IN THE MATTER OF AN ARBITRATION

BETWEEN:

CITY OF PRINCE GEORGE

(the "Employer")

AND :

PRINCE GEORGE FIREFIGHTERS LOCAL 1372

(the "Union")

(BEN WILLIAMS TERMINATION GRIEVANCE)

ARBITRATOR:	Karen Nordlinger, Q.C.
FOR THE EMPLOYER:	Adriana F. Willis
FOR THE UNION	Allan E. Black, Q.C.
DATES OF HEARING:	July 25 to July 28, 2016
PLACE OF HEARING:	Prince George, B.C.
DATE OF DECISION:	September 16, 2016

AWARD OF THE ARBITRATOR

The Grievor was terminated from his position as a firefighter employed by the City of Prince George on June 17, 2015 after being found guilty of the possession of stolen property over $5,000, namely, a boat and trailer. On October 29, 2015, the Grievor was given an absolute discharge at his sentencing hearing. His letter of termination stated the following:

> "We understand that you have now been convicted of possession of stolen property of a value in excess of five (5) thousand dollars. Further, we understand that you were found not to be truthful in your explanations to the Court. Finally, your initial charge and more current conviction have been the subject of coverage in the local and provincial media, causing negative publicity and, in our view, raising doubt about the trustworthiness of Prince George firefighters.
>
> The City's Firefighters occupy positions of trust. Not only are they required to and access public and private properties in order to perform their duties, they are in a position to observe the location of property, goods and other information. We consider that the issue is not only that you have access to property but also that you have the ability to gain information about the location of goods.
>
> We consider that your continued employment is incompatible with your employment as a City of Prince George firefighter. We do not have trust in your truthfulness and reliability. Your conviction and the publicity surrounding that conviction are detrimental to the City's reputation and the public's trust in our firefighters. We have considered potential mitigating factors and conclude that the employment relationship cannot be continued, having regard to all of the circumstances."

On May 1, 2013, the Grievor received a telephone call at his home at 10:15 a.m. from Cst. MacDonald of the Prince George RCMP, who advised him

that they had a tip that the Grievor may have a stolen boat on his property, and they wished to come to the property for the purposes of their investigation. There is some dispute as to whether Cst. MacDonald mentioned the boat or was more general in his comments. I do not feel the need to resolve this dispute for the purposes of this Award. The Grievor acquiesced, and Cst. MacDonald advised him that they would be at his property at 2:00 p.m. Within minutes of that phone call, the Grievor hooked the boat and trailer to his car and began towing it away from his property. Unbeknownst to him, the RCMP had his property under surveillance, and he was stopped and arrested.

It is undisputed that the Grievor took possession of the boat and trailer from a fellow firefighter. He paid $9,500 to that firefighter for the boat in 2012. It is also undisputed that the boat had been stolen from a Mr. Lane in 2011.

What is disputed is the state of knowledge of the Grievor when he purchased the boat.

The Grievor provided a statement to the police on the morning of his arrest. His statement was recorded by videocamera. A transcript of the statement was provided in Exhibit 1 in these proceedings (the Employer's Documents) and the actual video ultimately became Exhibit 5. After opening statements, the Union advised that it would be objecting to the introduction of the video statement. I heard submissions from counsel on this objection at that time and ruled that the statement was admissible, and am now recording my reasons for doing so.

It is common ground that the Grievor's statement to the police was ruled inadmissible in a voir dire at his criminal trial.

In seeking to have the statement admitted in this arbitration, the Employer submits:

1. The Employer is not limited to the same evidence as was produced in the criminal case;

2. It is not bound by the voir dire's findings or by the evidence in the criminal case;

3. It was unaware of the statement and video until it was produced only as the result of an Order made in this arbitration;

4. It was thought the statement did not provide a change of grounds for termination as dishonesty is the ground and this was an extension thereof;

5. If it is a new ground, it was one that could not be obtained at the time of the termination, as the Employer did not know of it and required an Order to have it produced.

6. The statement represents additional instances of dishonesty and it is dishonesty on which the Employer relies for the termination.

The Union responds that the Employer could have obtained knowledge of the statement by attending the trial prior to the termination of the

Grievor, and failed to do so. The statement is post-discharge evidence only, and the admission of the statement would result in a fundamental breach of natural justice that cannot be cured by providing more time to the Union to respond to this evidence.

The Union relied on *United Food & Commercial Workers Union, Local 175 v. Waste Management of Canada Corp. (Mikhail Grievance)* for the proposition that the employer cannot broaden the grounds for termination on evidence acquired after the termination, particularly where the Union has not been given early notice of the intended evidence sought to be called, and the grounds arising therefrom that support termination.

The arbitrator found, in that case, the employer only raised the issue on the first day of hearing and that it would be procedurally unfair to allow the employer to call witnesses that the union had no real opportunity to prepare for. The union did not have the time to know the case it had to meet.

I found that the situation in the *Waste Management* case was different than the case before me. Here, the evidence sought to be introduced is police questioning of the Grievor that took place prior to his termination. That evidence was not available to the Employer until an Order to produce was obtained. It was provided to the parties a few months ago.

The Union obviously knew of its import, as it obtained a letter from the Grievor's criminal counsel referring to it in the event that the issue was pursued at arbitration.

In addition, I do not accept that the Employer is attempting to raise a different ground of termination by the use of the evidence. Rather, it appears to be evidence that will go to the issue of the Grievor's honesty. It appears to be, in the words of Brown & Beatty, evidence of "incidents and events that are closely related to and/or which provide further examples of those on which they originally relied".

Brown & Beatty 7:2200

And in the words of the Board in *Fraser Lake Sawmills*

> "Evidence may become available subsequent to the dismissal which is relevant to a proper assessment to the existing state of facts at the time the decision to dismiss was made. Such evidence is properly admissible and was not prohibited by the *Quebec Cartier* case. Such evidence is not evidence of subsequent events."

Here, the letter of termination refers to the Grievor's dishonesty to the "Court". It seems unduly restrictive to say that dishonesty in the investigation leading to "Court" should be excluded. This is a grievance in an employment context. The rules are vastly different to those governing a criminal prosecution. I do not accept that the exclusion of evidence in a criminal context automatically results in its exclusion in the context of a labour arbitration. Here, both parties have had notice of the impugned evidence for some time, and I do not find that it would be procedurally unfair to allow the Employer to adduce it. As a result, both the transcript and video were admitted.

It is clear from the statement made by the Grievor to the police that he initially lied about his acquisition of the boat and trailer. He advised Cst.

MacDonald that he had seen a notice with regard to the sale of the boat on a bulletin board with a tear-off phone number. He telephoned the number and was told that the price was low because the seller was having matrimonial difficulties and trying to dispose of his things. The Grievor at first indicated to Cst. MacDonald that he paid $20,000 for the boat, then said it was $15,000 and then said he bought it for $17,500. He also said that he thought he would not have taken the boat without a receipt. He also said that he hadn't used the boat because he hadn't felt "100% sure that I should".

When confronted with the fact that Cst. MacDonald knew he had bought the boat from another firefighter, the Grievor reluctantly agreed that he had not told the truth because he did not want to get the other firefighter in trouble. He also admitted that the boat was $9,500, not $17,500. He did not admit that he knew the boat was stolen, but made comments, such as he had some inkling in the "pit of his stomach", that he wasn't "just 100% sure" that he "did not 100% know that the thing was stolen until those fuckin' lights came on, until you called me". He admitted he had doubts about the deal and he was going to look into it, but never got around to it.

During the investigation conducted by the Employer after his arrest, the Grievor was interviewed on May 6, 2013. The Grievor initially was reluctant to admit to his arrest, as he had received legal advice not to discuss it. However, after a brief adjournment to discuss the issue with his union representative, he advised the Employer of his arrest, and the purchase of the boat from the other firefighter. He was advised he would be put on paid leave

immediately. No charges had been laid at that point. The Grievor's reaction to his paid suspension was to point out to the Employer that it would damage his reputation and foreclose his ability to run in an upcoming union election. He was not asked if he knew the boat was stolen during this interview.

In a subsequent interview on May 8, 2013, he was asked if he knew the boat was stolen. He replied it was "a gray area". He did then advise the Employer of his attempt to flee with the boat and referred to it as a "grievous error".

The Employer then accepted that the Grievor had been forthright about his arrest and indicated that he could return to work with conditions. He was assigned to a different firehall than his regular one, and prohibited from accepting any shift trades. He was also advised that if any charges were laid, the reinstatement would be revisited. He was later, in June, 2013, returned to his regular firehall when it appeared that charges would not be laid. The Employer felt that the Grievor had been duped by his fellow firefighter.

In July, 2015, the Employer was advised that the RCMP was recommending charges against the Grievor. At that point, he was moved back to the alternate firehall on the same conditions as initially set.

After charges were laid in September, 2013, the Employer moved him out of fire suppression duties altogether and into the training branch. The Grievor had training and skills in high angle rescues, which he could pass on to other firefighters. In this regard, the Employer wrote to the Grievor on October

11, 2013, advising him that "This charge, and the publicity around it, has a deleterious effect on the reputation of the department and, more critically, has the potential to jeopardize the public trust."

However, the Grievor remained employed in the training branch until the verdict in his criminal trial was pronounced.

The Grievor's criminal trial took place in June of 2015 before the Honourable Judge R. Harris. During the criminal proceedings, the Grievor testified that he trusted the fellow firefighter seller of the boat, and that he did not recall why the seller was prompted to advise him that he had a boat for sale. He testified that he knew $9,500 was a good price, and that he was not surprised to learn that the boat was worth $30,000. He felt he paid less because the paint was stripped off. He did not get a bill of sale, did not pay taxes, and did not insure or register the boat. He denied knowing the boat was stolen or suspecting that it was stolen. He maintained that he moved the boat to avoid being arrested in front of his family.

The Court in the criminal matter did not believe the Grievor's evidence. It found that his evidence was vague, lacked detail, and made no sense, particularly the evidence that he obtained no documentation from the seller. It found he paid an unusually low amount. In addition, the Grievor's conduct in fleeing with the boat upon being advised of the police investigation instead of contacting the seller to seek an explanation was not consistent with his story that he did not know the boat was stolen, or had no idea that it was so. The Court did not accept that the Grievor was so panicked or stressed that he

was devoid of rational thought. I do not propose to go through all of the reasons for the Court; suffice it to say that the Grievor's evidence was not accepted, and he was found to have known the boat was stolen and was thus guilty of being in possession of stolen property in excess of $5,000 knowing that the items were obtained by the commission of an indictable offence.

The Grievor's arrest, charge and trial was widely reported by the media in Prince George.

After the guilty verdict, the Grievor immediately attended at the office of the Employer and spoke to Rae-Ann Emery, Director of Human Resources. He advised her of the verdict and was concerned about his job. Ms. Emery did not read the Reasons for Judgment before deciding to recommend the termination of the Grievor. However, she took into account reports of comments that were made by the Judge as to the non-acceptance of the Grievor's evidence, was aware of media reports of his arrest and subsequent charges. She was concerned that he had not been honest with the Employer during their early investigation. She testified that, from the time of his arrest until the verdict, the Grievor had not been suspended or terminated and, in fact, was kept on, in essence, because he was given the benefit of the doubt.

City Manager Kathleen Soltis was aware of the progress of the criminal trial through the media reports. She testified that the Judge had found that the Grievor's evidence was not credible, and that he lacked judgment, was dishonest, and could not be trusted. She testified that aspects of his duties required honesty, such as reporting back on fires or other emergent events

and/or any safety issues with co-workers. Prevention duties also required honest, accurate reports. In cross, she conceded that the Grievor was not involved in prevention duties. She also conceded that the Judge in the criminal proceedings did not say that the Grievor was dishonest and could not be trusted. She testified that her concern that he would not report accurately on any difficulties with co-workers arose from his lack of forthrightness in the interviews with the Employer, and in light of the Court's findings against him. Ms. Soltis determined that the Employer could not trust him to tell the truth, and that the employment relationship was irretrievably broken.

She testified that the publicity surrounding the criminal trial was deleterious to the reputation of the Employer, and that by the time of the verdict, it had gone on long enough. She did not read the judgment until after the termination, but said that when she did, it did not change her mind. She wished to put an end to the negative media attention as soon as possible. She read the sentencing decision after it came out some months later, but again it did not change her opinion. The termination letter was signed by Ms. Soltis on June 17, 2015, shortly after the verdict in the criminal matter.

Ms. Soltis testified that until these events, there were no concerns with the Grievor's honesty or work, and that he was a skilled employee who got along with fellow firefighters.

On October 29, 2015, the Grievor received a sentence of an absolute discharge in the criminal matter. The Court stated, at paragraph 12:

> "As for a discharge not being contrary to the public's interest, counsel points out, denunciation and deterrence has already, in large measure, been achieved. This has been achieved through the arrest, detention for half a day, Court appearances, publicity, loss of job and necessity to change his home location."

At paragraph 21:

> "With respect to the offence itself, I arrive at the following conclusions. I expect that the accused acted impulsively when he decided to engage in this business transaction. That impulsive action took him outside his normal good character and who he is as a person."

In paragraph 24:

> "...that is not specific deterrence to Mr. Williams, as I find that there is no likelihood that he will ever be before the Courts again."

And at paragraph 26:

> "I note the public will be acutely aware and as the result of this offence, Mr. Williams was arrested, Mr. Williams spent a short period of time in custody. Mr. Williams spent at long period of time before the Courts. Mr. Williams lost his employment. Mr. Williams has been, as the result of losing employment and having to sustain and support his family, has in essence been isolated from his family in that he has had to move to a new community to obtain gainful employment, and he has done that."

In paragraph 29:

> "There is no need for rehabilitation. Denunciation and deterrence have been achieved far beyond what this Court could ever impose upon him."

At paragraph 30:

> "As well, I believe, the community has an interest in having a man like Mr. Williams, with his skills, his background and his experience of bringing that to use within Canada and assisting them in their development in playing hockey, if he does not receive a discharge, the community would be deprived of that benefit going forward."

Since his termination, the Grievor has apparently worked outside of the province to support his family.

The Grievor is 40 years old, married with two young children. He had been with the Prince George Fire Service since 2004 until his termination. He had no discipline record and received excellent evaluation reports. He testified that he had never falsified a report to the City, and was required to complete reports from time to time as part of his duties in fire suppression and his duties in the training department after his arrest. He does not believe that he has ever been dishonest with his employer. He stated that he had been involved in many volunteer activities in the community, including Special Olympics, the 911 Relay and many of the charities that firefighters support generally. He was a trustee in his union and had done some political work during elections, such as putting up signs and making phone calls. Outside of his role as a firefighter, he coached hockey for his son and helped out at events at his school.

With regard to his professional development, he has taken approximately 35 extra courses, and was taking courses leading to a Fire Service Leadership Certificate. He testified that in order to coach hockey, as he had been doing for his son, he would be the subject of a criminal records check. The absolute discharge that he had received meant that he had no criminal

conviction and thus no criminal record arising from the finding of guilt in the criminal proceedings.

In direct, the Grievor was asked about the statement he gave to the police the morning of his arrest, and he said that he found himself in a bad situation and that he had made some bad decisions that day. He said he was sorry every day about the decisions he made, and he could not apologize enough. After his arrest, he was interviewed by the Employer on two occasions, and he testified that there was no attempt to interview him at any time after those two interviews. My understanding of his evidence is that he believed he was truthful with the Employer, given the restrictions on what he could say as the result of the legal advice he had received. He blamed the charges on the fact that he had not done enough due diligence, and was excited to buy a boat. He testified that it is "never going to happen again" and that "I will do everything in my power to restore trust". He admitted in cross that he had not been honest with the police initially. The Grievor testified for the first time at this arbitration as to how it was that his fellow firefighter knew he wanted a boat. He was advised after the guilty verdict in his criminal matter by another firefighter that he had recalled a discussion at a stag party between the Grievor and his fellow firefighter as to the Grievor's desire to obtain a boat and trailer for his family. The Grievor now believes that is how the other firefighter knew to call him when he had a boat. He had, at that time, been trying to raise money to buy a boat from reselling quads that he bought at a profit. Before me, in cross, he was asked about his initial lies to the police about how he obtained the boat, and he

testified that he was panicked and made a mistake. He was asked about whether he had doubts about the boat when he bought it and he answered "None at all." He was asked about his comments during his police statement that he "should have gone with his gut". He responded by saying "that's just a saying".

In his police statement, he stated that when he was pulled over by the police on the morning of May 1, 2013, he was 100% sure that the boat was stolen. He was asked how sure he was before that, and he stated that "I was unsure."

The evidence of the Grievor before me was consistent with his evidence in his criminal trial, but not necessarily consistent with his police statement wherein he expressed doubts as to the bona fides of the purchase. Yet before me, he continued to maintain his position that he had no concern that the boat was stolen. It is difficult to reconcile this evidence. I am left with grave doubts as to his understanding of the underlying issue of his honesty. Although he apologizes at different points, it is not for bringing the fire department into the negative public glare, but rather for not doing "due diligence" or for making a "grievous error" in fleeing with the boat.

In her submissions, counsel for the Employer submits that the guilty finding by the criminal court cannot and should not be revisited in this arbitration. I do not understand the Union to be taking issue with this proposition. The Employer submits on the authority of the *Toronto (City) v. Canadian Union of Public Employees, Local 79 (CUPE)* 2003 SCC 63

("*Toronto*") as further considered in *Sultan Aly Sultan v. The Law Society of Upper Canada,* 2011 ONLSAP 28 that an arbitration board is bound to accept the trial Judge's findings as fact after a criminal conviction.

The finding that it is submitted I am bound by is the trial Judge's finding that the Grievor's evidence was not to be accepted. That finding leads, it is submitted, to the conclusion that the Grievor is dishonest.

The Employer further submits that the Grievor is in public service, and that the expectations of him are higher than an employee in the private sector. While his misconduct was during his off-duty hours, it is submitted that it relates to his employment, as he purchased the boat and trailer from a fellow firefighter. On this point, the Union concedes that some discipline is warranted. The question then remaining is was termination excessive in the circumstances and, if so, what is the appropriate alternative measure?

William Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162, [1976] BCLRBD No. 98.

The Employer, in support of termination, points to the adverse effect of publicity on the Employer's reputation and relies on the *Emergency Health Services Commission and Ambulance Paramedics of British Columbia, CUPE Local 873,* [1987] BCCAAA No. 391, wherein Arbitrator McColl stated in paragraph 19:

> "Where, however, off-duty misconduct has an impact upon the employer and as such the employer's public reputation is at stake, the conduct may be deemed worthy of discipline. Where that is so, the issue will be whether or not the circumstances mandate a

dismissal or some lesser form of discipline."

And in paragraph 21:

> "Arbitrators must exercise special care that the employer does not have 'an excessive concern' with its public reputation. There must be a real causal connection between the offence and the employer's general business in order to consider the matter disciplinable. To support discharge, the offence must be of such a serious nature as to demonstrate that the conduct is wholly incompatible with the continuation of the employment relationship."

The Employer points out that the City continued to employ the Grievor until the Court found that he was not credible. The City had relied on the Grievor's version of events in continuing to give him the benefit of the doubt, but had to reassess their position in light of the Court's findings. The City felt that the employment relationship, given what it saw as the dishonesty of the Grievor, was irretrievably broken.

In *Toronto (City) v. Toronto Professional Firefighters Association, Local 3888 (Bowman Grievance),* [2014] OLAA No. 507, a firefighter was terminated for making obscene posts on his personal twitter account. The National Post published an article featuring a number of his posts. Arbitrator Newman again asserted the need for a causal connection between the workplace and the off-duty conduct, and warned that a concern about the damage to the employer's reputation must be both substantial and warranted. The test is the objective one of what a reasonable and fair-minded member of the public would think if apprised of all the relevant facts.

It is clear that actual harm to the reputation of the Employer need not be proven. It is enough that there is evidence of negative media scrutiny and/or public controversy. In *Bowman*, the arbitrator held that:

> "I agree that where an employer suffers both widespread negative press scrutiny and public controversy, actual damage may be presumed. That would, in my view, be true of any employer that sought to maintain a good reputation. It is particularly true of one in the public service." (Paragraph 89)

In that case, the duties of firefighters in attending to the health and medical needs of individuals and in attending at individuals' homes to fight fires was found to be of such intimacy that members of the public must be able to trust firefighters.

In the *Bowman* case, the grievor's conduct not only harmed the reputation of the fire department, it also violated a number of fundamental workplace policies, including the human rights policy. The grievor was dishonest in his dealings with the employer with regard to the misconduct. The grievance was dismissed.

The Employer submits that the Grievor did not plead guilty to the charge against him and that he does not therefore have that mitigating factor available to him.

The Union submits that the Grievor's conduct was off-duty conduct which was not significantly injurious to the reputation of the Employer.

Re: U.A.W., Local 195 v. Huron Steel Products Company Ltd.
(1964) 15 LAC 288

The Union further refers to the factors set out in *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l. Union, Local 9-670* [1967] OLAA No. 4 as quoted in the *Air Canada v. International Association of Machinists, Lodge 148* (1973), 5 LAC (2d) 7, at page 8:

> "If the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the company to show that:
>
> 1. The conduct of the grievor harms the company's reputation or product;
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> 2. The grievor's behaviour renders the employee unable to perform his duties satisfactorily;
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> 3. The grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him;
>
> 4. The grievor has been guilty of a serious breach of the criminal code and thus rendering his conduct injurious to the general reputation of the company and its employees;
>
> 5. Places difficulty in the way of the company properly carrying out its function of efficiently managing its works and efficiently directing its working force."

In *Alberta and Alberta Union of Provincial Employees (Morrison Grievance)* [1998] AGAA No. 28 (McFetridge), the arbitrator found that the grievor's off-duty conduct must be "wholly incompatible with the continuation of the employment relationship".

In *Morrison*, an employee helped a friend stage a robbery in order to obtain money to alleviate her friend's financial difficulties. The grievor was

discharged from her position as a careworker at a residential care facility. There was media coverage of the crime and the grievor's arrest, some of which named the employer. She was discharged on the basis that her conviction jeopardized the property and security of the employer and the clients who reside there and "places in jeopardy the public reputation of (the employer)".

The grievor pleaded guilty to the charges against her and was sentenced to a conditional discharge and probation. She had attempted suicide on several occasions and was on medical leave from the employer for some time. The arbitrator found that the grievor's conduct was not sufficiently connected to her employment and that "it is only work-related in the sense that her job entails an element of trust and her off-duty conduct raises issues with respect to her honesty and integrity." (Paragraph 29) In sentencing the grievor, the Court found that she was "not a bad person" and expressed the opinion that he "did not expect to see her back in Court". The arbitrator found that her conduct was an isolated incident totally out of character and not likely to be repeated.

In considering whether or not the employer's interest would be impaired by the continued employment of the grievor, the arbitrator found that "there was no evidence that her behaviour had or would cause anyone to refuse or be reluctant to work with her".

The arbitrator went on to assess whether it was reasonable for the employer to terminate the grievor's employment in order to protect its public image. He cited the principle from *Re Emergency Health Services*

Communication v. CUPE, Local 873, supra, that an arbitrator must be alive to any "excessive concern" by the employer with its public reputation, and to a "real" causal connection between the office and the employer's general business.

The grievance was dismissed, as the arbitrator found that the grievor's duties did not expose her to the temptation to steal, and adequate controls were in place to prevent it. As well, it was an isolated incident which was out of character for the grievor. A letter of reprimand was substituted (paragraph 42).

In *Re City of Port Moody and CUPE, Local 825* (supra), a 32-year employee was convicted of sexual assault and sentenced to one year in jail. The duties of the employee were as a utility maintenance worker in a unit of some 18 employees. His duties included service and repair of city utilities, emergency services to businesses, industry, schools and residences with regard to floods and maintaining walkways, ponds and irrigation. As the result of his duties, the grievor was, at times, required to enter into the residence of the public. There was evidence from the employer that some of the grievor's co-workers were reluctant to work with him, given the nature of his crime. There was some media coverage of the trial, although there was a publication ban on the grievor's name. The employer submitted that its reputation had been sullied by his conduct.

In dealing with that submission, the arbitrator found that there was no "objective evidence" that anyone outside the workforce had made concerns or objections known to the employer, notwithstanding the fact that there had been

comment in the media about the matter. Dealing with the reluctance of the co-workers to work with the grievor, Arbitrator Laing said this:

> "The employer argues this is a determining factor in support of their decision to terminate the grievor. I do not agree. The other employees are entitled to their personal views about the grievor and his conduct. If they do not want to work with him, that becomes a matter between them and the employer. It cannot be used as a reason for the employer to alleviate its responsibility towards the grievor. In our system of labour relations, the buck stops with the management and cannot be passed off to other employees to decide in accordance with their views of the grievor's criminal conduct, however sincerely those views are held. I cannot think of a more unjust work environment than one where decisions affecting the employability of workers is based on popularity. Only if there is reliable objective evidence that employees could be injured or harmed in some way by the grievor can their refusal to work with the grievor be considered as a proper factor in deciding on his continuing employment.

Arbitrator Laing went on to find that there was no nexus between the criminal activity of the grievor and his employment duties. In particular, the arbitrator considered the fact that the grievor would occasionally have to go into the public's home as part of his duties, and the controls put in place by the employer to deal with the anxiety of the co-workers and the interaction of the grievor with the public. All in all, the arbitrator found that there was not sufficient nexus between the grievor's duties and his criminal activity to warrant dismissal.

In *Re Borough of Scarborough and Scarborough Professional Firefighters Association, Local 626,* [1973] OLAA No. 73, arbitrator Brown dealt

with a grievance arising out of the theft of three tapes worth approximately $20.00 by the employee. The grievor pled guilty and was fined $75.00 (in 1973).

The employer submitted in that case that part of the duties of the employee was to inspect private homes and mercantile properties for the purpose of determining their fire safety. The employer submitted that it could no longer trust the grievor to act with integrity in the performance of his duties and that his termination was warranted. The arbitrator found that the degree of trust that the employee's duties entailed must be considered as well as his past record and the nature of the offence. In that case, the arbitrator found that the theft was of a relatively small amount, and that it had been an isolated incident. The grievor had 14 years seniority and a commendable employment record. He went on to say, at paragraph 18:

> "Also, the grievor's conviction, the fine imposed on him and the public humiliation which he has suffered, in my opinion, has been ample penalty for his crime. By further imposing the economic hardship entailed by discharging the grievor from his employment, the corporation has acted in an unduly severe and unwarranted punishment of the grievor. Moreover, the conviction in itself can reasonably be expected to act as a deterrent to the grievor and for that matter his colleagues, from engaging in any improper or unlawful activities whether on or off the job."

The grievance was allowed, and the grievor was reinstated with full compensation.

I have reviewed the many authorities cited to me by both parties. I do not feel the need to review each of them individually. The factors to be taken

into account in determining whether discipline is excessive are set out in *Millhaven Fibres* (supra).

Here, there is no direct link between the misconduct for which he was charged and his duties. However, the element of dishonesty in how he dealt with the discovery of the misconduct is disturbing. The Grievor accepts that the Employer feels it can no longer trust him, particularly to report accurately when he is required to do so. He says that it will never happen again and that he will work to build trust. There is no suggestion that he cannot be trusted to do his firefighting duties. There was no evidence at all as to his ability (or inability) to work with co-workers. I cannot draw any conclusions from that lack of evidence. As to the Employer's submission that his failure to plead guilty was an aggravating factor, I do not find that to be the case. He had the right to have the Crown prove the case against him, and it would not be appropriate to find that the exercise of that right results in a higher penalty in a workplace context.

The Grievor had a pristine work record for 11 years. The Employer admitted that he was a skilled firefighter. It appears, and I accept, that his misconduct was an isolated incident not likely to be repeated. The issue of his dishonesty is more difficult. The Employer urges me to look more deeply into the character of the Grievor, or lack thereof, because of his dishonesty. It is submitted that the dishonesty of the Grievor and resulting lack of trust by the Employer is a fundamental breach of the employment contract. But the Grievor is not in a fiduciary position that requires absolute trust. He does not work on his own in most situations. Nor do his duties typically expose him to the

temptation of greed. He is a firefighter of some experience and skill. He made some dreadful mistakes in this matter for which he has paid a heavy price. He has exhibited a flawed character, but character can be built or improved by our mistakes and how we deal with them. I do not fault the Employer for a lack of trust in the Grievor, and I expect that he will have to work very hard to restore that trust, but I cannot find that there is a sufficient nexus between the Grievor's misconduct and his duties to warrant termination.

This is not meant to condone the Grievor's conduct in any way. But the negative media attention, embarrassment and dishonor he has brought to himself are part of the penalty already imposed. I have considered that Judge Harris referred to the Grievor's loss of employment as a factor in his sentence. But it was only one factor amongst many. I agree with the Employer that the Grievor has not been as fulsome in his apology or his expression of remorse as he might have been. I find that to be an aggravating factor in terms of the discipline to be imposed in substitution for termination. I therefore reinstate the Grievor as of the date of this Award. He is not to receive pay, seniority or benefits from the date of termination to date of reinstatement. I remain seized of any issues arising from this Award.

KAREN F. NORDLINGER, Q.C.
ARBITRATOR