In the matter of The Labour Relations Act, R.S.O 1995,

B E T W E E N :

The Corporation of the City of Kingston

("the Employer")

and

Canadian Union of Public Employees, Local 109

("the Union")

and in the matter of the grievance of Donna Hudson,

Elaine Newman, Arbitrator

Hearings at Kingston April 4, 5, 11, July 18, 19, 20, 2011

For the Union Peggy Smith, Counsel
Bev Patchell CUPE National Staff
Lacricia Turner, Local 109 Recording Secretary
Adam Bol Local 109, Chief Steward
Joe Sapp, Local 109, Past Chief Steward

For the Employer Christopher Edwards, Counsel
Mark Noble, student-at-law
Danielle Malone, Counsel
Jim Keech, President and CEO, Utilities Kingston
Deanne Roberge, Manager, Employee Relations, Health and Safety
Dianne Davison, Labour Relations Officer
Damon Wells, Director, Public Works
Judy Brick, Manager, Public Works

AWARD

This is a grievance from termination. The grievor, a 47 year old employee with twenty-eight years' seniority, is alleged to have uttered a death threat against co-worker John Hale, her Local President. The grievor admits to having an anger management problem, but denies the allegation. There is no objection to the jurisdiction of this board of arbitration.

The Facts

Evidence was provided by nine witnesses. Because the requisite factual findings depend upon issues of credibility, a review of all relevant evidence is provided.

Background

The grievor, Donna Hudson, began working for the Employer in 1983, as a part-time dietary aide at a retirement facility, Rideau Crest. In January of 1988 she was awarded the position of labourer/truck driver in the Parks and Recreation Department – the first woman to hold such a position in a male dominated environment.

Early in the grievor's performance of this position, her absenteeism became a problem. The grievor attributes this to the stress and anxiety generated by gender based relationship problems with co-workers.

She was first discharged from employment in September 1989, and reinstated by the award of Arbitrator Don Carter, dated February 1, 1990. The arbitrator concluded that "there was no evidence to suggest that *the grievor's+ stress could be attributed to any deliberate harassment on the part of the fellow employees, or even that she had to cope with the demands of a non-traditional job". He concluded that the grievor, "who appears to be the author of her stress related anxiety, and not the employer or her fellow employees, [was] not entitled to compensation, but ought not be considered to have been absent due to deliberate acts of insubordination".

The arbitrator did not reinstate her to her former position, but directed the Employer to provide access to job posting procedures of the collective agreement, giving proper weight to the grievor's seniority. The grievor returned to work.

In 1992, the Ontario Human Rights Commission denied referral of a complaint by the grievor to a board of inquiry. It concluded that there was insufficient evidence to support a complaint based either on the grounds of handicap or gender.

In 1992 the grievor was discharged a second time. On this occasion she was reinstated during the grievance procedure.

In May 2001, the grievor received a non-disciplinary warning for arguing with and shouting at her supervisor, and leaving the workplace. In her evidence, the grievor admits that she has "always had a short fuse, and a bad temper".

In October 2001, the grievor attended "Respect in the Workplace Training" and "Preventing Harassment Training", along with all other employees.

In November 2004, the grievor received a non-disciplinary verbal warning for angrily confronting a co-worker.

And so, the evidence of more recent facts is found against a background of some workplace tension, and some history of anger, which the grievor admits.

Judy Brick

Judy Brick is the Manager of Public Works for the Employer. She explained that there are about 100 employees in the public works department, over whom Damon Wells has authority, as Director of Public Works, and to whom she reports. It is Ms Brick's duty to deal with all employees in public works, and handle all situations that arise pertaining to them and their activities. It is Judy Brick's evidence that sets the framework for the Employer's factual case.

Ms Brick has known the grievor since she hired her at Rideau Crest in 1983. The grievor was a casual employee until 1988, and then began working as a driver labourer in the parks department. She was then transferred, as a driver labourer, to the roads department, the predecessor to the public works department. This was the position the grievor held until her termination.

Ms Brick testified that the City has held training sessions and workshops for employees on Respect in the Workplace for as long as she has been there, since 1980. It is mandatory for all employees to attend. These sessions are based on respecting co-workers and superiors. Employees are told how they should conduct themselves in the workplace. They include discussions about how employees need to "pick their audience" – that is, to ensure that what they are saying is acceptable to those who are hearing their words. The grievor's certificate of attendance in the session entitled Respect in the Workplace for Employees, dated October 12, 2001, is in evidence.

Ms Brick described her long relationship with the grievor. She said that it is "rocky – some days good, and others not so good". She said that some days she and the grievor had good conversations, but that the grievor gets agitated easily. The grievor, she says, "can be aggressive, in your face". Particularly if the grievor does not feel that job assignments are as they should be, the grievor can get very angry and aggressive. Brick said that this "can be very stressful at times".

Ms Brick has been interacting with the grievor on these issues for years. She has spent a great deal of time with the grievor, in particular over the last couple of years, in attendance meetings, discussions, and then some disciplinary meetings.

The "Road School" Incident

Ms Brick explained that every year, the City sends some employees to road school, a course in which employees learn elements of road construction, safety, report writing, and other topics relevant to their job duties. Each year the City puts up a posting for individuals to sign up for the course which is offered in Guelph, over a period of three days.

In 2009 Damon Wells and Judy Brick determined that they could offer six positions that year at road school. There were more applicants that there were positions available. In order to resolve the problem, Ms Brick met with individuals who signed up, and suggested that the fairest way to determine eligibility would be to pull names out of a hat. All applicants agreed. They decided to do the draw at the end of the shift.

When the shift ended, Ms Brick asked the grievor to come help her with the draw. The grievor refused to participate, and said it was not fair – she was the senior employee and felt that she should be able to go.

(There was conflicting evidence about whether the practice had been to determine road school eligibility based on seniority. The Union's evidence is that this had been the consistent practice, and the Employer's evidence is that it had not been. The issue was resolved, and is not before this Board.)

The grievor's complaint escalated. The grievor said she wanted no part of the draw. Ms Brick gathered the rest of the employees and proceeded to draw names, including the grievor's name. Just as the process began, the grievor came in, banged the door open, and started yelling and swearing. Brick says she yelled that she "was sick of us fucking with her, sick of the fucking bullshit". The grievor slammed door open again and said Brick would "be getting a fucking grievance for this". Brick testified that the grievor was very angry, yelling very loudly. The incident took place in front of the other employees, and some supervisors.

Brick testified that the other employees were very upset. One co-worker offered to give up his place so the grievor could go to road school. Brick said the others were made to feel uncomfortable about going. Brick said the process would not be reversed - that the names were drawn fair and square, and the results would remain. The evidence that other employees were either upset or intimidated by the grievor's behaviour is not corroborated by direct evidence. It is hearsay evidence, and as the Union correctly argues, will not be relied upon to support any finding of fact.

Brick then went to speak to Damon Wells, reviewed files, and reviewed whether the road school eligibility had or had not always been determined by seniority. They were satisfied that no such

consistent practice had developed. They then notified Local President John Hale that the incident had occurred.

The grievor was absent for a few days. She explained that she was so upset about the road school incident that she was under too much stress to return to work. When she returned, on April 21, 2009, a meeting was established to discuss the incident. Brick testified that the intention of the meeting was to allow the City and the Union to discuss the incident with her, to explain how the road school decision had been made in the past, and to talk to her about the process. The grievor, Union rep John Hale, Judy Brick and Damon Wells were to attend.

Damon Wells and Judy Brick were in the lunch room, and the grievor arrived. Hale had not yet entered, and Wells and Brick asked her to please wait for the Union to attend. The grievor asked three times what the meeting was about, and was repeatedly told to please wait for her Union. The grievor said, "I suppose now you are going to fucking discipline me for this".

When John Hale arrived, Damon Wells, a soft-spoken individual, started to explain the process of how, in the past, the process of road school selection had been arranged. The grievor was very upset, and was yelling. Brick testified that the grievor became angrier by the minute. She interrupted the discussion with a lot of swearing. She would cut Wells off, and her hand kept going up fairly close to Wells' face. She kept saying Wells and Brick were "no good fuckers, just fucking with her". Damon Wells continued to try to settle the grievor down. He waited for her to stop, then tried again to explain the process and the history of the process. The grievor continued to swear, and to place her hand close to his face.

The grievor's angry outburst continued for ten minutes. Local President John Hale tried to take control of the meeting, and continually tried to calm the grievor down. The grievor said she "could fucking say what she fucking wanted and there was nothing he could fucking do about it". John Hale called an end to the meeting.

A three-day disciplinary suspension was imposed for the grievor's misconduct on April 24, 2009. In a meeting with Hale, Damon Wells, Brick and the grievor, the inappropriateness of the grievor's

actions was discussed. Brick gave her a letter advising of a three-day suspension. The grievor was very quiet. Brick testified that she discussed all the details of the incident, and suggested that the Employee Assistance Program was available to the grievor at any time. She explained that EAP assistance was confidential, that employees can go and meet with counsellors. Brick suggested that maybe they could help the grievor with some anger management counselling.

The grievor offered no explanation for her behaviour, and offered no apology.

The grievor filed her grievance against misconduct, as well as her grievance against the process of determining road school eligibility.

After the meeting of April 24, 2009, and the discipline imposed for the grievor's outburst, she was absent from work on sick leave for three months. During this absence, Judy Brick provided some evidence of an incident of anger in the workplace, when the grievor was asked to attend and provide an up to date medical note. The evidence in respect of this incident is composed of only hearsay evidence, in which Judy Brick reported that which she learned from other employees. There is no evidence of discipline being imposed in respect of this alleged incident. Evidence of this alleged incident is not direct evidence, and is not relied upon in the process of making any factual findings relevant to the issues in dispute in this case.

As will be detailed below, the Employer arranged for the grievor to be assessed by a medical doctor in July 2009, for the purpose of seeking an opinion on whether the grievor's continued absence from work was due to a medical problem. Judy Brick did not see this report, because the practice is to limit access to medical reports to the office of occupational health, and not to share it with human resource or supervisory personnel. Judy Brick therefore, had no knowledge of the content of the report when the grievor then returned to work, early in August 2009. Although the usual practice would have been to conduct a formal return to work meeting, in this case the grievor just showed up, had a conversation with Judy Brick, and returned to work. There was no modified work assignment.

The road school grievance was resolved. The three-day suspension was reduced to a one-day suspension, in Minutes of Settlement signed August 7, 2009.

The Vacation (Absence without Leave) Incident Leads to Discipline

Shortly after the grievor's return to work after the Minutes of Settlement were signed, the grievor was alleged to have been absent one day without leave. Judy Brick testified that the grievor was absent, and was advised that on the weekend, she had told an assistant supervisor that she would be taking a week's vacation because there was an illness in the family. That assistant supervisor had told her that he had no authority to approve a vacation, and that she should speak with a supervisor during the week. The grievor completed a vacation request, and left it on the supervisor's door.

On August 31, 2009, Judy Brick called the grievor to discuss the issue of vacation. The grievor said that the assistant supervisor had approved her vacation, and Brick explained that he had no authority to do so. In addition, Brick reminded the grievor that vacation applications had to be made 24 hours in advance of the request.

Brick explained that the grievor was on unapproved leave, and that she would have to get the problem sorted out. Brick added that they had recently, (August 7, 2009) settled another vacation dispute grievance with her, and that she was aware of the proper process for securing vacation time.

Brick said she would approve the vacation but when the grievor returned, they would have to hold a meeting to review the issue. The grievor responded by saying that "it was her fucking vacation and she would take it when she wanted. I [Brick] could stick my fucking meeting". The grievor, very upset, added that Brick had "fucked her, and fucked her out of an assistant supervisor job". The grievor hung up on Judy Brick.

Brick issued discipline for the grievor's misconduct in that conversation. She issued a written warning letter. When asked why she imposed such light discipline of that sort, Brick explained that she also arranged a meeting to discuss how people ought to conduct themselves in the workplace with the grievor and Deanne Roberge, Manager of Employee Relations and Health and Safety, which they felt would be a more constructive approach than escalating discipline. Brick and Roberge also gave the

grievor a letter explaining the Employer's new attendance management program, and explained how that would work. Brick testified that at this meeting, as in other meetings with the grievor, she reminded her that EAP services were available. The written warning was grieved.

Two weeks later, the Employer conducted training for employees in preparation for the Bill 168 amendments to the Occupational Health and Safety Act requirements. The grievor and Judy Brick attended on the same day, September 11, 2009. In a two or three hour session, concepts of harassment, verbal and physical violence were discussed. Explanations focussed on the need to be mindful of how one's words and actions affect other people in the workplace.

The grievor attends anger management counselling

On December 16, 2009, the grievor signed Minutes of Settlement which resolved a job competition grievance, and the written letter of discipline. In exchange, the grievor agreed to attend an anger management course, to be arranged and paid for by the Employer. The Employer also agreed to pay the grievor the sum of $2,000 upon completion of the course. This was explained by Brick as an additional incentive to encourage the grievor to attend. The parties further agreed that if the grievor remained discipline free for one year, until November 1, 2010, the Employer would not rely upon either the written discipline or the one day suspension (which had been reduced from the 3-day), for future disciplinary purposes.

In January of 2010 Judy Brick met with the grievor once again to discuss the Employer's new attendance management program. The grievor was, by then, at the fourth level of attendance management, and as with all employees who are falling below workplace attendance norms, a letter was issued and a meeting held to discuss. Brick explained there was a policy grievance filed on the program, and the grievor said she understood and agreed to comply.

The grievor's attendance at anger management counselling was organised by the Employer, as agreed. This did not occur, however, until July of 2010. Judy Brick explained the delay by reference to the grievor's continued absences from work. The Union, on the other hand, points to this delay in

support of its assertion that the Employer did not pursue the assistance agenda with appropriate timeliness or vigour.

By email dated July 26, 2010, Colleen Hickey reported to Judy Brick, Damon Wells and Deanne Roberge that the grievor had fulfilled her requirement to attend anger management counselling, and that she was entitled to her payment of $2,000. The service provider, Human Solutions, stated that the grievor did complete the 5 session program. Clinician Larry Holmes did not cite any concerns. He reported that the grievor had arrived on time for each session. Hickey also said, in that email, "Donna [the grievor] advised me of the same today and feels that she has benefitted from the sessions and has learned different methods on how to refocus".

Judy Brick also spoke to the grievor about her attendance at anger management. The grievor and employer had been dealing with another challenging aspect of their relationship – the need for appropriate workplace modifications to accommodate a work related should injury, and the legitimate absences flowing from that injury. The grievor had been off work, suffering from the work-related shoulder injury, and had returned to work with a "medical pink" form setting out restrictions.

Judy Brick testified that she had a concern about the grievor's restrictions getting tighter, and they had had a series of meetings about that. The grievor was having trouble pulling herself up into the cab of the truck. In the meeting on her return, the grievor told Brick that she had completed the anger management training. She reported that the sessions had gone really well, and that she really liked the counsellor, Larry Holmes. The grievor said she felt she had "really got a lot out of the anger management counselling".

The Confrontation and Alleged Threat

Two days after the grievor reported successful completion of the anger management counselling course, the incident occurred which led to her termination. On July 28, 2010, at 8:30 a.m., Brick was at the city yard at 701 Division Street, for the purpose of meeting with the grievor, the occupational health nurse, and Local President John Hale to discuss a return to work plan that would accommodate her restrictions.

Brick said that the purpose of the meeting was to discuss her restrictions, to look at what was available within the public works department, and what the occupational health nurse had identified throughout the City that would be an appropriate accommodation. There was a position in another building that might have worked out. The intent of the meeting was to discuss the options, which were narrowing as the grievor's restrictions increased, to see if that job was appropriate.

Hale went out to talk with the grievor before the meeting. He returned, very upset, visibly shaken. He was, in Brick's language, distraught. He grabbed his book, said he was done with Donna, and said that he would get Adam Bol to represent her.

Brick asked Hale if he was okay. He said yes, but that Donna had just threatened his life. Hale said they were having a discussion about her physical restrictions. Donna said she "didn't have restrictions, and that Hale was trying to fuck her". She said Brian Allen, the former steward, "always tried to fuck her too". Brian Allen had been Hale's friend. He had recently died. Hale said to Donna, "Don't talk about Brian - he's dead". Donna said, "Yes, and you will be too".

Brick's evidence described her observations of Hale's behaviour and reaction to his meeting with the grievor. She said John was getting ready to leave, and that he would get Adam. He was very upset, and Brick was worried about him driving. She asked if he was okay to drive, and he said he was, that he just needed to get away. Brick has known Hale for many years. She said she had never seen him in that state.

Brick went outside to where the grievor was sitting on a bench, and they tried to reach Adam Bol. The grievor asked Brick who it was who decided on modified work assignments, and Brick told her it was the occupational nurse who guides that process. The grievor responded by saying that "she [the occupational nurse] was not a fucking doctor". Brick told the grievor not to be silly – that unless the job was safe she could end up with a permanent injury. The grievor repeated, a few times, that "the nurse was not a fucking doctor". The grievor continued to curse at Brick, saying that she never cared about her, about her injury, and was just trying to build a file against her.

Brick told her it would be best if she went home, and they would be in touch. Brick went back inside, then drove with occupational health nurse Debra Bagg to her next appointment at social services. John Hale was there, still very upset. He was pacing back and forth, reiterating what had been said about Brian Allen. He said that the grievor had accused him and Brian of "fucking Arnie", that is, of doing some damage to her husband Arnie, because they were afraid Arnie would beat Hale in the next round of elections.

Brick testified that Hale was very concerned, he was very, very upset. She immediately informed Damon Wells of what had happened between the grievor and Hale, and they then contacted Deanne Roberge to report the incident.

The Investigation

In the investigation that followed, witnesses advised that they had observed the grievor and John Hale in an angry confrontation. No witness heard their words.

Brick and Roberge interviewed Hale, in the presence of Al Pattison, Local Vice President. They began by reminding them that under the new provisions of Bill 168, they were required to take incidents of alleged threat very seriously. Hale and Pattison said they understood. Hale provided this report of what had taken place in the confrontation with the grievor:

Hale said that he started to have a discussion with the grievor in regard to her return to a modified work position. The grievor said "Hale was going to fucking represent her, and she was not leaving her job, that she was staying in public works, and that she had no fucking restrictions". The grievor accused him of getting her husband Arnie fired, and said that "he [Hale] had fucked her out of $50,000". She said that Hale was "trying to fuck her, that Brian Allen had always fucked her". Hale told her to leave Brian alone, that he was dead. The grievor said "Yes, and you will be too".

Brick's evidence is that in the investigation, Hale expressed concern about the outcome. He was concerned for himself if the Employer took action against the grievor, and was concerned about the outcome for his family. He said he had not been sleeping at night. Brick described him as visibly upset at

the investigation, and said that he had been watching for cars when he was at home, watching at his windows, sitting in the house where he could see out, and that he was very anxious.

Brick and Roberge suggested that Hale contact the police and report the incident. He did so on August 3, on the urging of his wife.

At the end of the meeting, Hale and Roberge left the room, and Brick testified that she stayed back with Al Pattison. She was very concerned for Hale, because he was really upset. Al advised that on the day of the incident, July 28, after Brick had told the grievor to go home, that the grievor had not done so. Brick heard that the grievor had gone to another work site, to Adam's work site, and was seen yelling and causing a disturbance in front of other workers and some contractors.

In the next interview, Adam Bol said that he and the grievor had met, had discussed grievances. He would not share with Brick the content of those discussions, considering them confidential union business. The investigation revealed no other evidence that supports the report that the grievor caused a disturbance at this second work site. There is no evidence corroborating this later aspect of the allegations. It is considered mere hearsay, and is not relied upon in the fact finding process.

The investigation proceeded to the interview with the grievor. Paul Edwards, the CUPE National Representative, attended. The grievor reported that she and Hale had a heated argument, but it was private and confidential matter between the two of them. Brick advised the grievor that because the incident had happened at the workplace, and because it had been witnessed, it was not a private matter. Brick reminded the grievor of the Bill 168 requirements that the Employer take such incidents seriously, and investigate them.

The grievor said she was aware of Bill 168, and she would not do something like that.

Brick reminded her they had just had the Respect in the Workplace training, and that it is the Employer's responsibility to investigate any situations that are brought forward. This was part of that responsibility.

The grievor asked if this was serious. She was told that it was. She said she did not threaten John and she would not do something like that. Brick said that no one had mentioned an allegation of

threatening, and that the grievor was the first to use the word. She said she did not threaten John. She said that she and John had angry words, and that he misunderstood her words, or took them out of context. She said she was “sorry”. Brick took this to mean that the grievor said she was sorry that Hale has mistaken her words; Brick did not take the use of the word to mean that the grievor was offering an apology to Hale, or to anyone else, for her behaviour. She denied making a threat. She did not apologize for having made one.

The Employer Decision to Terminate

In discussion after the investigation was completed, Jim Keech, Deanne Roberge and Judy Brick discussed next steps. Brick testified that they looked at everything that had gone on the grievor’s record, at the grievance that had just been resolved, at the training that had been provided in the past on Respect in the Workplace and on the Bill 168 requirements, at the fact that the grievor had just, days before, completed her anger management training and said it had gone well, and that she had got some good things from that counsellor. They looked at what steps they had contemplated for the grievor in respect of her modified work, and confirmed that they were doing the same thing for her that they would have done for any employee.

They concluded that termination was the appropriate disciplinary response.

The Termination Meeting

Because the Employer had concerns for its employee, John Hale, it retained the services of a private investigator to observe the grievor. David Black attended that termination meeting on August 5, 2010, along with Jim Keech, Judy Brick, Adam Bol, Paul Edwards, and Deanne Roberge.

Jim Keech spoke at the meeting and advised the grievor of her termination. The grievor’s response was to ask if she would be getting the $2,000 payment owed to her for completing the anger management course. She expressed no remorse, offered no apology, and no explanation of her behaviour.

A meeting was held of staff and supervisors. A statement was issued advising that the termination had been imposed. They were asked if they had any concerns arising out of the termination. Two individuals said there were concerns in the past, but none at present. They were reminded to make no judgements, to engage in no discussions about the incident or termination, and to just "let it be". Once again, the evidence of the reaction of others is considered hearsay, and is not relied upon in fact finding.

Under cross examination, Judy Brick agreed that the grievor had a long record of service, and had an active goal of moving into an assistant supervisor position. The grievor had achieved an assistant supervisor's role, but lost it in the reorganization caused by the 1990 amalgamation process. She had been actively seeking that role since. Brick confirmed that the grievor had received a job shadowing opportunity, and had been in charge of a ditching crew for a short period.

Brick understood the grievor's interest in attending road school, in light of her motivation to advance. She confirmed her belief that selections had, in past, been made on grounds other than seniority. She admits, however, that there was one year in which John Hale had his bags packed, ready to attend, but a more senior applicant had bumped him out of the position. In reviewing her files, she had found two occasions on which the process was based on something other than seniority.

Brick was challenged on her decision not to allow another employee, Pete, to give up his place at road school for the grievor. She was firm in her decision because all had agreed that a draw would be fair, but agreed that after the process, the Union had expressed concern about her not having used seniority as the basis of the selection.

After the road school incident, as had been said, the grievor was absent from work for about three months on sick leave. During that time, in July 2009, the Employer arranged for her to be assessed by Dr. Ronald Walsh, for the purpose of determining whether there was a medical reason for her continued absence, as well as for advice on facilitating her return to work.

In an important exchange, Brick was asked whether she knew that the grievor had been referred for medical assessment prior to her return to work, and whether she had seen the report of the

examining physician, Dr. Ronald Walsh. Brick knew that there had been a question of whether the grievor had been absent for a *bona fide* medical reason, and whether accommodations would be required on her return. She did not see the resulting report. That report, in accordance with usual practice, went to the occupational health nurse.

Brick admits that the workplace is one in which foul language is often used. It would, she said, have been discussed in the context of Bill 168 training. She drew a distinction between the more common use of swear words in the course of the day, and between the use of swear words directed angrily toward individuals, mixed with name calling and directed anger. She said that in recent training, there was emphasis put on teaching employees how to monitor the effect their words had on people, and how verbal assault can be considered harassment.

Judy Brick was cross examined on the decisions that were made, from time to time, to invoke certain levels of discipline for this grievor. For example, the one day suspension issued for the road school event was followed by a disciplinary letter for the vacation incident. Why had a progressive approach not been taken? Brick explained that in her judgement, the letter was more appropriate because they had just been through a confrontation with the grievor, had settled one serious matter, and chose an approach that was more in the nature of counselling than punishment. (As will be seen, a critical part of the Union's position is that the Employer failed to invoke a progressive chain of discipline, and therefore failed to effectively convey the seriousness of certain incidents.)

Dr. Ronald Walsh

After the road school incident, and the imposition of discipline upon the grievor for her angry outbursts and verbal aggression toward her supervisors, the grievor was absent from work, on sick leave, for three months. It was during this time, in July of 2009, that Dr. Ronald Walsh was retained by the Employer to conduct a medical assessment, in order to "describe the medical condition, if any, that is likely to continue to affect her ability to work, now and in the future". He was also asked to assess her current ability to perform the duties of a driver labourer in the public works department, what the reasons are for her inability to work, and what treatment, if any, he would recommend. He was asked what steps the City should take to facilitate her return to work.

Dr. Walsh's report, dated July 17, 2009, described his clinical assessment of the grievor, his physical examination, and his opinion:

> "Ms Hudson was lucid and co-operative throughout the entire evaluation process. Physical examination did not reveal any significant abnormalities with respect to performing her work tasks. Medical issues and medications were identified, but it is my opinion that she is receiving appropriate care, and these medical issues do not significantly impact in any way her ability to perform her duties as a labour/driver as outlined.
>
> In particular, there are no signs of significant underlying mental health issues (for example depression, dementia, or personality disorder). Ms Hudson is certainly capable of managing her affairs. There is no apparent mental health based interventions in the form of medication changes, psychotherapy/counselling or major activity restrictions other than her "inability to work.
>
> Ms. Hudson (and husband) do have firm beliefs that she has been mistreated and that the actions of her employer are deliberate. Furthermore, she feels that the employer is in fact responsible for her agreed upon and documented behaviour. She is willing to fight to have any suspension removed from her record. In fact, this is the one identified barrier to her prompt return to work at this juncture in time. I could not discern any threatening tone or intent in Mr. Well's recorded message. (The grievor had recorded a phone conversation in which Damon Wells had requested further medical information).
>
> It is my unequivocal opinion that the present dilemma experienced by Ms. Hudson is not a medical issue, but an employer/employee issue that requires workplace rather than medical intervention. I do not feel that there is any clinical evidence or suggested treatments that would imply that Ms. Hudson has an identifiable mental health disease/disorder that prevents her from performing her workplace duties. From her perspective, she is frustrated and angry and feels unable to work.
>
> It is my opinion, supported by Ms. Hudson, that she could return to the workplace promptly with a resolution of the employer/employee difficulties. Ms. Hudson's suspicions and firm beliefs about her mistreatment and her employer's intentions are based on her personal experiences and perceptions, not a diagnosable mental disorder".

Dr. Walsh added, in response to the question of treatment,

> "At this juncture I would not recommend any definitive medical treatment. Although it is not in the medical realm, I would highly recommend face-to-face discussions with Ms. Hudson and her employer outside the parameters of a formal grievance process. I think it more likely than not that a fair mediation type process that involves dialogue between employer and employee is likely to be successful in achieving a desirable outcome for

> both parties. It is my opinion supported by ample research evidence, that Ms Hudson's continuing absence from the workplace is not beneficial to her well being. The longer her absence persists, the more difficult it will be to successfully re-integrate her into her workplace duties".

Dr. Walsh added, in response to a question about follow up to treatment:

> "I highly recommend that return to work be supported by a formal course of counselling to focus on anger management and attempt to gain insight into some of her attitudes and behaviours. Cleary her present language and behaviours are unsuitable/inappropriate no matter what the provocation, and helping give Ms Hudson insight into these issues with some tools to perform at a higher level might be beneficial and certainly reflect the good intentions of her employer".

Dr. Walsh added, in response to a question about what the city could do to assist her return to work:

> "... I would recommend that the City take the lead in initiating facilitatory/mediation meetings and also clearly outlining measurable and achievable expectations for behaviour and performance".

In evidence, Dr. Walsh explained that his assessment process is standard. His nursing staff take vitals, then he conducts the interview with the patient and physical examination. There is no battery of psychological tests performed in this assessment.

Dr. Walsh repeated the thrust of his report – concluding that this was not a medical problem, but a relationship issue between employer and employee. He explained that to the grievor . Both sides needed to engage in a process of developing a way to go forward. He also explained to her that she needed to get involved in some conversations with her employer, that this would be an important part of her successful return to work. Dr. Walsh advised the grievor that she needed some kind of anger management counselling, to give her more insight into her behaviours, which he identified as quite dramatic. (The grievor denies that he said this much to her, and recalls only hearing that he had recommended face to face discussions with the employer.)

Dr. Walsh saw the grievor again, in April 2010. She and her husband wanted to know what he had written in his report to the employer. They attended and he read them parts of the report.

In cross examination, Dr. Walsh testified that after he sent the report to the City, there were no follow up discussions or questions from anyone at the city. In evidence, he expanded upon his recommendations for face to face discussions with the grievor and the City, saying that the grievor had very fixed ideas, that there had been a lot of bad things going on for a long time. Without a clear path forward that involved calm and fulsome discussions, there was concern that her return to work would not be successful.

Dr. Walsh is familiar with anger management programs, but does not offer such courses or training as part of his service. He did suggest that some number of sessions be provided – three, four, five or six, and that there be someone with whom the grievor could keep contact afterward.

Damon Wells, Director of Public Works

Mr. Wells is responsible for direction and oversight of the 100 public works staff that carry out maintenance on the city roads street sidewalks, parks and sports fields. He recalled that the grievor came to the roads division in fall 2001, shortly after him.

He explained that typically the grievor reports to an assistant supervisor, who reports to a supervisor, who reports to Judy Brick, then to him. Mr. Wells said that his own involvement with the grievor usually arises through the request of a manager or supervisor. He has been involved with her directly, through this chain of command, once or twice a month, in respect of behavioural and discipline issues or matters of work assignment. Judy Brick was usually present at these discussions.

Mr. Wells has had more contact with the grievor than with any other employee in the public works department. He says that she is difficult to work with, has her own opinion of what her work assignments should or should not be. She has her own opinions about what work assignments she can or cannot undertake. If she is not allowed to do what she wants, there are often other issues that tend to be difficult to resolve. For example, if the work assignment is not what she thinks appropriate, she will want to know exactly why an assignment was made as it was, and she will often not accept explanations. She typically does not take no for an answer.

Her demeanour when challenging work assignments can be very aggressive, very demonstrative. She can anger quickly.

Mr. Wells testified to an angry confrontation in 2004, which the grievor had allegedly had with another employee, in which it had been reported that she made an effort to run him off the road with a city vehicle. The other employee had asked that the matter be kept confidential, and Wells took no disciplinary action. He spoke with both parties and then assigned them to separate work sites. (This evidence of violent misconduct is mere hearsay, and is not relied upon as the basis of any finding of fact in this matter. It is evidence only of Mr. Well's prior experience in addressing behavioural issues with the grievor, when such an allegation was made against her).

Wells testified to the road school process, confirming that he and Judy Brick had suggested the process of drawing names from a hat. He did not witness the outburst of the grievor after that event, but received a report of it that was consistent with the evidence of Judy Brick in this hearing. Wells is aware of the fact that the Employer has adopted a selection process based on seniority in some prior years.

Wells did attend the meeting which followed, as described by Judy Brick, and corroborated the relevant facts. He said that the grievor came into the meeting, began arguing and shouting about the process. Judy Brick asked her to wait for Hale so they could discuss all of it. This request was to no avail.

At this point the grievor said, "I suppose you are going to fucking discipline me now". When John Hale arrived, Wells corroborates the evidence of Judy Brick by describing an angry, yelling, swearing grievor.

He said that the grievor kept interrupting, was quite argumentative, loud and used profanity. Several times, she yelled at Hale, "see what these fuckers are trying to do?" She was gesturing directly into Wells' face with her hand. He was sitting beside her, in what he describes as a fairly close room, and she was gesturing toward him and Judy. Wells explained that John Hale tried to calm her on several occasions, but that she refused to be calmed. He asked her perhaps to step out of the room with him,

to give him the opportunity to discuss the road school selection process. Her response was, "I will say what I fucking want to say".

Mr. Wells, a soft spoken witness who seems to choose his words carefully, describes the grievor's behaviour as very inappropriate. He adds that it was "somewhat intimidating, but very disrespectful to say the least. There was no regard for our position or even for ourselves as fellow employees".

Wells was part of the group that determined the appropriateness of the three-day suspension. They felt that a strong message had to be sent, in response to the very inappropriate behaviour. He admits, under cross examination, that the three-day was eventually reduced to a one-day when the grievor agreed to attend anger management counselling.

Wells was asked to explain why written discipline was imposed for the absenteeism issue, instead of a progressively increased mode of discipline. He explained that they had been trying to work with the grievor. He said that the behaviour had not been as serious as previously been the case, and the City only had to remind the grievor that this behaviour was not appropriate. She needed to adhere to the attendance management program.

When advised of the incident between the grievor and John Hale, Mr. Wells took the matter very seriously. He said, "We had just been through training with respect to prevention of violence and harassment in the workplace, Bill 168 was coming out, and had to be addressed. I had never in my career had a threat like this directed at myself or an employee under my care. We felt it was a very serious issue. It flew in the face of the anger management program that the grievor had just completed several days before. We felt it was a very serious issue and it required immediate investigation".

Mr. Wells left on previously scheduled vacation before the investigation and decision to terminate.

Deanne Roberge

Deanne Roberge is the Manager of Employee Relations and Health and Safety for 1400 employees, and direct supervisor of Judy Brick. She joined the City in May of 2009. It was she who managed preparation for the introduction of Bill 168 in this workplace, and who was responsible to ensure that all employees were trained. It was she who was responsible for ensuring that all employees learned about the new anti-harassment and anti-violence requirements of the Occupational Health and Safety Act. She issued bulletins and notices through email and posted these on boards, in order to make them accessible to all employees. She prepared the first Bill 168 policy that was distributed to all departments, for posting on all City bulletin boards.

Ms. Roberge became involved in the grievor's story after the City received the report from Dr. Walsh. Roberge became the individual with carriage of the grievor's return to work.

Roberge did not share all details of the report with Judy Brick, but did with occupational health nurse Bragg. Confidentiality required discretion. She said that the report confirmed that the grievor did not have a medical condition, so that her first priority would be getting her back to work.

Roberge did not have a return to work meeting with the grievor. She was in the midst of the Bill 168 preparations, and felt that the workplace training that touched on communication would be sufficient. In addition, she said that there was to be a grievance settlement meeting with the grievor in the next week, regarding an outstanding grievance. When the absenteeism incident arose in August, Roberge explained that when the absenteeism incident resulted in the need for further discipline, there was no interest in escalating hostility, but a strong interest in encouraging attendance at anger management. The approach was one of counselling, not punishment. At the same time, Roberge wanted to emphasize that the grievor's behaviour would not be tolerated.

Roberge attended the investigation interview that followed the incident between the grievor and John Hale. Her evidence corroborates that of Judy Brick, in terms of what each interviewee said.

In particular, she corroborated the reports of John Hale and the grievor, confirming that the grievor denied making a threat to John Hale, and was "sorry that he misunderstood". The grievor said she

understood Bill 168, and would never do anything to jeopardize her employment. She offered no explanation for her behaviour, offered no apology to anyone, and expressed no remorse. She denied having made a threat.

Deanne Roberge corroborated Judy Brick and Damon Wells' evidence about the discussions that led to the decision to terminate, the termination meeting, and the steps taken to advise and protect other employees.

Deanne Roberge added an additional piece of evidence. She testified that before the termination meeting began, the others had assembled and were waiting for Judy Brick and Damon Wells. Roberge said, "I need to go hunt them down". The grievor responded with: "I'd like to go hunt them down". The room went silent.

A few months later Deanne Roberge was in front of the British Whig Building in Kingston. She saw the grievor driving her SUV. She testified that the grievor slowed her vehicle down and just stared at her. Roberge testified that this caused her to feel concerned.

Under cross examination, Roberge testified that she had read the entire report of Dr. Walsh. She discussed it with Debra Bagg, the occupational health nurse. Based on the conclusion that there was no medical reason for her absence, they both felt that the grievor should return to work, and that a timely return to work would be, as it is with most off- work employees, in the grievor's best interests.

Roberge admits that she did not invoke Dr. Walsh's suggestions for a face to face meeting to enable an airing of employee/employer issues. As she stated in chief, she was new, very busy, and had a Bill 168 agenda in full swing that she thought was delivering a message of relevance. She also had a GSO meeting with the grievor in the coming week that she thought would be useful.

Roberge was directly challenged with the assertion that she had failed – that she had put into place none of the suggestions that Dr. Walsh had recommended in the interests if facilitating a successful return to work for this troubled grievor. Roberge responded by saying that she felt the immediate availability of Bill 168 training would help this grievor, and that they had a GSO meeting the

next week. She said that in the interests of taking the lead, the City had recommended EAP counselling, and suggested anger management counselling. This is consistent with Dr. Walsh's suggestion that the employer take the lead in facilitating such meetings.

She admitted that more could have been done to facilitate the grievor's re-entry, and that in hindsight, she and others in other positions, such as occupational health, could have done more.

Ms Roberge confirmed that the delay in setting up the grievor's anger management sessions was due to the grievor's absences from work. Still, she fairly admits, on review of the record, that the Employer could have been more aggressive about getting this done.

In deciding that the grievor ought to be terminated, Roberge testified that she looked at the seriousness of the threat, what Hale had said about leaving Brian Allen out of the argument, and Donna that the grievor said he (Hale) would be too. Based on Hale's physical demeanour, which Roberge saw at the investigation interview, based on conversations he had with Brick and Bagg right after the incident, based on the new legislation Bill 168, taking into consideration the grievor's past history, and taking into consideration that they had just gone through anger management training, they felt that her behaviour would not change. Their primary concern was health and safety for their employees, she said, and they could not tolerate this type of behaviour going forward.

Roberge, under cross examination, was challenged on the point that the grievor had in fact made an apology. Roberge agreed that the grievor did say the word "sorry". She said that word, but she did not apologize. She said she would never do anything that would put her job in jeopardy, and she asked how serious this was. The evidence regarding the grievor's words of apology are considered in detail later in this award.

John Hale

Mr. Hale is the President of CUPE Local 109, and has been for six years. He has known and worked with the grievor for twenty years. He confirmed that on July 28, 2010, he was scheduled to attend a return to work meeting with the grievor, Brick and occupational health nurse Debra Bagg. The

purpose of that meeting was to explore an appropriate modified work placement for the grievor who, he believed, was to return from an absence due to injury. The goal, as he understood, was to talk about her return to modified work.

Hale intended to talk with the grievor before the meeting. Hale said he had completed a return to work meeting with another employee before meeting with this grievor, and was going out for a cigarette. He said, "the grievor come rolling along, we start talking about every day stuff for a little bit, and if I remember correctly, Donna showed me some papers she had for her return to work. Then we talked about her return to work, and I believe they were going to accommodate her at another site. She said she could do her work".

I understand from this evidence that the grievor did not want to be transferred into another position.

Hale said that the conversation went in a couple of different directions. Donna was talking to him about her husband who was terminated, and saying he (Hale) had been in cahoots with Sheila Kidd to terminate him, "because he was going to be the next president of the Union". Hale said that was not the case, and that he had gone to bat for Arnie. The conversation got a little heated.

Hale said that no one was cursing or yelling at that point, but then Donna said "you have been screwing me for years. So were Gord and Allen". Hale said, "I appreciate your keeping my friend`s name out of this, he is dead, and not even cold". She said, "Yes, and you will be too".

Hale then testified that he left the conversation, told Brick and Bagg that he will not be representing the grievor, but that he will call Adam to finish the meeting.

Hale testifies that when went back to Judy Brick and Debra Bagg, he was "madder than hell".

"I was pissed off – I was madder than hell. I said I`m not dealing with her any more. Adam will come down and finish the meeting". Hale got in the car, and went to the union hall. He saw Adam and told him what had happened. He asked Adam to go down to the yard to finish the meeting.

Hale testified that he gave the same information to the investigation. He did not relay any concerns about his personal safety. He says that he was angry. Furious. "Mad as hell, but not scared".

But then Hale did start to have concerns, as he found out the grievor's termination was possible. He spoke to Jim Keech, President and C.E.O. of the Corporation of the City of Kingston about this, and did state some concerns for his safety, and for that of his wife. But primarily, at this point, Hale emphasizes that he was the Union President, and upset that it was he who was "being used here to do whatever they [the Employer] had to do". He was very upset about the Employer using the information from a Union President to instigate a termination. He spoke with Jim Keech about this, as well as to Judy Brick and Damon Wells.

Hale testified that in the earlier meeting with Jim Keech, he had expressed concern about his own safety, and about that of his wife. Based on those concerns, and at the urging of his wife, he filed a police report, citing the death threat. The police report, dated August 3, 2010, is in evidence.

Hale testified that he was not seeking that charges be laid. He didn't want anything to come of the report – he just wanted to report it. The police said they had to go talk to the grievor, and that will be the end of it for now. And there would be a police record of the incident.

Hale told police that he did not believe the grievor capable of carrying out her threat. He did not want to increase the volatility of event, and filed the report because his wife urged him to do so. He admitted that he had expressed concerns about his safety while at home, more so after the termination than before.

In summary, John Hale was a reluctant witness who spoke moderately about the incident, admitted his own arousal to anger, and who did not in any way emphasize or embellish the event. The impression that emerges is that of a committed union president who was furious and shaken by being the victim of a threat – but who was plainly upset at the thought of his own words or experience providing the basis of a member`s termination.

Under cross examination, Hale also agreed that seniority was typically the basis upon which road school attendance had been selected. He had communicated to management the union`s position that the process ought to be governed by seniority.

Jim Keech

Jim Keech is the President and Chief Executive Officer of the Corporation of the City of Kingston. Although it is not typical for this highest level of management to be involved in a matter of employee misconduct, this was considered a very serious issue. He testified that in a case in which one employee is alleged to have threatened another, and in light of the orientation required by Bill 168, he felt his direct involvement in the matter was important. Mr. Keech became involved in the matter on July 28, 2010. He did not directly participate in the investigation process, was involved by telephone and was kept up to date in respect of the data and process. Keech met with the investigating team and reviewed all findings in what he called *"a fair amount of detail".* He was involved in the decision to impose termination.

The decision to terminate was based upon the investigation findings, and took into consideration the history of the grievor's angry behaviour, and in particular, the fact that she had just completed anger management counselling in the days before this incident with John Hale. The City was in the process of bringing the concepts of Bill 168 into the workplace, teaching all employees the seriousness of workplace violence, and the legislation was supported by everyone. But, he said, the main factor in deciding to terminate was the fact that a death threat had been made against another employee.

Keech conducted the termination meeting himself. It was a brief meeting in which the termination was delivered. Keech corroborated the evidence of Judy Brick to the effect that the grievor had her Union representative inquire about her entitlement to the $2,000 payment for having completed the anger management sessions. Keech was noncommittal about his reply. The grievor was asked to leave the premises. The meeting concluded without incident.

Keech testified that after the termination meeting he went, himself, to the Union Hall, to tell John Hale that the termination had been imposed. He delivered that news, and then watched Hale's

reaction. Keech testified that Hale immediately did a check around the room, locked the doors, and became quite nervous. Keech said Hale became quite agitated, and indicated concern for a number of reasons. Keech remained with Hale for about ten minutes, and said that Hale was behaving in a manner that was out of character for him. He grew nervous and agitated, to such an extent that Hale's tension "wore off on him". He said, "he had me wanting to get out of there".

Under cross examination, Mr. Keech said that he had never read the report of Dr. Walsh, although he had heard that one had been prepared.

Marlene Rivier

Ms Rivier was called as the Union's first witness. Her testimony was provided in respect of the relevant surrounding circumstances, context of the allegation, and penalty, if the allegation is proved. She is a certified psychological associate, with a Master's degree in psychology. She is employed by The Royal Ottawa Hospital, and also conducts her own private practice as a therapist. She has been established as an expert in the field of anger management for the purposes of this hearing, and therefore, has included opinion evidence in her remarks.

Ms Rivier saw the grievor on December 29, 2011 for an assessment that was arranged by the Union. She saw her a second time, on February 10, 2011 for a feedback session.

Ms Rivier testified at some length about the intake process she conducted with the grievor, and included mention of a well-organized stack of documents that the grievor and her husband brought to the appointment to provide historical context.

(The Employer made a demand for production of these documents, to which the Union objected. Having heard argument on the point, I ruled that all documents that the grievor provided to the psychological assessor, and which the assessor read as part of her history taking process is properly produced to the opposite party – the Employer. This is necessary in order that an opposite party has full and fair opportunity to cross examine the expert on the factual foundation of her opinion. It is also necessary in order that the credibility of the grievor, which is, in this case, in issue, may be tested.

However, in the interests of maximizing the protection of the personal privacy of the grievor, I ordered that the package of documents that the grievor provided to the psychological assessor be delivered to Employer counsel only. In the event that he required opportunity to disclose this data to his adviser, he would seek that permission from this board, on notice to the Union. This was a limited Order for production, in which a balance was sought between ensuring full and fair opportunity to test the Union's evidence, while protecting the personal privacy of the grievor. That production was made. A subsequent request from Employer to enter a part of that package into evidence was refused on the ground that it formed part of the effort to resolve a grievance, and was therefore privileged.)

Ms Rivier explained that she was retained in this case by the Union to assess the grievor, in light of the difficulties she was having with anger. She described, in evidence, the series of psychological tests she performed. She employed the Million Clinical Multiaxial Inventory – III (MCMI-III), which tests character indicators over a more enduring period of time, the Minnesota Multiphasic Personality Inventory 2 (MMPI-2) – a snap shot test which is very sensitive to the moment at which it is taken. She employed the State-Trait Anger Expression Inventory – 2 (STAXI-2), and the Rotters Incomplete Sentence Blank, giving the client a more flexible opportunity to express herself more broadly. She employed an aggression questionnaire (A.Q.) and an anger expression inventory (STATI II) to enrich her understanding of the anger problem.

Ms Rivier added that the tests incorporate validity indicators to protect the outcome from the client who seeks to simulate a particular profile. She was satisfied in this case that the grievor had made no such effort.

Ms Rivier emphasized that in the grievor's case, the testing process was very important to her evaluation. The testing is necessary to understand the nature of the anger problem, which is not a unified area of difficulty, and enabled her to gain critical insight in to the nature of the grievor's perception of the world. The goal of the testing, in addition to assisting the assessor's development of understanding, enables the development of a treatment regime that will target the client's needs, and maximize the client's ability to engage in treatment, positively and collaboratively.

The report of Marlene Rivier was entered into evidence. Her critical observations and findings are these:

> "... Ms Hudson feels she has been harassed and discriminated against as a woman in a male dominated workplace early in her career and as retribution for returning to the workplace following her first termination. She feels she has been denied advancement and in 2009 she was suspended when denied a training opportunity precipitating an angry outburst (swearing, door slamming). Ms Hudson admits to having a temper; however, she asserts that her angry outbursts in the workplace are the result of provocation and that she is unduly blamed for the problems she attributes to a toxic work environment...
>
> ... Validity indicators suggest that Ms Hudson approached the assessment measures in a consistent manner attempting neither to exaggerate problems nor deny them. Her approach is cautious; nonetheless, she is reporting some psychological symptoms and emotional turmoil.
>
> The most prominent feature is one of anxiety. Ms Hudson is characteristically anxious. Tense, apprehensive and psychologically overaroused. She is hardworking, perfectionistic and persistent. industrious and dependable, her compulsivity may also express itself in a lack of flexibility. She values security, stable environments and clearly defined social boundaries. She harbours feelings of inadequacy and low self esteem and strives to avoid criticism. She seeks the approval of authority figures and when frustrated in this regard experiences strong feelings of anger and resentment. Despite this she is inclined to stand up for what she believes and is not greatly influenced by the values and standards of others.
>
> There is also an element of subjective depression expressed as a lack of energy, feeling easily hurt, brooding, withdrawn, immobilized and unable to cope with stress.
>
> While Ms Hudson states that the effect of her termination are less strongly feel at this time, the impact of this event remains quite evident. She views he world as a threatening place. She remains highly aroused and is feeling trapped and defeated, angry and bitter. She anticipates criticism and negative judgment. She is interpersonally sensitive, may overinterpret situations as directed at her and attribute blame to others. Ms Hudson has a low threshold for frustration and tends to be mistrustful of others who are perceived more as depriving that hostile.
>
> In dealing with minor frustrations Ms Hudson is likely to suppress her angry feelings or express them in passive ways. Under more stressful circumstances her anger may be aroused by perceived unfairness, shame and humiliation and be expressed openly without adequate consideration for the consequences of her actions...".

Ms Rivier made a number of recommendations in her report. Noting that the grievor has had treatment for anxiety and depression over the years, and had attended the six anger management counselling sessions to which she responded favourably, she noted that this was little more than a start. She recommended relaxation training, and other arousal reducing strategies. She suggested that the grievor requires practical assistance in identifying and resolving sources of frustration, and would benefit from education on ways to deal with these. Because the grievor is sensitive to criticism, she said it would be important for a therapist to adopt an accepting approach which demonstrates respect for her autonomy and fosters a sense of personal agency. With these elements in place, she felt the grievor would be a good therapy candidate.

On a particularly relevant note, Ms Rivier said, "The best predictor of violence is history and with no evidence that Ms Hudson has such a history at age 47, it is unlikely she poses a risk to others." It is important to note that Ms Rivier, in evidence, clarified that she was speaking of physical violence in this context, and referring to the absence of any history of the grievor having performed an act of physical violence.

Asked if, based on the same principle, there is a high likelihood of repeated door slamming, yelling, swearing, the answer was yes – this is the history, and the likelihood is that there is a risk of these behaviours recurring. Ms Rivier considers these behaviours to be "non physical violence".

In respect of the grievor's ability to return to work, Ms Rivier's report said the following:

> Ms Hudson enjoys her job and would like to return to the workplace which is clearly within her capacity to do; however, she worries about what the effect would be if she is not welcomed there. This is a reasonable concern on her part and while a determination of the culture of the workplace in terms of Ms Hudson's assertions of harassment and discrimination is beyond the scope of this assessment clearly some considerable attention to the issues in the workplace would be essential to facilitate a successful return. It might be beneficial to accommodate Ms Hudson in an alternative location but this will need to be explored wit her to assure such accommodation is not experienced as punitive and, in fact, her needs fully into account [sic].
>
> As well, in order to equip Ms Hudson with the skills and supports to ensure a successful return to the workplace, she will require a more extended course of anger management in the context of individual therapy as previously set out. This should be instituted prior to a return to the workplace, the therapist playing a key role in determining her

readiness to return and should continues once she has returned to work to support her in response to the inevitable frustrations of work life."

In evidence before this board, Ms Rivier provided detailed and articulate insight into the psychological characteristics of the grievor, as detailed in her report, and commented on the efforts that had been made on her behalf. She said that the few (five or six) sessions of anger management training that had been provided by the Employer were not a lot. When Ms Rivier recommends this process, she suggests 10 or 12 sessions. In this case, more may be required.

In any event, she provided the opinion that in this case, the proof was in the pudding. The grievor had had six individual anger management counselling sessions, and it obviously did not help. This experience was only sufficient to help her learn a few tips – not enough to help her transition behavioural changes into her real life. Ms Rivier recommends that once a thorough course of anger management counselling is undertaken, and once the grievor returns to the workplace, that supportive therapy continue, in order that the transition is supported.

Ms Rivier did not review the notes of the anger management counselling the grievor attended, and did not have the benefit of speaking with that counsellor. However, she makes a very important point: In assessing the grievor, she had the benefit of fulsome testing, and therefore a great deal more individual information about the psychological state, and the psychological demands, of the grievor than that which was available to the counsellor who performed this service. It follows, she asserts, (quite sensibly) that any one performing an intervention would have far greater ability to model the technique and content of that intervention to a client whom they understood more completely.

Ms Rivier's involvement ended with the grievor after a feedback session. The grievor had said it was too bad that Rivier was based in Ottawa, because she felt they had potential for a good relationship. The grievor did not ask Ms Rivier to refer her to another therapist, or to another anger management service provider.

Ms Rivier indicated that she had some familiarity with the preventative aspect of Bill 168, but that she had not prepared her report specifically in the context of that legislation. This was, she said , a "standard psychological report". She had not had regard to the definitions of violence contained in that

legislation, and her reference to “violence” was to the definition [the profession] commonly uses - physical violence. She said that she would not necessarily link the grievor’s verbal expressions and door slamming to the potential for physical violence. Past non-physical violence, in her view, is only a good predictor of future non-physical violence, and not of physical violence.

Finally, Ms Rivier was asked if her opinion or prediction would have been different if she had learned a different history – if she had learned that the grievor had in fact made a death threat against her co-worker. She said, first, that she would have to distinguish between a “direct threat” and an “indirect passive threat”, like “I just hope you die”. People say things, she added, sometimes not to generate a particular intention, but to create an effect. She said, had the grievor made a threat, which was denied, “it may have been to intimidate, not to actually threaten”.

I understand the opinion of this witness to be that the grievor has an anger management problem. The witness understands that there is no history of physical violence, and therefore does not predict physical violence in the future. Her view is that insufficient assistance has been provided to enable the grievor to cope with her anger management problem, that an appropriate level of service ought to be provided prior to the grievor’s return to the workplace, that care must be taken in the assignment of the grievor to her workplace position, and that continuing therapeutic support should be provided to support the process of re-entry.

Paul Edwards

Paul Edwards is the former CUPE representative. He represented the grievor in the investigation interviews that preceded her termination. He testified that the grievor described the conflict that arose between her and John Hale, and that she said she did not intend to threaten Mr. Hale. She said that “if her words were taken as such then she was sorry for any distress that it may caused”. She also indicated that she knew the implications of making a threat, and would not have done so, and did not do so. She was sorry if her words were taken that way. She had been misunderstood.

Mr. Edwards testified that the grievor’s tone of voice in the interview was measured, concise, appropriate to the circumstances, and that she was serious and sincere.

In cross examination, Mr. Edwards recalled having been among those who were waiting for the Step Two meeting to begin, but did not recall Deanne Roberge saying that she would have to go hunt down Judy Brick and Damon Wells. Nor did he recall hearing the grievor say the she would like to hunt them down. He did not recall having motioned to her to be quiet, as Employer evidence suggests.

He did not recall the grievor saying anything about the comment to Hale being taken out of context, as Roberge had said. He did remember that the grievor said she knew about Bill 168, and did recall her referring to her conversation with John Hale as private and confidential. He did not recall the grievor having said that she would never do anything to put her job in jeopardy, and indicated that he would only testify to that which he specifically recalled.

The Grievor, Donna Hudson

The grievor began her evidence by saying that she was feeling humiliated and embarrassed to sit in the hearing and listen to what she had said to people in a state of anger, when she was upset. She said she recognized the person who was being described in the hearing, but that she now felt different. She knows that the things she had said in the workplace were totally inappropriate. The grievor was tearful and genuine in her expression of humiliation.

The grievor said she had tried to get some assistance in the past, had a few counselling sessions, and in 2005, saw a psychologist and also began taking an anti depressant, Prozac. She has not seen anyone for therapy since her meetings with Marlene Rivier, but says she is on a list for counselling to help her deal with stress, and has been on that list for about four months.

The grievor explained that before seeing Marlene Rivier, she had never been tested for an anger management problem. The counsellor who provided the anger management sessions through the EAP, Larry Holmes, had done no individual testing on her before beginning the sessions. He did not, she testified, tell her that he had diagnosed an anger management problem, but that she had told him she had difficulty in her job with her temper. The grievor has had no further contact or follow up with Larry Holmes.

The grievor traces her problems with controlling her temper back many years. She referred to the problem she had with a supervisor many years ago, for which she was terminated and reinstated by the Carter award back in 1990. After returning to the workplace on that occasion, she says that the Employer provided no assistance. She admits that she did not seek assistance from EAP, or from any other source.

Turning to the road school incident, the grievor provided her perspective, and explained her anger and frustration. She had tried very hard to secure a position as assistant supervisor, and felt that the road school experience was an important addition to her c.v. She felt that she was entitled to attend, based upon her seniority. She felt that Judy Brick and Damon Wells were trying to hold her back, and that they refused her that opportunity. She acknowledges the outburst of anger that she inflicted on those involved in that episode, said she did not think about the effect her words had on others, and was just pretty angry and went ahead. She acknowledges that such behaviour is wrong and inappropriate.

The grievor said that counsellor Larry Holmes has suggested that she take a "time out" when she gets anxious and upset. She said that he proposed other strategies. She can't recall what these other strategies were.

The grievor denies having ever been physically violent at work. She specifically denies having put her hand in Damon Wells' face at the meeting held to discuss the road school incident. She denies encroaching upon his personal space. She denies having had a physical or violent confrontation with a co-worker as described by Damon Wells, although she admits to having had a verbal confrontation with him. She testified that she has never been told that she intimidates others at work, and specifically denies that she intimidated another worker into offering his position in the road school.

The grievor says that this is a rough workplace, and the language can get pretty rough at times. The Bill 168 training has had some impact, however, and she says people are a little more aware of what they are saying now.

The grievor was aware that EAP was available to her, and especially after the road school incident. She does not recall having been encouraged to attend before that incident. She cannot explain why she did not attend at EAP for counselling before. She acknowledges that she has always had a short fuse, and difficulty managing her temper.

The grievor testified to her assessment with Dr. Walsh. Her family doctor had placed her on stress leave at the time, after the road school incident. The family doctor, she said, did not believe that the grievor should be in that hostile working environment – in which she was denied the opportunity to advance.

The grievor's perspective on Dr. Walsh's involvement was that he just did a normal medical exam, then said that she should not return to work until the issues she faced were resolved. In what was a frustrating turn of events, she was not provided with a copy of his report, and the Union was not provided with a copy of his report. She made an appointment to return to Dr. Walsh, and asked him to read to her portions of the report. He did so. He made no specific referral for anger management training or counselling, but advised that she get some help before returning to the workplace. She did not.

When the grievor returned to work after the road school incident, and after her appointment and assessment with Dr. Walsh, she said that nothing in the workplace had changed. She testified that she wanted to sit down with the Employer calmly, and try to resolve her issues. She admits, however, that her temper gets the better of her, and she does not know if she could have managed those meetings.

The grievor testified that she would like to get the help she needs. She enjoyed working with Larry Holmes at the EAP, and said that she enjoyed talking with him.

The grievor denies threatening John Hale. She says they both lost their tempers, and there was a lot of bad language. There was, she said, no violence of any kind.

The grievor was asked how it was that she came to deny having made a threat, before anyone accused her of doing so. She explained that Adam Bol had told her of John Hale's allegation just after the incident. She denied it then, as she does now, and as she has done consistently.

The grievor denies that there was any yelling or shouting in the conversation with Bol.

At the first meeting with the Employer, the grievor says she was quite upset and anxious. She was aware of how serious a threat would be at the workplace. She gave no explanation of the event, but said the conversation between her and Hale was confidential. She admitted to having had a heated argument with Hale. The grievor said she was "sorry if he had taken her words out of context, or didn't hear her, or something", but insists that she did not threaten him. She meant Hale was dead in terms of Union politics.

The grievor reports that the police did come to her house, in response to Hale's complaint. They took her statement and left. No charges were laid.

The grievor has had no further contact with John Hale. She has not made an effort to contact him, or to communicate an apology.

In response to the allegation of Deanne Roberge, the grievor said that she had driven her husband to City Hall to obtain a permit in their sign business. There was no where to park, so she drove around the block. The grievor denies giving Ms Roberge a glaring look, or doing anything with intent to intimidate her.

The grievor says she understands the preventative nature of Bill 168, and that there was no violent element in the confrontation with John Hale. It was, she said, just a conversation that got a little loud. She does not see it as violent, but understands how someone else might view it that way. From her perspective, it was just a conversation between two people that got carried away. Her anger management counsellor, Larry Holmes, had explained that sometimes people can misinterpret things people say, and believe them to be violent. The grievor says she regretted the argument ten minutes after it happened.

In cross examination, the grievor said:

It was not she who sought out Marlene Rivier, but her Union, in preparation for hearing. The grievor did not herself seek out assistance or therapy after her termination, but states that she has been on a list for counselling.

She has never arranged for a meeting with the Employer to ask for assistance. She did not ask for such an opportunity when she returned to work after the road school incident and stress leave, and after her assessment by Dr. Walsh. She admits that diagnosing her problems is not the responsibility of the City.

The grievor denies putting her hand in front of Damon Wells' face in the road school meeting, but admits that when she gets excited she tends to use her hands when she is talking. She could very well have done so in that situation. She cannot deny or confirm that Mr. Wells found her to be intimidating in that meeting, but denies invading his personal space.

The grievor agrees that in a previous incident of anger, in which she had been disciplined in August 2009, anger management counselling had been encouraged. She did not accept that suggestion. Rather, she grieved the discipline, as was her right.

The grievor agrees that the issues of workplace behaviour, and preventing violence in the workplace were very much in the forefront in the workplace when these events took place.

The grievor was asked why, when she learned that John Hale thought she had threatened his life, that she did not try to contact him to clarify her intent or to make apology. She said she was still mad at him for what he had said in their argument. In fact, instead of apologizing to Hale, she instigated proceedings against him, and brought him to trial of his peers within the rules of the Union's constitution. She has never apologized to Hale, and adds, "He has never apologized to me".

To be quite clear, the grievor was asked if she denied having said to John Hale, with respect to his recently deceased friend, "You will be too". She was asked if she denied that evidence. She said, "yes". However, she also maintains that Hale misunderstood her comment. When asked why he would report such a thing, and report it to police, she said, "He was angry at me and was trying to get back at me. He said himself he was as mad as hell. I've never seen him like that, and I've known him a long time".

Finally, the grievor admitted that as she was waiting for the meeting to begin, and Roberge said she would have to hunt down Judy Brick and Damon Wells, that she quipped, "I'd like to hunt them down myself". She confirmed that she thought it was a statement that would get a laugh. However, the grievor recognized from the silence that followed that it had not been taken as a joke. The grievor says she thinks she might have apologized as soon as she realized that her statement had not been taken as a joke.

Positions of the Parties

The Employer takes the position that it had no option but to terminate. The grievor had been provided with assistance in the form of anger management counselling, and had just returned from that experience when she uttered a death threat against another employee.

This is a case of the most serious kind, in which the violent misconduct irretrievably damaged the employment relationship. The Employer argues that a threat uttered in the workplace is an act of misconduct that is fundamentally at odds with the relationship.

The Employer relies upon the following excerpts from Brown & Beatty, Canadian Labour Arbitration, (c.d. edition):

> 7:3430 Physically and/or verbally abusing, and acting aggressively towards others, is as deviant and unacceptable behaviour in the workplace as it is in the community at large. Assaults, harassment and threats made in the course of a person's employment are universally regarded as being fundamentally at odds with an

> employer's interest in creating a positive and productive working environment, and with the health, safety, and general well-being of employees...
>
> ... As a general principle, where arbitrators are satisfied that there is little likelihood of a recurrence because, for example, the employee has apologized and/or shown real remorse, they typically favour a suspension without pay for some period of time, rather than a conclusion that the grievor must lose his job. The converse of this principle is that, in the absence of extenuating circumstances, arbitrators usually do not reinstate employees who continue to deny that they did anything wrong, or who refuse to take responsibility for the harm the caused...

Threats of violence in the wake of the Bill 168 amendments to the Occupational Health and Safety Act are simply unacceptable. The existing authorities must be read and applied in the context of these amendments, which the arbitrator is required to interpret and apply, as an employment-related statute, in accordance with section 48 (12) (j) of the Labour Relations Act, S.O. 1995, C. 1.

The Employer argues that the amendments should be considered to constitute a new deal in Ontario, with very little tolerance for an unremorseful perpetrator of violent misconduct.

The Employer relies upon the following authorities, which, well before the Bill 168 amendments, establish persuasive precedent for a very serious disciplinary response, often discharge, where threats have been made in the workplace:

Avis Budget Group and UFCW 175, [2009] O.L.A.A. No. 152 (Craven)

Code Electric and IBEW Local 258, [2010] 187 L.A.C. (4th), (Laing)

City of Woodstock and CUPE 1146, [2007] O.L.A.A. No. 681, (Barrett)

Mirolin and USWA Local 13571, [2007] 163 L.A.C. (4th) 385, (Knopf)

TDS Automotive and CAW 222, [2005] 136 L.A.C. (4th) 204, (Barrett)

Grant Forest Products and CEP Local 37X [2005] 136 L.A.C. (4th) 159, (Gray)

Go Transit and ATU 1587 [2005] 145 L.A.C. (4th) 68, (Fisher),

Cadillac Fairview Corp. and CEP, [2004] 130 L.A.C. (4th) 54 (Keller)

CN Rail and CAW[2004] 133 L.A.C. (4th) 190, (M. Picher)

College Printers Ltd. and GCIU, [2001] 101 L.A.C. (4th) 193 (Ready),

St. Vincent's Hospital and HEU, [2003] 116 L.A.C. (4th) 97 (Gordon)

Metropolitan Hotel and HEU 75, [2003] 124 L.A.C. (4th), (Springate)

McCain Foods and UFCW, Local 114P3, [2002] 107 L.A.C. (4th) 193 (Simmons)

Livingston Distribution and IWA-Canada Local 700, [2001] 94 L.A.C. (4th) 129 (Stewart)

Ontario Store Fixtures and USWA 5338, [2001] C.L.A.S.290, (Murray).

Notable, among these authorities, is the comment of the highly respected, late C.G. Simmons, who, in the *McCain Foods* matter, in 2002, said:

> [para 60] In addressing this issue of uttering death threats in the workplace one must approach the matter from the standpoint in time in which we are now living. When Galco was decided in 1974 the world had not witnessed the Lepine shootings in Montreal nor the employee shootings at the Ottawa Bus Terminal nor, indeed, had shootings in schools across North America become as frequent as they have during the past decade. It is always difficult to determine whether the intent behind such statements were made in jest or whether they were seriously made. What is certain, however, is death threats made in the workplace have no place in today's society whether made in jest or are seriously made. Indeed, society has become acutely aware that there is zero tolerance relating to such threats being uttered in certain places. If utterances are made in airports serious consequences are expected to be imposed on those who might venture to make such utterances whether made in jest or not. It is just not acceptable...
>
> *para 62+ Threats of violence, especially uttering threats to one's life in the workplace, are the most serious threats imaginable. The employer must take such threats seriously and take steps to protect its workers. Calling police is a natural reaction to this end. Removing the employee from the workplace is another.

Also notable are the words of M.G. Picher, who, in the *C.N. Railway* matter said:

> [page 192] Threatening the murder of fellow employees is an extremely serious matter. While at one time such comments might have been given a certain latitude, highly publicized real life tragedies which have occurred in a number of workplace, both in Canada and elsewhere in recent years, have understandably changed that. The obligation to protect employees and supervisors against threats and fear for their own safety and the safety of their families is now recognized as one of the highest obligations of an employer...

The Employer argues that discharge is the only appropriate consequence in this case, following a long and patient course of interaction with this unapologetic grievor, and the only course consistent with its obligations to provide a safe workplace to its employees.

The Union argues that if the alleged misconduct is found to have been committed, the incident itself took place at a time when a 28 year employee 's history was crossing paths with new legislation – Bill 168. The events took place at a time when everyone was asking themselves what Bill 168 means. It argues that the impact of that legislation has to be considered in the reasoning behind this award. That impact, it says, is that of a preventative piece of legislation, imposing a proactive opportunity for employers to do risk assessments, and to take appropriate action to deal with potential situations of violence in the workplace. But the amendments do not legislate zero tolerance for misconduct. They do not re-write the common law of requiring progressive discipline and proportionate response to misconduct that gives the erring employee fair notice of the seriousness of the misconduct, and a chance to change their behaviour.

The Union argues that the question in this case remains a simple one - was the decision to terminate Hudson a proportionate response to the harm arising from the incident between herself and Union President John Hale? It says that the incident was not violent, but was an angry confrontation between a union member and her representative. The suggestion that there was a threat was something that grew with the process of reporting the incident through the chain of command.

The Union argues that the Employer disregarded the advice of its own expert, Dr. Walsh, in returning the grievor to work after a long absence without appropriate method and without appropriate supports. This, it argues, is a critical piece of data that militates against the severity of penalty, if a threat is found to have been made in the context of this angry confrontation. It allowed her to fall through the cracks, and paid insufficient heed to the knowledge it had of the grievor's difficulties with anger, and gave no weight to the advice of the expert it had itself hired to advise of the best way to facilitate her return to work after a long absence, in the summer of 2009.

The Union submits that the evidence reveals a shift in employer approach with the introduction of Bill 168, and that its previous reaction to grievor misconduct had delivered a message of moderate

disapproval. It had not progressively increased discipline in a matter that conveyed the seriousness of the grievor's angry interactions. And, the workplace training in respect of the serious new approach was in early stages - the message was just being formed when these events occurred. It is the Union's submission that the Employer must prove that it took prior incidents seriously, reacted seriously, and gave the grievor a strong message that termination would ensure if her behaviour did not improve.

Critical to the Union's case is its position that the evidence of Marlene Rivier is significant. She fairly criticized the nature of the anger management counselling provided to the grievor in the days and weeks before the incident, explaining that it would have been more effective to have based the intervention on thorough psychological testing, individually tailored counselling, and a longer course of therapy. Supportive therapy would have to accompany a return to work. The grievor has not yet had the benefit, says the Union, of meaningful anger management counselling, which the Employer agreed to provide.

The Union submits that this grievor has demonstrated remorse for her use of angry language in the workplace, and that she delivered an apology through the Employer. She testified to her regret at the confrontation with John Hale ten minutes after the incident occurred. She did the best she could, given how she saw the incident.

The Union says the Employer made a premature assessment of risk, and dealt with an unproven perception of danger by termination. That, says the Union, is not what Bill 168 was intended to accomplish.

The Union seeks reinstatement, and urges a creative response to ensuring that the grievor receives appropriate and effective anger management counselling prior to a carefully managed return to work.

The Union relies upon the authority of those cases in which arbitrators have, for one reason or another, seen fit to return employees to work, in cases in which anger or threat has been a characteristic of the misconduct. It urges that each case must be decided upon its own facts, with due

regard to each of the factors traditionally assessed in the determination of a fair and proportionate response to misconduct.

In a post- Bill 168 award, Arbitrator Luborsky, in *Georgia Pacific Canada Inc. and Communications, Energy and Paperworkers Union of Canada, Local 192,* [2011], March 28, 2011, said that tolerance for workplace violence was decreasing, but "there must still be a proper assessment of the extent for all surrounding circumstances related to the act or acts of violence to ensure a proportionate disciplinary response, with only those transgressions at the higher end of the scale deserving of the ultimate sanction of discharge".

The Union also relies upon these authorities, including some in which discipline of a less severe nature was substituted for that of discharge, in cases where threats were made in the workplace:

Enisteel, a Division of Leroux Steel Inc. V. United Steelworkers of America, Local 6444 (Dennis grievance), [2000] O.L.A.A. No. 150, (Clement), in which the arbitrator relied upon a thorough assessment of the grievor that did predict future violence, made before deciding the outcome.

*Zochem, Division of Hudson Bay Mining and Smelting Co. Ltd and Communications, Energy and Paperworkers Union of Canada, Local 591G (Harvey Grievance), [2010] O.L.A.A. NO. 466, (Monteith),*in which the grievor had committed a very serious physical threatening act, and had been referred to anger management counselling before being reinstated. The arbitrator balanced the factors, and concluded that in the circumstances, this result was capable of addressing both the legitimate needs of the employer, and the appropriateness of a serious disciplinary response.

OSF Inc. And United Steelworkers of America, Local 5338 (Keefe grievance), [2000] O.L.A.A. No. 428, (Kirkwood), in which the grievor uttered angry words that were interpreted as a threat, but which the victim did not take seriously. The grievor had an anger management problem which he had been working hard to correct. He was required to attend for further assistance. The grievor's anger management problem, his lack of control, was seen by the arbitrator to mitigate against his intent to do harm with is words. He was reinstated.

Siemens VDO Automotive Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada, (CAW – Canada), Local 1941 (Twigg grievance), [2006] O.L.A.A. No. 158, (Crljenica), in which the arbitrator found that a death threat had been made, but the words were taken as empty threats, and had, he found, been condoned by inaction by the employer. The arbitrator was satisfied that the grievor was genuinely remorseful, intended to change his behaviours, and ultimately, that the employment relationship was reparable.

Abco Supply and Service Ltd. and International Brotherhood of Electrical Workers (Harty Grievance), [2009] M.G.A.D. No.. 27, (Graham), in which the arbitrator concluded that the threatening words were made with no real intent to carry out an act of violence. The threatening words were, for this reason, considered less than very serious misconduct. The arbitrator appears to have been influenced by the facts that the words were said in the context of an angry confrontation between employees, in which the grievor was found to be the less aggressive.

Finally, in *Ventra Plastics and National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada), Local 127, (McBrayne grievance) [2000] O.L.A.A. No. 340, (Watters),* a threat against a co-worker had been admitted, and the grievor produced evidence of having been working hard in an anger management program, accomplishing noted changes in his behaviours. The arbitrator, confident that the grievor appreciated the seriousness of his misconduct, which was caused by his condition of diagnosed depression and anxiety, found that the grievor had made a serious and genuine effort to modify his conduct. He was reinstated in a creative award that included a requirement for continued attendance at counselling.

Conclusions and Analysis

The first question is whether the grievor did or did not make a death threat against her Union President, John Hale.

There is no third party witness to the alleged incident. The determination depends upon the assessment of credibility of the grievor and John Hale, based upon their evidence, guided by the test set out in *Faryna v. Chorny, [1952] 2 D.L.R. 354*. The latter requires consideration of whether the evidence given is consistent with the probabilities that surround the circumstances.

The Union argues that the facts do not support a finding that a death threat was uttered. There was a loud and angry confrontation between the grievor and Hale, but it asserts that the language and the significance of the language enlarged as the incident was repeated, and reported through the chain of command. The Union also argues that the evidence supports that Hale was furious – "mad as hell", as he said, but not genuinely afraid.

The Union argues that it is significant that when Hale first told of his confrontation with the grievor, he did not request that the Employer provide protection or that they call police.

It is my assessment that Hale is a reticent witness. He was not just reluctant about testifying, he was very upset that his encounter with the grievor led to her termination. I did not take this concern to reflect anything but a strong sense of duty as Union President. I felt Hale's evidence to be restrained. There was no element of malice or of exaggeration in his recitation of events. He emerged as an accurate historian, who only reluctantly spoke of the incident causing fear for him and for his wife.

Hale has been consistent in his recitations of the incident. His reflex immediately following the incident was to tell Judy Brick that he was through representing the grievor, that she had just threatened his life. His response to Brick's concerned inquiries, made a few minutes after the incident, his responses to questions at investigation, and his evidence at hearing all provided consistent recitation of what he heard.

It is my view that the observation of Hale's reactions, provided independently by a number of witnesses, is reliable corroboration of the impact of the grievor's words. Judy Brick testified to his immediate report that the grievor had just threatened his life. Judy Brick testified to Hale's immediate and dramatic physical manifestations of being upset, and to his agitated behaviour a few minutes after the incident at social services.

Jim Keech testified that when he advised Hale of the grievor's termination, the normally calm man became so nervous and agitated that his reaction wore off on Keech, who also wanted to get out of the room. This is chilling and persuasive evidence.

I am mindful of the important evidence that Hale provided to police, and to this Board – that he did not believe the grievor capable of carrying out the act of ending his life. I am mindful of the facts that he did not immediately report the incident to police, but waited until August 3, when termination seemed imminent, and when his spouse urged him to report. He did not ask the Employer to provide help or protection. He did not seek investigation or retribution of any sort.

These elements do not, in my view, reflect that the event escalated with reporting, as the Union urges. Rather, it reflects Hale's commitment to serve his duty as a union officer, and, when required to do so, to provide an accurate and unembellished record of the events.

The evidence does not reflect Hale's immediate reaction of fear for his life. The evidence, as the union points out, reflects Hale's initial reaction of anger, of being shaken. The evidence reflects demonstrable discomfort and agitation, followed by increased agitation and fear when advised of the termination of the grievor. But, it is not necessary, in order to determine whether the threat was uttered, to find that the speaker of the words had the actual ability to carry out the threat. Nor is it necessary to find that the victim of the threat had an immediate and urgent fear of death. These are matters that go more properly to the question of the seriousness of the incident, the impact on the victim, and ultimately, to the appropriate disciplinary response – subjects that will be addressed later in this award.

I take the grievor's evidence of humiliation, at hearing of her own angry outbursts and swearing to be genuine. At the same time, I find her own account of the events to be inconsistent. First, she denied having said the words of which she is accused. Then, she said that Hale took the words out of context. She did not provide an alternate description of that context, but said that she meant Hale would be dead in terms of union politics. Then, the grievor said that Hale may have misunderstood her words. In the interests of giving her the benefit of the doubt, I will take this explanation to be substantially the same as having taken the words out of context.

On another occasion, in evidence before this board, she said that Hale did not hear her correctly. Finally, she repeats her clear and unequivocal denial of having uttered the words at all. The inconsistency of the grievor's evidence casts doubt on her credibility.

The grievor's primary explanation – that Hale had taken her words out of context – makes no sense. It is inconsistent with the probabilities in the circumstances. The context was the she had made reference to Hale's friend, Brian Allen, who had recently died. She is alleged to have said, "Yes, and you will be too". The only plausible inference, taken directly from the immediate context, was that she was making direct reference to the end of Hale's life.

Based on these observations, I consider the evidence of Hale to be more reliable than that of the grievor. Where their evidence conflicts, I am persuaded that the evidence of Hale is to be preferred. I find as a fact that when, in angry confrontation with Hale, he told her to leave his friend out it, that he was dead, she said, "Yes, and you will be too".

I find it more probable than not, that the grievor said the words of which she is accused. I find that in so doing, she uttered a death threat to Hale.

I further find as a fact that the grievor has made no apology to John Hale. She has failed to acknowledge her behaviour, failed to recognize the seriousness of this misconduct, and has neither expressed nor evidenced remorse for having made the threat. The evidence is that at the investigation meeting, the grievor said the words, "I'm sorry". She explained in evidence that she said she was sorry if

Hale misunderstood her. The grievor's denial, and attempt to explain away her words, has continued to her include her final words in evidence.

The grievor has expressed embarrassment, humiliation and remorse for her words and profanity, used in anger, in conversations with her supervisors and managers. This remorse stops short of including any remorse at having uttered the threat to John Hale. It does, however, reflect the first occasion in the long history of this matter, in which the grievor has demonstrated any acknowledgement of the impact that her angry outbursts have had on others.

This Board is required by section 48 (12) (j) of the Labour Relations Act to interpret and apply labour-related statutes. The Occupational Health and Safety Act, R.S.O. 1990, C. 0.1, as amended by Bill 168, ("Bill 168") provides, in part:

"workplace violence" means,

(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

(c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Policies, violence and harassment
32.0.1 (1) An employer shall,

(a) prepare a policy with respect to workplace violence;

(b) prepare a policy with respect to workplace harassment; and

(c) review the policies as often as is necessary, but at least annually. 2009, c. 23, s. 3.

Written form, posting
(2) The policies shall be in written form and shall be posted at a conspicuous place in the workplace. 2009, c. 23, s. 3.

Exception
(3) Subsection (2) does not apply if the number of workers regularly employed at the workplace is five or fewer, unless an inspector orders otherwise. 2009, c. 23, s. 3; 2011, c. 1, Sched. 7, s. 2 (3).

Program, violence
32.0.2 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace violence required under clause 32.0.1 (1) (a). 2009, c. 23, s. 3.

Contents
(2) Without limiting the generality of subsection (1), the program shall,

(a) include measures and procedures to control the risks identified in the assessment required under subsection 32.0.3 (1) as likely to expose a worker to physical injury;

(b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;

(c) include measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;

(d) set out how the employer will investigate and deal with incidents or complaints of workplace violence; and

(e) include any prescribed elements. 2009, c. 23, s. 3.

Assessment of risks of violence
32.0.3 (1) An employer shall assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work. 2009, c. 23, s. 3.

Considerations
(2) The assessment shall take into account,

(a) circumstances that would be common to similar workplaces;

(b) circumstances specific to the workplace; and

(c) any other prescribed elements. 2009, c. 23, s. 3.

Results
(3) An employer shall,

(a) advise the committee or a health and safety representative, if any, of the results of the assessment, and provide a copy if the assessment is in writing; and

(b) if there is no committee or health and safety representative, advise the workers of the results of the assessment and, if the assessment is in writing, provide copies on request or advise the workers how to obtain copies. 2009, c. 23, s. 3.

Reassessment
(4) An employer shall reassess the risks of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence. 2009, c. 23, s. 3.

Same
(5) Subsection (3) also applies with respect to the results of the reassessment. 2009, c. 23, s. 3.

Domestic violence
32.0.4 If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker. 2009, c. 23, s. 3.

Duties re violence
32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence. 2009, c. 23, s. 3.

Information
(2) An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence; and

(b) any other prescribed information or instruction. 2009, c. 23, s. 3.

Provision of information
(3) An employer's duty to provide information to a worker under clause 25 (2) (a) and a supervisor's duty to advise a worker under clause 27 (2) (a) include the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if,

(a) the worker can be expected to encounter that person in the course of his or her work; and

(b) the risk of workplace violence is likely to expose the worker to physical injury. 2009, c. 23, s. 3.

Limit on disclosure
(4) No employer or supervisor shall disclose more personal information in the circumstances described in subsection (3) than is reasonably necessary to protect the worker from physical injury. 2009, c. 23, s. 3.

Duties of employers

25.

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;...

(c) when appointing a supervisor, appoint a competent person;...

(e) afford assistance and co-operation to a committee and a health and safety representative in the carrying out by the committee and the health and safety representative of any of their functions;...

(h) take every precaution reasonable in the circumstances for the protection of a worker;

(i) post, in the workplace, a copy of this Act and any explanatory material prepared by the Ministry, both in English and the majority language of the workplace, outlining the rights, responsibilities and duties of workers;

(j) prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy;

(k) post at a conspicuous location in the workplace a copy of the occupational health and safety policy;

(l) provide to the committee or to a health and safety representative the results of a report respecting occupational health and safety that is in the employer's possession and, if that report is in writing, a copy of the portions of the report that concern occupational health and safety; and

(m) advise workers of the results of a report referred to in clause (l) and, if the report is in writing, make available to them on request copies of the portions of the report that concern occupational health and safety. R.S.O. 1990, c. O.1, s. 25 (2).

28. (1) A worker shall,

(a) work in compliance with the provisions of this Act and the regulations;...

(c) report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself or another worker; and

(d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.

Duties re violence

32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence. 2009, c. 23, s. 3.

The Bill 168 amendments to the Occupational Health and Safety Act have changed the law of the workplace in a significant way. They are largely based on the grim conclusions of coroners' inquests into workplace deaths in Ontario, such as the death of nurse Lori Dupont at the Hotel Dieu Hospital in Windsor. The theory is that workplace violence is usually foreshadowed. It is, in many cases, predictable. The amendments reflect the view that violence can be prevented if employers, supervisors, and workers, seriously heed signs of danger, communicate clearly, and act with clarity when risk is identified.

Heightened vigilance in respect of violence requires that an employer be proactive in the identification of potential workplace violence. The employer must identify the risks that arise in its workplace by performing a risk assessment, and must inform the joint health and safety committee of the results of its assessment. It must develop a policy and program that addresses the risks of workplace violence. It must perform the necessary training and implement that program.

The Bill 168 amendments to the Occupational Health and Safety Act go further. They bring the issue of workplace violence within the sphere of occupational health and safety, and include the issue of workplace violence within the scope of mandatory employer obligations enumerated under that Act. Of particular relevance in this case, by section 32.0.5 (1), the pre-existing employer duties, supervisor duties and worker duties set out in sections 25, 27, and 28 respectively, are made applicable to workplace violence.

Section 25 (2) (h) requires that an employer take every precaution reasonable in the circumstances to protect a worker. Section 27 (2) (c) requires that a supervisor take every precaution reasonable in the circumstances for the protection of a worker. Section 28 (1) (d) requires that a worker report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows. These obligations now extend beyond ensuring safety

from hazardous substances and dangerous machinery and equipment. I interpret the legislation to mean that an employer must protect a worker from a hazardous person in the workplace. The failure to comply with these requirements will attract penalties under that Act, and subject the employer to the enforcement mechanisms administered by the Ministry of Labour.

The amendments go further still. Workplace safety trumps personal privacy, as the amendments require that an employer or supervisor provide information, including personal information, to a worker if he or she is likely to encounter, in the course of their work, an individual with a history of violent conduct, and if the worker is likely to be exposed to physical injury.

The Bill 168 amendments to the Occupational Health and Safety Act are intended for a very real and critical purpose. Based on the hindsight provided by inquests into the deaths of the victims of workplace violence in this province, the amendments are intended to require the workplace parties to heighten their awareness, to sharpen their antennae, and to refuse to ignore the warnings of violence that puts employees in peril. The amendments, if effectively implemented, have real potential to protect the emotional health of workers who are the victims of violence. They also have real potential to save human life. They are, most obviously, to be taken seriously.

The important question raised in the instant case is what effect, if any, the Bill 168 amendments have on the arbitral process of determining the appropriate penalty for acts of misconduct that are within the category of workplace violence. What, if anything about that process has changed by virtue of this legislation?

It is my view that there are four significant ways in which the Bill 168 amendments have impact upon the process of the analysis of a case such as this:

First, the Bill 168 amendments have clarified the way in which the workplace parties, adjudicators, arbitrators and judges, must think about incidents involving the inappropriate use of language in the workplace. The amendments make it clear that language that is vexatious and unwelcome is harassment, and very serious in its own right. But language that is made in direct reference the end of a person's life or that suggests impending danger, falls into a category of its own.

This is not just language, it is violence. This point will distinguish a case that arises after the introduction of Bill 168 from some of those upon which the Union relies, such as the *Abco Supply* case, in which the misconduct was considered to be merely an unfortunate choice of language.

The Bill 168 amendments tell us that "a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force, in a workplace, that could cause physical injury to the worker" is workplace violence. Such language is, by definition, workplace violence.

The amendments bring a high degree of clarity to the way in which we must think about such workplace language. Where an alleged threat is reported, the incident falls into a new category. The parties must address the allegation as one of violent misconduct. It must be addressed as a very serious allegation.

The workplace violence is the utterance of the words. There need not be evidence of an immediate ability to do physical harm. There need not be evidence of intent to do harm. No employee is required, as the receiver of the words, to live or work in fear of attack. No employee is required to look over their shoulder because they fear that which might follow.

In *Cadillac Fairview*, Arbitrator Keller found that although the element of intent, the *mens rea* of the offence, is a requisite element in the charge of criminal conduct, that concept is unique to the Criminal Code. The elements of the offence, and the burden of proof in criminal matters, is different from that required in a civil proceeding. He concluded that in a labour arbitration context, it is not required that intent be found for the arbitrator to conclude that a threat has been made. On the facts, he concluded that the words uttered were not made in jest, or in a jocular fashion, but that they were purposeful – intended to intimidate, and to make the hearer fearful. This was sufficient, in the context, to constitute a threat.

In *GO Transit,* Arbitrator Fisher found that the grievor had no actual intent to cause physical harm when he wrote and delivered a threatening letter. The clear purpose of the act, he found, was to intimidate the hearer into worrying about possible future harm. He said, "no one in this day and age should have to look over their shoulder while at work because they fear an attack from a co-worker".

The new classification of threatening language as workplace violence is a clear and significant change.

Second, the Bill 168 amendments have changed the manner in which the employer and a worker must react to an allegation of a threat. An employer may not hide its head in the sand, or take a passive stand, hoping that things will sort themselves out. It must not trivialize the allegation. The utterance of a threat is workplace violence, and must be reported, investigated, and addressed. A worker who becomes aware of a danger is required to report the incident, as Hale was required to do here.

The utterance of a threat in the workplace requires that the workplace parties stop cold. They must report. They must investigate. They must assess the existence of real danger. They must act.

In this case the Employer took this language very seriously, and made that message clear and unequivocal in respect of all communications that followed. It reacted with the sort of gravitas required by the allegation, and addressed the allegation with appropriate care and attention, with the involvement of a very senior level of management, in order that investigation and decision-making could occur in a highly effective way.

Of course, this is not to say that an employer will be justified in acting without facts, or in precipitous over-reaction. It must investigate allegations of workplace violence with a full and fair approach, assessing objectively verifiable fact, and ensuring that decision-making in responding to the incident is informed, reasonable and proportionate. The seriousness of the allegation does not minimize the requirement for thorough and appropriate investigation and decision-making.

Nor is this to say that termination of an employee found to have committed an act of workplace evidence may be “automatic”. The Union is correct when it rejects that potential interpretation of the Bill 168 amendments. There is nothing in the Occupational Health and Safety Act that requires that an employee, found to have committed an act of workplace violence, be automatically terminated. This is not legislation of zero tolerance. It is not legislation that expressly restricts arbitral discretion in assessing the appropriateness of penalty.

An employer can fulfill its obligations and responsibilities to provide a safe workplace, and to take reasonable precautions to protect an intended victim of violence, in a variety of ways. In fact, it may be wise for an employer to maintain contact with the offending employee, to contemplate providing a lengthy leave of absence during incarceration, or while some form of therapy or counselling is undertaken. There may be safety in maintaining some ability to observe and control the trajectory of anger that has been demonstrated. But this is for the employer to determine, at the end of an appropriate investigation and consideration of options.

After the Bill 168 amendments to the Occupational Health and Safety Act, it remains good law that discipline must be determined on the facts of each case, guided by the usual criteria referred to in the arbitral jurisprudence, and must be reasonable and proportionate. It would be a mistake for any employer to assume the Bill 168 amendments make termination automatic or necessary if the misconduct amounts to workplace violence.

The critical point is that it will not do for an employer to disregard, to minimize, or to turn a blind eye to a report of workplace violence in the form of a threat. An employer may not be passive or indifferent to any report of workplace violence. That option no longer exists in Ontario. It would constitute an abrogation of the employer's obligations under the Occupational Health and Safety Act, and would expose that employer to the penalties and offences set out in that Act.

Here, the Employer reacted with the appropriate deliberateness required by the allegation of workplace violence. It did not over-react, but addressed the allegation with appropriate care and attention. It investigated, and involved the most senior level of management, in order that decision making could occur with effective and timely action. It did not jump to precipitous termination, but undertook investigation of the facts. It deliberated upon its decision, taking into account the relevant data, including the grievor's history of discipline, the level of her seniority, the seriousness of the misconduct, the impact of the misconduct upon the others affected by the misconduct, and most importantly, the likelihood of improvement of the grievor's behaviour, and the likelihood of restoration of the employment relationship.

Third, the Bill 168 amendments have impact upon the manner in which an arbitrator might assess the reasonableness of termination as an appropriate form of discipline when a threat is found to have been made. As the Union argues, the usual factors, suggested by the case of *Dominion Glass Co. and United Glass & Ceramic Workers, Local 203, (1975) 11 L.A.C. (2d) 84*, still apply to the analysis:

Who was threatened or attacked?

Was this a momentary flare-up or a premeditated act?

How serious was the threat or attack?

Was there a weapon involved?

Was there provocation?

What is the grievor's length of service?

What are the economic consequences of a discharge on the grievor?

Is there genuine remorse?

Has a sincere apology been made?

Has the grievor accepted responsibility for his or her actions?

But the amendments, in my view, should be interpreted to provide instruction on the weight given to one of these factors – the seriousness of the incident. There is no question that threats uttered in the workplace have usually been considered very serious misconduct. The *Siemens VDO Automotive* award is, perhaps, a rare example of a contrary approach. As both parties acknowledge, the arbitral jurisprudence has reflected a reasonably consistent trend to take allegations of violence very seriously, as epitomized by the Simmons award in *McCain Foods,* and the Picher award in *CN Railway.*

But threats are now categorized, by statutory definition, as falling within the category of workplace violence. The shift in emphasis is likely to cause an arbitrator who is weighing the seriousness of the incident against the other factors, to give that factor greater weight.

Incidents of threatening at work have been addressed with increasing seriousness. It is becoming rare for an arbitrator to be persuaded to consider such incidents less than serious, when it is suggested for example, that the offending employee was "just blowing off steam", "not really serious", "just trying to get a reaction", or "didn't really mean to threaten". As Arbitrator Simmons suggested,

such language is not tolerated in environments where safety is a concern, such as airports. It ought not to be tolerated in the workplace. With greater and greater frequency, the trend has been to consider such misconduct at the grave end of the scale. The Bill 168 amendments, in my view, should, and will, reinforce that trend, and raise the bar on the factor of seriousness of the offence.

Fourth, and finally, I interpret the Bill 168 amendments to cause on additional factor to be added to the list of those usually considered when assessing the reasonability and proportionality of the discipline. That factor is workplace safety.

In the past, this aspect of the evidence has traditionally been considered part of the question "to what extent can this employment relationship be repaired?" It is my view that a separate and distinct question must now focus that analysis. That question is this: "To what extent is it likely that this employee, if returned to the workplace, can be relied upon to conduct himself or herself in a way that is safe for others"? Put another way, "to what extent is it predictable that the misconduct demonstrated here will be repeated?"

That element of inquiry is required, in light of the amendments, because the employment relationship will be incapable of reparation, if the offending employee is likely to render the employer incapable of fulfilling its obligation to provide a safe workplace under The Occupational Health and Safety Act. This is an additional consideration in the arbitral process of considering the relevant factors in the equation.

Consistent with the Union's argument, I am mindful, in assessing the evidence, that this grievor's difficulties must not be used for the purpose, merely, of emphasising the significance of Bill 168. She may not be martyred to the cause of giving the new legislation a purposive reading. She, as every other grievor in the circumstances, is entitled to consideration of all of the evidence. She is entitled to thoughtful consideration, particularly in light of her very long years of service, of whether any other form of discipline will serve the goals of imposing appropriate and proportionate discipline, while ensuring a safe workplace.

The following factors, those suggested by *Dominion Glass,* and those raised by the evidence in this case, are considered in addressing the question of penalty:

Record of prior discipline

The prior discipline consists only of a 1-day suspension and a written warning. Both episodes involved incidents in which the grievor acted out of anger, and lashed out with verbal assaults of directed profanity toward those with whom she come into conflict in the workplace.

The history of the reduction of the three-day suspension is, in the Union's argument, significant, because it epitomizes a pattern of reaction on the part of the Employer that sent a consistent message that the behaviour was objectionable, but not very serious. Had the Employer applied a rigorous and consistent approach of progressive discipline, it argues, the process would have been more likely to have the desired effect of enhancing the grievor's awareness that her misconduct – her angry outbursts of directed profanity, yelling and door slamming, were being taken as serious misconduct. It is the submission of the Union that to the extent that previous incidents are taking into account, the Employer is required to prove that it took prior events seriously, and that it had given the grievor a strong message that she had failed to consider.

There is merit in the union's position. If this were a case in which a grievor had been terminated for a culminating incident, in which the behaviour was a further example of repeated verbal harassment directed at supervisors, an Employer's reduction of the 3-day suspension, might be interpreted by a grievor as a moderate message of rebuke – a slap on the wrist.

But that is not the evidence in this case. First, the evidence includes several situations in which this Employer drew the grievor's attention to the fact that anger management counselling through the Employee Assistance Program was available to her. It encouraged her to take advantage of it. She repeatedly ignored that advice. Each time the Employer intervened to respond to one of the grievor's episodes of anger, it reminded her of the availability of this service. The evidence is that it was primarily interested in altering her behaviour – not in punishing her for past acts. That is why the Employer

deliberately imposed the written warning for the last event – because it was trying to emphasize the aspect of behavioural correction rather than punishment. It was, in my view, a good effort. It failed.

Second, the Employer's agreement in December 2009, to wipe the disciplinary slate clean after one clear year, was part of a comprehensive and deliberate effort to encourage the grievor to address her anger management problem in a constructive way. The Employer did not merely modify the escalation of progressive discipline in the interests of efficacy, or in order to avoid an expensive adversarial process. It did so as part of a package and as part of a plan – very much in the grievor's interests. The discipline would be removed from her record if she attended a course of anger management counselling, which the Employer arranged, and for which opportunity the Employer paid the grievor a $2,000 incentive, and if she could avoid discipline for one year. The Employer's message, in my assessment, was serious and unequivocal. She had to take responsibility for, and change, her behaviour.

Third, the incident that led to the grievor's termination was not another similar outburst of anger. It was distinctly different and a more serious form of misconduct. The incident on July 28, 2010, was an act of workplace violence. An employer, under such circumstances, is entitled to escalate the severity of discipline in an appropriate way that is responsive to the seriousness of the offence.

The context of the incident

The context of the incident is an important consideration. It is, in this case, central to the Union's position that the Employer, however well intentioned in its efforts to encourage the grievor to get some help, dropped the ball. The Employer, a year before this event, retained the services of Dr. Ronald Walsh, an independent medical practitioner with particular expertise in the field of occupational health, to assess the grievor and to provide advice in facilitating a healthy and productive return to work. The Union says it then disregarded Dr. Walsh's advice. It says it left the grievor to fall through the cracks, to return to the workplace on her own, without adequate supports, and without fulsome or appropriate counselling. This is the factual context, says the Union, within which the July 28, 2010 incident arose.

Dr. Walsh reported that there was no medical problem at the root of the grievor's difficulties with anger management. There is no diagnosis of a medical cause for her absence from work after the road school incident. There is no diagnosis of emotional disorder, of disability, of handicap. He said:

> At this juncture I would not recommend any definitive medical treatment. Although it is not in the medical realm, I would highly recommend face-to-face discussions with Ms. Hudson and her employer outside the parameters of a formal grievance process. I think it more likely than not that a fair mediation type process that involves dialogue between employer and employee is likely to be successful in achieving a desirable outcome for both parties. It is my opinion supported by ample research evidence, that Ms Hudson's continuing absence from the workplace is not beneficial to her well being. The longer her absence persists, the more difficult it will be to successfully re-integrate her into her workplace duties.

Dr. Walsh recommended that the grievor's return to work be supported by a formal course of counselling to help her gain insight into her attitudes and behaviours. He also suggests that it was essential that the grievor be advised of clear expectations, and that the Employer take the lead in initiating meeting, and clearly outlining those measureable and clear expectations for behaviour and performance.

The Union points out that when the Employer received this report, it exacerbated tensions between it and the grievor by failing to share the report with her, or with the union. It did not invite her to engage in face-to-face discussions in a non-adversarial manner. It did not institute a mediation type process that would address the grievor's genuinely held belief that she had been discriminated against and held back at work. It made no accommodation for her difficulties, and merely advised her that in the absence of a medical reason for continued absence, her immediate return to work was required.

The evidence is that Judy Brick was not told of any special requirements in respect of the grievor's return to work. It was the occupational health nurse, Debra Bagg, who received the Walsh report. Brick testified that she followed the usual process of returning the grievor to work. Although the usual process would have involved a meeting with the employee, the union, the occupational health nurse and human resources, that did not happen here. The grievor returned to work without that meeting. This, and the failure to share the report with the grievor, in my view, is evidence that demonstrates a flaw in the Employer's action one year before the incident here in question.

The Union argues that the Employer, under such circumstances, is required to do more – to explore accommodations for the troubled employee, and to ensure that her needs are met. It argues that the evidence of Marlene Rivier, which I accept as valuable and thoughtful expert evidence in respect of what would be optimal therapeutic assistance for this grievor, establishes that the anger management counselling provided by the Employer was insufficient. It was barely a start, and by no means optimal.

Deanne Roberge, in hindsight, admits that she could have done more to ease the grievor's return to work after the road school incident. She might have taken a more personal approach. She might have avoided the harshness of the standard approach taken to return the grievor to work, in light of the challenged employment relationship.

At hearing, I asked the Union if it was, in the case, asserting reliance upon the Ontario Human Rights Code. Was it asserting a duty upon the Employer to accommodate disability? The Union acknowledges that there is no current evidence of disability in this case, as is clear from the evidence of both Dr. Walsh, and Marlene Rivier. However, the Union asserts that it remains unclear at present if such grounds exist, and the Employer was under a duty to ascertain whether that was or was not the case, as it returned the grievor to work after her absence, following the road school event, and as it contemplated imposing discipline for the July 28 incident.

The Employer's assertion, with which I agree, is that absent evidence of any medical basis for the grievor's difficulty, and absent evidence of disability or handicap, there is no ground upon which the Union may claim a duty on the Employer to accommodate the grievor.

The Employer could have done better, as it admits, in the process of returning the grievor to work a year before the incident. A more open and personalized approach may have assisted this angry employee with her re-entry to the workplace following her work-related absence. There is no reason, in my view, why the report of Dr. Walsh should not have been shared with the grievor.

But the Employer is not held to a standard of perfection in such matters. I do not assess these aspects of the evidence as displacing blame for the grievor's misconduct, as evidencing provocation, or as providing justification for her behaviour one year later.

Furthermore, and perhaps more to the point, there is no obligation in law upon an employer to accommodate the needs of an employee who is angry, hurt, or who perceives herself to have been ill treated. The grievor has rights if she has complaints. The evidence demonstrates that this grievor knows her rights. She has appropriately explored her avenues for relief. In some of her efforts, she has been successful. In others, she has failed. She remains bitter and angry. That continued anger may, and has in this case, caused the Employer to make efforts, to recommend counselling, and try to support the grievor's access to counselling. But an employee's bitterness and anger does not give rise, in law, to an obligation on the part of an employer to accommodate her needs, or her best interests, as would a handicap.

Marlene Rivier came to the task of assessing the grievor with considerable experience, and with an approach of genuine interest and concern for her emotional health. To the extent that she has suggested an optimum course of treatment for the grievor, and specified the elements of what would make a strong therapeutic relationship functional, her evidence may assist in plotting a course of action for the grievor in future. It is noted, however, that her frame of reference was not consistent with the definition of workplace violence that is introduce by the Bill 168 amendments to the Occupational Health and Safety Act. She does not categorize the grievor's misconduct as workplace violence, as this Board must.

The essence of the Union's position on this point is that a year before this incident, after the grievor was absent following the road school incident, and after the Employer received the report of Dr. Walsh, it ought to have called a meeting with the grievor, the Union, and the occupational health nurse, to talk about her return to work, and to discuss her needs. It then ought to have ensured thorough testing and optimal therapy, as described by Ms Rivier, and ensured that individual supportive counselling support the grievor's re-entry to the workplace.

It is not without significance, in my view, that the calling of a face to face meeting, with union and occupation health involvement, was exactly the process that the Employer was trying to invoke on July 28, 2010, when the grievor lashed out at her Union President, and uttered the threat. The evidence does not persuade me that, had the Employer followed Dr. Walsh's advice to the letter, the workplace violence would have been avoided. To the extent that the Union asserts an obligation upon this Employer to provide optimal therapeutic services and ongoing individual support for the grievor, I consider that beyond the scope of responsibility for any employer. At some point, in my view, the grievor ought to have taken responsibility for her own behavioural problem.

Premeditation or Spontaneous Event?

This was not a premeditated act. The evidence is that this was a spontaneous incident.

Whether there was a genuine intent to harm

I do not conclude from the evidence that there was a genuine intent to end John Hale's life on July 28. Hale did not think so, and neither did Judy Brick, Damon Wells, or anyone immediately involved with the incident. I can conclude form the evidence that there was intent to impress upon Hale the extent of the grievor's frustration and anger. I conclude that there was an intent to intimidate with language, and to cause him to fear for the future.

Whether there was actual harm

There was no physical assault. However, I conclude from the evidence that the threat did cause actual harm. Hale was shaken. He was provoked to extreme anger, and he was caused to be upset. In the aftermath of the incident, as the grievor was terminated, the evidence is that he was made to be nervous and fearful. The emotional impact of a death threat is considerable, and constitutes actual harm upon its victim.

Whether there was provocation

The evidence is that the grievor perceived herself and her husband to have been poorly treated by the Union and by Hale. There is no evidence of provocation before this board. This finding distinguishes the case from that of *ABCO,* upon which the Union relies, in which it was found that the grievor had been provoked to anger.

If there was an apology and genuine acceptance of responsibility for the act

There has been no apology to the victim. The grievor continues to express anger toward Hale, and explains that is why she has not apologized. She continues to deny having threatened Hale, although she is remorseful for her profanity and for her outbursts of temper directed at supervisors and managers. There is no acknowledgement of her threat to Hale, and no remorse for having allowed her anger to have reached the level of workplace violence on July 28, 2010.

This evidence distinguishes the case from a number of those upon which the Union relies, such as *Enisteel* and *Zochem.* In the former, the grievor immediately acknowledged his wrongdoing, and went straight away in to the office of the supervisor he had threatened, in order to apologize for his outburst. In the latter, the grievor was found to have offered one apology, and offered to provide another.

If there is a willingness and ability to correct behaviour

The grievor testifies that she is humiliated by the evidence of her language and angry outbursts. She acknowledges having had trouble controlling her temper. She says she knows she has a short fuse. She enjoyed talking with anger management counsellor Larry Holmes, and was encouraged by her discussions with Marlene Rivier. She believes that with the appropriate course of therapy, to which she is now willing to commit, that she can learn the skills necessary to control her anger.

The evidence, however, does not reflect that the grievor has taken meaningful steps to do that work. She said that she has been on a waiting list for counselling for four months, (which would have coincided with the scheduling of this hearing), but offered no particulars on that effort. She did not ask

Marlene Rivier for a suggestion or for a referral to a therapist in Kingston. She has not contacted Larry Holmes for additional help.

The Safety of the Workplace

There is no evidence that anything has changed since the grievor's act of workplace violence against Hale. She has not, as did the grievors in the *Zochem, OFC, and Siemens* awards, on which the Union relies, undertaken any sort of counselling, or done any of the hard work necessary to change her behaviour. If history is a good predictor of future behaviour, there is little in evidence to support the conclusion that the future would be different, or that the workplace will be safe from continued angry outbursts escalating to the point of making threats.

It is important that the grievor understand that had she provided any evidence of having performed this work, of having made the difficult effort to change her behaviour, it would not have been difficult for this Board to have concluded that she is entitled to reinstatement on some "last chance" arrangement. But the absence of this evidence, and a continuing concern for the physical and emotional well being of her co-workers, causes a lack of confidence that if she returned, this workplace would be safe.

Seniority, other mitigating circumstances, and the financial hardship caused by discharge

The grievor testified that the loss of her job has been a considerable hardship. I have no doubt that this is the case. Nor do I doubt that it will be a challenge for the grievor to secure alternate employment.

This is a very long service employee. She has twenty eight years' seniority. This is, in my view, the most compelling factor militating against termination. Any employee with this extraordinary length of service is entitled to every possible consideration in the assessment of the proportionality of discharge as a disciplinary response.

Having reviewed the evidence at length, and with this factor very much in mind, it is with regret that I must conclude that the termination, in this case, is an appropriate and proportionate disciplinary response. This would not have been my conclusion if the grievor's actions or evidence had reflected an acceptance of responsibility for her misconduct, any appreciation of how serious her misconduct was, or what she herself is going to have to do in order to gain control over her angry impulses. Although it is my sincere hope that she is able to achieve this goal, there is no evidence at present to satisfy this Board that she has achieved that level of awareness, or made such a commitment. Had the grievor given evidence that she understood that, as Arbitrator Carter said in 1990, she was the author of her own circumstances, or had she brought evidence to this Board demonstrating that she has taken any meaningful step to change her behaviours, the result would have been different.

The grievance is dismissed.

Ms Smith and Mr. Edwards each brought a remarkable degree of commitment and civility to the hearing process. The energy and thorough effort of counsel is very much appreciated, and each is complimented on the high degree of service provided to their respective clients.

DATED at Toronto this 18th day of August, 2011.

Elaine Newman

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Elaine Newman, Arbitrator