IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *LABOUR RELATIONS CODE* OF BRITISH COLUMBIA, R.S.B.C. 1996, c. 244 AND THE COLLECTIVE AGREEMENT

BETWEEN:

BC FERRY SERVICES INC.

(the "Employer")

AND:

BRITISH COLUMBIA FERRY AND MARINE WORKERS' UNION

(the "Union")

(S. Nugawila Grievance)

ARBITRATOR: Christopher Sullivan

COUNSEL: Peter Csiszar for
the Employer

John MacTavish for
the Union

DATE AND PLACE OF HEARING: December 18 and 19, 2012 and
February 22 and 23, 2013
Vancouver, BC

WRITTEN SUBMISSIONS: March 21, April 5 and 22, 2013

PUBLISHED: October 15, 2013

The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a grievance filed by the Union on behalf of Suram Nugawila, alleging wrongful discharge. Mr. Nugawila was terminated from his employment by letter dated June 21, 2010.

The information before me indicates the Employer miscalculated the grievor's days at work as at the relevant time and discharged him as a probationary employee on the basis of "suitability", taking the position that he did not complete his probationary period. The June 21, 2010 letter of discharge addresses this point, and also captures some of the general background facts surrounding the grievance. The letter reads, in part:

Re: Probationary Performance Review

You were hired on September 15, 2009 as a First Engineer on Salt Spring Island. All employees are required to successfully complete a 120 day trial period to determine suitability for continued employment in the position.

On February 8, 2010 your sixty (60) day performance review identified several areas where your work performance was not meeting the company's performance standards. As a result, your supervisor prepared a Performance Improvement Plan for you and a review date was set. Regrettably your next evaluation (90 working days) completed on April 9, 2010 showed little improvement. As a result of your continued performance difficulties your probationary period was extended by an additional 45 working days in order to allow you ample opportunity to improve your work habits and performance.

On June 1, 2010 we met to review to your performance and you were advised you must meet the standards for the position in order for your employment to continue. Despite the Company's efforts and assistance, you have been unable to meet the requirements of the position. As a result, the Company has determined that you are not suitable for continued employment with BC Ferry Services Inc. and your employment is terminated effective immediately.

As a preliminary issue to these proceedings the parties made submissions as to whether the grievor was a probationary employee or not as at the time of his termination

from employment. In their submissions on this preliminary issue the parties agreed on a statement of facts, which included the following:

1. Suram Nugawila ("SN") was hired by BC Ferries as a 1st Engineer on September 15, 2009.

2. Pursuant to Article 10.01 of the Collective Agreement, SN was a probationary employee commencing the first date of his active employment on September 15, 2009.

3. The probation period in Article 10.01 refers to new employees being on probation for a period of 120 days.

4. On February 8, 2010 the Senior Chief Engineer ("SCE") completed a "60 day" evaluation of SN. That evaluation identified areas of performance as insufficient or below standard/developing. A Performance Management and Development Evaluation was completed....

5. The "60 day" evaluation was completed on SN's 89th day of work instead of the 60th day as the Senior Chief Engineer assumed that SN's training/familiarization period was not part of the probationary period. At a meeting on February 12, 2010, the SCE was advised that the probationary period does include training/familiarization. Therefore the 60-day evaluation he completed on February 8, 2010 was closer to 90 days of work....

7. On February 16, 2010 Terry Maillot, Employee Relations Manager, on behalf of BC Ferries, and Brett Joyce on behalf of the Union, agreed to an extension of SN's probationary period for an additional 45 days beyond the 120 days referred to in Article 10.01 of the Collective Agreement.

8. SN was advised by his SCE that his probationary period had been extended....

9. On April 9, 2010 a further evaluation of SN was completed….

10. A 120-day evaluation was not completed.

11. On April 30, 2010 a "worked days" report was generated through the Company's Cognos system showing that SN had worked 122 days to that point....

12. In early June, 2010 a meeting was held where SN was informed that his employment was at risk and that another performance evaluation would be done with the SCE and Mr. Amarjit.

13. On June 14, 2010 a recommendation to terminate SN's probationary employment was forwarded to Blaine Ellis, VP Employee Relations, for approval.

14. On June 21, 2010 SN's probationary employment was terminated.

15. It was discovered after June 21, 2010 that an error occurred when the Cognos "worked days" report referred to in paragraph 10 was generated. The "worked days" report had been generated on April 30, 2010 however the reported 122 days worked by SN was up to April 15, 2010 not April 30, 2010….

16. The error referred to in paragraph 15 resulted in June 21, 2010 being the 168th day worked by SN. This represented 3 days past the 165 days of SN's extended probationary period.

17. The parties agree that:

a. The Company had a good faith belief that as at June 21, 2010 SN had not worked beyond his extended probationary period;

b. The error in the calculation of SN's days worked was an inadvertent error on the part of the Company.

18. If the Union would not have agreed to extend SN's probationary period, the Union acknowledges that the Company could have terminated SN within the 120 days of probation as per Article 10.01 of the Collective Agreement. The Company's position is that SN's probationary period would have been terminated if the Union had not agreed to extend SN's probationary period.

19. The Company had reached its conclusion to terminate SN's probationary employment within the 165 days of SN's employment and it would have issued the termination notice before SN's 165th day of work but for the inadvertent error referred to it in paragraph 15 above....

20. SN successfully completed his Training/Familiarization for his position 1st Engineer, Large Vessel on October 27, 2009 and worked in the capacity of 1st Engineer, Large Vessel until his termination. Successful completion of familiarization and clearing does not indicate whether a candidate meets job expectations.

In a decision dated December 12, 2011 I found the grievor had worked beyond his probationary period, which had been extended by the parties from 120 to 165 days, and that he had become a "regular-type employee". As noted, the grievor had worked 168 days of employment when he was discharged.

The present arbitration proceedings then proceeded on the basis of the Employer taking the position that it had just and reasonable cause to discharge the grievor as a regular employee who had completed his probationary under the Collective Agreement.

The evidence led at these proceedings may be summarized as follows. As noted, the grievor is a fully qualified Marine First Engineer. He began work for the Employer on September 15, 2009 in a Regular Assignment as a First Engineer – Large Vessel, based at Long Harbour Terminal located on Salt Spring Island. The usual vessel was the Queen of Nanaimo, with a capacity of about 180 vehicles and 1,100 passengers.

The evidence indicates the First Engineer – Large Vessel position reports to the Chief Engineer, who is effectively the technical manager of the ship charged with oversight of the technical side of the vessel's propulsion plant. The First Engineer position Job Description summarizes the basic duties and responsibilities as follows: "Stands a watch and monitors the operation of the ship's machinery and equipment; and supervises staff." The Job Description also includes the following list of tasks, which shed light on the nature and substance of the position:

Task Description

1. Performing watchkeeping duties including monitoring the levels of fuel, lube oil and water; monitoring all operating systems and domestic services including plumbing and ventilation; reporting any abnormalities to the Chief Engineer.

2. Supervises the start-up of auxiliary machinery; starting and testing the main engines; and assessing the operational condition of equipment.

3. Conferring with previous watch regarding the condition of machinery; conducting inspection rounds of the ship's systems; and reviewing engine room log and computer data for problems.

4. Supervising staff in scheduled maintenance; repair of machinery and equipment; cleaning of engine room spaces; and responding to repair requests from the deck and catering departments; conducting hands on diagnosis and repair of complex machinery and equipment; and overhauling all main and auxiliary machinery.

5. Receiving fuel; and ensuring staff and fuel suppliers follow procedures.

6. Supervising and training staff; assessing performance; allocating work; and conducting engine room control exercises and safety drills.

7. Collecting data and maintaining a variety of logs and report; assisting with annual refits; monitoring external contractors; ordering and ensuring sufficient stores, parts, and tools are available.

Other:

- Time percentages may vary between vessels.

- Serves as the Officer in charge when conducting over night maintenance and repair activities.

- Participates in fire and boat drills; and performs emergency duties as assigned.

The First Engineer position is in charge of the watch and has usually three engineers under its command. The First Engineer is the first responder to any medical emergency on the vessel. During graveyard shift the First Engineer is responsible for maintenance and repair of the vessel.

The evidence reveals the grievor had not worked on board a vessel for almost twenty years when hired by the Employer. His Familiarization Period was from October 2 to 27, 2009, and his clearance documentation was signed by Assessing First Engineer Iain Williamson, and Senior Chief Engineer Karan Bajwa. The evidence indicates that the Fleet Regulations require a minimum of ten days' of familiarization but that the usual for the Queen of Nanaimo is twelve days. The grievor ended up getting some extensions for a total of nineteen days. The trainer who was with the grievor for sixteen of the Familiarization Period days did not clear him, at which point Mr. Williamson was assigned to assess the grievor, who was ultimately cleared to work on the Queen of Nanaimo after the nineteenth day.

By email dated January 9, 2010 Amarjit Dhariwal directed Mr. Bajwa to conduct an appraisal of the grievor during his probationary period, and this was done. The grievor received an "overall rating" of "3" in a 7-point rating scale defined as follows:

1: Insufficient – Many requirements not met.

2-3: Below Standard/Developing – Some requirements not met.

4-5: Successful – Consistently meets ALL requirements.

6-7: Superior – Consistently exceeds requirements.

Out of twenty-one "Safety and Technical Competencies" and eleven "Personal Competencies" the grievor received many ones, twos and threes.

In a section for additional supervisor comments, Mr. Bajwa wrote: "Employee had difficulty during familiarization period. Was cleared after additional days....Since then he has shown very little initiative. Recall is a major concern." On February 8, 2010 Mr. Bajwa presented this appraisal to the grievor, who signed it indicating his acceptance.

In mid-February, 2010 the Employer and the Union agreed upon an extension to the grievor's probationary period from 120 days to 165 days. In correspondence dated February 18, 2010 Mr. Bajwa informed the grievor of this decision as follows:

Hi Suram,

This is to inform you that following performance assessment, your probationary period has been extended by a further 45 working days over the normal 120 working days. As discussed will do another review at the end of March. I hope to see a considerable improvement.

Please pay special attention to following areas, but not limited to:

- Proactive and enthusiastic approach towards work and learning;

- Engineering knowledge of ships systems and procedures, especially emergency related items;

- Watch control over personnel under you good day to day and watch cycle work planning and execution;

- Thorough knowledge of what is in progress onboard. Includes attentive reading and further questioning of entries in watchlog, safety bulletins, Maximo work orders/service requests/PMs, Equipment maintenance.

- Watch inventory and cleaning areas;

- Good watch handover and take over.

On April 9, 2010 Mr. Bajwa issued to the grievor another appraisal, with an overall rating of "3.5: Developing". Mr. Bajwa's additional comment on the appraisal document outlines his general views as follows:

Suram has shown improvement and initiative over the last month. He is still at the developing stage and should carry on with picking up further technical aspects, knowledge and procedures especially emergency ones.

Attached to the appraisal was a Performance Improvement Plan (PIP), which focused on the three main areas the grievor's performance was viewed as defective. Specifically, the PIP indicated the grievor was "below standard" in regards to his proficiency of certain emergency procedures; he was not familiar with the manuals and drawings relating to the engines and machinery; and he was not guiding the crew and taking a leadership role.

The grievor signed the appraisal and the PIP indicating his acceptance of the comments and action plans therein.

In an email sent on April 10, 2010 to Employee Relations Manager Terry Maillot, with a copy to Mr. Dhariwal, Mr Bajwa attached copies of the grievor's recent appraisal, adding:

Over the last month he has shown improvement and initiative. His attitude and initiative has been good. He is getting more involved and putting in extra effort. We were finding it difficult to meet and do a review due to different shifts and watches. He himself approached me and said that he can meet me during his off time. I have given him an overall rating of 3.5 as he still needs to put in more extra effort and show further improvement. His knowledge of emergency procedures is still not quite up to standard for a First Engineer.

He has requested that his watch be changed. As he has been thru a learning phase with the present watch and needed their help, he finds it difficult to

assert himself and take a leadership role. I am not sure how this can be done and am passing it to you....

On May 1, 2010 Mr. Bajwa wrote an email to Mr. Dhariwal regarding the grievor's progress, stating:

Hi Amarjit,

As I mentioned in the performance appraisal Suram has shown improvement but still has a lot to pick up. In my discussion TVS and Ark have also said the same thing. Suram and his watch will be doing the ME (main engine) head replacement job tonight.

My feeling is that Suram needs to be in Staffing pool for at least some (6-9) months. I mentioned this earlier also. He is one of the rare engineers hired directly on a watch. This can be stressful, especially if one has been away from shipping for 7-8 years and is new to this company. This is probably what he means when he says that he wants to change his watch.

The benefits of this are:

- Working on other ships he will get more understanding of BCF operations and way things are done.

- He will work under different conditions (CE, only one on watch etc).

- Other CEs and SCE will be able to provide feedback.

- He will have a better perspective once he sees different ways things are done on different ships in the same company and why.

I am not in favour of any strong decisions and I don't think that will be the right/fair thing. A fair chance would be to talk to him and move him around.

As I mentioned to Terry, our expectation has gone up but hiring procedure has not kept up. There are others around the fleet who have gone through similar issues. They went under the radar because expectations were different....

The reference in the first paragraph to TVS and Ark is to two Chief Engineers – Tejindervir "TVS" Bariana, and Arkadiy "Ark" Shnurov – who had concerns with the grievor's performance. These experienced employees also gave evidence at these proceedings.

The evidence indicates that there was nothing of substance raised with the grievor by his superiors regarding his job performance between the April 9, 2010 performance appraisal and a meeting that was convened on June 1, which the grievor understood pertained to a request he had made to be moved to a staffing pool position that would have allowed him to work on other vessels (after familiarization clearance for each vessel). The Employer, on the other hand, had convened the meeting to express its concerns to the grievor regarding his performance.

At the June 1, 2010 meeting Mr. Dhariwal informed the grievor that the Employer had serious concerns about his work performance and need for improvement. The grievor was told to seek input from his Chief Engineers, Mr. Bajwa, TVS and Ark, and that he would be subject to a further performance appraisal

The evidence indicates that subsequent to this meeting the grievor approached all of the Chief Engineers and asked them what he should improve on. Ark and TVS effectively declined to do so, but Mr. Bajwa gave the grievor a list of matters to concentrate on, which the grievor at these proceedings says he did.

On June 21, 2010 the Employer, without performing a subsequent evaluation as previously indicated, or any substantive follow up of the matters raised in the June 1 meeting, issued to the grievor the letter of discharge set out at the outset of this award.

Some evidence was led to the effect that prior to the grievor's discharge management only very briefly considered transferring him to the staffing pool, or placing

him elsewhere in the organization. It decided not to transfer him to the staffing pool based on a concern that some of the situations he could be placed in could result in him being the senior engineer in charge of a vessel. The grievor had also previously turned down an offer to have him increase his knowledge by performing supernumerary work as a Third Engineer.

ARGUMENTS

On behalf of the Employer, Mr. Csiszar argues the grievor's conduct gave rise to just and reasonable cause for discharge. The position that the grievor was hired for is an extremely responsible and important position in relation to the continued safe operation of the vessel. Given the grievor's problems as evidenced in his Familiarization Period, and his probationary period as a whole, there is no reasonable basis upon which to conclude he can perform in the position for which he was hired, or any demoted position.

Mr. Csiszar acknowledges the grievor is technically a regular employee, but that his minimal seniority, combined with the fact he was made aware of his deficiencies, and that improvement was required, are significant factors that weigh in favour of discharge for just cause. Counsel states the grievor in his 168 days of employment demonstrated he did not meet the minimum requirements of a First Engineer. The grievor's recall, safety and leadership deficiencies were material and significant and went to the core of him being unable to work as a First Engineer. He poses a risk that is unacceptable.

Mr. Csiszar asserts the evidence shows the grievor is incapable of working safely on his own, independent of constant and direct supervision, and that he declined an opportunity to work with a Third Engineer and a First Engineer on a supernumerary basis to aid his knowledge. There are no grounds upon which he can be reinstated to this employment, particularly as he could be required to work on his own, as he would pose a significant and unreasonable safety risk to himself, other employees and the travelling public.

The Employer relies upon the following authorities: *British Columbia Ferry Corp. v. British Columbia Ferry and Maritime Workers' Union (Scollan Grievance)*, [1995] BCCAAA No. 284 (Albertini); *Canada Post Corporation and Canadian Union of Postal Workers*, [1983] CLAD 62 (Picher); *Canadian Labour Arbitration* (Brown and Beatty) paras. 7:3510 and 7:3520; *University of Saskatchewan and Canadian Union of Public Employees, Local 1975*, 1994 CLB 14299 (Priel); *Edith Cavell Private Hospital and Hospital Employees' Union, Local 180*, 1982 CLB 8280 (Hope); *National Harbours Board and International Longshoremen's and Warehousemen's Union, Local 517 (Nealy Arbitration)*, September 30, 1982 (Hope); *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28; *Vancouver Island Health Authority and British Columbia Nurses' Union*, 2006 CLB 13227 (Hope); *Ontario (Ministry of Government Services) and Ontario Public Service Employees' Union*, 2012 CLB 1775 (Mikus); *New Brunswick Telephone Co. and Communications and Electrical Workers of Canada, Local 402*, 1988 CLB 10780 (Bruce); *Winnipeg Free Press and Media Union of Manitoba, M-38*, 1989 CLB 11198 (Teskey); and *Treasury Board (Statistics Canada) and Lundin*, 1996 CLB 13602 (Wexler).

On behalf of the Union, Mr. MacTavish argues the Employer must be held to the grounds it alleged in the termination letter and that it cannot now expand the grounds to include matters that were not raised, particularly in light of the existence of a Collective Agreement provision that expressly requires the reasons for discharge to be in writing.

In the alternative, Mr. MacTavish argues that if the Employer is permitted to expand the grounds for termination then it has failed to establish an inability on the part of the employee to meet the requisite performance standard to an extent that renders him incapable of performing the job he was hired for. Further, the Employer failed in its obligation to disclose that reasonable warnings were given to the grievor to the effect that a failure to meet the standard could result in dismissal. Nor did the Employer make

reasonable efforts to find alternate employment within the competence of the grievor, such as a position in the staffing pool that was expressly raised by Mr. Bajwa. Counsel suggests that Employer could have alleviated its concerns by demoting the grievor, prior to discharging him. The grievor could have been placed as a First Engineer on a smaller vessel, or if nothing else was suitable, a Third Engineer's position.

The Union's position is that there was significant improvement between the first and second appraisal of the grievor, and the grievor assumed, based on his discussions with Mr. Bajwa, that he should have an opportunity to work as part of a staffing pool. This is the type of measure the Employer is obligated to consider in addressing performance issues for post-probationary employees.

At these proceedings the Union vigorously objected to the admission of evidence of Employer concerns that were not specifically raised with the grievor at the time of their alleged occurrence. Counsel adds that much of the evidence of the Employer witnesses, particularly in relation to the last four months of the grievor's employment was vague, general and impressionistic. Nothing of substance was brought to the grievor's attention beyond his April 2010 evaluation up to the time he was discharged in June.

By way of remedy the Union claims reinstatement with backpay representing wages and benefits lost due to his wrongful termination of employment.

The Union relies upon the following authorities: *Canron Ltd. and International Association of Bridge, Structural & Ornamental Iron Workers, Shopmen's Local 743* (1973), 2 LAC (2d) 273 (H.D. Brown); *Edith Cavell Private Hospital and HEU, supra*; *City of Vancouver and Vancouver Municipal and Regional Employees' Union* (1983), 11 LAC (3d) 121 (Hope); *Musgrove Ford Sales and International Association of Machinists, Lodge 1857*, 1985 CLB 8100 (Kelleher); *McKellar General Hospital and Canadian Union of Public Employees, Local 1409*, [1986] OLAA No. 54 (Joyce); *Crane Canada*

Inc. and United Association of Plumbing & Pipefitting Industry, Local 170 (1990), 14 LAC (4th) 253 (Hickling); *Purolator Courier Ltd and Teamsters Union, Local 938*, [1992] OLAA No. 28 (Brent); *Canadian Forest Products Ltd and Industrial Wood & Allied workers of Canada, Local 1-424*, 2000 CLB 12128 (Larson); and *Community Social Services Employers Association v. British Columbia Government & Service Employees' Union (Harrison Grievance)*, [2000] BCCAAA No. 456 (Ready).

DECISION

The issue in this case is whether the grievor has given just and reasonable cause for discharge from employment. If not, what are the appropriate remedial consequences.

The criteria for dismissal of a post-probationary employees for poor work performance/failure to meet job requirements/incompetence is captured in *Edith Cavell Private Hospital and Hospital Employees' Union*, *supra*, wherein Arbitrator H. Allan Hope, Q.C. stated:

...There appears to be no assertion that the deficiencies in her job performance alleged by the Employer arise from any deliberate conduct on her part. Rather, in her evidence, Mrs. Fraser seemed to indicate that the grievor simply did not possess the qualifications necessary to perform her job. We conclude, having regard to the onus imposed upon the employer, that the assertions with respect to poor job performance are non-culpable and the Employer must meet the test applicable to a dismissal on that basis. It is not open to an Employer alleging a want of job performance to merely castigate the performance of the employee. It is necessary that specifics be provided. An Employer who seeks to dismiss an employee for a non-culpable deficiency in job performance must meet certain criteria:

(a) The employer must define the level of job performance required.

(b) The employer must establish that the standard expected was communicated to the employee.

(c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.

(d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.

(e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

The evidence in the present case supports a conclusion that the Employer has not met its onus under the established law to prove the grievor's performance deficiencies and conduct warranted the termination of a post-probationary employee. It is clear that the Employer discharged the grievor based on an assumption that he was a probationary employee, who could be discharged simply on the basis of "suitability".

While it may have met its onus under the probationary suitability language, the Employer has not established the grievor was treated properly under the law for a regular employee who was experiencing difficulties with his performance, but showing improvement. In a rating system where the number "4" represents "satisfactory", albeit at the low end, the grievor received an overall rating of "3" in his December 2009 probationary performance appraisal, and this was increased to a "3.5" in his April 2010 probationary appraisal.

Of significance is the fact that subsequent to the April 2010 appraisal the Employer raised with the grievor no concerns about his performance until a meeting convened on June 1, 2010 and at this time he was told to ask the Chief Engineers for input, which he did. The evidence discloses the grievor complied with the input provided by Mr. Bajwa, and that Ark and TVS effectively declined to express any specific concerns or give advice. The grievor ended up working a number of additional shifts before being discharged on June 21 without any further discussion or subsequent appraisal, which had been mentioned in the June 1 meeting.

It bears noting that in April and May, 2010 Mr. Bajwa wrote to Messrs. Maillot and Dhariwal, and expressed the view that the grievor had improved in a number of ways, but he required further improvement. In his email to Mr. Maillot, Mr. Bajwa mentioned the grievor "requested that his watch be changed", and explained the grievor "finds it difficult to assert himself and take a leadership role" as he had "been through a learning phase with the present watch and needed their help". In Mr. Bajwa's May 1, 2010 email to Mr. Dhariwal, he expressed: "A fair chance would be to talk to him (the grievor) and move him around."

In the present case it is clear that no reasonable effort was made by the Employer to find alternate employment for the grievor, including a demoted position, as was found appropriate in *Edith Cavell*. This factor has been found to be fatal for an employer in a number of cases, and it applies to this one as well. See: *Canron Ltd.*, *McKellar General Hospital*, *Crane Canada Inc.*, *Purolator Courier Ltd.*, and *Canadian Forest Products*, all *supra*.

In the normal case this finding would entail an award of reinstatement, but the facts of this case are unique and warrant a remedy other than reinstatement. This is a case where the grievor, while post-probationary, is without any of the required confidence of his supervisors in relation to his performance in an extremely important position for the safe operation of a large vessel. On this issue, it is not irrelevant that the grievor had significant problems in obtaining clearance to work on the vessel he was hired for, and during his probationary period. One cannot be blind to the fact that the usual twelve-day Familiarization Period had to be lengthened for the grievor to nineteen days, and he required an extension of his probationary period from 120 days to 165 days, which was mistakenly exceeded only 3 days. The grievor had not worked on a vessel for almost twenty years previously and he was having great trouble meeting an acceptable standard, particularly in key areas such as safety. His recall was admittedly poor. There

was no position to which the grievor could be transferred with any reasonable amount of confidence in his success.

Viewed objectively and in context the grievor was fortunate for the Employer's three-day miscalculation, but the facts do not support a remedy of reinstatement. The evidence discloses the position held by the grievor requires a significant amount of trust that he will not likely ever be able to achieve. Whatever confidence the Employer may have had in the grievor working in a high level engineering position with key responsibilities for the vessel's operation, and safety in particular, was lost during the grievor's early problematic days with the Employer and was never regained. The grievor's supervisors, particularly TVS and ARK, essentially gave up on the grievor and concluded he lacked the necessary leadership and was not taking his position to be as serious as it should be. The supervisors also observed that the grievor had opportunities to better his understanding of equipment that he needed to know about, and improve his performance, and they arrived at a reasonably grounded conclusion that he chose not to do so.

It bears reiterating this is not an employee with a significant investment in this particular employment relationship, given he worked all of three days beyond his probationary period.

The circumstances may be characterized as exceptional and extraordinary, and support a conclusion that a continued employment relationship is not viable. The unique factual circumstances of this case warrant an award for damages, as opposed to reinstatement.

In *Alberta Union of Provincial Employees v. Lethbridge Community College*, *supra*, the Supreme Court of Canada upheld an arbitration decision that awarded damages

instead of reinstatement in the context of a discharge case for poor work performance, stating as follows:

42 Further to that point, I note that the categorization of employee conduct as either culpable or non-culpable and the subsequent requirement for cause in either case somewhat obscures the issue before the arbitrator. It has been argued that in cases of non-culpable conduct such as incompetence, cause may only be found to exist where the employer has abided by the five criteria set out in *Re Edith Cavell, supra*. Absent a finding that these criteria have been met, the arbitrator is required to reinstate the employee on the basis that the employer has not established that there was cause for dismissal or discipline of the employee. Put differently, the argument posits that the arbitrator lacks the capacity to make any other remedial disposition, save reinstatement.

43 In my opinion, this narrow and mechanistic approach to employee conduct and arbitral authority does not take full account of the arbitrator's dispute resolution mandate, nor does it consider adequately the myriad of employment circumstances that employees and employers confront. As a result, I do not believe that the criteria set out in *Re Edith Cavell* by themselves determine the framework for analysis. More particularly, they should not be seen, in and of themselves, as dictating the terms of remedial authority exercised by the arbitrator.

44 Further, one must consider whether the distinction between culpable and non-culpable conduct is relevant in the particular context. The theory underlying culpable discharge, namely that the employer is engaged in a contractual relationship with the employee and is thus entitled to the "benefit of the bargain", does not in my opinion differ greatly from that underlying non-culpable discharge. A failure to meet the obligations and reasonable expectations of employment whether by virtue of culpable misconduct or deficient performance of a non-culpable character equally constitutes a disruption of the employment relationship. Arbitrator Hope's comments in *Re City of Vancouver and Vancouver Municipal and Regional Employees' Union* (1983), 11 LAC (3d) 121 at p. 140, on this point are apt:

It must be remembered that the question of whether conduct is culpable or non-culpable is an elusive question directed at drawing inferences as to an employee's state of mind on the basis of his conduct. In the final analysis it is the conduct and not the state of mind which determines the issue of continued employment. An employee who cannot perform is no better

off than an employee who will not perform, if the rights of the employer are to be respected.

In the circumstances of this case the grievor is entitled to a substantive financial remedy given he had completed his probationary period, but he is not entitled to a windfall. The circumstances of this case do not attract an order of reinstatement, with or without a reassignment or demotion that might involve the grievor having to be cleared for work in other areas.

In *Vancouver Island Health Authority and British Columbia Nurses' Union*, *supra*, Arbitrator Hope made the following comments regarding the requirement of an Employer to transfer an employee with non-culpable problems, stating:

61 The Grievor's alienation from the unit deepened over time to the point where the Employer was justified in concluding that continuing her in the SCN was not viable and, in addition, that there was no other position into which she could be placed which would accommodate the disaffection that had grown between her and her supervisors. In that context, the Employer relied on the following extract in para. 79 of the decision of Arbitrator Ready in *Burnaby Hospital and BCNU*, 58 CLAS 11:

79 In *Delta Hospital and Hospital Employees' Union*, unreported, October 14, 1986, Arbitrator Donald R. Munroe, Q.C. made the following observation about an employee's entitlement to be transferred to another position within the Employer's organization:

...the overwhelming weight of arbitral opinion is that the employee who is being considered for non-culpable termination unlike the employee who is a discipline problem – may be entitled to a determination of whether there is other work in the bargaining unit which is within his qualifications or competence. See, for example, the earlier-cited awards in *Edith Cavell* and *Maritime Telegraph & Telephone*; see also *Penticton & District Retirement Service*, (1978) 18 LAC (2d) 107 (MacIntyre), and *Western*

Marine Ltd., (1983) 12 LAC (3d) 60 (Albertini)...[I]n common with the arbitrator in *Maritime Telegraph & Telephone*, I do not think that the "alternative work" criterion arises in every such case. It depends on the circumstances. What is the nature of the Employer's involuntary shortcomings? What is the structure and size of the Employer's organization? What is the degree of interdependence between the various occupations or positions within that organization? What is the Employer's length of service, age, job prospects, etc. Without attempting to be exhaustive, surely those are the kinds of questions which naturally arise within the frame of the non-culpable just cause standard. It is the legitimate interest of both the employer and the employee that warrant arbitral protection.

62 In an application of that criteria, I conclude that the decision of the Employer in this dispute that there were no positions available to which the Grievor could be reassigned was reasonable.

Similarly, for the reasons set out above, the facts in the present case do not support reassignment to a different position in the organization.

In *Canada Post Corporation and Canadian Union of Postal Workers*, *supra*, Arbitrator Pamela Picher had opportunity to comment on the effect of one's status as a regular employee, who by mistake was allowed to work a few days beyond their probationary period. In that case the employee worked ten days beyond her probationary period. Arbitrator Picher stated:

14 ...Therefore, when the grievor worked beyond the probationary period it would be inconsistent with the collective agreement to asses her discharge by the standard applicable to a probationary employee...

16 Even though the propriety of the corporation's decision to discharge the grievor is to be measured by the standard applicable to an employee who has passed beyond the probation period, the grievor's minimal seniority at the point of her termination would still be relevant to an assessment of the appropriate quantum of discipline in the event that the circumstances justify at least some measure of discipline.

The grievor in the present case was employed by the Employer for slightly over nine months, and he ended up completing one hundred and sixty-eight days' employment comprised of his extended probationary period plus three days. I find the grievor is entitled to the sum of $19,500.00 in lieu of reinstatement as a fair and equitable resolve to his grievance.

I shall remain seized with jurisdiction to resolve any dispute that arises out of the implementation of this decision.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 15th day of October, 2013.

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Christopher Sullivan