2-22-1985

Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 79

Innis Christie

M Tate

BM W. Paulin

RE CORPORATION OF THE CITY OF TORONTO AND CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79

I. Christie, M. Tate, B. M. W. Paulin. (Ontario) February 22, 1985.

SUPPLEMENTARY AWARD relating to remedies for unjust discharge. Reinstatement ordered.

H. F. Caley, for the union.
J. P. Sanderson, Q.C., for the employer.

SUPPLEMENTARY AWARD

In the interests of keeping the record straight I will repeat here the opening paragraphs of this board's previous award (March 23, 1984, unreported):

> On October 13, 1977, the grievor, Brian Risdon, was demoted from the position of chief plumbing inspector for the City of Toronto to that of plumbing inspector. The grievor's superior, Richard Hadley, the then commissioner of buildings, had just received the report of His Honour Judge G. F. H. Moore to Toronto City Council respecting the allegations of Ronald Bazkur with respect to Brian Risdon. Hadley told Risdon he should not continue in the position of chief plumbing inspector and that he was demoted. Hadley further told Risdon that he might consider resigning and that they would meet the next day in that connection. When the two met the following day Risdon refused to resign and Hadley advised him of a resolution by city council, passed the previous evening, terminating his employment.

Risdon grieved his discharge in accordance with the collective agreement between the parties. When the grievance first came before this board of arbitration the hearing was concerned entirely with the admissibility of the Moore report. I will not burden these reasons with a full description of the issue, the conclusions of the majority and the ensuing legal proceedings. It suffices to say that in *Re City of Toronto and C.U.P.E., Local 79* (1978), 19 L.A.C. (2d) 388 (Christie), the board, with Mr. Paulin dissenting, ruled in a preliminary award that the Moore report was inadmissible. The city applied to the Divisional Court for a judicial review but the Divisional Court held the board's decision was not reviewable in *Re City of Toronto and C.U.P.E., Local 79* (1979), unreported.

In the summer of 1980 the board held five further days of hearings. The city called as witnesses Mr. Bazkur, whose complaints had triggered the inquiry that led to the Moore report, and Mr. Hadley. The union called the grievor, Mr. Bill Harper, structural plan examiner for the City of Toronto, Mr. Tom Mason, senior building inspector and Mr. Phil Burns, a building inspector for the city. Through Mr. Hadley the city attempted again to introduce the Moore report into evidence. The majority of this board, with Mr. Paulin dissenting, again ruled the report inadmissible and, based on the other evidence before the board, upheld the grievances and reserved on the question of the remedy to be accorded to the grievor, subject to the parties being unable to agree on a remedy. This second award is reported at 28 L.A.C. (2d) 249 (Christie).

The city again sought judicial review and this time, in *Re City of Toronto and C.U.P.E., Local 79* (1981), 125 D.L.R. (3d) 249, 33 O.R. (2d) 512, 81 C.L.L.C. para. 14,132, the Divisional Court set aside the board's award on the basis that the Moore report ought to have been admitted. The union appealed to the Ontario Court of Appeal and that court upheld the judgment of the Divisional Court, in 133 D.L.R. (3d) 94, 35 O.R. (2d) 545, 82 C.L.L.C. para. 14,174 [leave to appeal to S.C.C. refused 36 O.R. (2d) 386*n*, 42 N.R. 586*n*]. The Court of Appeal ruled that the board had erred in its second round of hearings in refusing to consider whether or not the Moore report should be admitted. The court suggested that the board should peruse the report in reaching its decision on admissibility and Blair J.A. made it clear, at p. 109, that, in his opinion, unless the "prejudice to any employee . . . far outweigh[ed] the evidentiary value of a report" it should be admitted.

When the board reconvened counsel for the union took the position that the board should peruse the Moore report and refuse to admit it. In a preliminary award, 8 L.A.C. (3d) 289 (Christie), the majority of the board, Mr. Tate dissenting, rejected that argument and ruled [at p. 301] that "the Moore report is admissible in evidence, purged of any direct quotation therein of the evidence of Brian Risdon".

In its March 23, 1984 award the board rejected the contention that the grievor had been subjected to double jeopardy by being first demoted and then discharged and then, Mr. Paulin dissenting, concluded at pp. 56-7:

Counsel for the city submitted before us that city council received the Moore report, reviewed it and acted on the basis of the findings and conclusions contained in it. He referred us to the summary of findings commencing on p. 73 of the report and stated that the issue was whether there was sufficient evidence of acts of misconduct substantial enough to justify the

discharge of the grievor. Having considered the "four themes" discussed in Chapter 2 of the report and the answers to each of the eight questions stated on pp. 73-6 of the report as well as the text of the report supporting each of those answers I have concluded that the city has not discharged the onus upon it of proving that discharge or any significant discipline of Mr. Risdon was justified. To use the words of the Court of Appeal in 133 D.L.R. (3d) 94 at p. 109, 35 O.R. (2d) 545, 82 C.L.L.C. para. 14,174, we have admitted the Moore report "subject to contestation by other evidence and the weighing of [its] . . . probative value by the Board" and I have concluded that the city has not made out its case. The grievances must therefore be allowed.

As agreed by counsel, we will leave it to the parties to work out an appropriate remedy and in the event that they are unable to agree, at the request of either party we will reconvene for still further hearings in this matter.

The parties were unable to work out an appropriate remedy and at the request of the union the board again reconvened.

The union introduced into evidence documents setting out its calculation of the wage loss suffered by the grievor since his discharge, his earnings in mitigation, his sick bank position and his pension position. This evidence was not agreed to by the city but neither was it disputed. Interest was claimed on behalf of the grievor and that claim was also undisputed. It was explicitly agreed at the hearing by the parties that the grievor should be credited with 371¾ sick bank days and with respect to his pension situation there was no dispute that any award of damages to the grievor should reflect the 7% (less Canada Pension Plan contributions) that he would have contributed to the city's pension plan had he continued to be employed and also the city's matching pension contribution. The parties agreed upon a similar "make whole" approach to the Canada Pension Plan, or a compensatory damage payment if the Canada Pension Plan administration was unwilling to accept retrospective contributions. The undisputed statement with respect to pensions was the following:

PENSION

As a member of the Civic Pension Plan, Brian would have been contributing 7% of his total annual salary less Canada Pension Plan Contribution, which sum is matched by the employer. We are asking that he be made whole in a pension sense.

It is customary for the City of Toronto to deduct full Canada Pension Plan Contributions by the end of July/August, and Brian's contribution for 1977 would have been complete at the time of his discharge. The following are the amounts for the ensuing years:

1978	—	$ 169.20
1979	—	190.80
1980	—	212.40
1981	—	239.40

1982	—	268.20
1983	—	300.60
1984	—	338.40
TOTAL		$1,719.00

With respect to interest on damages for unpaid pay the parties agreed that the calculation should be in accordance with the formula used in calculating interest on a wage claim set out by the Ontario Labour Relations Board in *Hallowell House Ltd. and Service Employees' Int'l Union, Local 183*, [1980] 1 Can. L.R.B.R. 499, [1980] O.L.R.B. Rep. 35. According to the board's practice note No. 13 of September 8, 1980, that formula is:

> Firstly, taking into account all factors, including the duty to mitigate, assess the wage portion of the compensation award; secondly, divide it in half; lastly, apply the appropriate annual interest rate prorated to reflect the proportion of the year represented by the compensation award.
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> . . . . .
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> 3. The appropriate annual interest rate normally applied is the prime rate as determined and published by the Bank of Canada in the "Bank of Canada Review" for the month in which the complaint was filed with the board.

In respect of other fringe benefits, the parties agreed that in so far as the grievor had made O.H.I.P. payments on his own he should be compensated for those to the extent that they would have been paid by the city had he continued to be employed from the date of his dismissal.

The parties further agreed that the tax treatment of any payments to the grievor, including any obligations that he or the city might have to Revenue Canada, were not the concern of this board. The same, they agreed, is true of any obligations to the Unemployment Insurance Commission. I note that no deductions for unemployment insurance payments were made from the union's calculations of the grievor's wage loss.

Following the hearing counsel for the city wrote to me, as chairman of the board of arbitration, with copies of course to the other members of the board and counsel for the union, as follows:

> Following the hearing of this matter, it was agreed that the City would examine the outstanding issue as to the appropriate wage rate for the Chief Plumbing Inspector. In the circumstances we are prepared to agree that the appropriate wage rate is 19, the category specified by Mr. Caley on behalf of Mr. Risdon.

In sum, while it was a matter of agreement only in the specified respects, there was no real dispute as to the compensation that should be awarded to the grievor for the period from his demotion and discharge to the date of the release of this award.

The union submitted calculations with respect to the salaries that the grievor would have earned had he been promoted to certain other positions but in my view there is no basis for awarding him damages based on other than the position that he held when he was discharged. Using the "Wage Grade 19" agreed to by counsel for the employer, the union's undisputed calculations are that the grievor will have lost $221,225.90 plus $746.20 per week for 1985 until reinstated by the city. From this must be deducted $82,225 earned by the grievor since the date of his discharge.

The issue between the parties is whether this board should order the grievor reinstated. Counsel for the union took the position very strongly that this board has no jurisdiction to do other than reinstate the grievor and that if we had jurisdiction to do otherwise we should, nevertheless, order reinstatement. Alternatively, if we were to decide that we had power not to reinstate the grievor, and that he should not be reinstated, counsel for the union submitted that the grievor should be fully compensated and receive at least two years' salary in compensation for his wrongful discharge and should be fully protected from a pension point of view. If the grievor were reinstated, or treated as having been reinstated, under the city's pension plan, as of the date of this award, he would have 31 years of service and be 59 years old. The mandatory retirement age under the city's pension plan is 65 but once the employee's age plus years of service exceeds 85 he or she has the option of retirement, at a pension calculated on the basis of 2% multiplied by years of service multiplied by his or her best consecutive 60 months of salary.

Counsel for the city did not seriously dispute the alternative remedy proposed by counsel for the union, even the very generous submissions with respect to the grievor's pension treatment, but he vigorously opposed the suggestion that the grievor be reinstated. I mention the position of the parties with respect to the appropriate damage award to highlight the importance they attach to the issue of whether or not the grievor should be reinstated.

Fundamental to the city's position with respect to reinstatement is a statutory declaration dated December 8, 1978, sworn by the grievor before a commissioner of oaths which charges that certain named persons connected with the Moore inquiry "conspire[d] to set [him] up as a scape goat in order to cover up City of Toronto Building Dept. malfeasance". In the hearing before this board on November 8, 1983, the grievor restated the beliefs set out in his

statutory declaration of 1978 and acknowledged the seriousness of his allegations. In the majority award of this board following that hearing we stated at pp. 14-5:

> ... the grievor's allegations against Judge Moore, commission counsel and his own counsel before the Moore inquiry raise some doubts about his rationality and judgment. Apparently he suffered a nervous breakdown at the time of the inquiry, presumably as a result of the pressures on him, and in that context committed himself to certain views which he finds it hard to retract. I mention these matters only in connection with the grievor's credibility. His rationality and judgment at any time have never been put forward as grounds for discharge.

The statutory declaration appears from its text to be directed to the federal Justice Minister but there is no evidence before us with respect to the circulation it was given.

The issue

As I have already suggested, there is no real dispute with respect to the compensation to which the grievor is entitled from the date of his discharge to the date of the release of this award. The real issue is whether or not this board should order him reinstated. If he is not ordered reinstated the issue of appropriate further damages for the permanent loss of his employment arises.

Decision

I have concluded that the grievor must be reinstated. I do not accept the submission by counsel for the union that, having concluded that there was no just cause for discharge proven, this board has no jurisdiction but to order the grievor reinstated, although in my opinion this is not an appropriate situation in which to deny reinstatement. I will attempt to set out with reasonable brevity the considerations that have led me to these conclusions.

Jurisdiction of the board

Because I have reached the conclusion sought by counsel for the union I will attempt to be particularly succinct in stating my disagreement with his submission that this board of arbitration does not have jurisdiction to refuse reinstatement where there has been no finding of just cause for some discipline. I am aware that at least two arbitration awards directly support this submission by counsel for the union although neither contains reasoning on the point: see *Re Hunter Rose Co. Ltd. and Graphic Arts Int'l Union, Local 28-B* (1980), 27 L.A.C. (2d) 338 (McLaren) at p. 348, and *Re Alberta Educational Communication Corp. and Int'l Brotherhood of Electrical Workers, Local Union 348* (1981), 2 L.A.C. (3d) 135 at (Sychuk) at pp. 145-6.

Counsel pointed to s. 44(9) of the Ontario *Labour Relations Act*, R.S.O. 1980, c. 228, which provides:

> 44(9) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.

He argued that under this subsection the power of an arbitrator or arbitration board to substitute "such other penalty" as seems just and reasonable is predicated on a finding that the employee has been "discharged or otherwise disciplined by an employer *for cause*" (emphasis added). That may well be a correct reading of s. 44(9) but in my opinion that statutory provision is not the sole source of the power of a board of arbitration to fashion an appropriate remedy if it finds that an employer has breached the collective agreement. That amendment to the Ontario *Labour Relations Act*, and similar amendments across the country, were passed in response to a decision of the Supreme Court of Canada in *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1968), 70 D.L.R. (3d) 693, [1969] S.C.R. 85, 68 C.L.L.C. para. 14,136, p. 586 *sub nom. R. v. Arthurs et al., Ex. p. Port Arthur Shipbuilding Co.*: see Palmer, *Collective Agreement Arbitration in Canada*, 2nd ed. (1983), at p. 239 *et seq.* Whatever the correct interpretation or application of the decision of the Supreme Court in the *Port Arthur* case might have been, it clearly did not hold that in the absence of explicit statutory or collective agreement provisions labour arbitrators and arbitration boards lacked jurisdiction to award damages, as the Supreme Court had held in *Re Polymer Corp. and Oil, Chemical & Atomic Workers Int'l Union, Local 16-14* (1962), 33 D.L.R. (2d) 124, [1962] S.C.R. 338 *sub nom. Imbleau et al. v. Laskin*, 62 C.L.L.C. para. 15,406, p. 447, was within the jurisdiction of labour arbitrators and arbitration boards.

In two subsequent cases the Supreme Court of Canada has severely limited and, indeed, cast doubt on the correctness of the *Port Arthur* decision: see *Newfoundland Ass'n of Public Employees v. A.-G. Nfld.* (1977), 75 D.L.R. (3d) 616, [1978] 1 S.C.R. 524, 12 Nfld. & P.E.I.R. 238; and *Heustis v. New Brunswick Electric Power Com'n* (1979), 98 D.L.R. (3d) 622, [1979] 2 S.C.R. 768, 25 N.B.R. (2d) 613. In both cases the issue before the court was the power of the arbitrator to substitute a lesser penalty when discharge was found not to be justifed

although the grievor had been guilty of some misconduct. However, particularly in *Heustis*, it is clear that the Supreme Court of Canada viewed broad remedial authority as "inher[ing] in the exercise of adjudicative authority" such as that exercised by labour arbitrators and arbitration boards, as was held in *Polymer*, and not as derived only from explicit statutory grants such as s. 44(9) of the Ontario *Labour Relations Act*. Manifestly, s. 44(9) was passed to broaden, not to narrow, the authority of arbitrators and arbitration boards. Therefore, in my view if we were to deem it appropriate that the grievor not be reinstated but instead be compensated with additional damages, we would have jurisdiction to so order.

Before leaving the legal, jurisdictional question, I wish to note that in *B.C. Central Credit Union, Central Data Systems Department* (decision No. 7/80) [unreported] the British Columbia Labour Relations Board concluded that it had become "a principle explicit in the Code that where there was no just cause for discharge the employee has a right to have the employment relationship preserved". This was based on s. 93(1) of the British Columbia *Labour Code*, which provides that every collective agreement in that province must contain a provision requiring an employer to have just and reasonable cause for dismissal. The labour board's conclusion has been criticized more broadly (Jordan, "The Remedial Authority of the Arbitrator; Revised Labour Relations Board Version", in *Labour Arbitration* 1981, published by the Continuing Legal Education Society of British Columbia) but the only point that needs to be made here is that s. 44(9) of the Ontario *Labour Relations Act* is not the same as the section of the British Columbia *Labour Code* which was the subject of the board's decision in the *B.C. Central Credit Union* case.

Because I agree with the ultimate result sought by counsel for the union it is important that it be clear that I have not reached that result because I agree with his submission that the law limits the jurisdiction of this board and gives us no other choice. If I am wrong in this, and our jurisdiction is limited as he submits, my error does not, of course, affect the result. If I am correct, then the decision to reinstate the grievor must be justified on other grounds, to which I now turn.

Reinstatement rather than further damages

Counsel for the city agreed with counsel for the union that there are no reported arbitration awards in which reinstatement was

refused after finding that there was no cause for discipline. Indeed, the *Hunter Rose* award, cited above, appears to be the only award that addresses the issue of non-reinstatement in the context of such a finding. The primary position of counsel for the city was, therefore, that there was, in fact, recognition of "some cause" for discipline in this board's award of March 23, 1984. Counsel pointed to the statement in the conclusion to that award, quoted at the outset of this award, where, speaking for the majority of the board, I said " . . . I have concluded that the city has not discharged the onus upon it of proving that discharge or any *significant* discipline of Mr. Risdon was justified" (emphasis added). This, counsel for the city submitted, indicated that "some" discipline had been shown to have been justified. However, a careful review of the entire text of the award yields no basis for suggesting that this board of arbitration was equivocal on the question of whether any discipline was justified. Presumably the use of the word "significant" in the quoted passage flowed from the following paragraph on pp. 55-6 of the award:

> I do not, however, understand that it is or was encumbent on the grievor to prove that tests were conducted on every piece of plumbing for which an application was made. Rather, the city would have to establish that tests were not made where they should have been made. Even if the city did discharge that onus, proof of more than a couple of instances would be required to justify discipline of any significance. For all of those reasons I cannot conclude that Judge Moore's statement on p. 60 of the report, quoted above, with respect to 286 Roncesvalles Ave. provides a basis for concluding that the city had discharged the onus of establishing before this board of arbitration that the grievor so misconducted himself as to justify discharge or any other significant discipline.

That does not amount to a finding that the city did in fact discharge the onus of proving even "a couple of instances" of failure to test. In short, I am unable to accede to the submission by counsel for the city that in its 1984 award this board in fact found that there was "some" cause for discipline.

The first issue as I stated it in that award, at p. 4, was whether there was "evidence of any misconduct on the part of the grievor to justify discipline . . .". The onus was on the city to establish first "on a balance of probabilities that discipline was justified" and, second, "that in all the circumstances, discharge was justified" (see p. 6). The evidence upon which the city relied was that of Mr. Bazkur and the Moore report. In our award of October 29, 1980, the majority of the board concluded [28 L.A.C. (2d) 249 (Christie) at p. 267]:

> . . . there is simply no evidence of improper failure to prosecute or delay in

> prosecuting breaches of the legislation the grievor was charged with administering. Nor is there evidence of any other shortcoming or wrong-doing . . . [which justified] discharge, demotion or any other disciplinary action against the grievor.

That conclusion was based on the evidence of Mr. Bazkur, Mr. Hadley and the witnesses called by the union. When read in conjunction with the conclusion to our award of March 23, 1984, from which I have already quoted, it leaves no room for any suggestion that the city made out its case that "some" discipline was justified.

Specifically, with respect to the statement in the Moore report that Risdon's method of handling certain of his "resources" raised "a fair inference that . . . the money was tainted i.e. monies paid to him by plumbers to obtain preferential treatment", the majority report of this board of March 23, 1984, states, at p. 25:

> On the evidence before us I am unprepared to conclude that the use of several accounts by Risdon, including some not in his own name, establishes on the balance of probabilities that moneys were paid to him by plumbers to obtain preferential treatment. That may have been the case, but I cannot regard it as having been proved to this board of arbitration.

An unproven allegation is not a basis for "some" discipline.

I should note here that Mr. Risdon's allegations about a conspiracy to set him up were made after his discharge and were not before us as constituting "cause" for discipline or discharge. I return to those allegations below.

I have made it clear that in my opinion the city did not establish to this board of arbitration that there was "some" cause for discipline, but I must go on to say that, notwithstanding the lack of arbitral precedent, in my opinion the presence or not of "some" cause for discipline is not a very significant factor in determining whether additional damages should be substituted for reinstatement. The important considerations must surely be the apparent non-viability, or otherwise, of the employment relationship and, perhaps, whether the grievor's employment was only very short-term at the time of discharge. Those are the factors that must weigh heavily in the balance between the employer's legitimate interests and the employee's legitimate interests with respect to reinstatement. Whether or not the employee has in fact been guilty of some *minor* misconduct is almost irrelevant in that balance. Major misconduct is, of course, a very different matter and enters importantly into the question of whether there is a viable continuing employment relationship.

In sum, we have not found that there was "some" misconduct by the grievor, but not only do I not agree with the submission by

counsel for the union that there must have been "some" cause for discipline for us to have jurisdiction to substitute further damages for reinstatement, I do not think that such a finding is critical to the question of whether we should exercise our remedial authority by substituting further damages for reinstatement.

Two reported cases in which prominent arbitrators have found that there was no just cause for discharge but have nevertheless refused to reinstate the grievor are *Re Lily Cups Ltd. and Printing Specialties & Paper Products Union, Local 466* (1981), 3 L.A.C. (3d) 6 (Brown), and *Re Extendicare Ltd. (St. Catharines) and Ontario Nurses Assoc.* (1981), 3 L.A.C. (3d) 243 (Adams). In *Lily Cups* the board stated at p. 17:

> Where such lack of co-operation has manifested in animosities to the extent of altercations, it can be concluded that there is little likelihood of a future acceptable employment relationship with the grievor should he be returned to his former position. . . . These factors raise considerable doubt in our minds that reinstatement to employment is the appropriate relief in the particular circumstances referred to in this case from which we conclude that such a remedy would not be in the future best interest of either the grievor or the company. The grievor's four years of service with the company must be balanced with his employment record and the final incident, and in so doing, we find that while the penalty of discharge should be amended to a penalty of suspension, we are persuaded that the grievor should not be reinstated to his employment with the company.

In *Extendicare* the board concluded as follows, at pp. 251-2:

> In deciding whether to uphold the penalty of discharge or to vary the penalty within the meaning of art. 9.03 of the collective agreement, we have been influenced by two kinds of factors. The first is the employer's failure to warn the grievor adequately of the concern it had over her job performance. This coupled with the grievor's age and seniority tempted the board to reinstate her without back pay for a further six to eight weeks of probation. The second and equally influential factor was the grievor's continuing failure to recognize that she was not meeting the reasonable expectations of the employer. This failure was carried into the hearing room and seriously deepened into allegations of harassment, conspiracy and badgering. The evidence also reveals that the grievor failed to understand and appreciate that there existed a substantial problem in her management of the nursing team even after her approach prompted certain nurses aides to file a grievance against her. The grievor gave the board no indication that she was prepared to change the way she dealt with subordinates and superiors.
>
> The combined effect of these two concerns dictates that the penalty of discharge be varied only to the extent of awarding a money payment to the grievor in lieu of reinstatement in the amount of one year's salary.

In both *Lily Cups* and *Extendicare* there was "some" cause for discipline but, as I have already suggested, what is more important in my view is the conclusion in those cases that a continued and viable employment relationship was simply not

possible. However, even where the facts strongly suggest such a conclusion labour arbitrators are very reluctant to deny reinstatement where just cause for discharge has not been found. In *Kingsway Transports Ltd. and Teamsters Union, Local 938* (1982), 4 L.A.C. (3d) 232, the majority of a board of arbitration chaired by Kevin Burkett dealt in some detail with this issue, concluding at pp. 241-2:

> . . . it is our view that arbitrators should be loath to deny any employee reinstatement where the penalty of discharge has been found excessive, on the basis of conduct which predates the immediate incident, and which could have been made the subject-matter of a discipline but was not. In any event, in this case there is no evidence upon which to conclude that the grievor should be denied reinstatement on the basis of his general unsuitability.

Chairman Burkett's particular concern with taking into account conduct which could have been made the subject of discipline and was not underscores the reliance here by counsel for the city on Risdon's post-discharge conduct, particularly his allegations of conspiracy, in arguing that reinstatement ought to be denied. That was not, of course, "conduct which could have been made the subject-matter of a discipline".

There are two points to be made here; first, the evidence with respect to Risdon's allegations of conspiracy was not admitted, nor was it at any time considered by the board, as itself constituting grounds for discharge or other discipline, and such was not the city's position. These allegations were treated as going to the grievor's credibility (in the opinion of the minority of the board, thoroughly destroying it) and, in the submission of counsel for the city, as indicating that the future viability of the employment relationship was destroyed. We must be careful, therefore, not to treat that evidence as if it could, *ex post facto*, be considered as just cause for discipline or discharge. In this connection see *Re Grand Lake Timber Ltd. and Canadian Paperworkers Union, Local 104* (1981), 3 L.A.C. (3d) 264 (Bruce) at p. 268 and pp. 270-4. Second, while as I said in the last award, I accept no part of the grievor's conspiracy allegations (at p. 13), it must not be lightly assumed that his employment relationship with the city has been rendered so completely non-viable that reinstatement is to be denied. I have already noted that the British Columbia Labour Relations Board held in the *B.C. Credit Union* case that under the British Columbia *Labour Code* reinstatement can never be denied in such circumstances. Also, in this context I have found the decision of R. O. MacDowell acting as arbitrator under an Ontario Labour Relations Board memorandum of settlement in *Re*

Tenant Hotline and Peters and Gittens (1983), 10 L.A.C. (3d) 130, particularly thoughtful. At p. 139 Mr. MacDowell states:

> From these hundreds of individual cases, there has now developed a coherent and generally accepted body of principles which differ significantly from those of the common law — that is, from those legal principles so aptly named the law of "master and servant". At the core of this arbitral jurisprudence, is the notion that employees are no longer "servants" who can be disposed of at will on the giving of notice or the payment of some sum of money. . . . Tenure in employment unless there is just cause of termination is one of the twin pillars (the other is seniority) of what Mr. Justice Laskin has described as "the employees' charter of employment security" [In *R. v. Arthurs, Ex. p. Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 at p. 363, [1967] 2 O.R. 49, 67 C.L.L.C. para. 14,024, p. 104, reversed without reference to this particular phrase, in the Supreme Court of Canada; see *Port Arthur Shipbuilding*, cited above].

In this connection see also Beatty "Labour is Not a Commodity" in Swan and Reiter, *Studies in Contract Law* (1980), at p. 313. Risdon's insistence here that he be reinstated rather than awarded the very generous additional damages discussed at the hearing is itself testimony to the truth of the assertions by Mr. MacDowell in his *Tenant Hotline* award and by Professor Beatty in his article. These are the very fundamental reasons why I agree with Mr. MacDowell (at p. 143) "that, absent truly exceptional circumstances, employees who have been unjustly discharged should be reinstated".

The grievor's conspiracy allegations, unfounded as they appear to be, and his bitterness, are directed towards specific people, none of whom is any longer employed by or involved in the government of the city. The evidence before us is that his immediate superiors at the time he was discharged, Mr. Hadley and Mr. Ruane, considered him an excellent employee. In fact, as far as we know there was no record of friction at the work place with anyone except Mr. Bazkur and there is no reason to conclude that there will be any unusual friction in the future. As Mr. MacDowell points out in *Tenant Hotline*, if a generalized fear of friction with superiors involved in discharge were treated as a significant factor reinstatement would never be ordered.

It may be that Mr. Risdon's allegations of conspiracy indicate lack of good judgment, or lack of rationality or some more serious disorder. However, we are in no position to conclude that his condition is such that he is unable to do whatever job he may appropriately be returned to. If such proves to be the case the city will be free to exercise its normal rights and the grievor will have to take the consequences. There might be some room for concern in cases such as this that a reinstated grievor will be a "marked

man", but in a modern employment regime we must avoid unwarranted paternalism. The grievor is, presumably, well aware of the situation. If he is not treated in accordance with the collective agreement he can again have recourse to the grievance procedure. If he is not treated unjustly and ends up worse off than he would have been had he been awarded damages in lieu of reinstatement he will, at least, have been afforded the dignity of a choice in the matter.

The other unusual feature of this case is, of course, the record length of time that has passed since the grievor was discharged, due to the extended legal proceedings of which this award is, hopefully, the last. Two effects of the passage of so much time are that the grievor's former position of chief plumbing inspector no longer exists and that he is out of touch with the routine of which he was a part for 25 years. These considerations are not irrelevant but they are no fault of the grievor's, and in all the circumstances cannot weigh heavily enough to justify denying him the reinstatement he seeks.

In conclusion, the grievor is a long service employee who for his own personal reasons prefers reinstatement to even a very generous additional damage award. We must assume that he understands his situation and, there being no sufficiently convincing basis for assuming he cannot viably return to a position equivalent to that which he held when he was discharged, he ought to be reinstated.

Order

The grievor is to be reinstated with full seniority, including the period of time he has been off work, in a position equivalent to that from which he was discharged and is to be compensated, with interest, for all loss of pay and fringe benefits. As far as possible his pension position is to be restored to that which it would have been had he not been discharged. Specifically, the grievor is to be paid $221,225.90, plus $746.20 per week for 1985 until the date of actual reinstatement, minus pay earned in mitigation of $82,225. He is to be credited with 371¾ sick bank days. His pension position in respect of the civic pension plan and the Canada Pension Plan is to be restored as fully as possible to that which it would have been had he not been discharged, and to the extent that it is impossible he is to be compensated by additional money payment. The grievor is to be compensated for any O.H.I.P. payments that he made on his own which would have been made by the city had he continued in employment. Interest is to be paid

him on any money which would have been paid directly to him had he continued in employment, calculated in accordance with the *Hallowell House* formula [*Hallowell House Ltd. and Service Employees' Int'l Union, Local 183*, [1980] 1 Can. L.R.B.R. 499, [1980] O.L.R.B. Rep. 35]. This board will remain seised and will reconvene at the request of either party should they be unable to agree on any aspect of the implementation of the award.

DISSENT (Paulin)

I do not concur with the manner in which the chairman proposes to implement the award. It seems to me that Mr. Risdon's accusations of conspiracy against his corporate employer, and others, have destroyed any notion of a continuing employment relationship.

I agree with the chairman's view that an arbitrator has power to make an award in a case of this kind other than reinstatement. The difference between us is that, in my opinion, this is not a case for reinstatement and I would have made an award of damages along the lines proposed by Mr. Sanderson.

While the courts of equity invented the remedy of specific performance, they never dreamed of extending that doctrine to contracts of employment. In my view, the wisdom of that policy is well demonstrated by this case.