**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**HUMBER RIVER HOSPITAL**

**("the Employer")**

**and**

**ONTARIO NURSES' ASSOCIATION**

**("the Union")**

**Grievances of Maria Rina Cherubino**

**("the Grievor")**



Before:

Larry Steinberg, Sole Arbitrator

Appearances:

For the Employer
Daryn M. Jeffries, Counsel

For the Union
Philip B. Abbink, Counsel

Written submissions received November 22, 28 and December 5, 2017

[1] In my award dated September 11, 2017 (2017 CanLII 58708 (ON LA)) I disposed of this matter as follows:

> [275] The written warning is to be replaced with a verbal warning. The harassment grievance is dismissed. The grievor was not terminated for just cause. In its place, I order that the grievor receive a suspension of 10 days without pay (three-days and seven-days) and damages in lieu of reinstatement.
>
> [276] I remain seized to resolve any difficulty the parties may encounter in implementing this award.

[2] The parties have been unable to agree on the calculation of damages in lieu of reinstatement. Written submissions were made. No oral hearing was held.

**Facts**

[3] The parties agreed on the following Agreed Statement of Facts for purpose of this award.

> 1. Ms. Cherubino was hired by Humber River Hospital on or about July 7, 2008, and was terminated on January 9, 2014. Her date of birth is June 20, 1964.
>
> 2. In 2013, Ms. Cherubino's base salary was $74,217, though she actually earned $101,245.78.
>
> 3. As a full-time registered nurse, Ms. Cherubino received the applicable collective agreement benefits, and paid into HOOPP.
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> 4. In or about June of 2014 Ms. Cherubino started working as a part-time Registered Nurse at Southlake Regional Health Centre. Her employment at Southlake is governed by the ONA Central Hospital collective agreement (and she continues to receive the applicable collective agreement benefits and pay into HOOPP). Since starting at Southlake, she has become a full-time Registered Nurse.
>
> 5. In 2014 Ms. Cherubino earned a total income of $91,944.76, from several different jobs. In 2015 she earned $120,144 and in 2016 she earned $121,937.

She continues to work at Southlake in 2017 though her annual earnings are not yet known as the year is not complete.

**Position of the Union**

[4] The union argues that the correct approach in a case such as this is to recognize that the amount awarded is for the loss of rights under the collective agreement such as seniority rights which impact on matters of compensation, pension and job security among others. It is not an exercise in compensating for ongoing lost income opportunities. (Re Municipality of *Metropolitan Toronto and Canadian Union of Public Employees Local 79*, (2001), 99 L.A.C. (4th) 1 (Simmons) ("*Metropolitan* Toronto") at para.12; *Canvil v. IAM & AW, Lodge 1547,* (2006), 152 L.A.C. (4th) 378 (Marcotte)("*Canvil*") at paras. 33 and 39; *Re DeHavilland Inc. and CAW, Local 112*, (1999) 83 L.A.C. (4th) 157 (Rayner) ("*DeHavilland*") at para. 13.

[5] The union argued that, since the purpose of damages in lieu of reinstatement is different than the case where an employee is reinstated and compensation for wage loss is the object of the damages exercise, the concept of mitigation does not apply (*Metropolitan Toronto* at para. 20).

[6] The union also argued that the grievor's actual income (which is inclusive of overtime and other premium rates) should inform the exercise and not just her base rate of pay because it more fully recognizes the job that was actually lost (*OPSEU v. Ontario*, (2011) 213 L.A.C. (4th) 119 (Abramsky)("*Ontario*") at para. 22).

[7] With respect to the quantum of damages, the union argued that the cases show a range from 1.25 months per year of service to 2 months per year of service plus top-up for collective agreement benefits, employment standards entitlements and interest on the amounts from the date of termination to payment and without mitigation being applied (*Metropolitan Toronto* at para. 21, *DeHavilland* at paras. 14-16, Canvil at paras. 40 and 45-46), *Ontario* at para. 30, *Cassellholme Home for the Aged (District of East Nipissing)*

*v. C.U.P.E., Local 146*, (207) 159 L.A.C. (4th) 251 (Slotnick) at para. 14 and *Cameco Corp. v. USWA, Loc. 8914,* (2008) 179 L.A.C. (4th) 97 (Sask. Q.B.) at paras. 7, 28 and 46).

[8] The union suggested that 1.5 months per year of service would be appropriate in view of the grievor's age, years of service, the value of the job she lost, the fact that the employer was to a large degree responsible for the fact that the grievor lost her job (see paras. 270 and 272 of the award). In addition, the union suggested 15% for benefit top up. The union calculated the total damages based on the above factors, her ESA notice and severance to be $102,310.62. Pre-judgment interest from January 9, 2014 to November 20, 2017 is calculated at $3,942.72 which would continue until the payment by the employer. The total damages claimed to November 20, 2017 is $106,253.34.

**Employer**

[9] The employer submits that the grievor was entitled to damages in the amount of $9,301.02 plus 3.85% interest (the employer accepted the rate of interest applied by the union in its submissions) for a total of $9659.11. Alternatively, the employer argued that even if the union's approach was accepted, the total should be in the range of $34,016 (5.5 months at the grievor's base salary) to $46,403 (5.5 months at her actual salary which included premium and overtime) plus interest.

[10] The employer argues that since damages in cases such as this are compensatory and are not designed to provide the grievor with a windfall or to punish the employer and mitigation principles apply (*IATSE Local 295 et al v. Saskatchewan Centre for the Arts*, 2008 SKCA 136 ("*IATSE*") at paras. 25 and 26).

[11] The employer notes that this case is unusual since the grievor found alternative employment with another hospital which was bound to the very same collective agreement that the employer is bound to and that mitigation is almost total. The employer argues that this fact must be taken into account even on the union's theory of what the aim of damages in these cases is for.

[12] The employer relies on the application of the mitigation principle in calculating what it believes is owed to the grievor in this case. The employer acknowledges that the majority of cases in this area do not apply mitigation principle but asserts that these are examples of "expediency over the basic principle". The employer cites the following cases in support of its position that mitigation should be applied in this case. *Hay River Health & Social Services Authority v. PSAC*, 2010 CarswellNat 5733 (Sims) ("*Hay River*"); *George Brown College of Applied Arts & Technology v. OPSEU*, 2011 CarswellOnt 9945 (Bendel) ("*George Brown College*"); *Extendicare (Canada) Inc. v. Unifor, Local 302*, 2016 CarswellOnt 3149 (White)("*Extendicare*") and *Children's Hospital of Eastern Ontario*, 2015 CarswellOnt 14005 )(Parmar).

[13] The employer argues, in the alternative, that if the grievor's actual damages are less than her ESA entitlement ($14,986.13), then she should be awarded her statutory entitlements (*Extendicare*).

[14] In the further alternative, the employer argues that if I reject its "actual loss" approach and opt instead to follow the approach urged by the union, then one month per year of service would be appropriate. The employer asserts that based on 5.5 years of service and using base salary only this would yield $34,016.00. If in, addition to base salary, overtime and premium pay is included the amount is $46,403.00.

[15] The employer submitted that since the union's theory is based on the loss of service, seniority and the protection of the collective agreement and since the grievor went to work at another hospital where she was covered by the very same collective agreement as she was when she worked for the employer, an amount much less than the 15% claimed by the union in respect of benefits would be appropriate.

[16] The employer submits further that awarding anything for ESA entitlements would amount to double recovery on top of pay in lieu. The employer pointed out that not all the cases cited by the union award anything for ESA and some award only in respect of severance.

[17] The employer further argues that the ESA provisions should not apply at all to cases of damages in lieu of reinstatement because employment is terminated by a third-party arbitrator.



**Union Reply**

[18] The union reiterates its argument that the purpose of damages in these cases is to compensate for the loss of the protection of the collective agreement and intangible, accrued benefits such as seniority that are irretrievably lost. The union asserts that this fundamental point was entirely missing from the analysis of the court in *IATSE* which approached the matter from the point of view of compensation for wrongful dismissal.

[19] The union made a “be careful what you wish for argument” by pointing out that if the approach in *Hay River* and *George Brown College* was adopted in this case, it calculated that the quantum of damages would be between $180,470.00 and $268,996.00.

[20] In addition, the union asserts that this approach still suffers from the problem of not properly taking into account the ongoing effects of the loss of seniority which will continue well into the future. The grievor does not get credit for her prior seniority and service with her new employer. While the grievor is now covered by the same collective agreement as when she worked for the employer, her seniority and service and the significant benefits these things afford to her in matters such as job security are lost forever.

[21] The union argues that there is no double recovery by providing ESA entitlement since these statutory entitlements compensate for the cessation of employment and not for the loss of employment governed by a collective agreement.

**Analysis and Decision**

[22] It is obvious from the case law cited by the parties that the issues in this case have been the subject of extensive discussion by arbitrators. In the interests of bringing this

lengthy proceeding to an expeditious and final conclusion, I will refrain from adding any more to that discussion than is necessary to decide the issues.

[23] There is broad agreement in the arbitral jurisprudence that damages in lieu of reinstatement are intended to compensate an employee for the loss of the benefits of union representation. These benefits include, but are not limited to, the protections afforded by just cause provisions, the right to be reinstated if they are terminated without just cause, job security protections, vacations and other benefits rooted in the concepts of seniority and service.



[24] The unique nature and particular advantages to employees employed under a collective agreement, in contrast to an individual contract of employment, were succinctly stated by Professor Paul Weiler more than 40 years ago in *(Re) Wm. Scott & Co.* [1977] 1 Can. LRBR 1 (BCLRB) as follows (at para. 10):

> First of all, under the standard seniority clause an employer no longer retains the unilateral right to terminate a person's employment simply with notice or pay in lieu of notice. Employment under a collective agreement is severed only if the employee quits voluntarily, is discharged for cause, or under certain other defined conditions (e.g. absence without leave for five days; layoff without recall for one year, and so on). As a result, an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal. On that foundation, the collective agreement erects a number of significant benefits: seniority claim to jobs in case of layoff or promotion; service-based entitlement to extended vacation or sick leave; accumulated credits in a pension plan funded by the employer. The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law, especially of one who has worked under it for some time under the agreement, is a qualitatively more serious and more detrimental event than it would be under the common law. (emphasis added)

[25] The employer's basic position is that the grievor should only be compensated for her actual monetary losses. This reflects the common law approach to breach of contract by putting the grievor in the same monetary position that she would have been in if the

contract was not breached. It must be rejected because it entirely ignores the loss of the "significant benefits" referred to by Professor Weiler and others in the cases cited by the union. It assigns no value to the loss of these benefits when the very rationale for damages in lieu of reinstatement is to compensate for the loss of these benefits.



[26] The challenge of course is how to value these lost benefits in a case of damages in lieu of reinstatement. The *Hay River* analysis has much to commend it. It is an attempt to value what an employee has lost and will continue to lose going forward. As pointed out by the union in its reply submissions, the amounts to be awarded can be very significant. My concern with that line of cases is the arbitrary (and very large) deductions made for contingencies that might have prevented the grievor from continuing employment and for mitigation. Even the employer acknowledged in its submissions that mitigation was reduced 'in the absence of much, if any, actual mitigation information.", and in my view, the same can be said for contingencies.

[27] The employer in its submission did not assert that I should decide this case on the approach in the *Hay River* line of cases but cited those cases for the proposition that mitigation should be taken into account. Accordingly, I do not have to decide whether and how to apply that analysis in this case and whether it is appropriate to take into account mitigation and how to value it.

[28] As a result, I intend to follow the approach in the cases cited by the union. In my view, that approach uses well-known employment law concepts as proxies for putting a value on the losses suffered by a grievor in these sorts of cases. It is an attempt to bring some principled predictability to the analysis even if it suffers from the obvious flaw of looking backwards to make an order of damages intended to compensate for ongoing future losses.

[29] I accept the union 's approach to the application of ESA entitlements. The ESA entitlements are intended to "tide the employee over" while they look for other employment and sort out their lives after the loss of employment. They are not intended

to compensate for the loss of the many benefits that employees enjoy under the collective agreement. There is no double recovery.

[30] I also agree with and accept the reasoning in the cases cited by the union that have held that it is not appropriate to take into account mitigation principles in these types of cases.

[31] The employer has correctly noted that this case is unusual in that the grievor ultimately found employment in a hospital covered by the very same terms and conditions of the collective agreement that applied when she worked for the employer. As result, she has regained some of the protections (such the just cause provision) that she would otherwise be compensated for. This must be considered as a factor that reduces her entitlement.

[32] On the other hand, her seniority and service which she had with the employer are lost forever and cannot be re-gained. Equally, her evidence at the hearing was that she wanted to return to work in the employer's ER because she preferred the nature, quality and challenge of the work more than at the ER with her current employer. These factors cannot be ignored and would operate to increase her entitlement.

[33] Taking all of these considerations into account the grievor shall be compensated on the basis of the union's calculations in its Appendix of Calculations with the exception that the calculations shall be based on 1.25 moths per year of service and 5.5 years of service. For clarity, the amounts are based on the following:

a) 1.25 months of pay for each year of service which is 5.5 years;

b) 15% top up for fringe benefits;

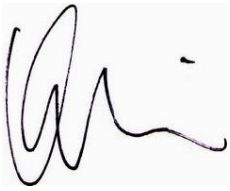
c) ESA entitlements

d) Compound interest calculated quarterly on the basis of the pre-judgment interest rates as determined by the Ministry of the Attorney General from the date of termination until the date of payment.

[34] With a written direction from the grievor she should be able to take all lawful steps to minimize the tax consequences of this payment.

[35] I remain seized in the event of any issues regarding the implementation of this aspect of the matter.

Dated at Toronto Ontario this 8th day of December 2017



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Larry Steinberg, Arbitrator