LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

UNIFOR LOCAL 467

UNION

UNITE HERE LOCAL 40

EMPLOYER

(Re: Larry Jandu – Is Evidence Related to Harassment Grievance Admissible?)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Jonathan Hanvelt
Representing the Employer:	Leo McGrady, Q.C.
Date of Hearing:	July 25, 2016
Date of Decision:	August 4, 2016

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Contents

1. Indefinite, Non-Disciplinary Suspension Dispute and Jurisdiction

[1] The employer imposed an indefinite, non-disciplinary suspension on full-time Union Representative Larry Jandu after he was approved medically fit to return to work. The medical approval was communicated by union counsel to employer counsel in a letter dated December 1, 2015. The suspension continues to date.

[2] The suspension was foreshadowed by employer allegations in a letter to Mr. Jandu on April 15, 2015 while he was on medical leave and subsequent discussions, including without prejudice discussions attended by counsel on September 15, 2015.

[3] The employer says it has not permitted Mr. Jandu to return to work because of events in his employment with other trade unions before October 15, 2013, the date he began work; his failure to disclose those events at the time of hire; and his failure to provide a satisfactory explanation for those events after April 15, 2015.

[4] The union and employer agreed to refer the dispute over this suspension to arbitration. I was notified of my appointment April 6, 2016. Despite the absence of a written grievance, the union and employer agree I am properly appointed as arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to make a final and binding decision and, if necessary, order a remedy.

[5] The arbitration hearing is scheduled for five dates in August and September. The employer has agreed to proceed first in the presentation of evidence. This is the third decision on preliminary employer motions. The recitations of events in this and the previous decisions are based on submissions by counsel and documents referred to in submissions.

[6] The employer seeks to exclude evidence of incidents the union included in its May 2, 2016 statement of particulars. They relate to a March 6, 2015 grievance alleging

harassment and inappropriate workplace behaviour by Robert Demand, President of Unite Here Local 40, against Mr. Jandu.

2. Past Employment as Union Organizer and BCGEU Lawsuit (2005 – 2013)

[7] Between November 14, 2005 and December 31, 2010, Mr. Jandu was employed on a series of term contracts as an Organizer with the British Columbia Government and Service Employees' Union. On February 9, 2010, he signed a confidentiality and proprietary information agreement with the BCGEU. In late 2010, before his last term contract expired, he was engaged in a campaign to organize a group of unrepresented employees.

[8] On August 9, 2011, the BCGEU wrote Mr. Jandu that it understood he was pursuing organizing opportunities with other unions; reminded him their confidentiality agreement continues after employment; and enclosed a copy of the agreement.

[9] Mr. Jandu was hired as a Union Representative by the Service Employees' International Union Local 1 Canada, now SEIU Healthcare. In October 2011, the BCGEU commenced a civil claim against Mr. Jandu and SEIU Healthcare seeking damages for misuse of confidential information by Mr. Jandu in an organizing drive for the same group of unrepresented employees he had been trying to organize for the BCGEU in 2010.

[10] The vigorously contested claim, which included examination for discovery of Mr. Jandu and an SEIU employee, was resolved on confidential terms in a settlement release signed by the BCGEU on July 23, 2013. A consent dismissal order without costs to any party dated September 25, 2013 concluded the lawsuit.

3. Hiring, Lawsuit Knowledge and Alleged Third Party Corroboration (2013)

[11] The employer advertised a temporary, full-time position for a Union Representative/Organizer. Applications were to be submitted to Mr. Demand by September 5, 2013. Coincidentally, Mr. Jandu approached Mr. Demand looking for employment. Mr. Demand interviewed him in mid-September 2013.

[12] The union says: "In that interview, Mr. Jandu stated clearly and immediately he did not want to do organizing work and was only interested in arbitrations and

bargaining. Mr. Demand agreed his work would be limited to arbitrations and bargaining."[1]

[13] The union says Mr. Jandu openly discussed his past employment; disclosed the BCGEU lawsuit; and provided three references, the SEIU Healthcare Director examined for discovery in the lawsuit, a BCGEU Organizer and a former B.C. Federation of Labour Director of Organizing. The union says: "Each of these references was well aware of the lawsuit, as were many individuals in the labour community. Mr. Demand determined not to contact any of Mr. Jandu's references."[2]

[14] The employer says there was no disclosure or discussion about the lawsuit during the interview and Mr. Demand had no knowledge of the lawsuit until March 2015.

[15] What was said during the interview and what Mr. Demand knew at the time of hiring Mr. Jandu emerged as a central issue in this suspension dispute in discussions between the union and employer and their counsel.

[16] In the December 1, 2015 letter informing the employer Mr. Jandu was medically approved to return to work union counsel wrote: "… there is third party corroboration of the fact Mr. Demand was aware of the lawsuit at the time he hired Mr. Jandu." On December 9, 2015, employer counsel wrote union counsel, in part, as follows:

> In our December 3 conversation, you mentioned that the real issue was whether or not Larry omitted key information or provided misleading information at the interview. You stated that he had made the disclosure and you suggested perhaps Mr. Demand had simply forgotten. Our response is very simple. If Mr. Jandu had made disclosure of these events at the time of the hiring, he simply would not have been hired.
>
> You also asked what obligation Larry had to disclose the circumstances of the lawsuit. A prospective employee during a hiring interview has an obligation not to mislead and an obligation of candour. In the course of the conversation at several points, Larry indicated that his relationship with the BCGEU was positive. Early this year my client found out quite by accident that simply was not true - that he had been sued by them in British Columbia Supreme Court.
>
> To repeat our request of July 28, 2015, we ask Mr. Jandu to agree to a limited waiver of any privacy rights with respect to the subject matter of the lawsuit so that his explanation can be verified by the BCGEU.
>
> If the explanation above is provided and is satisfactory, and is verified by the BCGEU, we will agree to distribute a mutually agreeable letter to other members of the staff of Local 40 explaining these events in a way that vindicates Mr. Jandu. I understand he has returned to health now, and so we would then agree

[1] Union Letter of Particulars, May 2, 2016, ¶ 1
[2] Union Particulars, May 2, 2016, ¶ 4

> to his return to his position. If he in fact does need an accommodated return, we would negotiate that with him and or his union representative.

[17] There was a stalemate. The union was saying Mr. Jandu had disclosed to Mr. Demand everything the employer needed to know at the time of hiring. If Mr. Demand had contacted the references supplied, he would have obtained any other relevant information. The employer was saying Mr. Jandu had not disclosed the lawsuit and had misrepresented his relationship with the BCGEU.

[18] Through a summons issued April 22, 2016, the employer obtained access to BCGEU documents including the confidential settlement release not in the court file. The employer subsequently asserted:

> In fact, contrary to what Mr. Jandu told Mr. Demand during the job interview on September 15, 2013, he did not leave the BCGEU on a point of principle. Rather BCGEU made a unilateral decision in January and/or February 2011 not to recall him to the Organizing department.[3]

[19] The union learned the employer had this access at a May 9, 2016 hearing on prehearing disclosure applications. It heard from the employer that: "False statements made by Mr. Jandu during his interview with Mr. Demand about the reasons for him leaving the employment of BCGEU are relevant to this case."[4] Building on this and, perhaps, with the benefit of having read the BCGEU documents, the employer sought an order that the union disclose all documents relating to the end of Mr. Jandu's employment with the BCGEU.

[20] I determined the documents the employer sought are potentially relevant to the issue of alleged falsehood during the interview and credibility. On the condition the employer discloses to the union copies of all documents it obtained from the BCGEU, I ordered the union to disclose to the employer all other documents relating to the reasons for Mr. Jandu's departure from the BCGEU.

[21] These orders were made because of the central importance in this dispute of what Mr. Jandu said and what Mr. Demand knew about the lawsuit in September and October 2013.

[22] Although the employer was emphasizing the relevance and seriousness of allegations in the lawsuit, which the union objected to the employer relitigating, no ruling

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[3] Employer Email, May 4, 2016
[4] Employer Letter, May 6, 2016, p. 1

has been made on the relevance or admissibility of evidence about the claims and counterclaims in the pleadings in the lawsuit or any statements during examination for discovery.

[23] On June 2, 2016, I allowed an employer motion for prehearing disclosure related to the alleged third party corroboration of what Mr. Demand knew about the lawsuit in 2013. I ordered as follows:

> Therefore, pursuant to section 92(1)(c) of the *Labour Relations Code*, I order the union to provide to the employer the following particulars;
>
> 1. The name(s) of the third party;
> 2. The date(s) of the event(s) witnessed
> 3. The place(s) where the event(s) occurred;
> 4. The name(s) of the person(s) present at the event(s); and
> 5. The substance of what was said by whom at the event(s);
>
> I further order that any documents in the possession or control of the union relating to or created following the event(s) are to be disclosed to the employer.
>
> The union seeks a delay in provision of particulars and disclosure of any document to a date closer to the first day of hearing. My understanding is that the third party will not willingly agree to testify. The union seeks to limit the time during which the employer has knowledge of the identity of the third party.
>
> This person should be made aware he or she has the protection of section 5 of the *Labour Relations Code*.
>
> **5.** (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person,
>
> (b) threaten dismissal of or otherwise threaten a person,
>
> (c) discriminate against or threaten to discriminate against a person with respect to employment or a term or condition of employment or membership in a trade union, or
>
> (d) intimidate or coerce or impose a pecuniary or other penalty on a person,
>
> because of a belief that the person may testify in a proceeding under this Code or because the person has made or is about to make a disclosure that may be required of the person in a proceeding under this Code or because the person has made an application, filed a complaint or otherwise exercised a right conferred under this Code or because the person has participated or is about to participate in a proceeding under this Code.
>
> In addition, this person should know counsel have responsibilities to inform their clients of this protection.
>
> Further, as custodian of the integrity of this arbitration process, I assert jurisdiction as part of this arbitration to hear and finally decide any complaint the third party has that he or she has suffered any retaliation from anyone as a consequence of this decision.
>
> I order the union to provide particulars and disclose any documents to the employer no later than June 10, 2016. This will allow the union time to prepare

> particulars and copy any documents. It will also allow the union time to provide a copy of this decision to the third party.[5]

[24] The union alleges Mr. Demand told a colleague at the employer's office in September 2013 that he intended to hire Mr. Jandu and that Mr. Demand said Mr. Jandu disclosed the existence of the BCGEU lawsuit during the hiring interview. Like the interview, only two persons were present for this conversation.

4. Ongoing Harassment Grievance and Particulars in This Dispute (2015)

[25] The union alleges that between October 2013 and September 2014, Mr. Jandu worked diligently; the value of his work was recognized by Mr. Demand and colleagues; and he had discussions with Mr. Demand about increasing his wages.

[26] In September 2014, Mr. Jandu joined the Unifor Local 467 collective bargaining committee. The collective agreement between Unifor Local 467 and the employer was subsequently renewed for the term September 1, 2012 to August 31, 2016. The union alleges and the employer denies Mr. Demand's tone in collective bargaining changed for the worse after Mr. Jandu joined the committee. The Memorandum of Settlement includes the following:

> The Union and Employer agree to a salary adjustment effective September 1, 2014, of Larry Jandu's wage to $50,000 per year. Further the Parties agree to non-binding mediation as a means of settling the outstanding Unifor proposal on a wage adjustment for Larry Jandu. The parties agree to proceed to mediation within 90 days of ratification to consider the question of increasing the amount of the adjustment to a maximum of $60,000 per year.

[27] The union alleges Mr. Demand's demeanour toward Mr. Jandu away from the collective bargaining table changed and became the basis of a harassment and inappropriate workplace behaviour grievance in March 2015.

[28] The employer's initial response was these allegations are irrelevant to the issues "or as being part of the freshly embellished harassment grievance, which had been withdrawn and resolved, and which we had agreed could not be joined with this arbitration except by consent."[6] The employer's later response was: "These allegations are simply untrue."[7]

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[5] Decision Letter, June 2, 2016, p. 3
[6] Employer Email May 2, 2016
[7] Employer Letter May 6, 2016, p. 3

[29] The union and employer's statements of particulars have differing accounts of interactions between Mr. Demand and Mr. Jandu on September 17, 2014; September 24, 2014; October 30, 2014; December 15, 2014; February 11, 2015; and February 18, 2015.

[30] Mr. Jandu took medical leave after he visited his physician on February 25, 2015.

[31] At an unspecified time, Mr. Jandu filed an unsafe workplace complaint with WorkSafeBC. At the May 9, 2016 hearing, the union agreed to make its best efforts to obtain and disclose to the employer a copy of this complaint and WorkSafeBC directions referred to in its statement of particulars. On May 16th, the union informed: "Mr. Jandu has made a request to the Freedom of Information department but has not received a response. We will provide a copy of the complaint and Worksafe directions upon receipt."[8]

[32] On March 6, 2015, the union filed a grievance that Mr. Demand's interactions with Mr. Jandu constituted harassment and inappropriate workplace behaviour. The union said the incidents that made Mr. Jandu feel "threatened and uncomfortable will be identified" at a meeting which the union sought to air and discuss concerns and to find a way to move forward.[9]

[33] On March 13th, Unifor National Representative Gavin Davies met with Mr. Demand and David Klainbaum, Unite Here Local 40 Organizing Director.[10]

[34] On March 19th, Mr. Davies, Mr. Jandu, who was on medical leave, and Mr. Demand met. Concerns were aired and a course of action for the future was discussed and agreed. Mr. Jandu was to return to work on a graduated basis.

[35] Mr. Jandu returned to work Monday, March 23rd and met with Mr. Demand. He worked until mid-day, March 26th and subsequently took medical leave.[11]

[36] On April 15th, Mr. Demand wrote Mr. Davies that the employer was barring Mr. Jandu from access to any employer premises, remote access to employer computers and any Local 40 certified units. "We request that he immediately return the union office

[8] Union Email May 16, 2016. This relates to paragraph 13 of the union's May 2, 2016 statement of particulars.
[9] Union Email March 6, 2015
[10] Employer Letter May 6, 2016, p. 5
[11] Employer Letter May 6, 2016, p. 5

keys, the parking fob, parking pass, and Union laptop." The reasons for this action were stated as follows:

> You will find attached the following BC Supreme Court filings relating to a civil case that appears to have remained active until a relatively short time before Larry's application for the position with Local 40. These pleadings were provided to us on April 9, 2015 by our legal counsel from public records which we only became aware of in the past week. …
>
> The issues of trust and confidence were raised with Larry explicitly and in detail during his 2013 interview and he was advised that it was of particular concern in his case because he had been working with two unions - the SEIU and the BCGEU - who in the past had engaged in raiding UNITE HERE certifications. Despite this he failed to ever disclose the fact that he and the SEIU had recently been defendants in a civil claim filed by BCGEU, which accused him of violating his written commitment to treat certain information as confidential. The allegation is that he used confidential employee contact information obtained when he was organizing on behalf of BCGEU to successfully organize that same unit for SEIU Local 1 after he had completed his term of employment with the BCGEU.
>
> We acknowledge that he has denied these allegations in his response to the claim. But given the gravity of the allegations, and given the centrality of the allegations to the duties he was to be required to perform with Local 40, he had an obligation to disclose the dispute and to offer whatever explanations he could to Local 40 before the decision was made to hire him.
>
> At this preliminary stage of our investigation, these omissions appear to constitute serious omissions of key details in your job application. We wish to meet with you and offer you an opportunity to explain them. I am available this Friday morning, April 17th to meet. Please let me know if this date works. …
>
> We are mindful of the fact that he is on sick leave and absent from work, but we consider these matters to be of such urgency that they require us to adopt this course of action.

[37] Mr. Davies replied April 21st recounting the resolution of the workplace harassment and inappropriate behaviour allegations discussed on March 19th and that: "With the commitment that was made by you the Union agreed that the remedy we were seeking for our grievance was achieved and as such the grievance was withdrawn."

[38] The union alleged there had been continuing harassment of Mr. Jandu after he returned to work and after he resumed medical leave, which included inappropriate employer communications in the workplace and actions, such as changing locks. Mr. Davies wrote:

> In light of the most recent actions by the Employer the Union is withdrawing the settlement of the previous grievance. We respectfully submit the most recent actions to be included in the complaint. ...
>
> We are suggesting an investigation and recommendations by an independent third party. The Union is proposing Joan Gordon.

He wrote further:

> The letter that was issued to Brother Jandu insinuates that he had not disclosed allegations from 2011 to the Employer during the interview process and that in its view it is a serious breach of trust. We are of the opinion that this was disclosed to the employer during the interview process and that they were more than aware that the proceedings were dismissed in September of 2013.

[39] Mr. Demand replied on April 28th, in part, as follows:

> My recollection of our meeting with Larry Jandu differs significantly from the version set out in your letter. However there does not appear to be much purpose in having a protracted exchange over that issue at this point in time, although our differences may arise again in the near future depending on how this matter unfolds. …
>
> At the moment we have some very serious unanswered allegations that go to the core issue of our ability to trust Larry. On legal advice we took the minimum necessary steps to protect confidential and private information that might otherwise be accessible to Larry until the matter had been fully investigated.
>
> … As a matter of common sense we were required to inform our staff as to the reasons why we were changing the locks to the office. They were told the minimum possible, and were told nothing beyond what was publicly available in the pleadings.
>
> We agree Joan Gordon is a suitable person to conduct an investigation and make recommendations. However we are not agreeable to appointing her at this point in time. An agreement to appoint an independent investigator into allegations of harassment (with which we strongly disagree), is simply premature, when there is a much more fundamental issue being investigated – namely the accuracy or otherwise of the allegations in the pleadings.

[40] On July 28, 2015, employer counsel wrote union counsel that the harassment grievance had been withdrawn and "… the facts on which it was based cannot be relied on a second time. If there are fresh allegations, would you please provide particulars so we can respond properly?" On December 22nd, employer counsel wrote that the employer will "… argue the harassment matter was settled, and cannot be the subject of a second grievance."[12]

[41] Union counsel replied the union was proceeding to arbitration on the suspension.

> We understand the positions you are taking but will proceed to arbitration. As I have said, our position is the settlement documents and the opinions of any particular members of the BCGEU are immaterial to the matter at hand, which is Mr. Jandu's alleged dishonesty in the interview. We are content to have an arbitrator determine the documents' relevance and whether it is appropriate to compromise the privacy interests of the SEIU, the BCGEU, and Mr. Jandu.[13]

[12] Email December 22, 2015
[13] Email January 22, 2016

[42] Employer counsel's response on February 3rd was, in part, that: "The harassment grievance has been unconditionally settled and cannot be revived."[14] Alternatively, separate grievances cannot be joined without consent and the employer does not consent to another grievance being joined with the suspension dispute.

[43] Against this background, the union statement of particulars[15] recites incidents from September 2014 to after Mr. Jandu resumed medical leave in March 2015. Employer counsel immediately informed union counsel the employer would object to some of these particulars "…as being part of the freshly embellished harassment grievance, which had been withdrawn and resolved, and which we had agreed could not be joined with this arbitration except by consent. In addition, much is being raised for the first time, and has never been raised with my client or anyone in Local 40."[16]

[44] In subsequent correspondence, the employer replied to the union's statement of particulars with requests for further particulars and provided its particulars of the incidents.[17] The union responded with further particulars.[18] The employer replied the new and "freshly embellished and expanded" particulars were untimely. To the extent they were not disclosed prior to the settlement of the grievance the union was engaging in untimely, serial litigation. It was an abuse of process to raise them in this dispute and an attempt to join two grievances without consent.[19]

[45] Although the employer says many or most of the particularized incidents on September 17, 2014; September 24, 2014; October 30, 2014; December 15, 2014; February 11, 2015; and February 18, 2015 are new or fresh allegations, the union says all the incidents were raised in the March 6, 2015 grievance. It says it is unaware of any other incident discussed with Mr. Demand on March 19th.

[46] It is evidence of these incidents the employer seeks to have excluded from the upcoming hearing.

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[14] Email February 3, 2016
[15] Union Letter of Particulars, May 2, 2016, ¶ 9 - 13
[16] Email May 2, 2016
[17] Employer Letter May 6, 2016
[18] Union Letter May 16, 2016
[19] Employer Letter May 18, 2016

5. Employer and Union Submissions

[47] The employer submits it heard for the first time some of the allegations in the union's statement of particulars, which were not raised before or at the March 19, 2015 meeting and ought not to be raised now. All incidents prior to March 19th whether known or not or raised or not are covered by the settlement.

[48] The employer submits the union cannot unilaterally revive a settled grievance and there is no agreement to reopen the settlement or the matters that gave rise to the grievance and settlement. Mr. Demand's letter of April 28th was not an agreement to set aside the settlement. It was an acknowledgement that allegations based on events since the March 19th meeting were appropriate for investigation and recommendation but not at this time.

[49] The employer submits the incidents predating the March 19, 2015 grievance meeting and withdrawal of the grievance are inadmissible for any purpose in this arbitration. It relies on the finality principle that every matter covered by the grievance, which could be brought forward through reasonable diligence, is covered by the settlement. Except in special circumstances, the same subject cannot be relitigated by the same parties. This is to protect the integrity of the grievance settlement process.[20]

[50] The employer submits the union is seeking to reopen and reargue a settled matter through evidence to support its statement of particulars and to lay a basis for cross-examination of Mr. Demand on that matter in an arbitration of a separate dispute. There is no consensual or other jurisdiction to permit re-examination of these incidents whether raised or not before the settlement.[21]

[51] The employer submits the union's inclusion of the particularized incidents as part of this dispute is litigation by installment, which can be an interminable process, and is an abuse of process.[22] It is also part of a pattern of shifting theories in the union's approach to this dispute. Initially, the union said the issue was whether Mr. Jandu failed to disclose or provided misleading information in the hiring interview. Now the union

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[20] *Henderson v. Henderson* (1843), 67 E.R. 313 cited in *Associated Foundry Ltd.* [1985] B.C.L.R.B.D. No. 85; see also *The Journal Publishing Company of Ottawa Limited* [1977] OLRB 549 and *TNL Construction Ltd.* [1990] B.C.L.R.B.D. No. 26

[21] *Edwards & Associates Logging Ltd.* [1984] B.C.C.A.A.A. No. 229 (McKee), ¶ 8 – 10; Langley School District No. 35 [1992] B.C.C.A.A.A. No. 336 (Giardini), 27; *City of Vancouver* [2004] B.C.C.A.A.A. No. 287 (Beattie), ¶ 119

[22] *385268 B.C. Ltd. v. Alberta (Treasury Branches)* [2000] A.J. No. 272, ¶ 29

says the issue is whether the suspension is a cover to end the employment relationship. The union's adoption of this new theory is a clever contrivance in an attempt to create independent relevance for the admissibility of evidence about incidents covered by the grievance settlement and withdrawal and to join two grievances without consent. This theory is completely contradictory to the employer's consistent position since December 2015 that Mr. Jandu may return to work with an accommodation if necessary if he provides the requested verified explanation of the allegations in the lawsuit.

[52] The union opposes the application to exclude evidence of the incidents in its statement of particulars. The union agrees a separate grievance cannot be joined with the arbitration of the suspension dispute without mutual consent and that there is no mutual consent.

[53] The union submits the grievance settlement has been revoked by agreement. Mr. Davies withdrew the settlement and proposed including the events before and after March 19, 2015 in the union's complaint to be investigated by a third party. Mr. Demand agreed. He agreed the person suggested by the union is suitable to conduct the investigation. His only reservation was that he thought it premature to have the investigation done before the employer's issue arising from the BCGEU lawsuit was fully investigated. Therefore, by agreement there is no settlement of the harassment grievance.

[54] Alternatively, the union submits the employer's reliance on principles of finality of settlements and preservation of the integrity of prior litigation processes and outcomes is misplaced and inapplicable. The correct analysis is to ask if evidence relevant to a settled grievance is admissible as evidence independently relevant to a subsequent dispute.

[55] Evidence of the incidents should be admitted and its admissibility and weight determined after the entirety of the evidence has been heard. The Labour Relations Board has followed this approach since 1997.

> A panel faced with the issue of the admissibility of what is asserted to be independently relevant evidence first determines whether the evidence is relevant to the issue before the panel. If it is only relevant to the settled complaint, or as an attempt to re-litigate the settled complaint, that ends the matter. The evidence is inadmissible. However, if the evidence is independently relevant to the matter before the panel, the panel may then listen to the evidence

> and reserve on its admissibility and, of course, its weight. What weight such evidence ultimately receives can only be determined after assessing it against the background of all the other evidence led in the context of the current application. This was the approach taken in *Dynamic Maintenance*, *supra*, and the approach suggested by Madame Justice J. L'Heureux-Dubé *Université du Québec à Trois-Rivières*, *supra*. That is, hear the evidence and reserve upon its admissibility and relevance, until the entire case has been put in.
>
> This position provides a sensible balance between the competing considerations. Natural justice considerations are integrated without opening the door to endless litigation. Having heard the evidence a panel may then reject it. If a panel concludes that the party tendering the evidence is seeking to introduce it for an improper purpose, or the panel concludes that the probative value of the evidence is so limited that it is outweighed by the prejudice to the Board's general policy of encouraging parties to put all aspects of earlier controversies behind them, the panel can refuse to admit the evidence.[23]

[56] In 2014, the Board heard and found evidence of past employer anti-union animus independently relevant to a new unfair labour practice complaint, which it ultimately dismissed.[24]

[57] The union submits the question is one of fairness, not blind adherence to never hearing evidence of incidents subject to a settlement or prior litigation. This has been stated clearly by the Supreme Court of Canada as follows:

> There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. …
>
> The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision ….[25]

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[23] *Cariboo Press (1969) Ltd. (100 Mile House Free Press)* [1997] B.C.L.R.B.D. No. 246, ¶ 29 – 30 reconsideration of [1996] B.C.L.R.B.D. No. 288; *APS Architectural Precast Structure Ltd.* [1998] B.C.L.R.B.D. No. 6; *Team Transport Services Ltd.* [2000] B.C.L.R.B.D. No 327, ¶14;

[24] *Carecorp Holdings Ltd (c.o.b. Carecorp Senior Services)* [2014] B.C.L.R.B.D. No. 201, ¶ 101

[25] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79* [2003] 3 S.C.R. 77, ¶ 52 - 53

[58] The union submits the history of relationships between Mr. Demand and Mr. Jandu is independently relevant to the employer's imposition of the suspension. There is a broad discretion which should be exercised to hear and decide the admissibility and weight of the evidence at the end of the hearing. The focus and stakes in the March 19th grievance meeting and settlement were far less than the risk of loss of employment at stake now and did not attract the full and robust union attention required by the current dispute. Then the focus was improving relationships not regaining gainful work, recovering lost compensation and repairing damaged reputation. The principle of finality should not prevail.

[59] The union submits this arbitration with its available remedies is not litigation by installment or abuse of process. The evidence is relevant to understand a pattern of antagonistic behaviour by Mr. Demand and to help in making critical assessments of his and Mr. Jandu's credibility. Because none of the incidents is new in the communications between the union and employer, none is untimely.

6. Discussion, Analysis and Decision

[60] Has the settlement of the March 6, 2015 harassment grievance been revoked? No. Are there special circumstances to permit the settlement and withdrawal of the grievance to be reopened? No.

[61] Some or all of the incidents of Mr. Demand's alleged harassment and inappropriate workplace behaviour in the union's statement of particulars might have been discussed in the March 13th meeting between the union and employer or the March 19th meeting attended by Messrs. Davies, Jandu and Demand. Neither the employer nor the union has identified any incident not in the statement of particulars that was discussed. The union says there is none. It is difficult to imagine what was discussed if there was no discussion of some or all of the incidents on September 17th and 24th; October 30th; December 15th; and February 11th and 18th. And it is unlikely Mr. Demand was moved to make a commitment acceptable to the union and Mr. Jandu without discussion of specific incidents Mr. Jandu considered threatening and made him feel uncomfortable.

[62] The union acknowledges the grievance was settled, but submits the employer agreed to set the settlement aside. It says Mr. Demand, the person alleged to have

engaged in harassment and inappropriate workplace behaviour, gratuitously agreed to the union's unilateral withdrawal of the settlement and agreed to reopen the grievance without the union giving anything in exchange to the employer. This is a more generous reading of the language of Mr. Demand's letter of April 28th than the circumstances reasonably support.

[63] The more reasonable reading of the language of his letter is that Mr. Demand was speaking to the events after March 19th that precipitated the union to declare unilateral revocation of the settlement and reinstatement of the grievance. These include the events of the week of March 23rd when Mr. Jandu returned to work; the employer's letter of April 19th; the employer communications to his fellow employees; and the changing of locks. These new events are what Mr. Demand was agreeing might be the subject of third party investigation and recommendation at some later time. Not events prior to the March 19th grievance meeting and settlement. I conclude the grievance settlement has not been withdrawn by agreement.

[64] The Supreme Court of Canada found in 2003 it was an abuse of process for an arbitrator to reinstate an employee found criminally guilty of sexually assaulting a boy under his supervision after finding the conviction upheld on appeal was not conclusive evidence the employee had assaulted the boy.[26] Relitigation of the criminal conviction at arbitration was detrimental to the adjudicative process and barred by the doctrine of abuse of process. The evidence of conviction established just cause for dismissal.

[65] The union refers to circumstances the Court identified when relitigation might be justified. The union does not allege the settlement was tainted by fraud or dishonesty or that there is new, previously unavailable evidence. It says all the incidents were known and discussed at the settlement meeting.

[66] The union submits fairness dictates the settlement should not be binding and discretion should be exercised to hear the challenged evidence, which it says is independently relevant, in order to avoid an undesirable result. The result to be avoided is denial of its ability to present and prove its theory that the suspension was imposed in bad faith as a pattern of antagonistic behaviour by Mr. Demand against Mr. Jandu that began when Mr. Jandu joined the Unifor Local 467 collective bargaining committee in

[26] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79* [2003] 3 S.C.R. 77

September 2014. The union submits fairness dictates allowing it to present evidence of the entire pattern despite the grievance settlement. I disagree.

[67] For legal and policy reasons arbitrators normally do not look behind grievance settlements and limit their jurisdiction to determining the terms of settlement and enforcing them.[27] Consistent with this the union has not expressly sought to reopen the settlement. Similarly, it does not seek to join the harassment and inappropriate workplace behaviour grievance to this proceeding to enlarge the scope of any remedy. This is likely because remedies of compensation for lost wages and benefits, damages related to the suspension and the manner in which it was communicated to others and reputational vindication may be pursued in this arbitration.

[68] However, what the union does seek to do, indirectly, is to reopen the grievance settlement and litigate the facts of all the incidents forming the basis of the grievance and settlement to establish there was a pattern of antagonistic behaviour over six months and that Mr. Demand's anticipated testimony about the hiring interview and the suspension will not be credible

[69] To establish the pattern the union will ask that, regardless of the terms of settlement, there must be a finding Mr. Demand engaged in harassment and inappropriate workplace behaviour in each or most of the September to February incidents. It will seek a first adjudication. In effect, the incidents the union says are independently relevant to the suspension dispute are everything it alleged and settled on March 19th foregoing arbitration in exchange for Mr. Demand's commitment about his future behaviour.

[70] Whether offered as independently relevant evidence or similar fact evidence (past misconduct to infer misconduct in the suspension), the purpose is to prove harassment and inappropriate workplace behaviour toward Mr. Jandu from September 2014 to February 2015. It is to arbitrate what the union agreed not to arbitrate. It is an attempt to litigate what was settled. In the words of the Labour Relations Board "… that ends the matter. The evidence is inadmissible."[28]

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[27] E.g., *Canada Post Corporation* [1993] C.L.A.D. No. 1221 (Joliffe); *British Columbia Nurses' Union* [20011] B.C.C.A.A.A. No. 78 (Germaine)

[28] *Cariboo Press (1969) Ltd. (100 Mile House Free Press)* [1997] B.C.L.R.B.D. No. 246, ¶ 29

[71] Grievance settlements involve risks an employer will continue what gave rise to the grievance being settled. These risks are sometimes taken in the hope there will be improvement in an ongoing relationship. However, as Arbitrator McKee wrote in 1984: "The fact is that in life, as in labour relations, decisions are made on the facts at hand every day, good, bad and indifferent, and once made they must be lived with and accepted by both parties."[29] In ongoing relationships, the decisions may also teach lessons captured in old maxims, such as: "Fool me once, shame on me. Fool me twice, shame on you. Fool me three times, shame on both of us."

[72] The employer's motion is allowed. The evidence that is not admissible is evidence of the incidents in paragraphs 9 to 12, inclusive, of the union's May 2, 2016 statement of particulars. I have no information and make no ruling on evidence relating to the complaint Mr. Jandu filed with WorkSafeBC or its directives particularized in paragraph 13. I do not know when the compliant and any directives were made.

AUGUST 4, 2016, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey

[29] *Edwards & Associates Logging Ltd.* [1984] B.C.C.A.A.A. No. 229 (McKee), ¶ 9