

IN THE MATTER OF AN ARBITRATION  
PURSUANT TO SECTION 104 OF THE *LABOUR RELATIONS CODE*

BETWEEN:

BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 39 (VANCOUVER)  
(the “Employer”)

AND:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 963  
(the “Union”)

(Kulwant S. Johal Grievance 229-10-17;  
Section 104 – Case No. 71748/18L)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Peter A. Csiszar for the Employer
	Richard L. Edgar for the Union
HEARING:	April 20, 2018 Richmond, BC
DECISION:	July 19, 2018

The parties are agreed that I have the jurisdiction, pursuant to Section 104 of the *Labour Code*, to hear and determine the matter in dispute.

This case concerns a ten-day suspension, October 12–25, 2017 imposed by the Employer, School District No. 39 (Vancouver), on Mr. Kulwant Johal, Building Engineer, for comments made during a September 1, 2017 telephone call with Mr. Gilbert Francisco, Operations Supervisor.

As well, the Union is claiming overtime pay for days on which overtime was worked outside of his regular working days during the period of his suspension; specifically, September 9 and 10, 2017 and October 8 and 15, 2017.

The Employer's disciplinary letter of October 11, 2017 states as follows:

This letter is further to our meeting held on the above date. In addition, present at that meeting was Brian Bell – Operations Manager, Gilbert Francisco – Operations Supervisor, Lisa Abercrombie – Employee Relations Advisor (Recorder), Tim Chester – President, IUOE Local 963 and Harjit Khangura – Vice-President, IUOE Local 963.

The purpose of our meeting was to discuss a matter regarding threats you made toward Mr. Bell during a telephone call with Mr. Francisco on September 01, 2017 at approximately 3:31 pm. Specifically, on that day, Mr. Francisco called you to advise you that Operations was in receipt of your clearance to return to work from medical leave and that as such, per process, you would be commencing your vacation effective September 05, 2017. During that conversation, Mr. Francisco also advised you that you had previously been approved for your fifth week of vacation which was to commence on October 10, 2017.

You then asked Mr. Francisco if you could start your vacation time on September 11, 2017 to which he replied that you could not. He further explained to you that it is standard operational procedure to serve outstanding vacation immediately upon approved return

from leave. It was reported by Mr. Francisco that you were becoming flustered and agitated with the denial of your request. You asked again, and Mr. Francisco once again explained the procedure. At this point in the conversation, you became very angry and aggressive in your tone. You questioned the decision and directed your hostility toward Mr. Bell. Mr. Francisco then described that you went on a hostile “rant” targeted at Mr. Bell. You then told Mr. Francisco, “He is going to regret this for the rest of his life, he will remember me for this”; “He is training you to be like him and treat me this way”; “This is just another way for you guys to screw me up”. You then asked Mr. Francisco if he was going to do anything regarding your vacation and he responded, “No”.

Mr. Francisco was shocked by the venom and anger in your tone and the statements you had made against Mr. Bell. He stayed quiet during your threatening tirade and knew that he had to document the conversation immediately with the intent of reporting your actions, which he did that afternoon. He further followed up with an email to you reiterating your vacation schedule. You also sent an email to Mr. Francisco and your union representative following the conversation. Your email included several statements made specifically about Mr. Bell, which were accusatory in nature.

During our meeting, you told us that the information that was reported by Mr. Francisco was, “Made up”. You were not argumentative with Mr. Francisco, but, “Humble”. You said that the only mention you made of Mr. Bell was to say that, “Brian remembers me when he is on vacation, I am so special to him and I guess he will remember me when I am retired”. You told us that you did not make threats against Mr. Bell, that it was all made up and, “All news to you”.

We believe that the information reported by Mr. Francisco to be factual. Supporting this determination are your own contradictions and inaccuracies that you presented to us during our meeting of September 14, 2017. Mr. Francisco reported the content of the conversation immediately because he found the threats against Mr. Bell alarming. Mr. Francisco also reported that you were angry and hostile in tone when referring to Mr. Bell during the conversation, as well as argumentative and agitated with him when he gave you direction about your schedule. This same tone is reflected in the email that you sent following the conversation, and it is noted that the focus of that email is your anger at Mr. Bell. Under no circumstances are threats made

against another employee of the Vancouver Board of Education tolerated. Your actions are extremely disturbing and troubling to your Employer: this has resulted in a breach of trust in you as an employee. As I told you during our meeting, based on your aggressive, argumentative, hostile and threatening remarks you have been suspended without pay for a period of ten (10) working days, which will be served October 12, 2017 to and including October 25, 2017. Be advised that further incidents will result in termination of your employment.

The Union grieved the suspension claiming, in an undated grievance (Case No #229-10-17), that:

**Statement of Grievance:**

I was suspended for 10 days without just cause and further, I was denied the opportunity to work overtime shifts at Vancouver Technical Secondary School, which includes Saturday, September 9, 2017, Sunday, September 10, 2017 and Sunday October 8 and 15, 2017. This is in breach of Article 11(A)(2)(g)(2) and Letter of Understanding #1 (1989) of the IUOE/VBE Collective Agreement regarding over time.

**Resolution:**

Make-whole remedy, including but not limited to, all back wages and lost overtime. Removal of all documentation regarding this unjust suspension.

Further background to this dispute is provided via: Mr. Francisco's notes of his phone call with the grievor; the grievor's email to Mr. Francisco at 4:07 p.m. on September 1<sup>st</sup>; Mr. Francisco's email to the grievor at 4:47 p.m. on Sept 1<sup>st</sup>; and the Employer's notes of the September 14, 2017 investigation meeting – all of which are reproduced below:

*Mr. Francisco's notes of his phone call with the grievor:*

Sept. 1 – Kulwant Johal

- called Kulwant at 3:30 pm on Fri. Sept. 1 to advise we were in receipt of his clearance and he would be going straight to vacation as of Tues. Sept. 5.
- I then advised him he also had a previously approved 5<sup>th</sup> week of vacation from Oct. 10-16 that was included in his remaining 26 days.
- Kulwant then asked if he could start his vacation on the following Monday the 11<sup>th</sup> to allow his vacation to run into his 5<sup>th</sup> week, it's just postponing it a week.
- He asked 2 times to reconsider this request.
- I replied I wouldn't.
- He then said "why does it make a difference to the VSB if you replace me next week or in October, it's no difference to you still have to replace me.
- I explained as we normally treat all clearances the same in that anyone with owed vacation goes straight to vacation, it's regular practice.
- He then asked if I would run this by Brian.
- I explained I had already run this Brian and we both agreed to going straight to vacation and Brian approves the time off request's, and that Brian is off starting next week so this is how Operation's will proceed.
- Kulwant then went on a rant about Brian.
- He is going to regret this for the rest of his life, he will remember me for this.
- He is training you to be like him and treat me this way.
- This is just a way for you guys to screw me up.
- I know it's not your fault, it's not you.
- (I did not respond to any of this) stayed quiet.
- He then asked if I was in a position to do anything else about this.
- I replied 'No'.
- I recapped that with 26 days of vacation he would start on Tues. Sept. 5 to Oct. 3, he would then return to work from Oct. 4-9 and go on his 5<sup>th</sup> week of vacation from Oct. 10-16.
- I advised him if he would like he could submit a request for another leave from Oct. 4-9.
- He then replied:
  - I know what I can do, you don't need to tell me and hung up the phone.

- I then started to send him a re-cap of our conversation through email after returning to deal with the afternoon crew @ Kitsilano and other matter's. I completed and emailed him @ 4:47 pm.
  - I then read an email from Kulwant which was not accurate outlining our discussion and clearly sent in a state of anger, it was cc'd to Tim Chester.
  - Very uncomfortable phone call, he was aggressive and agitated when I wouldn't agree to changing his vacation.
- 

*The grievor's email to Mr. Francisco at 4:07 p.m. on September 1<sup>st</sup>:*

You phoned me at 3:30 pm this afternoon on my cell phone to inform me that I would be forced to take my vacation, starting September 5, 2017.

I asked you if I could start my vacation from September 11, 2017, so that I would be able to include my approved fifth week vacation in October.

You told me that Brian wants me to start my vacation from September 5, 2017.

When I asked you if Brian has special instructions for me.

You replied that Brian was on vacation.

I further suggested to you that Brian was taking time from his vacation to take special interest in my vacation.

Then you changed your position and said that it was not Brian who was making this decision.

Now you are forcing me to take vacation from September 5<sup>th</sup> to October 3, 2017.

Then come back to work for 3 days (October 4<sup>th</sup> to 6<sup>th</sup>) and then go on my approved fifth week (one) vacation.

I tried to explain it you that it would not make any difference to VSB, if I work for first week of September or 3 days in October. As you have to replace me any way.

Your answer was that it would be your way.

By the way Donna Milville had already informed the Operations sometime before 11:50 am this morning that I had been cleared.

Donna Melville  
Reply all  
Today, 11:50 AM  
Kulwant S. Johal; Angela Fraser; Gillian Guliano;  
[dtchester@msn.com](mailto:dtchester@msn.com)  
Thanks Kulwant. I did get the faxed copy and advised operations. They will be in touch.  
Take care,

But it took you almost 4 hours to make this decision.  
One wonders why?

I conclude by letting you know that I will be following your directions under protest and would be informing my Union regarding this.

Because this is the continuity of Mr. Brian Bell's bullying & harassment treatment towards me.

---

*Mr. Francisco's email to the grievor at 4:47 p.m. on Sept 1<sup>st</sup>:*

Hi Kulwant,  
As a follow up to our phone conversation a short while ago,

We have received your medical clearance to return to regular hours on Tuesday, September 5, 2017 which as a result allows you to commence your vacation entitlement of 26 days. Included in the 26 total days is a previously approved 5<sup>th</sup> week of vacation (5 days) on Oct. 10-16.

Therefore you will be on vacation from Tuesday, September 5 through to October 3, 2017 then return to work from October 4 to October 9, 2017.  
You would then have your 5<sup>th</sup> week of vacation on Oct. 10-16, 2017.

Also as discussed you have the option to submit a request to use another leave and apply for the 4 working days of Oct. 4 to October 9 and that would be granted based on availability.

Enjoy your vacation.

---

*The Employer's notes of the September 14, 2017 investigation meeting:*

Joann-Horsley-Holwill [JHH]  
Brian Bell  
Gilbert Francisco  
Lisa Abercrombie

Kulwant Johal [KJ]  
Tim Chester [TC]  
Harjit Khangura [HK]

JHH Thank you for coming in an meeting with us today. The reason I have asked you to come in is because a matter was brought to our attention regarding a conversation you had with Gilbert Francisco, your supervisor, and during that conversation we were extremely concerned about some comments that you had made, in particular comments you made about the manager of Operations, Brian Bell, and comments that in the view of this employer, have been deemed as threatening, and therefore a concern. I will go through some details of the conversation to put it into context, and then you will be given the opportunity to speak to that. Do you have any questions about that process?

KJ Not so far.

JHH The conversation occurred at approximately 3:31 on Friday September 1, 2017 at which Gilbert called you to advise that they were in receipt of your clearance to return to work from medical leave and as per process you would be going to vacation Tuesday Sept. 5. During that conversation, he also advised you that you had previously been approved a fifth vacation week, and at that point, you asked if you could start your vacation the following week Monday Sept. 16 so it could run into the fifth week.

KJ I asked that?

JHH We will go through all the facts. You asked this two times and Gilbert let you know that he couldn't change that and it was reported to us that you started to get increasingly agitated at this point and quite flustered and more aggressive in your tone. You



then said to him, why does it make a difference to the VSB if you replace me next week or in October. Gilbert explained to you that this is operational procedure and that with all clearances if there is vacation owing, vacation is served upon the clearance return to work. Again, through my interview with Gilbert he explained to me that you were becoming increasingly angry, agitated and belligerent in your tone and at that point in the conversation you asked him if he would be running it by Brian. Gilbert explained to you that he had already spoken to Brian which is standard procedure as Brian is the manager of the department and responsible for the approval of vacation and that you would be sticking with standard operational practice as it would be with any other employee. At this point the conversation turned and it turned to the point where this is why we have brought you in today and why we feel it is necessary to talk to you. You became very angry, and very hostile and said, about Brian, and I will go slowly, "he is going to regret this for the rest of his life, he will remember me for this, he is training you to be like him and treat me this way, and this is just a way for you guys to screw me up". Gilbert was shocked by these statements and in particular the threat that was made and honestly didn't know what to say at that point in disbelief of what he had heard. While you were, and as it was described, on your rant about Mr. Bell, Gilbert stayed quiet. When you had finished you asked Gilbert if he was going to do anything about this. To which he replied no, he recapped the situation about your vacation and he also advised you that if you would like to submit a request for another leave you were able to do so. You replied, "I know what I can do" and hung up on him. At that point, because of the threats that were made, Gilbert knew that immediately he had to take notes of the conversation because of the seriousness. It's a threat and it would have to be reported to Labour Relations immediately. It was reported that evening. He also knew that he would have to recap the conversation to ensure that you understood and that was after he took the notes and that he emailed you at 4:47pm on Friday as well you sent an email cc'd to Tim Chester admitting all the threats you had made against Mr. Bell and reporting an entirely different conversation. That is why we asked you to come in and I want to let you know that the reason we asked you to come in is because of the comments and the threats you made about an employee of the VSB. You are not here because of your vacation and we aren't interested in talking about your vacation. We are here to address those remarks so I hope that is clear.

JHH What do you have to say?

KJ Thanks for the time and please don't interrupt me when I am trying to answer these questions.

JHH We will make that decision, we will have to ask further questions and its our meeting.

KJ If I miss any point I can be reminded about it. But the notes I have taken down quickly, whatever you have stated, I tried to address each and every single one of those.

JHH If I can reiterate one more time and maybe your union can help. We are only interested in your remarks, we aren't interested in your vacation, the purpose of this meeting is the remarks you made.

HJ [HK] She is saying we are not talking about why you couldn't take the vacation.

KJ I understand it perfectly I wanted to answer each and every question raised here. I am not talking about the vacation. It has been stated that the phone call was made to me by my supervisor, Mr. Francisco around 3:30pm. He advised me that I am slowed to come back to work and I have been cleared by Employee Services to start my work from Sept 5 after the long weekend and then he informed that I should start my vacation from that particular day. I had reported it this way, I requested Sept 16 to start which is wrong. I requested Mr. Francisco, if it was possible to start it from Sept 11 not 16, which was the following Monday. We already know that the make up stories weren't there. I did say that Mr. Francisco, I said I request you humbly Mr. Francisco that if it is possible that I can change my pre-approved vacation, its only three days and in my opinion, it won't make much difference to the VSB because they will replace me anyways. At this point it was Mr. Francisco who talked about Mr. Bell, he said it is not my decision it is Brian's decision. He has advised me that you are supposed to start your vacation on Sept 5 and for this reason I told Mr. Francisco, oh is Brian around I want to ask him and to talk to him, Brian is on vacation he let me know and that is why I mentioned Brian remembers me when he is on vacation, I am so special to him and I guess he will remember me when I am retired, that is about all this make up stuff. As far as the threat making, nothing happened, it is all news to me, and the email part now, which you mentioned, Mr. Francisco emailed me to recap the conversation, the knowledge of this and members of this meeting. I emailed first and you can check the time, it is in the record and I even mentioned all these points and what we had talked about and

since I didn't make anything about anything there is no mention and either in Mr. Francisco's email, there is no mention. The reason I cc'd to my union, and that has been the past practice, I am apart of a union, that when my employer is getting out of line I should keep my union informed. In my opinion. That is about it.

JHH You are telling me that Gilbert made this up? You said this is make up.

KJ To me it seems like make up, I don't know whether Gilbert made it up.

HK He has to stretch his knee.

JHH I asked the question, are you telling me Gilbert made this up?

KJ I already answered that question mam. I said this seems like a made up story I am not saying who made it up, I don't know.

JHH What do you mean you don't know who made it up?

KJ That is the best I can answer.

JHH I want to follow up on that, are you saying none of this happened someone made up the story, who do you think made up the story?

KJ I answered the best I could. I don't want to say the same thing again.

JHH Well I asked a question, you obviously think someone made up a story.

KJ And I answered the question.

JHH No you didn't.

TC He said he or someone else.

JHH We are going to be taking a break and we will be back.

Caucus

JHH Thank you for the break we were just taking some time to review what you had said and review our notes as well. It is

interesting that in your explanation to us just now what you had said in terms of the focus of the conversation seems to be different than the email you actually sent out after the conversation and I took the time to read that email carefully in light of what you had said and in fact it is, like I said, quite contradictory because the email you sent after that conversation to Gilbert and cc'd to Tim Chester, that the focus seemed to be specifically on Brian Bell, which lends support to what Gilbert has reported immediately to Labour Relations regarding the conversation that happened it was focused on Brian Bell and hostile and angry and your own notes reflect that and lend credence to the information provided by Gilbert. Looking and reviewing those notes you said if Brian has special instructions for you he was taking time from his vacation to take a special interest in you and some strange allegation that it took almost 4 hours to make a decision which seems strange knowing full well that you are not the only employee Operations deals with and not the only thing that they have going on. I want to point that contradiction because in terms of credibility I do believe what Gilbert told us. I don't believe, this employer does not believe that Gilbert would have any reason to make up a story. What started out as a simple phone call to let you know about starting your vacation turned into something that was completely disturbing to Gilbert. So disturbing that he knew he had to report it immediately so his employer could deal with it. It wasn't a conversation where the employer was getting out of line so you had to report it to your union it was a simple conversation about when you would start your vacation your reaction got out of line. Your reaction to that was to make threatening remarks toward another employee of the VSB. I have to let you know that under no circumstances are threats tolerated by this employer and that doesn't matter if the threats are made to a co-worker, to any staff member, or anyone affiliated with the VSB. It is simply not how this employer operates and we take it extremely seriously. The comments that you made and that were made in anger are extremely disturbing to us and as an employer we have to deal with your behaviour to ensure that it never happens again and that you know that this is not acceptable in our workplace. We also have concerns for our employees of course outside of work when threats like that are made. And like I said, we don't care if they are made to a co-worker, any staff member of the VSB. It is not okay. Unfortunately we can't as an employer take care of what can happen outside of the workplace but we do work with our employees to ensure they know what to do when threats have been made against them. With all that said, I have to let you know that we do accept that Gilbert's account of that conversation was accurate and that is further supported by your own contradictions

and inaccuracies that you presented us here today as compared to what you presently previously. Kulwant, because of the serious nature of your behaviour and your unwillingness to accept any responsibility you will be suspended without pay for a period of 10 working days and that suspension will be served upon your return from vacation starting October 12 to and including October 25. We also have to let you know that this is a confidential matter and that it is our expectation that you do not discuss this with anyone except your union reps who are here with you today and further to that there is no retaliation as a result of this incident being reported to us.

KJ Thank you.

---

Collective agreement provisions cited by the Union in its grievance state, in part, as follows:

#### 11. ENGINEER CUSTODIAL STAFF

##### (A) Working Conditions

...

##### (2) Hours of Work

...

##### (g) Overtime:

##### (1) Overtime Policy:

It is the duty of the Board to hold overtime to a minimum and the Union will support the Board in its endeavour to do so; further, the Union will establish a policy to provide with the Board a mutually agreeable understanding on how the Board's commitments in respect to rentals and other programs will be fulfilled, through the services of a joint committee. Clarification is contained in a joint letter appended hereto.

## (2) Overtime Definition:

Overtime is time worked in excess of seven and one-half (7 1/2) hours per day or thirty-seven and one-half (37 1/2) hours per week. Any time on the first rest day and any time on the second rest day is regarded as overtime.

---

Letter of Understanding #1

...

SUBJECT: Clarification – Overtime

It has been brought to our joint attention that some rentals have had to be deferred because no one in a particular school was prepared to work overtime. The provision of overtime in the Collective Agreement has a premium negotiated between the V.S.B. and the I.U.O.E. 963 to compensate employees for the right of the Board to ask for overtime particularly in the case of rentals. The fact that there is a provision in the Collective Agreement means that the Union has accepted to provide members to work under those conditions and for that premium.

Consequently, in future when overtime is required by the Board, the Building Engineer shall be responsible to provide someone to perform the overtime. Obviously the Building Engineer has the first right to accept or defer, but in the case of the latter it is necessary for him/her to find someone else to perform the duties, and failing which, he/she shall have no alternative but to comply himself/herself. The practice of finding some other member of the Union outside of the school staff willing to work overtime and who is qualified and knowledgeable in lockup, etc. is acceptable to the Union and to the Board. The onus, however, is on the Building Engineer and not on the Operations Division to find such person or persons.

Mr. Francisco, testifying for the Employer, was the only witness in these proceedings, and he confirmed the content of his notes regarding the telephone conversation of September 1<sup>st</sup> with the grievor. Mr. Francisco testified that:

the grievor's voice and tone grew progressively louder and more aggressive; the grievor's comments "made me feel uncomfortable"; I "was personally concerned for myself and [Brian] Bell as well"; and "I took it seriously enough to make notes of my conversation."

On cross-examination Mr. Francisco stated that he wrote the bulk of his note (i.e., up to "...hung up the phone") immediately after getting off the phone with the grievor, with the remainder of the note completed around 4:35 to 4:40 p.m., and emailed at 4:47 p.m.

On cross-examination Mr. Francisco also stated he changed the date in the third paragraph of his note from "the 16<sup>th</sup>" to the "the 11<sup>th</sup>" after confirming the correct start date for Mr. Johal's vacation rescheduling request with VSB staff involved (Joann Horsley-Holwill).

When asked by Union Counsel to specify in his notes where it states that Mr. Johal was angry or threatening, Mr. Francisco responded, "I have no idea what [Johal] meant when he said '[Bell] will regret this for the rest of his life.' I took it as threatening."

## **POSITION OF THE EMPLOYER**

Employer Counsel claims that there are two aspects of the grievor's behaviour that are most relevant to my consideration of the appropriateness of a ten-day suspension in this case; namely that the grievor's comments constitute a clear threat to Operations Manager Brian Bell, and the grievor was fundamentally dishonest throughout his dealings with the Employer in regard to the incident (i.e., grievor's September 1<sup>st</sup>, 4:07 p.m. email to Mr. Francisco, and during the September 14<sup>th</sup> investigation meeting).

Not only has the grievor not apologized for his behaviour, Mr. Johal has consistently denied that any threat occurred, claiming that the Employer made

it up. If not for the grievor's long service, Counsel contends, Mr. Johal would have been terminated.

Employer Counsel also notes that: the grievor knew, via an email sent to him on July 7<sup>th</sup>, almost two months before September 1<sup>st</sup>, that he would be required to go straight to vacation once cleared for a full return; and that the grievor's behaviour was unprovoked and contained an element of insubordination.

Counsel contends that the respect and confidence of the public would be eroded if it was known school district employees were threatened in the workplace, and perpetrators were ultimately treated with relative impunity.

In further support of his arguments on the appropriateness of a ten-day suspension, Employer Counsel cites the following authorities: Brown & Beatty, *Canadian Labour Arbitration*, at 7:3430 Aggressive and Abusive Behaviour; *Shoppers Drug Mart Store No. 222 v. Sidhu (Sidhu Grievance)*, [2008] B.C.C.A.A.A. No. 67 (Larson); *Alcan Smelters & Chemicals Ltd. v. Canadian Auto Workers, Local 2301 (Pirrota Grievance)*, [2004] B.C.C.A.A.A. No. 307 (Hope); *Doman Forest Products Ltd. and Industrial Wood and Allied Workers of Canada, Local 2171 (Volker Grievance)*, [1999] B.C.C.A.A.A. No. 330 (Kelleher); *Alberta Wheat Pool and Grain Workers' Union, Local #333, CLC*, (April 8, 1997), unreported (Korbin); *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Deol Grievance)*, [2008] B.C.C.A.A.A. No. 218 (Hall); *Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union (EA Grievance)*, [2003] B.C.C.A.A.A. No. 161 (McConchie); *Excerpts from Workers Compensation Act*, RSBC 1996, c492 (the "Act") and the *Occupational Health and Safety Regulations*, Reg 296/97 (the "Regulation"); *Board of Education of School District No. 39 (Vancouver) and United Brotherhood of Carpenters and Joiners, Local 1995*



*(Aubrey Hawco Grievance)*, unreported, June 2, 2010 (Ready); and *Global BC and Communications, Energy, Paperworkers Union, Local 814M (Grievance of S. Lyon)*, unreported, May 4, 2005 (Lanyon).

As for the Union's overtime claims, Employer Counsel argues that given the nature of the grievor's threat, his continued presence in the workplace subsequent to September 1<sup>st</sup> and prior to the serving of his entire suspension would be inappropriate and is not required by Collective Agreement provisions, case law or common sense.

Employer Counsel asks for the grievance to be dismissed.

#### **POSITION OF THE UNION**

Union Counsel summarizes his overall view of this dispute by noting that Mr. Johal is a forty-year employee, with no discipline on file, who got a ten-day suspension for making a simple vacation rescheduling request.

Counsel asserts that the Employer's reaction was out of proportion to the totality of the circumstances, claiming that even if everything in Mr. Francisco's notes is accepted as true and accurate, it still does not justify a ten-day suspension. Counsel further contends that the Employer's overreaction is apparent in the disciplinary letter wherein Mr. Johal's comments are overstated as a "hostile 'rant'", and a "threatening tirade" delivered with "venom and anger".

Union Counsel concedes that Mr. Johal did get upset and expressed his disappointment over what he considered a simple and rational policy variance request in an agitated and irritated tone, but contends that Mr. Johal's comments were non-specific, and did not imply physical violence. Counsel states that Mr. Johal's comments were simply a generalized "he'll regret this",

and notes that even Mr. Francisco, in his testimony, said he did know what the alleged threat meant.

In support of his arguments that the ten-day suspension imposed was excessive, Union Counsel cited the following jurisprudence: *Wm. Scott and Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can.L.R.B.R. 1; *Sun-Rype Products Ltd. v. Teamsters Local Union No. 213 (Lacktin Grievance)*, [2007] B.C.C.A.A.A. No. 92 (Pekeles); *Newfoundland (Treasury Board) v. Newfoundland Assn. of Public Employees (Gillingham Grievance)*, [1993] Nfld.L.A.A. No. 62 (Browne, Ivany, Horlick); *British Columbia Ferry Corp. v. British Columbia Ferry & Marine Workers' Union Stead Grievance*, [2001] B.C.C.A.A.A. No. 72 (Germaine); *Coquitlam (Municipality) and IAFF, Local 1782, Re*, 1991 CarswellBC 3191, [1991] B.C.C.A.A.A. No. 88, 23 C.L.A.S. 244; *Silgan Plastics Canada Inc. v. U.N.I.T.E.-H.E.R.E. Ontario Council*, 2006 CarswellOnt 5705, [2006] L.V.I. 3666-7; *Simon Fraser University and Association of University and College Employees, Local 6, Teaching Support Staff Union*, [1983] B.C.L.R.B.C. No. 169 (Appeal of No. L88/82); *British Columbia (Public Service Employee Relations Commission) and British Columbia Government and Service Employees' Union*, 2002 CarswellBC 3763 [2002] B.C.C.A.A.A. No. 395; *Kemess Mines Ltd. v. International Union of Operating Engineers Local Union No. 115 (Bowden Grievance)*, [2008] B.C.C.A.A.A. No. 28 (Jackson); *Rubbermaid (Canada) Ltd. and United Automobile Workers, Local 252*, [1978] O.L.A.A. No. 130 (Weatherill); and *Vancouver School Board and International Union of Operating Engineers, Local 963 (Article 10(D) – Reassignment Issue)*, unreported, July 31, 2009 (Munroe).

The Union's overtime claim for September 9<sup>th</sup> and 10<sup>th</sup> and October 8<sup>th</sup> and 15<sup>th</sup> is grounded in Letter of Understanding #1 [LOU #1] which states that, "...in future when overtime is required by the Board, the Building Engineer shall be responsible to provide someone to perform the overtime. Obviously,

the Building Engineer has the first right to accept or defer, but in the case of the latter it is necessary for him/her to find someone else to perform the duties, and failing which, he/she shall have no alternative but to comply himself/herself...”.

Union Counsel contends that not only is the language in LOU #1 “clear and unambiguous” – in contrast to the language in *Vancouver School Board v. IUOE, Local 963, supra*, – but also that there is no specific reference in the language of the LOU excluding a Building Engineer from entitlement to overtime while on vacation.

Counsel further contends that Mr. Johal working overtime on the days in question would in no way represent a “serious and immediate risk” to the Employer (see *Public Service Employee Relations Commissions (Bowden Grievance), supra*. On this point, Union Counsel also argues, further to *Kemess Mines, supra*, that in denying the grievor the four days of overtime claimed, has turned a ten-day suspension into a fourteen-day suspension, contrary to established dictates against “double jeopardy”.

Counsel also cites *Rubbermaid (Canada) Ltd., supra*, as support for the notion that scheduled/arranged overtime work should not be cancelled.

Union Counsel asks for the ten-day suspension to be replaced with a warning letter or short suspension and reimbursement in the amount of twenty-two hours for the loss of overtime on the specified dates.

## **DECISION**

This case, at its heart, is a relatively straight forward disciplinary case, complicated only by opposing views as to the appropriateness of the penalty imposed, and to whether the grievor is entitled to overtime, further to Letter of

Understanding #1 (Clarification – Overtime), if the ten-day suspension is rescinded or reduced.

With the existence of just cause for discipline agreed by the parties, we can turn immediately to the factors in *William Scott, supra*, appropriate to a consideration of penalty – seriousness of the offence, long service, earlier discipline, premeditation, and whether the employee was singled out for arbitrary treatment.

### *Seriousness of the Offence*

Having reviewed and considered Mr. Francisco's testimony, his handwritten notes of the September 1<sup>st</sup> call with Mr. Johal; the grievor's 4:07 p.m. email to Mr. Francisco on September 1<sup>st</sup>; and Employer and Union notes of the September 14<sup>th</sup> investigatory meeting, I have no difficulty in preferring Mr. Francisco's version of the disputed September 1<sup>st</sup> call.

Mr. Francisco's notes were taken little more than an hour after the call with the grievor occurred, and the grievor's claim that it was Mr. Francisco who brought up Brian Bell, and that the grievor's comments – "[Brian Bell] will regret this for the rest of his life", "he will remember me for this", etc. – were "made up" by the Employer are simply not credible.

Additionally, I find nothing relevant or determinative in Union criticisms of the timing of Mr. Francisco's notetaking, or of the date correction in those notes from September 16<sup>th</sup> to September 11<sup>th</sup>.

That being said, I do, however, have significant concerns as to the Employer's overall characterization of the degree of seriousness of the grievor's comments during the September 1<sup>st</sup> phone call between Mr. Johal and Mr. Francisco.

Looking at the context and entirety of the conversation, it concerned a vacation rescheduling request and proceeded along expected conversational lines, until the grievor raises, and reacts inappropriately to, the perceived involvement of Brian Bell in the denial. After that outburst, the grievor calms down somewhat, says “I know it’s not your fault, it’s not you”, and after some recapping of the logistics of the grievor’s vacation scheduling, he hangs up. The tenor and tone of the conversation seems to be on something of a bell curve, starting and ending innocuously enough, with a flare up in the middle.

The Employer attempts to underscore the seriousness of Mr. Johal’s statements by comparing them to the threats issued in cases decided by Arbitrators Hope and Kelleher in *Alcan (Pirrota Grievance)*, *supra*, and *Doman (Volker Grievance)*, *supra*, respectively. Having thoroughly reviewed both cases, I do not consider them particularly apt comparators.

In the *Alcan* case the grievor, upset about his brother’s ongoing termination arbitration, entered and closed the door of his car, which was parked close to Employer representatives participating in the arbitration, then “...opened the driver’s door, paused and said, ‘If he doesn’t get his job back, watch out!’” In the *Doman* case, the grievor, upset with being placed on day shift, said to his Supervisor “Fred you are toying with my life, I am only going to say this once, you are 63 years old, ready to retire, and you are in reasonably good health. Keep it that way.”

Both of these threats are, in my estimation, more serious than what we are dealing with in the instant case. Arbitrator Larson, in *Shoppers Drug Mart*, *supra*, confirms the relative seriousness of the threat in the *Doman* case noting that, “The fact that the grievor knew those details about his supervisor was taken to be an indication that he had done some checking on him, giving credence to the threat.”

Additionally, I note that the threats in both *Alcan* and *Doman* were issued directly at the person being threatened, rather than being made through an intermediary (i.e., Francisco); were the culmination of the respective encounters rather than a flareup which subsided; and neither occurred within the context of an existing *non-violent* history (i.e., cross complaints of harassment) between the grievor and the person allegedly being threatened.

Arbitrator Hope, when referencing the earlier Kelleher case states that, “It can be seen that the threat in that case was oblique, as was the threat in this dispute”. If the cold, direct statements in *Alcan* and *Doman*, can be considered “oblique”, Mr. Johal’s statements must be considered even more tangential and obscure. Without more, and when considered in context, Mr. Johal’s comments do not, in my estimation, imply physical violence. On this latter point – physical violence – I quote with approval from Arbitrator Knopf in *Silgan Plastics, supra*, wherein, when dealing with a “...next time, before I leave, I will make you understand” threat, concluded that, “...nothing in Mr. Gill’s conduct supports a conclusion that he intended to convey any real threat of violence.” A similar conclusion is applicable here.

In summary, while the seriousness of the grievor’s offence was considerable, the degree or level of seriousness is not as high as that contended by the Employer.

#### *Long Service*

The grievor is a long service forty-year employee of the School District.

#### *Earlier Discipline*

At the time of the incident there was no discipline on the grievor’s personnel file.

*Premeditation*

The incident grew out of a vacation rescheduling request, and while the grievor and Brian Bell had a “history”, there is no indication, or underlying common sense in the notion, that the grievor was looking to exacerbate his dispute(s) with Mr. Bell, via a vacation rescheduling request to Mr. Francisco. In short, the incident was not premeditated.

All of the foregoing factors work in favour of the grievor. While I have also considered the grievor’s denial and lack of remorse to be an aggravating factor, any inclusive and reasoned balancing of applicable factors and circumstances results in a conclusion that the discipline imposed was excessive.

As stated by Arbitrator Hope in *Alcan, supra*, while upholding a grievor’s dismissal for issuing threats, “That is not to say that there are not cases where an employer’s purported recognition of mitigating facts is deemed insufficient in an arbitral review.” Such is the case here; the Employer’s recognition of mitigating facts was insufficient.

Nor do I consider myself bound by deference to discipline falling within a “reasonable range”. As already discussed, I consider these circumstances as requiring a substantial reduction to the level of discipline and am further buttressed in that decision by reference to a number of cited cases that resulted in a reduction to the length of suspension (e.g., *Sun-Rype Products, supra*, *BC Ferry Corp., supra*, and *Silgan Plastics, supra*).

The ten-day suspension imposed is hereby reduced to a three-day suspension. It follows that the grievor is entitled to wages and benefits for the seven-day reduction in his suspension. It is so awarded.

**Overtime**

The Union's overtime claim is based on LOU #1 which states that it is the Building Engineer's responsibility to provide someone to perform necessary overtime. Union Counsel contends further that the Building Engineer's authority over and entitlement to overtime is unaffected by suspension (actual or pending investigation), vacation, or scheduled days off.

I do not agree with that assessment.

Vacation is defined and intended as time away from the workplace, and without more in terms of language, practice, or mutual intention that the Building Engineer is expected to provide/delegate overtime while on vacation, I am not prepared to recognize an absolute entitlement to same. I also consider the foregoing reasoning to be equally applicable to days off within a vacation block, or between blocks.

The Union also argues that at least some of the time prior to October 12<sup>th</sup> (the first day of the grievor's suspension) should be considered not as vacation, but as suspension pending investigation. Citing *Public Service Employee Relations Commission, supra*, which states that only a "serious and immediate risk to the Employer's legitimate interests" justifies exclusion of an employee while on suspension pending investigation – a circumstance not in evidence here – Union Counsel argues that the grievor is therefore entitled to the overtime claimed.

While I have sympathy for this argument, I am not prepared, particularly in the face of Exhibit 4, a calendar indicating that all time between September 5<sup>th</sup> and October 12<sup>th</sup> is vacation or days off between vacation blocks, to redefine that time period as suspension pending investigation.



I recognize that the exact status of October 9<sup>th</sup>, the day after the overtime claim for October 8<sup>th</sup>, is unconfirmed in Exhibit 4 – (i.e., is it days off between vacation blocks? Is it suspension pending investigation? Other?) – but I am not prepared to further parse individual overtime claims on an evidentiary basis so fluid and imprecise.

Neither do I accept the Union’s “double jeopardy” argument. This is not a situation like that in *Kemess Mines, supra*, where there was a question as to whether that Employer had already suspended the grievor for a day in advance of the seven-day suspension ultimately imposed. In this case, the loss of overtime for October 15<sup>th</sup> constituted not an additional penalty or double jeopardy but resulted from the fact that October 15<sup>th</sup> was within the time period of his suspension. And I do not consider it appropriate for an employee to be at work, for whatever reason, during the time period he is actually serving a disciplinary suspension.

The timing of the suspension also distinguishes the instant case from *Rubbermaid Canada, supra*. In that case a previously scheduled overtime assignment was withdrawn by the Employer for the day *before* an imposed disciplinary suspension. In the case at hand the overtime claimed for October 15<sup>th</sup> falls *within* the period of the disciplinary suspension.

Given all of the above, I dismiss the Union’s claim for overtime for September 9<sup>th</sup> and 10<sup>th</sup>, and October 8<sup>th</sup> and 15<sup>th</sup>.

Dated at the City of Vancouver in the Province of British Columbia this 19<sup>th</sup> day of July, 2018.



---

Vincent L. Ready