BRITISH COLUMBIA LABOUR RELATIONS BOARD

0715980 B.C. LTD.

(the "Employer")

-and-

UNITE HERE, LOCAL 40

(the "Union")

PANEL:	Leah Terai, Vice-Chair
APPEARANCES:	Donald J. Jordan, Q.C., for the Employer Michael J. Prokosh, for the Union
CASE NO.:	65242
DATE OF HEARING:	July 10, 2013
DATE OF DECISION:	August 15, 2013

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union alleges the Employer acted in breach of Section 54 of the *Labour Relations Code* (the "Code") by providing 9 days notice to the Union rather than the 60 days required by Section 54 and failed to meet with respect to the Employer's closure of its food and beverage departments and the layoff of employees. The Employer concedes it acted in breach of Section 54. At issue between the parties is the remedy for the breach. The Union seeks compensation for all employees and an order that the employees be made whole. The Union also seeks an order that the Employer produce all documents pertaining to the closure of the food and beverage departments and any future plans for the departments.

II. BACKGROUND

2 The parties submitted the following agreement:

> UNITE HERE Local 40 (the "Union") and Coast Discovery Inn & Marina (the "Employer") (collectively, the "Parties"), agree to the following terms regarding the hearing scheduled for July 10-11, 2013 at the BC Labour Relations Board (the "Board"):
>
> > 1) Per the Employer's March 8, 2013 submission, the Employer concedes that it has breached s. 54 of the *British Columbia Labour Relations Code* and "the Employer does not dispute the facts as related in the Union's application".
> >
> > 2) All of the attached documents throughout the 44 TABs (collective agreement in its entirety is one of the documents even though only the first page is included at Tab 1B) (collectively, the "Documents"), are admissible by way of agreement between the Parties, without a witness having to be called to the stand, subject to the following qualifications:
> >
> > > a. This agreement does not in any way amount to an agreement that any of the Documents is being admitted for the truth of its contents. The Agreement is intended to mean that the Parties agree that the Documents are admissible (subject to point 2)b) below), and either party is free to present arguments with respect to, among other things, what if any weight should be attached to any of the Documents.

b. The Union will be maintaining its arguments, that among other things, the duty to mitigate damages does not apply at all to this case. As such, with respect to any of the Documents which pertain to a potential duty to mitigate damages, the Parties agree that those documents may only be considered by the Board (should the Board decide they are relevant) if and only if the Board first determines that the duty to mitigate applies. That is, if the Board decides that the duty to mitigate does not apply, then despite the fact that the "mitigation documents" are "in the record", they are inadmissible and may not be considered by the Board.

3) Diane Palmer also goes by the name Diane deHaan.

4) The Parties agree that no witnesses will be called to the stand.

5) The Parties agree that the Documents form the entire evidentiary record in this proceeding; that is, no additional documents will be admitted into evidence.

6) The Union will be arguing, among other things, that all of the following people are affected employees:

a. Hans Zihlmann;
b. Joe McCormack;
c. Allen Folstrom;
d. Jenny (Hue Lingh) Phung;
e. Pat Third;
f. Dylan Hetu;
g. Pat Parsley;
h. Bob Croy;
i. Patty Fleming;
j. Cathy Fox;
k. Diane Palmer (deHaan);
l. Courtney Riel;
m. Jody Uren;
n. Michelle Davis;
o. Jennifer Renaas;
p. Jorja Hird;
q. Abby Morris;
r. Audrey Jones;
s. Cheryl Ruff;

t. Joanne Honsinger;
u. Michael Langille;
v. George Stawski; and
w. Jim Chew.

7) November and December are the busiest months of the year in the Employer's catering department.

8) There will not be any need for opening statements. At the start of the hearing, the Union will present its arguments, followed by the Employer's arguments in response and the Union's final reply arguments.

3 The facts contained in the Union's application (referenced in paragraph 1 of the above-noted agreement) are as follows:

> The Union is the bargaining agent for all of the approximately 50 employees at the Hotel. A copy of the Certification is attached as **Appendix A**. The parties are bound by the terms of the 2012-2015 collective agreement, (the "Collective Agreement") (**Appendix B**). At the center of this complaint [is] the closure of the Hotel's F & B Departments which consist of a restaurant, lounge, kitchen and catering. The Employer has also reduced the hours of employees, who are also covered by this application.
>
> On January 9, 2013, the owner of the Hotel, Mr. Sukhinjinder Bains, assembled the F & B Departments' 20 employees for a meeting in a room of the Hotel. He spread out a stack of identical unaddressed letters on a table and told the employees to each take one **(Appendix C)**. These letters stated:
>
> > It is with great sadness I regret to inform you that the Coast Discovery Inn Food and Beverage Departments will be closing as of Friday, January 18, 2013. Your position will be finished [as] of that date.
> >
> > Due to economic reasons, I can no longer afford to continue with this area of the Hotel…
>
> After the employees each took a letter, Mr. Bains individually approached several employees and told them that their jobs would be "OK" or words to that effect. In the following days, most employees of the F & B Departments received Records of Employment in the mail notifying them that they had been laid off. However, not all of the employees who received letters on January 9, 2013, have received Records of Employment. The Employer has left the job security of these employees in a precarious position.

On January 9, 2013, Mr. Bains also called Lorrie Dyer, Vice-President and Area Steward of the Union, to inform her that the F & B Departments would be closing. The Union received no other advanced notification. Mr. Bains also told Ms. Dyer that the Hotel would continue to serve a breakfast buffet, would cater events at the hotel, and that it would keep the lounge open without food service.

On January 11, 2013, Mr. Bains gave Ms. Dyer a list of employees who would be affected from the closure **(Appendix D)** (the "Affected Employees"). The Affected Employees worked in the kitchen, lounge, restaurant and catering departments. Missing from this list are George Stawski and Michael Langille, janitors who have had their hours reduced at the Hotel (also "Affected Employees"). Mr. Bains also told Ms. Dyer that the lounge would actually be closing. This was contrary to his assertion to Ms. Dyer on January 9, 2013, that it would remain open without food service. However, he stated that did not know what was going to happen to the F & B Departments in the future.

On January 18, 2013, the Hotel closed most of the operations under the F & B Departments. Nonetheless, the Union understands that several employees continue to work at the Hotel operating catering for events, and a breakfast buffet. On February 1, 2013, the Union filed a policy grievance alleging that remaining employees of the F & B Departments were being scheduled to perform such work without regard to their classifications. Currently, the Union is uncertain as to how many employees continue to work at the Hotel. Nevertheless, the Union understands and maintains that a majority of the employees in the F & B Departments have been completely laid off or have had their hours significantly reduced.

As a result of the Hotel's actions and the closure of the F & B Departments, approximately 22 employees are affected either through lay-off, reduced hours, or by being left with uncertain job security after having received the letters of January 9, but without yet having received a Record of Employment.

At no point has Mr. Bains discussed in good faith with Ms. Dyer any of the matters required by Section 54 of the *Code*, including the notice of layoff, which the Union submits was given improperly and without good faith discussions with the Union. The Union was prevented from engaging the Hotel in any serious discussions regarding an adjustment plan due to Mr. Bains' vague assertions regarding the future of the F & B departments and his quick moves toward closing the F & B Departments soon after making his vague assertions.

III. POSITIONS OF THE PARTIES

THE UNION

4 The Union submits the closure of the food and beverage departments of the Employer was a change that affected the terms, conditions and security of employment of a significant number of employees. It says the Employer was required under Section 54 of the Code to give notice to the Union at least 60 days before the closure of those departments. In this case the Employer provided only nine days notice. As noted in the agreement between the parties, the Employer concedes it has breached Section 54.

5 With respect to remedy, the Union submits the duty to mitigate does not apply at all in this case, due to the Employer's conduct in providing the purported notice and its failure to respond in any meaningful way to the Union's attempts to have an adjustment plan meeting pursuant to Section 54 of the Code.

6 The Union relies on *Pacific Pool Water Products Ltd.*, BCLRB No. B43/2000 ("*Pacific Pool 1*") where the Board noted "…the duty to mitigate may be balanced against the Employer's conduct in providing the notice required" (para. 61). The Union submits the Board found the principle of mitigation did not apply for a period of time due to the employer's conduct. The Union says the employer in that case failed to have an adjustment plan meeting with the union for some time after giving notice of the closure and the Board held the principle of mitigation did not apply until after the employer had an adjustment plan meeting with the union.

7 The Union notes the purpose of the notice under Section 54 is to provide an opportunity for the parties to explore alternatives to layoff and the Board has emphasized the importance of making reasonable proposals for an adjustment plan in good faith (*Pacific Pool 1*, paras. 34, 55, 56 and 59). The Union submits in order for a union or employees to know they are required to mitigate their damages, they must be secure in the knowledge that employment is no longer available. That certainty does not arise until after the parties have discussed reasonable proposals in good faith as required by Section 54.

8 The Union notes in *Pacific Pool Water Products Ltd.*, BCLRB No. B324/2000 ("*Pacific Pool 2*"), the Board found while the employees were not under a duty to mitigate for a period of time, the employer in that case had evidence of mitigation earnings from various employees. The Union submits the case at hand is distinguishable from the situation in *Pacific Pool 2* in that the Employer has not cooperated with the Union in having an adjustment plan meeting within the 60-day notice period, rather the Employer has gone to great lengths to avoid a meeting.

9 The Union says despite its numerous good faith attempts to arrange a meeting, the Employer has failed to engage in good faith discussions regarding an adjustment plan and the Union was deprived of an opportunity to discuss the closure in an effort to lessen its impact on the employees. The Union says the Employer has also avoided

discussions about the future of the food and beverage departments stating it does not know what will happen. The Union notes its representative attempted to schedule a meeting with the Employer five times prior to February 5, 2013 and then received an auto-reply by email which indicated the Employer was away until March 8, 2013. The Union submits the Employer has demonstrated a pattern of evasion toward the Union regarding Section 54 meetings. The Union says when the parties did meet on March 19, 2013, the Employer refused to discuss the layoffs or a majority of the issues arising from the closure of the departments; rather the Employer stated it was only interested in rooms and catering, not the restaurant and when asked, did not know what its plans were regarding the food and beverage departments.

10 The Union notes in *Pacific Pool 2* (at para. 22) and *The Brewster Healthcare Group Inc.*, BCLRB No. B219/2012, 218 C.L.R.B.R. (2d) 155 (at paras. 62 and 63), the Board stated a remedy for a breach of Section 54 could include an award of compensation to a union over and above wages to employees. It says in an arbitration award, *Jim Pattison Sign Co., a Division of Jim Pattison Industries Ltd. and International Brotherhood of Electrical Workers, Local 213*, Ministry No. A-134/05(a), [2006] B.C.C.A.A.A. No. 15 (Dorsey) ("*Jim Pattison*"), the arbitrator found that remedial compensation following a breach of Section 54 served a deterrent purpose (paras. 57 and 73). The Union says in the case at hand, it is not seeking damages over and above the payment of wages and benefits to the employees and any necessary make-whole payments, nor is it seeking punitive damages despite the Employer's egregious violation of its duties under Section 54 and its clear avoidance of good faith discussions. It submits:

> …Nonetheless, the Union has requested full compensation for the affected employees who have lost hours and who were denied the opportunity to have the Union engage in an adjustment plan meeting with the Employer as required by Section 54. As the Employer has deliberately avoided any good faith adjustment plan discussions with the Union, the Union respectfully submits that the principle of mitigation ought not to apply in these circumstances.

11 The Union submits in order to make the employees whole, the Board should use the hours worked in the preceding two months (November and December 2012) to determine how much the employees would have worked between January 9 and March 10, 2013 (the Section 54 notice period).

12 In the alternative, if the Board concludes the duty to mitigate does apply, it should only apply to the period March 1 to 10, 2013, the last 10 days of the 60-day period and the only amounts which should be deducted are those earnings from employment with this Employer (*Money's Mushrooms Ltd.*, BCLRB No. B82/2005, 110 C.L.R.B.R. (2d) 100 ("*Money's Mushrooms*") at paras. 49, 51 and 52).

13 The Union says some employees may have received severance pay pursuant to Article 17.08(a) of the Collective Agreement. It submits the principle of mitigation does not apply to those earnings (*Abbotsford Times, a Division of CanWest MediaWorks Publications Inc. Publications CanWest MediaWorks Inc.*, BCLRB No. B86/2009

("*Abbotsford Times*") at para. 14). Applying the test in *Abbotsford Times*, the Union submits that any of the affected employees who received severance pay and who would have received such pay in any event, should not have their severance pay deducted from a damages award (see also *Jim Pattison* at paras. 77-79).

14 The Union says in this case it is unclear to the affected employees whether or not they have been finally terminated or whether they may be called back to work. The Union has not been given the opportunity to discuss the matter of severance pay with the Employer as contemplated under Section 54. Accordingly, the Union submits the principle of mitigation ought not apply to any severance pay employees may have received.

15 In the further alternative, the Union says the employees made reasonable efforts to mitigate their damages. It reviews the circumstances of the individuals and notes all employees went to the North Island Employment Foundation Society to look for work. It says at that time of the year in Campbell River, there are few employment opportunities for hospitality workers as the golf clubs and resorts are still closed for the season.

THE EMPLOYER

16 The Employer submits the language of Section 54 does not provide for 60 days working notice or pay in lieu of notice. It submits the Union's characterization of the Employer's conduct as an "egregious violation" and its invitation to compare this Employer's conduct with conduct in other cases amounts to an invitation to punish, which the Board is not entitled to do under the Code. The Employer says the Board recognized this as the appropriate approach in *Convergys Customer Management Canada Inc.*, BCLRB No. B111/2003 (Leave for Reconsideration of BCLRB No. B62/2003), 90 C.L.R.B.R. (2d) 287, where it stated:

> The Board's remedial powers are not, however, absolute or without limits. Remedies must be compensatory, not punitive: *Skeena Cellulose, Inc.*, BCLRB No. B182/99 (Leave for Reconsideration of BCLRB No. B127/99). There must be a rational connection between a breach, its consequences and the remedy: *National Bank of Canada, supra*. The remedy must also be consistent with the purposes and objectives of the Code: *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369. (para. 43)

17 The Employer says the Union must prove a loss in order to obtain an order for damages, which are subject to avoidable losses, i.e., a duty to mitigate (*Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 ("*Michaels v. Red Deer College*"). In the absence of establishing a loss, the Employer says the Code does not provide the remedy sought in this case, which uses the nature of the Employer's breach to enhance the remedies available to an individual under Section 133(1)(d) of the Code.

18 The Employer submits Section 133(1)(d) confines the Board's remedial authority to determining the monetary value "of an injury or loss", i.e., compensatory damages.

19 The Employer submits damages which are not compensatory, that is, not directly referable to the express effect of an injury suffered by an individual, are punitive. The Employer submits as a statutory body with no inherent jurisdiction, the Board must be provided with specific statutory power in its enabling statute to impose a punitive remedy (S.M. Waddams, *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2012); Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008); Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis Butterworths, 2001)).

20 With respect to reliance on the broad purposeful authority provided in the Code, the Employer submits if the language of the statute is specific, the Board is confined to it and cannot use other provisions to override the specific language (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724). In the case at hand, the Employer submits the scope of Section 133(1)(d) cannot be enlarged by reference to a more general remedial provision of the Code.

21 The Employer submits examples of specific language which could achieve the result sought by the Union are contained in the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "Act"). For example Section 63(3)(b) of the Act provides for a combination of written notice and pay in lieu of notice. With respect to Section 64 of the Act, group terminations, Section 68(2) states the termination pay requirements apply whether or not the employee has obtained other employment or has in any other way realized or recovered any money for the notice period. The Employer submits there is no similar language with respect to Section 133(1)(d) of the Code.

22 The Employer submits the BC Supreme Court has recognized that the power to award damages which are not compensatory in nature must be specifically expressed (*Carrier Lumber Ltd. v. Joe Martin & Sons Ltd.*, 2003 BCSC 1038 ("*Carrier Lumber*"); *Lee v. Gao*, 65 B.C.L.R. (2d) 294, [1992] B.C.J. No. 407 (S.C.)). The Court noted in *Carrier Lumber* the following excerpt from *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, [1996] S.C.J. No. 14:

> It must be remembered that applying a standard of patent reasonableness does not give a Board free rein to impose any remedy it wishes. For example, if a Court determined that the remedy imposed by the Board bore no relation to the breach found, or **was purely punitive in nature**...**or was adverse to the policy objectives of the *Canada Labour Code* the order could be properly found to be patently unreasonable**. (*Carrier Lumber*, para. 42, emphasis in original)

23 In *Carrier Lumber*, the Court said:

> The respondents in these proceedings, and the arbitrators in the decision they made, have relied heavily on the fact that there

> is no restriction in the *Act*, and have relied heavily on the particular wording of s. 5 of the *Regulation* and what they see to be the incorporation of the *Commercial Arbitration Act* into the *Regulation*.
>
> In so doing, they embarked, in my respectful opinion, on the wrong analysis. The analysis ought to have been centered on the express powers given under the legislation. The arbitrators ought not to have gone further if the power was not expressly given in the enabling legislation or regulation. ...
>
> It is also necessary to consider the differences between compensatory damages and punitive damages. Punitive damages are punishment for the defendant, not compensation for the plaintiff. Few tribunals are given the power to punish. ... (paras. 59-61)

24 The Employer submits there are conflicting decisions of the Board as to remedies available under Section 54 of the Code. Addressing *Pacific Pool 1*, the Employer says the remedy provided for in Section 133(1)(d) incorporates the principles of mitigation. The Board cannot 'relieve' the individual from a duty to mitigate. Further, the Employer submits in *Pacific Pool 1*, the Board appears to find that a duty to mitigate does not arise until after Section 54 discussions have taken place. The Employer submits if the contravention occurs when an employer fails to give notice, that is when the injury occurs, not at a later point as *Pacific Pool 1* suggests. The Employer submits with respect to the calculation of damages, the approach taken in *Abbotsford Times* is the correct approach.

25 The Employer submits that damages ought to be calculated using January, February and March of the preceding two years. It submits in January and February, there is very little work in comparison to November and December, which has been agreed between the parties to be busy months for catering. The Employer submits November and December shifts cannot be relied on in calculating a loss for the months of January, February and March.

26 With respect to the Union seeking disclosure of documents and in particular documents relating to future plans, the Employer submits Section 54 provides that the discussions may include certain topics. There is no obligation to discuss any particular item.

27 In response, the Union disagrees that there is no obligation on the Employer under Section 54 with respect to the topics to be discussed. It submits under Section 54, documents are properly disclosable. It notes in the Collective Agreement there is an article providing for recall rights of nine months, therefore the documents are relevant to the employees affected.

IV. ANALYSIS AND DECISION

28 Section 54 of the Code provides as follows:

> 54 (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,
>
> (a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and
>
> (b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:
>
> (i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;
>
> (ii) human resource planning and employee counselling and retraining;
>
> (iii) notice of termination;
>
> (iv) severance pay;
>
> (v) entitlement to pension and other benefits including early retirement benefits;
>
> (vi) a bipartite process for overseeing the implementation of the adjustment plan.
>
> (2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.
>
> (3) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of the *Employment Standards Act* from the application of section 64 of that Act.

29 On January 9, 2013, the Employer gave notice to the Union and to the affected employees that its food and beverage departments would be closing on January 18, 2013. The Employer did not provide 60 days notice to the Union in accordance with Section 54(1)(a); it provided 9 days notice. After experiencing difficulty in scheduling a meeting with the Employer to discuss an adjustment plan, the Union met with the Employer on March 19, 2013. The Union says no meaningful discussion with respect to matters contemplated under Section 54 took place at the meeting. The Employer does not dispute these facts and concedes it has breached Section 54 of the Code. In the circumstances, I find the Employer has acted in breach of Section 54(1)(a) of the Code by failing to provide at least 60 days notice to the Union before the change was to be effected. I also find after notice was given, the Employer did not meet with the Union, in good faith, and endeavour to develop an adjustment plan as required under Section 54(1)(b).

30 The parties are unable to agree on the remedy that flows to the employees affected by the Employer's failure to provide 60 days notice as required by Section 54(1)(a) and the failure to meet in good faith with the Union as required by Section 54(1)(b).

31 The Union's position is the duty to mitigate does not apply at all in this case due to the Employer's conduct in providing the notice and the Employer's failure to respond in a meaningful way to the Union's attempts to have an adjustment plan meeting pursuant to Section 54. The issue is therefore not whether a duty to mitigate applies generally, but rather, whether it ought to be applied in the circumstances of this case with respect to providing the affected employees with a remedy for a breach of Section 54 of the Code.

32 The policy and principles of Section 54 of the Code were described in *University of British Columbia*, BCLRB No. B371/94, 26 C.L.R.B.R. (2d) 33 ("*UBC*") as follows:

> The section requires the parties to engage in bargaining on a wide range of issues. The section contemplates a cooperative model of labour relations, which recognizes the valuable contribution which unions and employees may make to the decision-making processes which affect their working lives. The section is a companion to Section 53 and is in furtherance of a purpose of the Code which is to "encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity"... . (p. 53)

33 In *UBC* the Board dealt with the question of what remedy should be granted for a failure to comply with the requirements of Section 54 of the Code. With respect to remedies for employees, the Board held:

> The employees at the Faculty Club were entitled to at least 60 days' notice before the change affecting their terms and employment occurred. I have found the change occurred June 3rd

> and that no notice was given. It is my understanding that no monetary loss was suffered by any employee by reason of this insufficient notice as no employee was laid off by reason of the closure prior to August 9, 1994. If the facts had been otherwise I would have ordered the Employer to make whole any employee who had suffered damages by reason of the Employer's failure to provide notice. (p. 65)

34 In the case at hand, notice was provided on January 9, 2013, the food and beverage departments were closed on January 18, 2013, the Union and Employer met on March 19, 2013, and the parties did not agree on an adjustment plan. Sixty days notice would have ended on March 10, 2013.

35 In *Pacific Pool 2*, the Board said the following with respect to its decision in *Pacific Pool 1*:

> ...principles of mitigation were of limited application in that they did not apply for the period of November 2, 1998 to November 23, 1998. By virtue of the Employer's failure to provide the required notice, employees lost a valuable right arising under Section 54, i.e. the right to be assured of income for a period of two months. The conclusion that the principles of mitigation did not apply for the period of November 2, 1998 to November 28, 1998 means employees were under no obligation or duty to take steps to reduce their losses or to establish what steps they had taken in order to be entitled to damages to compensate for wages they would have otherwise earned had proper notice been provided. (para. 25)

36 In *Abbotsford Times*, the Board stated:

> In my view Pacific Pool No. 1 stands for the proposition that while principles of mitigation are generally applicable to a claim for Section 54 damages, in certain circumstances employees claiming such damages may be relieved of the duty to mitigate... . (para. 9)

37 Following *Abbotsford Times*, principles of mitigation generally apply to a claim for Section 54 damages. There is a distinction between the duty to mitigate and the result of the mitigation (*Neilson v. Vancouver Hockey Club Ltd.*, 51 D.L.R. (4th) 40, [1988] B.C.J. No. 584 (B.C.C.A.) (paras. 10-14)). Even if an employee was not required to mitigate, if the individual actually mitigated some of his or her loss, that would be taken into account. As stated in *Abbotsford Times*:

> ...If the Employer is able to establish that the Production Work Employees did mitigate some or all of their losses (regardless of whether they were required to), its obligation to pay Section 54 damages will be reduced accordingly. (para. 13)

38 In this case, the Employer gave notice on January 9, 2013. The letters said the departments would be closing and their positions would be finished as of January 18, 2013. However, it also told several employees their jobs would be 'okay' or words to

that effect. In the following days, most but not all employees received records of employment which indicated they had been laid off. On January 9, 2013 when it gave notice, the Employer told the Union it would continue to serve a breakfast buffet, cater events, and keep the lounge open without food service. On January 11, 2013 the Employer gave the Union a list of employees affected by the closure but also told the Union the lounge would be closing. On January 18, 2013 the Employer closed most of its operations under the food and beverage departments but several employees continued to work operating catering for events and a breakfast buffet. The Union attempted to schedule a meeting with the Employer before February 5, 2013 but it received an email auto-reply that the Employer was away until March 8, 2013. The 60-days notice ended March 10, 2013. The Union and Employer met on March 19, 2013. The meeting did not result in an adjustment plan.

39 These circumstances arise in the context of the Employer's breach of its obligations under Section 54 of the Code which provides for 60 days notice before a change affecting the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies is effected and requires a union and employer to engage in discussions.

40 In the circumstances, keeping in mind the obligations and purpose of Section 54, if the employees actually mitigated some or all of their losses, the Section 54 damages will be reduced accordingly. However, because of the circumstances of this case, I find the employees are not required to demonstrate any other efforts to reduce their losses.

41 With respect to severance that has been paid to employees, I find that the approach described in *Abbotsford Times* applies:

> One final matter requires consideration. *Pacific Pool No. 2* appears to approve the deduction from damages for failure to give sufficient Section 54 notice, of severance monies paid to employees who had been laid off. In my view, since the purpose of an award of Section 54 damages is to ensure an employee is returned to the position he or she would have been in had sufficient Section 54 notice been given, the question of whether any severance monies paid should be deducted from such an award should depend on the answer to the following question: 'If sufficient Section 54 notice had been given but subsequent negotiations did not produce an adjustment plan that resulted in a withdrawal of the layoff notices, would employees who were then laid off be entitled to severance pay under the terms of the collective agreement?' If the answer to that question is 'yes' despite the fact that Section 54 notice had earlier been given, deducting severance pay from an award of damages for failing to give any or sufficient Section 54 notice would not put the laid off employees in the position they would have been in had Section 54 not been breached. (para. 14)

42 In assessing what the affected employees would have worked had 60 days notice been provided, the Union submits the calculation should be based on what hours were worked during the preceding two months (November and December 2012) using the remittance forms submitted by the Employer. The Employer submits November and December 2012 should not be used as those were the busiest months for catering. It submits the calculation should be based on January, February and March of the preceding two years.

43 The purpose of the remedial powers in the Code is to put the injured party, as far as possible, in the place he or she might otherwise have been had the Code not been violated. I conclude that in order to be consistent with this purpose, the calculation should not be based on what the employees worked in November and December 2012 as those are the busiest months for catering and would not be reflective of what the employees would have worked in January, February and March 2013. I find it is appropriate for the parties to use the months of January, February and March of the preceding year, 2012, as a means to assess what would place the affected employees in the place he or she might have been had the Code not been violated.

44 Having determined the primary issues of whether mitigation principles apply and the time frame (January, February and March 2012) to use in calculating damages, the particular circumstances of the individual employees and the calculation of the loss or injury they have suffered as a result of the change being affected without the full 60 days notice must now be considered. The evidence indicates some employees resigned, some received severance pay, some were on medical leave, and another was on maternity leave. In light of my determinations above, I will leave it to the parties to address the individual amounts owing. If the parties are unable to agree on the quantum owed to certain individuals, they may provide further submissions in light of this decision.

45 I turn now to the remedy for the Employer's breach of Section 54(1)(b). The Union seeks an order that the Employer disclose documents including any plans for the future use of its food and beverage departments. It says the documents regarding future use are relevant to Section 54 discussions because there is a nine-month recall provision in the Collective Agreement. Section 54(1)(b) describes what may be discussed, however there is no obligation on the parties to achieve an adjustment plan as a result of the process. I therefore decline to make any order that the Employer produce information or documents including plans for future use. However, the parties may still be able to discuss outstanding issues relating to the closure of the food and beverage departments. Accordingly, I direct the Employer to meet with the Union, if the Union requests it to do so; the meeting to take place within 20 days from the date of this decision and endeavour in good faith to develop an adjustment plan.

V. CONCLUSION

46 I declare the Employer acted in breach of Section 54(1)(a) of the Code in that it did not give notice to the Union at least 60 days before the change was effected.

47 I declare the Employer acted in breach of Section 54(1)(b) of the Code in that, after notice had been given, it did not meet, in good faith, and endeavour to develop an adjustment plan.

48 I order the Employer to pay to the employees affected by the breach of Section 54(1)(a) wages and other monetary benefits as set out in the Collective Agreement for the period January 19, 2013 up to and including March 10, 2013, using January, February and March 2012 as a basis for the calculation, and taking into account the actual mitigation. The amounts payable to employees are subject to statutory deductions. Severance payments are not to be considered in these calculations.

49 I direct the Employer to meet with the Union, if the Union requests a meeting; the meeting to take place within 20 days from the date of this decision.

50 I will remain seized should there be any disputes concerning the implementation of this decision.

LABOUR RELATIONS BOARD

"LEAH TERAI"

LEAH TERAI
VICE-CHAIR