Case Name:

Unite Here Local 40 v. Compass Group Canada (Morrison) (Nanaimo Seniors Centre) (Stauffer Grievance)

Labour Relations Code
(Section 84 Appointment)
Between
Unite Here, Local 40, Union, and
Compass Group Canada Ltd. (Morrison)
(Nanaimo Seniors Centre), Employer
(Re: Remedy Decision -- Melissa Stauffer)

[2012] B.C.C.A.A.A. No. 77

No. A-061/12(a)

British Columbia
Collective Agreement Arbitration

Panel: James E. Dorsey, Q.C. (Arbitrator)

Heard: May 22, 2012.
Award: May 24, 2012.

(29 paras.)

Labour arbitration -- Awards -- Reinstatement.

Labour arbitration -- Awards -- Damages.

Labour arbitration -- Awards -- Costs.

The grievor, a cook, grieved a demotion she received when she returned to work from maternity leave. The employer failed to disclose particulars and documents to the union and the grievance was allowed without hearing any evidence.

HELD: Grievance allowed. The employer was ordered to reinstate the grievor to her pre-leave position and accompanying schedule of work. The grievor was awarded the sum of $10,372 less collective agreement and statutory deductions. If the grievor chose to enroll in the RRSP pension plan, the

employer was to deduct the required amount from the grievor's compensation and make a matching contribution. The grievor was to be credited with vacation leave and seniority. It was not an appropriate case for payment of other damages for breach of the Human Rights Code. The arbitrator declined to make a punitive order for costs against the employer.

Statutes, Regulations and Rules Cited:

Employment Standards Act, RSBC 1996, CHAPTER 113, s. 54(2), s. 54(3)

Human Rights Code, RSBC 1996, CHAPTER 210, s. 13(1), s. 27.3(2), s. 27.3(3), s. 37(2)(d)(iii), s. 37(4)

Labour Relations Code, RSBC 1996, CHAPTER 244, s. 84

Appearances:

Representing the Union: Michael J. Prokosh.

Representing the Employer: Michael F. McDevitt.

ARBITRATION AWARD

1 Melissa Stauffer began employment with the employer in January 2008. When she took maternity leave from her position as Cook on April 6, 2010, she was working 35 hours per week from Tuesday to Saturday on the 10:30 a.m. to 6:00 p.m. shift. She had successfully applied for this position in February 2010.

2 When she returned to work in April 2011, she was entitled under Article 9.12 of the collective agreement to "return to the same job", which continued to exist. She was denied this entitlement and demoted to the status of a casual on call.

3 Ms Stauffer grieved the employer's contravention of the collective agreement on April 19, 2011 requesting immediate reinstatement to her former position and to be made whole for her loss.

4 On October 21, 2011, I was notified by the union of my appointment to arbitrate this grievance. At that time, counsel for the union was not available for a hearing until February or March. After identifying dates mutually agreed by the union and employer, an arbitration hearing was scheduled for March 5 and 6, 2012.

5 On February 28, 2012, the hearing was adjourned because the union's counsel had resigned his position with the union. The hearing was rescheduled for May 22 and 23, 2012.

6 In April, the union broadened and particularized the scope of the grievance to include alleged employer breaches of sections 54(2) and (3) of the *Employment Standards Act* and employer discrimination against Ms Stauffer because of her sex contrary to section 13(1) of the *Human Rights Code*. The union listed the remedies it would seek at arbitration.

7 Subsequent proceedings concerning the employer's failure to disclose particulars and documents to the union led to my May 16, 2012 decision as follows:

> I, therefore, find the appropriate and measured response to the employer's non-compliance in this situation is to convene the hearing as scheduled and, in the absence of immediate and extraordinary steps by the employer or the grievance having been resolved, to allow the grievance. If that occurs at the outset of the hearing, I will proceed immediately to hear any evidence available to the union with respect to the remedies it seeks, including a calculation or estimation of Ms Stauffer's lost wages and benefits, steps to ensure future compliance with the collective agreement and any damages for alleged contraventions of the *Employment Standards Act* and *Human Rights Code*. To this extent the union's application is allowed. (para 20)

8 The employer did not take remedial steps and the grievance was not resolved. Consequently, at the commencement of the hearing, without requiring the union to adduce any evidence, I allowed the grievance.

9 The remainder of the hearing and proceedings were directed to obtaining payroll and other information on which Ms Stauffer's loss could be calculated and to hearing submissions on appropriate remedies. It was agreed the period for which she is to be compensated is from April 16, 2011 to June 4, 2012, inclusive.

10 At the hearing, the employer openly acknowledged its failure to comply with the collective agreement; willingly assisted in determining what had to be done to make Ms Stauffer whole; and apologized to her for what had happened. To facilitate an expeditious final resolution of the grievance, the union withdrew its sole claim for loss under the Health Care Plan (Article 14.01), namely compensation for certain unspecified dental care expenditures by Ms Stauffer's spouse.

11 As agreed, I order the employer effective Tuesday, June 5, 2012 to reinstate Ms Stauffer to her pre-leave position and accompanying schedule of work, which is referred to as Cook 3 in the February 5, 2010 job vacancy posting for which Ms Stauffer was the successful applicant.

12 From calculations based on the payroll information provided and accounting for Ms Stauffer's earnings for hours worked, I order the employer to pay Ms Stauffer, no later than Friday, June 2, 2012, the sum of $10,372.41 less collective agreement and statutory deductions for the following losses:

Regular hourly wages	$10,033.09
Statutory holiday pay	$ 281.30
Sub-total	$10,314.39
Pre-judgment interest	$ 58.02
Total	$10,372.41

The amount of pre-judgment interest is not precise. Because of current Court Order Interest Rates, it is calculated on a simplified approach proposed by the union that I find to be reasonable. Assuming there will be compliance with this deadline, there is no need for an order for post-judgment interest.

13 Further, I order, if Ms Stauffer chooses to enroll in the RRSP pension plan under Article 14.03(b) of the collective agreement on or before May 30, 2012, which choice must be given to her by the employer, then in addition to any other collective agreement and statutory deduction from the

amount to be paid Ms Stauffer, the employer will deduct the contribution Ms Stauffer elects and the employer will make its matching contribution to a maximum of 1% of $10,372.41 as provided in Article 14.03(a).

14 Also from calculations based on the payroll information provided, I order the employer to credit Ms Stauffer, no later than Friday, June 2, 2012, with 33.66 hours to her bank of accrued vacation owing, which at May 4, 2012 was 882.45 hours.

15 Under Article 8.04(a) of the collective agreement, seniority is "accrued on the basis of completed working hours." Ms Stauffer was not credited with any hours during her leave contrary to Article 8.04(a)(vi). The union and employer agree she was entitled to have accrued 1,820 hours for her period of leave. I order the employer to credit Ms Stauffer, no later than Friday, June 2, 2012, with an additional 1,820 hours of seniority for the period of her maternity leave plus 561.05 hours for the work she was denied in contravention of the collective agreement and for which she is being paid lost wages.

16 The union seeks several remedies based on a finding the employer discriminated against Ms Stauffer contrary to section 13 (1) of the *Human Rights* Code.

17 First, the union seeks compensation for tax consequences citing de *Lissar v. Travel Leisure Vehicles Ltd*. [2009] B.C.H.R.T.D. No. 36, para 155(b)(iii). Grievance arbitrators have recognized under our progressive tax rate system that lump-sum payments to employees flowing from employer collective agreement contraventions can result in an increased tax burden for the employees in the year in which they receive the payment. In appropriate situations, lump-sum compensable amounts have been grossed-up to account for the increased tax burden in order to put employees in the same position they would have been had there not been an employer contravention of a collective agreement.

18 The gross-up amount is not equivalent to the minimum an employer is required to deduct and withhold from a lump-sum payment; remit to the Canada Revenue Agency on an employee's behalf as an installment payment in the calendar year; and report in a subsequent T4 Statement of Remuneration Paid. The gross-up amount is additional compensation for the increased tax burden the employee incurs because a wage loss payment was delayed from one tax year to another, inflating the employee's taxable income in the later year and subjecting a portion of the taxable income to a higher rate.

19 In this situation, the compensation payable to Ms Stauffer is for loss during the 59 weeks in the agreed compensation period. Thirty-nine of the weeks were in 2011 and 20 are in 2012. The potential adverse tax burden is having the lost wage and statutory pay compensation for the 39 weeks in 2011 ($5,366.79) taxable in 2012. It is potential because there would have to be evidence of all Ms Stauffer's sources of taxable income and comparisons between her tax returns for 2011 and projected returns for 2012 to determine the likelihood of an increased tax burden from having the additional $5,366.79 as part of her taxable income in 2012 rather than 2011.

20 Ms Stauffer has available to her the tool of Article 14.03 to manage some of any potential increased tax burden and to obtain additional employer contributions to her RRSP. In addition, in the calculation of lost hours and wages the required assumptions and estimations were made in a manner that favoured more, rather than less, compensation payable to her.

21 These features of this situation persuade me this is not an appropriate one in which to gross-up the compensation amount payable entirely by the employer to offset a potential adverse tax burden to Ms Stauffer which, following Ms Stauffer's prompt grievance last April, are primarily attributable to the shared union and employer delay in scheduling the arbitration hearing.

22 Secondly, relying on decisions of the British Columbia Human Rights Tribunal awarding damages for termination of employment because of pregnancy, the union seeks damages in the amount of $8,000 payable to Ms Stauffer for injury to her dignity, feelings and self-respect. (*de Lissar v. Travel Leisure Vehicles Ltd*. [2009] B.C.H.R.T.D. No. 36; *Brown v. PML Professional Mechanical Ltd*. [2010] B.C.H.R.T.D. No. 93; *Su v. Coniston Products (No. 2)* [2011] B.C.H.R.T.D. No. 223)

23 Ms Stauffer has had and continues to have security of tenure in her employment. She has had the support and advocacy of the union and the benefit of the collective agreement. Although belatedly, her employer has apologized for its actions and assured her there was no discriminatory intention in what happened to her. She worked over 1,300 hours from April 16, 2011 to June 4, 2012, inclusive. I find there is neither the evidentiary foundation nor is this an appropriate circumstance to exercise jurisdiction I might have under section 37(2)(d)(iii) of the *Human Rights Code* to order the employer to pay Ms Stauffer an amount "to compensate for injury to dignity, feelings and self respect or to any of them."

24 Thirdly, the union requests a declaratory order that the employer engaged in discriminatory behaviour. Fourthly, the union requests an order that the employer cease and refrain from discriminating against women in similar circumstances to that of Ms Stauffer.

25 There is no suggestion or evidence the employer has treated other female employees in a similar manner to the treatment Ms Stauffer received. The employer contravened articles of the collective agreement and there has been redress for Ms Stauffer. If there is a recurring contravention, the union has recourse to grievance-arbitration. The employees in the decisions of the British Columbia Human Rights Tribunal cited by the union did not have the benefit of an exclusive bargaining agent, a collective agreement and the *Labour Relations Code*. In this situation, it is over reaching to make the declaration and order the union requests.

26 Fifthly, the union seeks costs in the amount of $8,000 under section 37(4) of the *Human Rights Code* for the employer's improper conduct and contravention of rules under sections 27.3(2) and (3) of the *Human Rights Code*. It adopts the determination of the Human Rights Tribunal that: "The primary purpose of an award of costs under s. 37(4) is punitive." (*Brown v. PML Professional Mechanical Ltd*. [2010] B.C.H.R.T.D. No. 93, para 1172; see also para1192 and 1217)

27 In response, the employer says it is recognizing that management of the day at this facility made a "bloody big" mistake and it is working to make Ms Stauffer whole. It wonders when the focus on ongoing "relations" in labour relations was lost. Lawyers and arbitrators are here today and gone tomorrow, but the people in the relationship must continue to work with one another. A punitive order for costs can provoke a future employer request for punitive costs when the union advances to arbitration, for whatever reason, an unmeritorious grievance. In a tit for tat cost exchange, the need for the people in the relationship to work together is ignored and the ability to do so can be lost to the detriment of the relationship. An order for a union or employer to pay costs as a punishment is not consistent with the intent of the *Labour Relations Code* and does not promote good collective bargaining relationships.

28 The jurisdiction to make and the appropriateness of a punitive or any costs award under the *Labour Relations Code* could be an engaging legislative interpretation and policy question, but this is not the arbitration in which to embark on that discourse. The remedy for the employer's pre-hearing dilatory disclosure of particulars and documents, non-compliance with my order and its subsequent failure to disclose before the hearing was addressed in my preliminary decision and granted in the implementation of that decision at the commencement of this hearing.

29 I retain and reserve jurisdiction on the interpretation and implementation of this decision.

MAY 24, 2012, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey
Arbitrator

qp/e/qlspi