when questioned two days later, but not to know precisely which speakers made which remarks and in what sequence. There was simply no reason for staff to make mental note of those details at the time. Therefore, it is reasonable that there are differing recollections of how the "blown out of proportion" comment came to pass, albeit there is consensus that a message was delivered about the paramount importance of maintaining confidentiality. Carlson and Amodeo testified that this was their objective in planning the meeting. All witnesses confirmed they heard and understood the general message.

The Employer laid great emphasis on the fact that the grievor, and no other witness, reported the words "no big deal" being used during the staff meeting. The Parent testified that the grievor spoke these words in recounting the staff meeting discussion when she phoned. In the Employer's submission, there is no other logical explanation except that it was the grievor who made the phone call. It cannot be mere coincidence.

I am not entirely convinced by this line of argument. "No big deal" was not part of the grievor's account when she was first interviewed on September 11 by Deacon. Her response in Question 4 was that the message was about how talking "can be blown out of proportion." The point did not come up during the September 15 interview. On October 15, the termination letter was handed to the grievor and it included a reference to "it wasn't really a 'big deal'" as being part of the Parent's version of the phone call. When the grievor testified at arbitration, she stated in direct examination that Amodeo, prompted by the grievor's interjection, called the situation "blown out of proportion" and "no big deal." This was her first mention of "no big deal." Given the foregoing, a question arises as to whether the grievor was

recalling what she believes she heard Amodeo say at the staff meeting or alternatively, was influenced in her recall by the framing of the allegation in the termination letter. I return to the point that participants at a routine staff meeting cannot reasonably be expected to remember the precise words spoken in the meeting. I appreciate the force of the Employer's argument but cannot agree that there is *no* logical explanation except that it was the grievor who phoned the Parent. Nevertheless, the grievor's use of these words does raise a genuine issue as to her credibility and this must be weighed in the balance.

The Employer questioned the grievor's statement to Deacon that she was unsure about making the phone call but could tell him all the details of what she did on the night of September 9, 2015. Then the grievor shifted the conversation to her Facebook posts commenting on the School start-up, a completely irrelevant topic. In quick succession this was followed by comments about her medical condition, which can cause her to forget things, and a detailed listing of her activities on the evening in question. She declined a last opportunity to make a statement about the investigation. In direct examination, she again presented a detailed account of the September 9 evening but the Employer enumerated all the differences and additions as compared with the September 11 interview. The Employer characterized this evidence as "incredible." The new account included visitors in the living room, a recent suicide in the family and the sinking of a fishing vessel that employed a nephew who was nearly lost. The Employer noted that the grievor did not claim these events caused her memory problems. Rather it appeared to a bid for arbitral sympathy. Asked in cross examination why she neglected to mention so many details to Deacon, the grievor answered he asked about "the evening" and the visitors left before dinner. The Employer submitted that such disjointed and contradictory evidence could not be believed.

In reply, the Union argued that the grievor was doing her best to respond honestly. She was not vague and evasive. She has a medical condition that sometimes affects her memory so she was reluctant to be absolute about any of the facts. She was frightened that "part of her" had forgotten what she had done, even though it was the kind of thing she would never do, as it was hurtful and a violation of trust. As she continued responding, she clarified that only deep sleep disrupts her memory, so she could not have forgotten a phone call on this occasion. Clearly the grievor was overwhelmed by the allegation, said the Union. As she testified, a person in authority was telling her she had committed serious misconduct, so she would only say she was 98% sure she had not done it.

Again I agree that questions are raised by the nature and quality of the grievor's responses and her evidence at arbitration about the September 11 interview. She presented as a person struggling to cope with the situation in which she found herself. Indeed, she made several comments about the need to see a doctor. However, no medical evidence was tendered by the Union and I am precluded from relying on undocumented medical claims, except to note the grievor's obvious distress. Certainly she believes she has memory problems at certain times.

The question recurs: was the grievor stressed and confused because of the allegation, or was she hiding her guilt, or both? On consideration, I do not find an inherent contradiction in her equivocal denial of the allegation and her assertion that she can remember "everything" she did that evening. Later under cross examination she was candid and conceded no one can remember literally all their activities over the course of a busy evening. She was trying to defend herself. She tried her best to run through the evening, including visitors, child caring, a nap, cooking dinner, clean up and

bedtime. She was pretty sure she did not phone the Parent as alleged but in the face of Deacon's accusation, she just could not bring herself to be definitive. The whole notion of being "too busy" to make a phone call is itself a dubious line of defence but not entirely surprising coming from a person who was anxious and stressed about an anonymous accusation.

The grievor's weekend journal notes and her home call history

The Employer submitted that the grievor's change from confusion on September 11 to absolute denial on September 15 was too incredible to believe. Her supposed health-related memory problems apparently disappeared by the time of the second interview. The Employer pointed to events on the weekend between the two meetings as further grounds for disbelief. The grievor wrote a personal journal (Ex. 4) with a number of entries that raise serious doubt about her denial of the allegation.

The grievor did not appear to believe her own denial.

> I am incredulous. I remember no such phone call … . In the meeting I state to them that I am pretty sure I made no such call, 98% sure I think I say. … What if I truly have forgotten a specific event such as this with so short a time span having gone by. It's possible, even my three year old notices that I forget things. Like what we came to the grocery store for, certainly not events of work two days prior.

The grievor recorded that she came home from the meeting and tried to check her call history on the home phone. "I have been unsuccessful but am certain there will be no surprises there." Later she added "I wish I knew how to check my call history. I have tried and can't figure it out."

In response, the Union said the Employer made too much of a personal journal and took these comments out of context. I agree that the entries were personal but they may still be probative. Reading the journal overall, it confirms the grievor's basic denial of the allegation ("pretty sure") but shows that she remained tormented by nagging doubt.

The Employer said the reference to call history was especially significant. The grievor obviously knew that her home phone did have the call history feature. She had the whole weekend to seek assistance in accessing the call log, but failed to do so. Her notes indicate an awareness that the call history could either exonerate her or implicate her. In testimony, she confirmed all the above but was unable to provide any satisfactory explanation for why she did not pursue getting a record of the call history. She said if anyone wanted the phone, she would have brought it in, but she neglected to tell Deacon that she had a call history option until the second interview. The Employer maintained that an honest employee would have volunteered the information promptly during the investigation and made sure that the call log was verified. Under cross examination the story changed and she said she did look at the history but the phone date was not set properly and she couldn't figure it out.

The Employer argued that either the grievor engaged in willful blindness or she did check the call history and is now hiding the evidence, which shows the Parent's home number. More likely the latter is true. Both scenarios are indicative of guilt.

In reply, the Union said the grievor did try to access the call history but was unsuccessful and gave up. Deacon was told this at the start of the second interview. The grievor was cross examined intensively. Why not make further inquiries? She answered that by that stage, she was confident she did not make the call. She was

certain someone would tell her "there has been a huge mistake." In retrospect, she conceded in testimony, it would have been prudent to verify the call history. At the time, she did not fully appreciate that it could exonerate her. She was naïve in thinking that she should stand back from the investigation. Still, she was trying to get a call history from Telus, and once she learned that there are no local calls logged by Telus, she saw that fact as her exoneration. She notified Deacon. She reasonably concluded that the Parent must not have been telling the truth when she presented the Telus email, and surely Deacon would be persuaded.

The Union denied that the lack of call history evidence was probative of guilt. The onus of proof lies on the Employer and the grievor had no obligation to *disprove* the allegations. Deacon could have asked her to bring in the home phone and could have checked the call history.

Regarding this last point, it is true that the Employer bears the onus of proof, but the grievor's conduct during the investigation is still open to scrutiny. Reasonable inferences may be drawn from proven facts. The grievor made inquiries with Telus and quite sensibly forwarded the Telus information to Deacon, seeing it as a basis for exoneration. But the Employer's point was that the home call history was the most obvious way to achieve exoneration and the grievor opted not to pursue it**.** I agree that this is significant because of the concurrent fact that the call history might have definitively established the grievor's guilt. I acknowledge the Union's points of explanation but the call history evidence weighs against the grievor.

On a related point, the Employer also criticized the grievor's statement that she avoided the phone as a means of communication. This was self-serving and in any case, the phone bill records in evidence revealed a pattern of extensive telephone

usage, said the Employer. I agree that such a statement is difficult to verify and could be self-serving, but a review of the phone records in question tends to support the grievor's assertion. Her personal cell phone billings for September 2015 show about two calls per day, few of which were extended conversations. About half the calls were one minute or less in duration. The land line was shared with her husband and no local calls are logged, but the long distance calls (68 for the month) averaged about five minutes each.

No definitive analysis is possible but in my view the evidence was somewhat supportive of the grievor's testimony that she is "not a phone person." In her personal journal notes written on Saturday September 12, she observed that she could not imagine herself picking up the phone to make the call as alleged "considering the phone is one of the last places I choose to be." I don't regard the point as pivotal either way.

The September 15 interview responses

The Employer described the turnaround in the grievor's memory at the second interview as "nothing short of miraculous." She expressed in absolute terms her denial of the allegation. Moreover, said the Employer, she lashed out and suggested she was being bullied and harassed, perhaps by fellow employees with whom she had past issues. The Employer argued that this revealed an angry and vindictive side to the grievor, which was consistent with calling a parent to make hurtful and false statements about their family. Continuing her inconsistency, however, the grievor then told Deacon, "If this happened I need to go to the doctor," thereby casting doubt on her own absolute denial. Immediately after that, the grievor repeated her denial, coming full circle.

The Union reiterated its argument that the grievor was unequivocal at the second interview because the complainant had finally been named. The exchange between Deacon and the grievor was as follows:

> Q. You have previously stated that you did not make the alleged phone call. Do you want to make any changes to your response to this allegation?
>
> A. I absolutely did not. Further, now that you have given me the name, I am relieved. I absolutely did not call this parent. If this is still an investigation on me, I need to know my rights. …

The Union strenuously disagreed with the Employer's characterization that the grievor lashed out in anger, calling it "grasping at straws." In fact, the grievor was merely musing out loud about why someone would make such an allegation against her.

I agree with the Union on both points. As I stated earlier, the accusation against the grievor should have been accompanied by the name of the Parent. Once she had the name and made a firm denial, she continued:

> Now, I'm saying that I didn't make the call so I have to ask, is someone impersonating me? Is this bullying and harassment related to something else?

The grievor did not make an accusation and her questions were legitimate ones in these circumstances. I saw nothing during the grievor's two days of testimony, touching on this and numerous other topics, to suggest an angry or vindictive aspect to her personality. This included lengthy periods of pressing and unrelenting cross examination by Employer counsel. The grievor at times showed frustration or impatience, but was never impolite and always made an effort to respond

respectfully to questioning. *Faryna* and other authorities caution against overreliance on the demeanor of a witness, an approach I have endorsed. However, the performance of the grievor under the stress of a hearing is a relevant factor when the Employer alleges that the grievor's angry and vindictive personality led to the misconduct in question.

Browne v. Dunn response evidence and the grievor's inconsistencies

The Employer catalogued a series of points made by Carlson, Amodeo and Deacon when they were recalled to address the grievor's evidence in chief. Deacon confirmed that when she was interviewed, the grievor did not mention many of the circumstances that featured prominently in her testimony at arbitration. The Union did not deny that the grievor's testimony was much more detailed than her statements during the investigation. This was normal and reasonable, argued the Union. The first interview was less than an hour including formalities and introductions. The second interview was about half an hour. By contrast, the grievor testified for two days after waiting a year to have her day in court. She had more time to recall and prepare. In addition, she was cross examined comprehensively and pushed to explain herself in myriad areas, which she tried her best to do, sometimes successfully and sometimes less so. The Union submitted that when all these circumstances are considered, the grievor's testimony should be found imperfect but honest.

The Employer listed numerous internal inconsistencies and conflicts with other witnesses, as revealed during cross examination of the grievor. Some of these points have already been canvassed but the Employer also referenced the following:

- Could the grievor recall anything more about the staff meeting? She answered that "more could come to me in an hour."
- In the first interview the grievor said "blown out of proportion" was in relation to playground difficulties. In testimony she said it arose from her question about the 15-year old incident. Explaining the discrepancy, the grievor said "my language is different now than it was then."
- Asked why she didn't raise the 15-year old incident during the interviews, the grievor testified, "I didn't think I was being asked about my thoughts."
- When it was put to the grievor that she knew what was going on in the meetings with Deacon, she testified: "My understanding was different in those meetings."
- The grievor made an absurd claim when asked that she did not raise being bullied and harassed with Deacon: "He claimed he didn't want that information."
- The grievor testified for the first time that "My voice is different on the telephone." Also she said "My mom's husband doesn't recognize me when I call." This was a clear attempt at deflection of responsibility.
- When asked that she never told Deacon that the Parent lied until her testimony, she testified: "I tried to tell Mr. Deacon." Further, it was not suggested to the Parent in her cross-examination that she had lied.
- The grievor testified she may have told her counsellor, mom and doctor that the Parent lied, then a few questions later says: "I only told my mom and husband." Then later, when asked that she ever suggested to anyone that the Parent lied: "I never spoke to anyone." Also, asked did she tell anyone in preparation for this hearing that she felt the Parent lied to protect someone, she testified: "No." When asked why not share that view (the Parent lied),

she said: “I don’t know how to share. I don’t think it’s appropriate to share with you or anyone else.”

- The grievor was asked if she could think of any reason for Quinten to make up a story of being called by the Parent, and answered: “No.”
- When asked that she had the motive of protecting her job when she said the Parent was lying, the grievor said: “Not the main reason.”
- We hear for the first time at the hearing that “if I have a deep sleep I can do a form of sleep walking, I indicated my medical condition can affect my memory.” When asked if she may have called the Parent in a sleep walk, the grievor said: “I was thinking that in the meeting.” However, she did not share that thought in the meeting. Shortly after the above, the grievor said: “It was pretty clear that I was confused.”
- When asked if the message to Deacon about her medical condition causing memory loss was that she could have forgotten the call, her answer was: “Yes”.
- When asked that she never mentioned details about September 9th in the September 11th interview with Deacon, the grievor testified “I was talking about the evening,” “about dinner and afterwards.” When asked about saying that she went to the bank: “I could have gone to the machine and popped something into the mail slot.” When asked about being busy and having a luxury of a nap, the grievor said “a 20-minute nap does not take away from me being busy.”
- On why the grievor did not answer Deacon’s clarification question given her different answers, she answered: “I was feeling defeated.” When asked again, she said: “I don’t necessarily remember that.” She acknowledged that she chose not to respond.

- The grievor testified she felt bullied and harassed and did not raise it with Deacon because: “Didn’t think it was my place to give him that information. He is a busy man.”
- The grievor said her luxury of a nap occurred at 5:00 p.m. waking at 5:30 to 5:40 p.m. when earlier she referred to a 20-minute luxury nap. Also she said: “a nap could affect her for hours in her feeling.” Note the Parent said that the phone call came in at 5:43 p.m. When the grievor was asked that her medical condition and nap was consistent with the time the Parent said she made the call, she answered: “It needs to be a deep sleep. They only occur then”, “this (September 9th) was not a deep sleep.”
- When asked about her journal note saying “What if I have truly forgotten” and suggested that it was possible that she did forget, the grievor testified: “Yes.”
- When the grievor was asked that at several points if she thought she made the phone call, she said: “Part of me said what if I made that call.”
- When asked about her direct testimony about making a cup of tea and having a cigarette on the deck she says: “I don’t remember. That’s what I usually do.”

The Union replied that most of the points canvassed by counsel were minor or even trivial. The Employer was pursuing a strategy of “death by a thousand cuts.” The Union also disputed the accuracy of the list.

Once again I find merit in both lines of argument. No witness can be completely consistent and accurate through all stages of an investigation and hearing process. Even professional witnesses may fall short in this respect. The grievor in the present

case had no experience whatsoever in this realm. She said she was undergoing severe stress due to the allegation and other events in her personal life. She described medical issues that create doubt in her own mind about her powers of recall. I agree with the Union that these considerations call for a measure of tolerance in assessing the consistency of the grievor's evidence. Much of the grievor's testimony, especially in cross examination, showed confusion more than an attempt to deceive. Perhaps the most substantive admission was that she may have forgotten making the call. I agree with the Employer that the extent of the inconsistencies was significant and raised a serious question about the grievor's credibility.

Speculation by the grievor as to the reason for the Parent's accusation

The Employer criticized the grievor for suggesting that the Parent may be covering up for another employee who was the real culprit in breaching confidentiality. The grievor suggested this person could be a friend of the Parent and the Parent may be protecting that person by blaming the grievor. There was no evidence to support this theory. The Union responded that it had not intended to pursue any such line of defense, precisely because the facts are unknown. I agree with the Union that the grievor's speculation resulted from my own question at the end of her testimony and that therefore the grievor's credibility should not be discounted due to an absence of supporting evidence.

Conclusions and findings on credibility

As outlined above, I do not accept the main thrust of the Employer's attack on the grievor's credibility, although I recognize that serious questions were raised about aspects of her conduct during the investigation and her testimony at arbitration. The

notice of investigation was inadequate and explains the grievor's initially equivocal response to the allegation. She was absolute once the Parent was named at the second meeting. The conflicting evidence about the sequence of comments during the staff meeting is best explained as a problem of recollection by all concerned. However, the fact that only the grievor mentioned the phrase "no big deal" is a feature of the evidence that weighs against her credibility. I do not construe the grievor's shifting recollection of the details of her September 9 evening at home to be based on dishonesty or deception. Her journal entries were not inconsistent with a denial of the allegation. However, her failure to access her home phone call history is another aspect of the evidence that raises questions about her credibility. The numerous inconsistencies and confusions in the grievor's testimony similarly weigh against her.

The authorities dictate that credibility must be assessed taking into account a witness's sincerity, veracity, firmness of memory, consistency and motivation. I have accepted the basic sincerity of the grievor's testimony but she scores poorly on the remainder of these tests. It is clear that the grievor has an interest or motivation to deny the allegation. The character of a witness's testimony is important. Was the witness forthright or evasive? The Employer sought to characterize the grievor as evasive, deflecting and deceptive, but I have largely rejected this submission. Is the grievor's evidence in harmony with the preponderance of the probabilities? In this regard, there was nothing to suggest why the grievor would have breached established policy on confidentiality and phoned the Parent. She testified she had no reason to do so and was not challenged on the point. Despite voluminous evidence and examination, there is a vacuum on the question of *why* she did it, if indeed she is guilty.

Earlier, I found in favour of the Parent's credibility on many of the factors recited above related to demeanor and the content of her testimony. As for the probabilities, just as with the grievor, there was nothing to suggest why the Parent would have launched a false complaint against the grievor. Nothing indicated there was impersonation. The Parent clearly identified the grievor. The Parent's emotional state and her call to Quinten strongly suggested that it was a genuine issue to her. She was cooperative and open during the investigation, whereas the grievor declined to verify her home call display, which might have provided a definitive answer to the allegation. Against all that, I have found that the Parent lied about the Telus email, which was the single most important piece of evidence in the case. The email was a fake.

On the evidence, I am simply unable to make a firm credibility finding in favour of either the Parent or the grievor. However, the inability to find the grievor's evidence wholly credible does not constitute proof of the Employer's allegations against her. Moreover, my finding that the Parent lied about the Telus email leaves me in grave doubt about the veracity of her allegations.

Did the Employer prove the allegation on a balance of probabilities?

The Employer bears the onus of proving the misconduct alleged against the grievor under Question 1 of *Wm. Scott*. On the evidence, and given my conclusions with respect to the credibility of the two contending witnesses, I am unable to find that the Employer has established just and reasonable cause for discipline. The Employer has failed to prove that the allegations are more probable than not.

Decision on the grievance

The grievance is allowed. The Union requested an order of reinstatement with full redress. The Employer indicated that, if the grievance was upheld, there may be an issue with respect to reinstatement. Both parties agreed that I should retain jurisdiction.

Jurisdiction is retained to settle any question relating to remedy, as may be requested by either party.

DATED at Victoria, B.C. on April 19, 2017.

ARNE PELTZ, Arbitrator