IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIFOR, LOCAL 333

-AND-

ATLANTIC PACKAGING PRODUCTS LTD.

GRIEVANCES OF L. KALB

AWARD

Arbitrator:	Laura Trachuk
For Unifor, Local 333:	Ken Stuebing Ken Cole Gamaiel Williams Cliff Biron David MacNeal Kelly Swartzman Lorne Kalb
For Atlantic Packaging Products Ltd:	Amanda J. Hunter Sunny Khaira Dianne Neale Bob Alarie Dan Terryberry Dave Croken Sean Crosbie

This arbitration took place in Toronto on January 17, September 19, November 2, 29, 30, 2017 and January 4, 2018.

AWARD

Unifor, Local 333 (the Union) has filed three grievances. The first grievance alleges that Atlantic Packaging Ltd. (the Employer) violated the collective agreement by imposing a five day suspension on Lorne Kalb (the "grievor") without cause on March 23, 2015. The second grievance alleges that the Employer violated the collective agreement by imposing a five day suspension on the grievor without cause on February 12, 2016. The third grievance alleges that the Employer violated the collective agreement by terminating the grievor's employment on June 7, 2016 without cause.

FACTS

The Employer operates a number of plants including the corrugating plant on Midwest Avenue where the grievor works. He began working for Atlantic Packaging Ltd. in January 1997. The grievor originally worked on the corrugator but was appointed to the position of assistant die man within a year. He has worked as a die man ever since. The grievor originally assisted another die man and worked days and afternoons. He was the only die man in the plant from 2005 until 2016 and worked day shifts.

The Midwest Avenue plant makes corrugated sheets and turns them into cartons and containers. They also print the boxes using the dies for which the grievor was responsible. The die man's duties involve pre-staging the orders by making sure that the necessary dies are available at the presses where they are to be run. The company uses both print dies, which are usually made of flexible polymer, and steel dies.

Extended Lunches

The first grievance relates to a five day suspension the grievor received for taking extended lunches.

The Employer does not have a written break policy other than what is found in the collective agreement. It provides:

> 3. Rest Periods
>
> It is agreed that two (2) rest periods of ten (10) minutes duration will be provided per shift. The time of rest period to be set by the employer and can change from day to day and from machine to machine.

Thus, the collective agreement provides that the employees are entitled to two 10 minute breaks each shift. However, the witnesses all agreed that the employees combine those breaks into one 20 minute lunch which they often exceed by at least by a few minutes. There was also no dispute that employees working on the machines could take other breaks when the machines were running. There is a rule that employees are not supposed to leave the plant but most of the witnesses, including Shift Supervisor Dave Croken, agreed that the rule was not strictly enforced. Mark Nigro, the Plant Superintendent, also confirmed that employees took smoke breaks when the machines were running as well as their 20 minute lunch break. He also said that he did not closely monitor the breaks. Mr. Nigro was unaware of anyone being disciplined for taking a smoke break. He agreed that it was possible that some employees might take multiple smoke breaks in a shift. Mr. Croken confirmed that the employees working on the

machines can take a washroom or smoke break or go to get a drink in the lunchroom once they have the machines up and running a job. Those breaks are not considered part of the two 10 minute breaks for which the collective agreement provides. Robert Alarie, the Plant Manager, said that the 20 minute lunch is not strictly enforced because employees are allowed a few minutes travel time on each side.

Mr. Alarie testified that they decided to investigate the length of lunches people were taking in March 2015 because some discrepancies relating to production had been brought to management's attention. Mr. Nigro testified that management started observing the length of breaks taken by people in the converting department by watching out the window of the Planning department while they came and went on their lunches. They also observed the grievor coming and going. Mr. Nigro testified that they also looked at three days of camera footage from the same area. According to the Employer's notes, the grievor was observed taking lunches of 30 to 70 minutes in length over a period of 10 days from March 9 to 19. He was also observed taking what Mr. Nigro called a "second lunch" on five occasions. On those occasions the grievor was either seen eating lunch at his desk or was observed in the lunchroom later in the day. Two other employees were observed taking 25 minute lunches and were not disciplined and one employee, Curt Davey, was observed taking 31 minutes and was given a written warning.

Mr. Nigro observed the grievor sitting in the lunchroom with an employee from the Shipping department, Mark St. Thomas, at 1:15 on March 12, 2015. He spoke to the grievor but did not ask him why he was there or tell him that he should not be there. At 3:38 he sent an email to Mr. Alarie and Dianne Neale, the Human Resources Partner for the Midwest Avenue plant that provided:

> Yesterday it was reported to me that Lorne was taking a second lunch in the cafeteria around 1pm with Mark St Tomas. This is not the first time I have heard this so today I decided to monitor the cafeteria around the time in question. At approximately 1.15pm Lorne was sitting behind the pop machine adjacent to Mark. I entered the cafeteria his immediate reaction was "look Mark there after me now" I made some small talk not mentioning the fact that he was on his second lunch. Lorne proceeded to purchase a drink and sit back down with Mark at which time I left.

Mr. Nigro sent two other emails about the grievor's breaks that week to Ms. Neale but never spoke to the grievor himself. He confirmed that he never asked the grievor why he was leaving the facility on his break or why he was in the lunchroom at any particular time. Mr. Nigro also testified that he was not aware of any time in 2015 in which the grievor's duties had been jeopardized by his conduct.

Shift Supervisor, Joebel De Los Santos, testified that he observed the grievor leaving the premises on March 18 and returning more than 36 minutes later with a bag that he assumed was food that he then ate at his desk. Mr. De Los Santos also testified that he later saw the grievor in the lunchroom talking to Mr. St. Thomas and spoke to him. Mr. De Los Santos said he asked the grievor why he was having a break with Mr. St. Thomas and the grievor said he was on a break. According to Mr. De Los Santos he did not say anything else to the grievor. Mr. De Los Santos sent an email to Ms. Neale at 5:36 p.m. about his observations but did not say anything about talking to the grievor. The email said "It is also brought to my attention previously that Lorne had been taking

additional break with Mark St. Tomas so, I also monitored the cafeteria and observed him he is with Mark St. Tomas in between 1:23pm and approximately 1:30pm."

The grievor testified that he was called to a meeting with union representative, Cliff Biron, on March 23, 2015. He said he went into the meeting and Ms. Neale said that he was being suspended for five days for taking extra lunches. The grievor said that he was not asked any questions about his lunches but that he did tell them that he did not take his lunches at the same time as everybody else. He said that Ms. Neale told him that he was supposed to take his lunch from 11:00 to 11:20 and that he was then given the suspension letter and walked out of the plant. The grievor testified that it was a very short meeting and that he was not provided with any of the dates on which he had exceeded his lunch.

Ms. Neale's notes of the meeting indicate that the grievor was told he had been observed taking extended lunches and that he objected by saying that he was being harassed. He also said that they did not know when his lunch was and that he did not have it at any certain time. He advised, further, that he might have been doing a die transfer when he was observed. There was no follow up about whether he was doing a transfer. It does not appear that the grievor was informed of any of the dates and times that he was alleged to have taken an extended lunch or asked for any explanations. It also does not appear that he was advised that he had been observed in the lunchroom or asked why he was there. He was told that he had previously been counseled about his lunches but he said he did not recall that. Ms. Neale testified that no one had observed the grievor carrying dies or paperwork. She agreed that the notes do not indicate whether the grievor was carrying anything but she said that there would have been a discussion with the supervisors in which they could have provided that information.

Ms. Neale said the meeting took five to ten minutes at most. The suspension letter had been written and signed before the meeting took place. She said the decision to impose the five day suspension was probably made by herself, Mr. Croken and Mr. Alarie. Ms. Neale said that the five day suspension reflected the discipline already on the grievor's file.

Mr. Croken signed the suspension letter but he testified that he did not write it or take part in the investigation. He said that he signed it because he was the supervisor on day shift that week. The letter provides:

> It has been observed that you have taken extended lunches on numerous occasions. You have been observed leaving the premises on extended lunch time, returning to work then eating your lunch at your desk and then taking an additional time in the cafeteria.
>
> As you are aware Midwest is working to create better efficiencies within our organization and this blatant disregard to our lunch schedule and complete disregard to your specific responsibilities is detrimental to serving the customer both internal and external.
>
> You had previously been counseled about this on November 2014 by supervisor Jeff Lycett.

> You will serve your suspension starting Tuesday March 24 and return to your regularly scheduled shift on Tuesday March 31st, 2015.
>
> Any further infractions will result in further corrective action up to and including termination of employment.

The counseling referred to in the discipline letter had been provided by Jeff Lycett, the Shift Manager. He testified that he saw the grievor in the lunch room at 13:20 on November 7, 2014. He then sent an email to Ms. Neale which stated:

> Today at approx. 13:20 I pulled Lorne Kalb out of lunch room as he was sitting there talking with Mark St. Thomas, he had a die requisition form with him.
>
> I brought him to the die room and asked him if he had his lunch yet, he said yes.
> I asked him why he was there, he told me he was just there for a minute.
>
> I asked him if this happens daily and he said no.
> I told him not to let it happen again.

Mr. Lycett testified that he did not say anything to Mr. St. Thomas because he worked in Shipping and he did not know when his lunch was. He was unaware of whether the email had ever been brought to the grievor's or Union's attention.

Mr. Lycett said that he talked to the grievor on another occasion when he saw him extending his lunch by taking his break then returning to his desk and eating his lunch. Mr. Lycett testified that he told the grievor that was not acceptable and not to do it again. He said that he spoke to the grievor because it was becoming a habit for him to take his full lunch then bring his food back to his desk and eat.

The grievor agreed that Mr. Lycett had told him once that he did not want to see him eating at his desk but that he did not think he was serious because everyone else was eating at their machines. Mr. Lycett agreed in cross-examination that employees sometimes ate at their machines even though they were not supposed to.

Ms. Neale agreed, in cross-examination, that there were no productivity issues with respect to the grievor's die man duties. She said it was the machine time that led them to assess the lunch periods of other employees and that did not apply to the grievor. Ms. Neale also agreed that nothing was specifically posted about extended lunches before the discipline was imposed.

The grievor was not provided with the dates and times that he had been seen taking an extended lunch or extra break until shortly before the arbitration hearing so he could not provide specific explanations. However, he testified that he might have been doing a die transfer or taking a break away from the conditions in his work area on those occasions.

Prior to October 2014, the grievor had worked in his own office beside the one the supervisors used. In October 2014 he was asked to be part of the "5S" committee which would be engaged in reorganizing the work place. The grievor declined, although he knew that the die room was the first place to be reorganized. The grievor was then advised that he would be moved out of the die room and provided with a new work station near the baler. He objected to the proposed furniture and kept his old desk and

chair. He also said that he did not want to breath the baler dust. Nevertheless, the grievor's desk was moved out of the office and onto the floor near the baler. The supervisors were moved into his old office and, according the grievor, the supervisors' former office was left empty. The grievor asked if he could move in but was told that it would be a first aid area. The grievor testified that that did not happen. He asked to be moved somewhere away from the baler but that did not happen either. He provided evidence to show how dusty his work station was due to its proximity to the baler. The board the company uses is from recycled paper and the grievor said that results in thicker dust. The grievor testified that there was so much dust than when he blew his nose it would be black. He also said that he often went outside or to the lunchroom to get away from it. The grievor testified that he sometimes met his friend Mark St. Thomas in the lunchroom when he went there.

The grievor also testified that it was so noisy in his new work area that he could not hear on the telephone. He advised Mr. Alarie and was eventually provided with something to make the phone louder. The grievor's new work area was also wet.

The grievor said that he complained regularly about his working conditions to his supervisors and also spoke to Ms. Neale. She suggested that he use a dust mask but it seems that there was reluctance to adopt that suggestion because it would set the grievor apart from the other workers.

The grievor provided photographs that he took between March 10, 2015 and May 24, 2016 to show all the dust in his work area.

On February 26, 2015 the grievor initiated a work refusal about his designated work space because of the dust, the effect of the cold on his back, and the noise. The problem was investigated by Mr. De Los Santos and a union representative from the Health and Safety Committee. The grievor and Mr. De Los Santos filled out the Refuse Unsafe Work Form. The temporary resolution was for the grievor to share the supervisors' office however the grievor testified that did not work as a long term solution because there were too many people and computers in there. The grievor went back to work at his desk on the plant floor after a few weeks.

The grievor did complain to the Ministry of Labour about the cold and an inspector came to the plant. At some point, either as a result of intervention from the Workplace Safety and Insurance Board or the Ministry of Labour, a heater was ordered. The first heater was too small and the second one required an outlet and power source that was not available where the grievor worked.

Mr. Croken testified that the baler was 20 to 30 feet away from the grievor's work space. Scrap cardboard is funneled into the baler so that it can be returned to the mills for disposal. It was not sealed until 2016. Mr. Croken explained that it could get dusty around the baler because the cuttings create dust. He said, however, that there is a vacuum to suck it up. Mr. Croken testified that the grievor, and everyone else, had complained to him about the dust. He considered dust to be part of the industry. Mr. Croken advised that the baler was known to back up with the result that the scrap was redirected to the shop floor. He agreed, in cross-examination, that even when the baler was functioning there would be visible dust in the air around it. Mr. Croken testified that since the grievor was situated right outside the baler room he could vacate the area if the baler malfunctioned. He was permitted to go to the lunchroom if that occurred. The

people on the nearby 1228 machine were also permitted to leave the area until the dust cleared. Mr. Croken thought that the baler might malfunction once every few weeks. He said that there might have been a period when it was happening almost every day. He could not recall whether there were particular problems with the baler around the time the grievor was disciplined for extending his lunches.

Mr. Nigro recalled the grievor complaining about the dust. He told the grievor to leave the area until it was contained and under control. Mr. Nigro agreed that the grievor might go to the lunchroom when he left the area. He recalled the baler dispersing dust into the air only occasionally. He could not recall if any of those occasions were from March 9 to 19 in 2015.

Mr. Alarie agreed that he grievor had spoken to him about concerns that his work space was exceedingly dusty on three or four occasions. Mr. Alarie said that they worked together to correct that as well as providing him with a heater. Mr. Alarie did not describe what they had done to deal with the dust. He agreed that he told the grievor that when the baler blew he could go to the lunchroom or get fresh air.

The grievor testified that he usually took lunch around 12:00 p.m. or later depending upon what his die duties required. He said that he went out to get sushi three times per week and since it took 20 minutes to go out and buy it he would eat it at his desk while he did data entries and transfers. The other days he would bring his lunch. The grievor denied that he had been told that he could not leave the plant. He thought he was allowed to leave the plant because there was no food available (except snacks) on the premises and lots of other people went out. He said that the other employees would then take their food back to their machines and eat it there.

The grievor testified that prior to March 2015 no one had talked to him about the length of time that he was taking for lunches. He could not recall being warned that he would be disciplined if he took more than 20 minutes for lunch.

The grievor explained that the die men at all of the plants worked together to make sure they all got the dies that they needed. The grievor testified that often the dies he needed were at the Progress Avenue plant and vice versa. He said that he would ask his supervisor if he could go and pick up a die if it was a rush job. There is also a maintenance shop at Progress Avenue where they maintain the rubber printing plates. Sometimes they had to send the dies there and he would take them or pick them up. At other times the supervisor would go himself. The grievor testified that he would also go and get press type if they ran out of numbers or letters. He explained that if he were going to pick up any of those things at the Progress Avenue plant he would go at lunch. He said that if he went at lunch he would not necessarily ask his supervisor. Mr. Croken confirmed that the grievor was responsible for transferring the dies to the other plant and spent time coming and going there. He also confirmed that the grievor performed most of his duties independently and without having to be directed what to do.

Mr. Alarie denied that the grievor's job required him to leave the premises to deliver dies to the Progress Avenue plant. He said that he did not observe him carrying anything resembling a die when he watched him through the Planning department window. Mr. Alarie testified that he reviewed plant records and the baler only malfunctioned three times in the five months prior to the grievor's suspension. He could not find any

occasions that correlated to the dates the grievor was observed on an extended lunch or in the lunchroom in the afternoon.

The grievor testified that after his desk was moved out near the baler he would sometimes do paperwork that did not require using the computer in the lunchroom to get a break from the area.

The grievor testified in cross-examination that until sometime in 2015 he worked four hours of overtime every Saturday cleaning out the baler. However, when he performed that job he wore full personal protective equipment including a mask and full suit.

The grievor could not recall anyone ever expressing concerns to him about not completing his duties.

Dave MacNeal has worked for the company since 1998. He is a union steward and a member of the Health and Safety Committee. He testified that the employees take lunch breaks as well as smoke breaks although people who do not smoke take them as well. He said that the frequency of the breaks depends on the individuals. Mr. MacNeal also testified that the 20 minute lunch break was never really enforced and that people usually took 30 or 40 minutes. He said that it could depend on what the person's job was. He said that as the knife man he had more leeway with breaks than people working on the press side but that the operators could set their machines and leave. He also testified that he often did not get a break and would eat in the knife room. He said that other employees ate at their machines or outside at the picnic table.

Mr. Alarie testified that they decided to impose a five day suspension for the extended lunches because the grievor already had a three day suspension on his record. The three day suspension had been imposed on December 4, 2013 for possession of "drugs or alcohol" in his car on company property.

Posting

The grievor testified that sometime around January 2016, there was a week with a lot of dust. He noticed that there was an empty office in the Shipping department and he moved his things in there. He was there for two weeks and at some point Mr. Alarie came by and said he wanted to see the office he had put together. According to the grievor, Mr. Alarie just said OK and walked out. The grievor had set up a temporary desk with corrugated board because he did not think that he would be allowed to stay.

There is a union bulletin board and a company bulletin board near the punch clock at the front of the plant. The grievor testified that the union board would have postings of union meetings and there would be postings of people selling things like tires or golf clubs or renting cottages on the company board. The grievor had never posted anything but he had rented a cottage that was posted there. He testified that he was not aware, in February 2016, of any rules about posting things on the boards. The grievor acknowledged that the company rules are posted near the bulletin boards but could not recall any meeting where they were all reviewed.

The grievor testified that he posted notices on the union and company bulletin boards near the punch clock on February 10, 2016. The notices said:

> Do you feel that this union is protecting us?
> Do you feel that you are being treated fairly?
> Maybe it's time for a change!!!
> LET'S GET BACK ON TRACK WITH A UNION THAT WILL FIGHT FOR US
> "TEAMSTERS"

The grievor testified that the Union and Employer had been in bargaining for months and they were still without a contract. He said he was advised that they were at a stalemate and that he asked the Local President, Linus King, if it would help if he put up a posting about going to the Teamsters. Apparently, a local of the Teamsters had represented the employees at one time. The grievor testified that Mr. King told him that such a posting would not hurt. The grievor said that he only made two postings and put one up on the union board and one on the company board. In re-examination the grievor said that it was probably Dave MacNeal that he spoke to not Linus King.

Mr. MacNeal testified that the grievor approached him and said that he was frustrated by the length of negotiations and wondered if they should go to another union. Mr. MacNeal suggested that he ask people at the end of their shift if they were happy or wanted a new union. Mr. MacNeal said he told the grievor that he should make a list and they would go from there. Mr. MacNeal could not recall the grievor saying anything to him about a posting but he agreed that he might have. He said that if the grievor had asked him about it he would have suggested posting only the union board.

The same day the grievor put up the postings, he went to attend a meeting with Ms. Neale, Mr. Alarie, Mr. Croken, Mr. MacNeal and Gamaiel Williams, another union representative, about some concerns he had about people using his computer who were not trained in the die room. Sean Crosbie, the Director of Manufacturing East, came in and called Ms. Neale and Mr. Williams out of the room. The grievor left the meeting and was returning to his office when he was paged back. He was told he was being suspended until further notice due to the posting. Mr. Alarie and the two union representatives walked him back to his office and then out of the plant. When the grievor returned five days later everything had been taken out of the office he had been using in the Shipping area, and returned to the area near the baler. Apparently the office he was using was then made into the new Shipping office.

Mr. Crosbie testified that on February 10, 2016, he was walking around the Midwest Avenue plant and saw the posting by the time clock. He testified that he then reviewed footage from the camera near the clock and saw that the grievor had put it up. He went to Ms. Neale's office where a meeting was already taking place with the grievor. Mr. Crosbie said that he asked Ms. Neale, Mr. Alarie and Mr. Williams to come out of the meeting and showed them the video. He said that he wanted it dealt with immediately. Mr. Crosbie testified that he expected the grievor to be disciplined.

Mr. Crosbie also testified that he found a copy of the posting in the grievor's temporary office by the Shipping department. He said that he was concerned about the notices because they were in negotiations and because no one had given permission to post them which was contrary to the company's rules. Mr. Crosbie said that management would never have given permission to post that notice because it would be disruptive to employees, especially during negotiations. He said that it would pit employees against each other. Mr. Crosbie acknowledged that he had seen postings on the company board from employees relating to cottages for rent and items for sale. He said that he had

never investigated whether permission had been granted to post them. He agreed that he was concerned about the message of the February 10 posting.

Mr. Alarie testified that he was meeting with Ms. Neale, the grievor and Mr. Williams on another matter when Mr. Crosbie came in and asked him, Ms. Neale and Mr. Williams to come with him. Mr. Crosbie showed them video camera footage of the grievor posting the notice. He said that Mr. Crosbie said that something has to be done about this now. They went back and met with the grievor and asked him if he had posted the notice and he said that he had. He was told he was suspended and escorted off the premises. Mr. Alarie testified that further notices were found on the company bulletin board near the time clock, on the bulletin board in Shipping and the bulletin board near the corrugator. The one on the union board was posted right beside a copy of the plant rules. He said that the grievor was given a five day suspension on February 12, 2016.

Mr. MacNeal testified that he was in a meeting with the grievor, Mr. Williams, Ms. Neale and Mr. Croken when Mr. Crosbie came in and called Mr. Williams, Ms. Neale and Mr. Croken out of the room. He said that Mr. Crosbie then came back in and told the grievor that he was fired for posting something. He said that Mr. Williams walked the grievor out and that he and Mr. Williams went back to Mr. Crosbie's office. Mr. MacNeal claimed that Mr. Williams said "Don't you think that's rather harsh for posting something?" and Mr. Crosbie responded "We are going to let him sweat it out". Mr. Crosbie denied that he told the grievor that he was suspended or fired.

Mr. De Los Santos, the Converting Supervisor on the grievor's shift, signed the discipline letter dated February 12, 2016, which provided:

> On Wednesday February 10th, 2016 you posted union information on company bulletin boards. You were on company time, this action was disruptive to the workplace and you violated plant rule #12 "Literature of any kind cannot be distributed on company property without management approval."
>
> You are hereby being issued a five (5) day suspension without pay.
>
> You will serve your suspension effective from Thursday February 11th to Wednesday February 17th inclusive and report to Bob Alarie Plant Manager effective your regularly scheduled shift on Thursday February 18th, 2016.
>
> Any further infractions will result in termination of employment with Atlantic Packaging.

Mr. De Los Santos was not involved in the investigation or the decision to impose a five day suspension.

Mr. Alarie testified that the normal process for posting something is to ask a supervisor and he recalled that he had been asked permission by someone who wanted to post snow tires for sale. He said that the Union also asked for permission when it wanted to post something. Mr. Croken recalled Curt Davey asking him if he could post his cottage rental on the bulletin board near the time clock.

Mr. Alarie could not point to any actual negative consequences from the postings except that it was not a very productive day because employees were focused on what was

going on. Mr. Alarie insisted, however, that he had a safety concern arising from the posting. He said there was a potential safety issue because it disrupted the plant and caused the work force to be distracted.

Mr. Alarie acknowledged that he had a conversation with the Union's president, Ken Cole, about the posting and that he said that he was not offended by it.

Mr. MacNeal testified that people sometimes write things on the notices on the company bulletin board. He could only recall one person being disciplined for doing that. Mr. MacNeal also recalled postings for a house for sale, tires for sale, a cottage for rent and raffle tickets. However, Mr. MacNeal said that he would not post anything on the company board because he considers the union board to be the appropriate place for the union and employees to post things.

Mr. MacNeal testified that he has been given two books with the plant rules in them. He said that he had not been asked to sign off on them.

The plant rules provide, in part, as follows:

> The company expects that individual employees co-operate in every respect with the plant safety program so that the operations may be carried out in such a manner as to ensure the safety of all workers.
>
> The following rules and regulations were designed to assist the company in protecting the safety and rights of every employee and the every day operations of the company.
>
> Disregard or violation of any of these rules will result in disciplinary action at the management's discretion and ranging from a reprimand to suspension and possible discharge depending upon the seriousness of the offense.
>
> …
> 2. No one is allowed to leave the plant or his work assignment during work hours without the supervisor's permission.
>
> 3. Work areas must be kept clean. No refuse or objects are to be thrown on the floor anywhere in the building.
>
> 4. All posted plant notices are to be followed.
> …
> 6. Supervisor's instructions are to be followed. Any complaints may be taken up afterwards with your foreman.
> …
> 10. Time wasting, loitering in toilets or on company property is not allowed.
> …
> 12. Literature of any kind cannot be distributed on company property without management approval.
>
> 13. No signs or notices are to be removed or marked on company property without management approval.
> …

20. Common safety procedures are to be observed.

Insubordination

The grievor injured his back at work in 2012 and was off work and on modified duties for a time. He then returned to his full die man duties. In October 2014 he was struck in the face when retrieving a die and lost a tooth. In November 2014 he injured his back again. He lost time again on December 15, 2014 and the Workplace Safety and Insurance Board (WSIB) decision refers to low back sprain/strain, a herniated disc, low back stenosis and degenerative joint disease. On January 13, 2015 a WSIB Return to Work Specialist meeting was held and the grievor returned to work with restrictions. He resumed his full duties in March 2015. The grievor testified that, subsequently, he would spread the times when he had to move the dies throughout the shift and if he felt a "kink" in his back he would take a break. He also testified that he would ask for help if there was a lot of work. He said that if there was no one available to help him he would get a flare up in his back but he did not always report it.

A second die man position was posted in the spring of 2016. The grievor had been the only die man at the Midwest Avenue plant for many years. He said that he was not told why the company had decided to post another die man position. The grievor had previously worked days but he and the new die man were assigned to rotating shifts so he had to start working midnights. The grievor was very upset about being scheduled on midnights and was concerned about whether he could do it after so many years on days. He went off work for two weeks during the first midnight rotation and provided medical notes. He also testified that he was unable to find someone to look after his 12 year old son overnight. The grievor then returned to work for a week of day shifts.

The first midnight shift that the grievor worked was on May 25/26, 2016. He was scheduled to work from 10:30 p.m. to 6:30 a.m. Early in the shift, the grievor and Dan Terryberry, the Converting Supervisor on that shift, had a disagreement about a new process with the load tags but it was resolved with the assistance of one of the union stewards, Kelly Swartzman. The grievor felt that Mr. Terryberry was being aggressive with him, however, and sent himself an email with the details of the altercation which he titled "harassment by Dan T". Mr. Terryberry sent an email reporting this incident to Mr. Lycett, Mr. Nigro and Ms. Neale at 12:25 a.m. He said that the grievor never actually did the load tag task he had been assigned.

The grievor testified that around 2:00 a.m. Mr. Terryberry told him that he had to go and hand feed the 618 machine at 2:30. The automatic prefeeder for that machine had not functioned for several months and a pair of workers were assigned to feed it when it was running. The grievor responded that he still had the earlier task he had been directed to do and other die man work to complete as well. The grievor testified that he told Mr. Terryberry that he had worked on the 618 machine before and that he did not think the movement required was safe for his back. He explained that he would have to grab a handful of board as it came up and twist it upside down and feed it into metal tampers that keep the board straight. The grievor testified that he told Mr. Terryberry he did not feel comfortable doing the work and that Mr. Terryberry responded that there was no safety issue and he should do as he was told. He said that when Mr. Terryberry said there was no safety issue we went and got Mr. Swartzman.

In cross-examination, the grievor claimed that he first told Mr. Terryberry that he still had lots of the work that had been assigned earlier and also that he was concerned for his back because he had not worked on the machine for over five years except for 20 minutes that he worked for Mr. De Los Santos.

The grievor also testified that he told Mr. Swartzman that he thought he had a safety issue because he was being told to work on the 618 and he did not feel comfortable. He said that Mr. Swartzman told the grievor that he was new and did not really know how the safety part worked so he got Mr. MacNeal to come with them.

The grievor, Mr. Swartzman and Mr. MacNeal went to Mr. Terryberry's office and found that he and Mr. Croken were there. The grievor testified that Mr. Terryberry asked Mr. MacNeal what he was doing there. According to the grievor, Mr. MacNeal answered that there was a safety issue. Mr. Terryberry said that there was no safety issue and that Mr. MacNeal should go back to his machine as he was not needed.

The grievor testified that Mr. Swartzman asked what the issue was and Mr. Terryberry said that he wanted the grievor to go and hand feed the 618 and that he would not go. According to the grievor, Mr. Swartzman responded that apparently there is a safety issue and that the grievor feels uncomfortable going to the machine. Mr. Swartzman asked Mr. Terryberry what he wanted them to do. Mr. Terryberry responded that if the grievor did not go to the machine he would be going home. The grievor said that Mr. Swartzman told him that if he felt concerned he should go home and the Union would grieve it later. The grievor said that he collected his things and left.

The grievor filed a complaint to the Human Rights Tribunal of Ontario (HRTO) in the summer of 2016. He stated as follows on his complaint:

> Later that evening Dan Terryberry came to me and told me that at 2:30am I was to go to the 618 machine and hand feed on the prefeeder, I told Dan I've never been a crew member on any machines and have never signed off any safety process, as Dieman my job was to take care of the steel dies and printing plates but never working on any machines and with my back injury last year I was worried the repeating movement would re-injure my back.
> Dan again raised his voice and said I don't care you do what I tell you to do, again I walked away and went to Kelly the union rep. and told him that Dan was making me work on a machine I felt unsafe on.
> When Kelly and I got to the converting supervisors office Dave Crocken the corragator supervisor was there with Dan, Kelly asked whats going on? Dan replied I told Lorne to go to the 618 and hand feed. Kelly said he's never been a crew member or signed off on any safety processes or lockouts, which is why he feels unsafe about it, then Kelly added why are you asking Lorne when you told him earlier to take out all the orders for the machines which he hasn't finished yet?
> Dan Terryberry said if Lorne doesn't go to the 618 I will send him home.
> Kelly looked at me and said grab your things, what Dan and Dave Crocken are doing is not right and I think is against the law.
> After grabbing my things I asked Dan Terryberry "should I come in tomorrow? Dan replied "we'll call you".

Mr. Terryberry testified that they were shorthanded the night of May 25/26 and were going to have trouble when they ran the 1228 from 2:30 to 6:30 a.m. He, therefore, called people on the day shift and left messages for them to come in early if they could. Mr. Terryberry and Mr. Croken agreed that in the worst case scenario, i.e. if no one came in, they would ask the grievor to feed the 618 machine. Someone ultimately did come in but Mr. Terryberry said that he did not know he was coming until he arrived.

Mr. Terryberry testified that he asked the grievor to go and hand load board into the 618 machine at 1:57 a.m. He said that he had heard that the grievor had worked overtime on the 618 and he had seen him working overtime on the J and L machine himself. He said that the J and L was a bigger machine with bigger boards. Mr. Terryberry also said that at one point, none of the machines had prefeeders so he was sure the grievor had performed that duty more than once over the years. Mr. Terryberry testified that the grievor said, "No, I'm not going to do that" and then walked away. According to Mr. Terryberry he again told the grievor to go to the 618 and the grievor said that was not in his job description and that he was a die man. Mr. Terryberry said that he told the grievor that he was the supervisor and that he was giving the grievor a direction. According to Mr. Terryberry, the grievor replied that he had other work to do. Mr. Terryberry testified that he then went and got Kelly Swartzman. He also asked Mr. Croken to come to his office. The grievor, Mr. Swartzman and Mr. MacNeal then came to the office and he told Mr. MacNeal that he was not needed and he left. Mr. Terryberry said that he told the grievor once again to go to the 618 and again he refused saying that he had priority work to do. Mr. Terryberry said that he responded that he made the priorities. Mr. Terryberry testified that the grievor claimed that that he had important die related work do do a few more times. He testified that then as a "last ditch attempt" the grievor said it was unsafe and that he did not know the job. Mr. Terryberry said that he and Mr. Croken told the grievor that it was a helper position and that he would not be using the machine. Mr. Terryberry said that he then told the grievor that he was insubordinate. The grievor said "fine what do you want me to do?" and Mr. Terryberry told him to go home and wait for human resources to call. Mr. Terryberry claimed that the last comment the grievor made before he walked out the door was that it was unsafe.

At 2:59 a.m. Mr. Terryberry sent an email to Mr. Lycett, Mr. Nigro and Ms. Neale copied to Mr. Alarie, Mr. Grober and Mr. Croken. The email provided:

> I sent Lorne Kalb home for insubordination.
>
> At 1:57 I told Lorne to go to the 618 to hand load the board onto the feeder. He responded "Nah I'm not gonna do that" and walked away from me.
>
> I went to him again and asked why he would not follow my direction He said I have dieman work to do I'm a die man. I said I'm a supervisor and you need to follow direction. He said "That's not in my job description." I said most if not all job descriptions end with…*and any other direction given by a supervisor*. He said "I have other work to do". I went to tell Kelly Schwartzman I would be paging him shortly and why, and called Dave Croken to ask him to be a witness. Kelly, Dave MacNeal and Lorne came to my office. Dave was told "I do not need you go back to your job station."
>
> Lorne was brought into the office and told again (witnesses Dave and Kelly) what was expected of him, He said he was not going to do that that he had priority

> work to do. I told him "I decide the priorities" he tried a few other times with important die room stuff as the reason he would not as directed then said It's unsafe that he does not know the machine. (this is a lie as he has hand loaded at the machine before) Dave and I said that he is not operating a machine he is to help hand load boards.
>
> Lorne was informed he was being insubordinate, he said fine what do you want me to do? I told him he can go home he said "fine I'll get my stuff" while walking him out he was told to punch his card and to wait for a call from H/R.

Mr. Terryberry also provided notes that he took that night in his notebook and on his copy of the insubordination process. The notebook included a note that said:

May 26 1:57 am
Told Lorne I need him @ 618 at 2:30
He said "Nah I wont do that" and walked away.

On his Insubordination process summary he wrote 1:57 at the top. Then as follows:

1. Ask to do the task *@2:30 Need You @ 618*
2. Employee must refuse. *Nah I won't do that*
3. If H & S related, refer to work refusal, or –
4. Further discuss privately. – *No I'm a Die Man*
5. Get a steward and company witness. –
6. With a witness, repeat occurrence. – *I'm refusing*
7. Repeat your request & inform, if refusal it is insubordination & subject to suspension and termination. *I Have Die Work To Do – I Decide Priority What Work Is Done.*
8. If employee returns to work:

- no disciplinary action
- suspend if refusal continues – *Get My Stuff*

9. Document the incident in employee's file. *-Go Home/ Call – H/R In Morning 2:30 am:*

Mr. Terryberry said that he did not engage the health and safety process because the grievor had been defiant and disobedient and he believed him to be grasping at straws when he mentioned safety. He did not believe that the grievor was acting in good faith.
Mr. Terryberry testified that there was no safety concern and he did not have to resort to the work refusal process because the grievor had done the job before. He testified that the helper loading the 618 does not touch the machine or lead the lift. He said that the feeder grabs a stack of boards and then the helper picks it up and flips it into the feeder. Mr. Terryberry testified that he was aware that the grievor had had a problem with his back but he said that the grievor was not on accommodated duties so he should have been able to do the work he assigned to him. Mr. Terryberry also knew that Mr. MacNeal was on the Health and Safety Committee and that Mr. Swartzman was not. He was aware of some other employees complaining about physical problems related to prefeeding the 618 machine.

Dave Croken has worked for Atlantic Packaging for 30 years. He was working as the Corrugator Shift Supervisor on the midnight shift on May 25/26. Mr. Croken testified that Mr. Terryberry called him to come to the Converting Supervisor's office for a meeting with the grievor and Kelly Swartzman. He said that the grievor and Mr. Swartzman came into the office and the grievor was told that he needed to help on the 618 machine. Mr. Croken testified that the grievor said that he would not do that because he was the die man and had other priorities. According to Mr. Croken, Mr. Terryberry then said that he was the supervisor and decided the direction of the manpower and where to delegate them. Mr. Croken testified that the discussion went back and forth like that until Mr. Terryberry said the the grievor was being insubordinate for not following his direction and that if nothing changed he would be sent home. Mr. Croken said that the grievor's response was that he guessed he was going home. Mr. Croken also said that at the end of the meeting the grievor said that it was unsafe. Mr. Croken said that he found that strange because the grievor would not be doing anything accept helping someone else load the machine and there had been a two man crew there since they took out the prefeeder. In Mr. Croken's opinion it would only take five minutes to train someone to do that work. Mr. Croken believed that the grievor mentioned the safety issue after Mr. Terryberry said that he was being insubordinate.

Mr. Croken also testified that he recalled the grievor coming in for overtime and feeding the 618 machine. He said that he did not know how long the grievor had actually worked on the 618 but he knew that he had because he had looked at Cronos (the timekeeping program). Mr. Croken said that the grievor had also hand fed the J and L machine but he could not recall when. Mr. Croken denied that anyone else had complained that hand feeding the 618 machine was unsafe.

Mr. Croken testified that in May 2016 he was not aware that the grievor had any restrictions that had to be accommodated.

Mr. Croken sent an email to Mr. Alarie at 3:12 a.m. on May 26 that provided among other things:

> I received a page from DAN awhile later saying he needed me to be a witness, he said lorne is saying he is not going on the 618. I went to the converting office and lorne came in with Kelly and he was again asked if he could help us out as we are short manpower, his response was he is the DIEMAN and it is not in his job description, he said he was not familiar with that machine and could be unsafe, it was brought to his attention that he would be there to assist hand feed to which he still said no.
>
> Dan said that it would be insubordination to refuse work direction from a supervisor to which lorne still said he would not go to the 618, dan asked him to leave the premises and escorted him out of the building after he swipe out

Mr. Croken testified that he did not see the need to engage any work safety protocol because the grievor had done the work he was being asked to do before.

Mr. Croken testified that moving the dies is heavier than feeding the 618 machine. He said that there are dollies that can be used to move the dies around the plant but that

they have to be loaded by hand onto the dollies. He said that moving them onto the dollies is a one person job.

Mr. MacNeal said that he was working in the take off position on the 618 machine in the early morning of May 26 when the grievor and Mr. Swartzman approached him. He said that they came to get him because Mr. Swartzman had concerns about his own inexperience as a union representative and referred to the grievor's issues with Mr. Terryberry and his back and the 618. Mr. MacNeal testified that the grievor told him that he had concerns about his back in prefeeding the 618. The three of them walked back to the press office. Mr. Terryberry asked him what he was doing there and Mr. MacNeal said that the grievor and Mr. Swartzman wanted him there and Mr. Terryberry said "I don't need you here you can leave" and Mr. MacNeal left.

Kelly Swartzman has worked at Atlantic Packaging for three or four years. He had been a union steward for fewer than six months prior to the May 26, 2016 incident. Mr. Swartzman said that the grievor came to him about 2:00 a.m. and said that Mr. Terryberry was directing him to work on the 618 at 2:30. Mr. Swartzman said that he had never seen the grievor work on the machines. Mr. Swartzman testified that the grievor told him that he did not feel safe and they went to talk to Mr. Terryberry. Mr. Swartzman was asked if the grievor told him why he felt unsafe and he said that the grievor told him he did not really know the machine. Mr. Swartzman also said that he knew the grievor had back problems and it was a physical job. Mr. Swartzman testified that they brought Mr. MacNeal with them because he was a Health and Safety representative and shop steward and Mr. Swartzman was pretty new. Mr. Swartzman testified that Mr. Terryberry told Mr. MacNeal that he would not be needed.

Mr. Swartzman testified that Mr. Terryberry gave the grievor an ultimatum to work on the 618 or go home. Mr. Swartzman said that he told the grievor that he is a firm believer in obey now and grieve later but if it is a safety issue he did not think he had to do the job. Mr. Swartzman said that he did not know the safety procedure then but he learned afterwards that there should have been a Health and Safety representative there. Mr. Swartzman testified that they mentioned both the grievor's back and not knowing the machine.

In cross-examination Mr. Swartzman testified that he knew the grievor had a back problem because he used to stay on overtime to help him lift the dies. He insisted that the grievor mentioned it in the meeting with Mr. Terryberry and Mr. Croken that night. When told they denied that, he said that the grievor at least discussed it with him. Mr. Swartzman acknowledged that his own concern was that he had never seen the grievor work on a machine and believed that he did not have any training, including lock out and tag out training.

The employer's notes from the investigation meeting with Mr. Swartzman a week later include the following:

> Nick: Did Lorne provide any specifics or details relating to his safety concerns?
>
> Kelly: He hadn't worked on the machine in years. He had plenty of work to do in the die room doing his own job.
>
> Nick: Did Lorne ask to have a JHSC member to help investigate his concerns?

Kelly: No, this was not done.

Mr. Swartzman's only recollection of that meeting was that Mr. Grober explained the health and safety process that should have been followed. He also said that the notes did not reflect the entire conversation and that he had said that the grievor had not worked on the machine in years and had not been trained on lock-out and tag-out. Mr. Grober did not testify.

Mr. MacNeal testified that he obeyed Mr. Terryberry when he told him to leave because he did not want to get in any more trouble. He had already received a suspension and had filed multiple grievances in 2016.

The grievor testified that he used to help out on the machines before his injuries but that he had refrained from doing so since 2012. He also said that he was not mechanically inclined and he had a lot of work to do.

The grievor also testified that in October or November 2015 (i.e. after his back injuries) he had asked his supervisor Mr. De Los Santos if he could come in early to work overtime in the die room as he had not finished all of his work. The grievor said that he had been at work in the die room for about an hour and a half when Mr. De Los Santos asked him if he could help feeding the 618 machine. The grievor was not certain who the other person loading the machine was. The grievor said that he started feeding the 618 and he was worried that he would injure his back because it was running very fast and he could not keep up. He said that he told Mr. De Los Santos that he felt uncomfortable and that Mr. De Los Santos told him he could go back to the die room. The grievor testified that he worked on the machine for 15 or 20 minutes. In cross-examination the grievor specified that he told Mr. De Los Santos that he felt uncomfortable with his back. The grievor said that he did not fill out an incident report because he did not injure himself.

The grievor was interviewed about May 26 on June 1, 2016. Mr. Nigro, Mr. Grober, Mr. King and the grievor attended the meeting. The minutes of the meeting were taken by Mr. Grober. The minutes provide:

> Mark: We've asked you to come in this morning to conclude our investigation of your actions on May 26th, 2016. Lorne we would like to know why you refused to perform the feeder assignment at the 618 converting machine on May 26th, 2016?
>
> Lorne: I did not refuse. I was concerned about safety. Never been on a crew before. Never signed off on the machine before. I had die work to do. I was taken away and couldn't perform the load tag work.
>
> Mark: have you worked on the 618 converting machine previously?
>
> Lorne: I worked once for 4 hours before on overtime. I felt very uncomfortable.
>
> Mark: Have you ever worked on the 618 converting machine while working overtime?

> Lorne: Yes
>
> Mark: Ever worked on the J and L
>
> Lorne: No
>
> Mark: Thanks for coming out. We will render a decision about your employment status shortly.

Mr. Nigro testified that he also said to the grievor something like "Why are you comfortable on overtime but not straight time?" but that is not reflected in the minutes. Mr. Nigro did not know whether the grievor had received training on the 618 and did not ask. Mr. Nigro testified that it would take half an hour to learn how to feed the 618 safely but for someone familiar with the plant it would only take a few minutes. He agreed that the meeting was probably only five or six minutes long at most. He could not recall asking the grievor any questions about his safety concerns at the meeting. Mr. Nigro could not recall any employee being injured by manually feeding the 618.

The grievor testified that the difference between being a crew member and filling in on a machine is that the crews are three people who often work on a machine together for years. However, someone filling in only works on the machine occasionally. The grievor testified that crew members are taught "lock out" procedures and "E Stop" which is the emergency stop. The lock out is used to stop the machine so work can safely be done inside it. The grievor believed that all of the crew members have a key that locks out the machine. The grievor said that he never received any training on the 618. He said that the operator watches the window not the feeder.

Mr. Swartzman was asked what the grievor would need to know about the machine. He said he would need to know its functioning and the emergency stop buttons. He said that he was a crew member on another machine and that he received training on lock out/ tag out, how to stop it running, where not to put your hands and other things like that.

Mr. Lycett testified that he had no involvement in the investigation leading to the grievor's termination but he signed the letter dated June 7, 2016 which provided:

> On May 26th, 2016 you were sent home by your supervisor Dan Terryberry for insubordination.
>
> The Company interviewed you with your union steward present on June 1st, 2016 to investigate the issue.
>
> The Company has concluded its investigation and has found that you were insubordinate and uncooperative.
>
> Because of these actions and your prior discipline record we consider this to be a culminating incident and your employment with Atlantic Packaging is terminated effective immediately.
>
> A cheque shall be forwarded, to the above mentioned address, for any vacation monies accrued and not yet paid, less statutory deductions required by law and your record of employment will also be forwarded to you in due course.

No shift reports were provided showing the grievor working on the J and L or the 618 machine but apparently they do not always indicate where employees were working.

Mr. De Los Santos testified that the grievor had worked overtime feeding the 618 machine. He thought that had occurred about three months prior to January or February, 2016 which is consistent with the grievor's recollection that it occurred in the fall of 2015. Mr. De Los Santos said it was a small job and they needed two people to load the prefeeder. He denied that the grievor said anything about the work causing him pain. Mr. De Los Santos said that if the grievor had said that he would have told him to stop working and then taken him to the office to file an incident report.

Mr. De Los Santos has filled out incident reports for the grievor on other occasions. In one incident in October 2014, a die hit him in the face and he lost a tooth. The other incident was in August 2014 when he hurt his back pulling out some dies. There was a third incident report from June 2015 in which the grievor felt a pain in his groin pulling down a steel die and was instructed to work with a helper until he saw a doctor. Incident reports were also provided for three employees who reported pain or injury while feeding the 618 machine between February and April 2016. None of the employees lost any time from work. At least one other person spoke to Mr. MacNeal about it.

Mr. Alarie testified that the management team on site in June 2016 decided together to terminate the grievor's employment. He said that their attempts to change his behaviour had not been successful. Mr. Alarie testified that the grievor continued to be uncooperative and disruptive in the workplace and that he did not appreciate authority. He said that management considered the three day suspension, the two five day suspensions and the grievor's insubordination on May 26 and decided to terminate him.

The company's Refuse Unsafe Work policy provides:

> All employees have the right to refuse work they believe may bring harm to themselves or any other person. An employee may refuse to work or do particular work when they have reason to believe that:
>
> - Any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker.

The grievor filled out a quiz entitled "Worker Health and Safety at Work" on June 26, 2014. The grievor correctly answered that he knew he had the right to refuse if he had reason to believe the equipment might hurt him and that he could call the Ministry of Labour.

The grievor testified that has not been able to find other employment. He is now 59 years old and has two teenaged children.

SUBMISSIONS

The Employer submits that it properly implemented progressive discipline in managing the grievor and had just cause to dismiss him on June 7, 2016.

The Employer argues that its witnesses should be preferred to those of the Union. It contends that the grievor believes that the plant rules do not apply to him because of his unique position as a die man. According to the Employer, the grievor thinks that he is entitled to an office, that he can decide what work he does, when to take his breaks and what to post on the bulletin boards.

The Employer submits that the grievor has shown no remorse or understanding of his behaviour. It says that he continues to claim that he has done nothing wrong which is consistent with his view that the rules do not apply to him. The Employer argues that the grievor works in a factory and that safety requires that he accept the authority of the supervisors and managers. It maintains that the grievor does not accept that management runs the plant and assigns work.

The Employer argues that the grievor was not the only employee disciplined for extended lunches but he was the only one with a three day suspension on his record so the five day suspension he was given was justified. It submits that the grievor had been observed extending his lunch on multiple occasions. The Employer notes, further, that the grievor had been spoken to in November 2014 for taking a second break with Mr. St. Thomas which was the same behaviour for which he was disciplined in March 2015.

The Employer contends that none of the reasons the grievor provided for extending his lunches were true. Among other things, it says that the baler did not blow on any of those days and he was not observed carrying any dies. The Employer argues that grievor admitted that he would take breaks and go to the lunchroom for a drink and sometimes sit down for a few minutes.

The Employer also submits that a five day suspension was reasonable discipline for putting up postings in four different locations in the plant without permission in view of the five day suspension already on the grievor's record. The Employer maintains that it was a very sensitive time because of the ongoing negotiations. It contends that the grievor intended to disrupt the plant. The Employer also asserts that the grievor's claim that a union representative encouraged him to put up the postings around the plant was not credible and not consistent with the evidence. It argues that the grievor's lack of credibility and/or his recollection of events about the posting should be considered in determining the reliability of his evidence on other issues.

The Employer argues that the grievor's version of the events on May 26, 2016 is not credible. It asserts that the notes made by Mr. Terryberry and Mr. Croken were contemporaneous and support their testimony. The Employer says that the grievor's first response to the direction to work on the 618 machine was to refuse, insist that he was a die man, that it was not in his job description, and to walk away. Mr. Terryberry then got Mr. Swartzman and Mr. Croken involved and followed the insubordination procedure. The Employer contends that the grievor said he could not work on the 618 because he was unfamiliar with it only at the very end of the meeting. It asserts that Mr. Terryberry did not accept that because he knew that the grievor had worked on it before. Mr. Croken confirmed that he was only going to be hand feeding with another employee and the grievor still refused. The Employer argues that this was not a real and legitimate health and safety work refusal so it did not need to follow the work refusal protocol.

The Employer points out that the grievor's version of events is not consistent with Mr. Swartzman's either. It asserts that the grievor claimed that he told Mr. Terryberry right

away that he had worked on the machine before and was not comfortable because of his back. The Employer notes, however, that Mr. Swartzman only said that it was unsafe because he had not worked on the machine before. According to the Employer, the grievor claimed that Mr. MacNeal said he was at the meeting because there was a safety issue but Mr. MacNeal testified that he did not say anything except "OK " when told to leave. The Employer argues that if the grievor had told Mr. MacNeal that there was a safety issue he would not have left but would have persisted on the grievor's behalf. Furthermore, the Employer submits, the grievor was familiar with the work refusal process.

The Employer contends that the grievor's testimony was also inconsistent with his HRTO complaint. It submits, further, that the grievor's evidence that he worked on the 618 for only a short time in 2015 and then stopped because of his back was denied by Mr. De Los Santos. It notes that no incident report was filled out.

The Employer submits that the conclusion to be drawn is that the grievor did not want to work on the 618 machine. He just wanted to do his own work and he claimed that he had a safety concern because he was going to be found insubordinate. The Employer asserts that that was consistent with his usual attitude that his die work was a priority and that he should not be required to do anything else. It was also consistent with his refusal to take direction about his work earlier in the shift. The Employer maintains that the grievor was warned that his behaviour was insubordinate yet he continued to refuse to do the work assigned to him.

The Employer submits that the right to refuse unsafe work is an important fundamental right for workers and should not be abused. It says that if a worker has a real health and safety concern they should raise it at the first opportunity.

The Employer argues that termination was the appropriate disciplinary response in these circumstances because the insubordination on May 26 was a culminating incident and the grievor had a three day suspension and two five day suspensions on his record. It contends that the behaviour leading to all of the discipline shows that the grievor persists in believing that the company's rules do not apply to him which made the employment relationship unsuccessful. The Employer says that there are no mitigating circumstances because the grievor has not accepted any responsibility for his actions or given any indication that he will comply with the rules in the future. The Employer asks that the grievances be dismissed.

The Employer refers to the following awards: *Sunworthy Wallcoverings v. C.E.P., Local 304,* 1996 CarswellOnt 5782 (Simmons); *Cuddy Food Products Ltd. v. U.F.C.W., Local 175*, 2004 CarswellOnt 5235 (Welling); *Durham (Regional Municipality) v. C.U.P.E., Local 132*, 2011 CarswellOnt 8032 (Knopf).

The Union submits that the grievor should be reinstated to his employment. It denies that the testimony of the Employer's witnesses should be preferred and asserts that its own witnesses provided their honest and sincere recollections. The Union contends that there is no basis to conclude that the grievor was not candid with the Employer.

The Union relies upon the grievor's HRTO complaint as a detailed summary of events that was written not long after the termination.

The Union argues that no real investigation was held about the grievor's breaks in March 2015. It contends that he was never provided with any particulars and, therefore, did not have an opportunity to respond to the allegations in a timely fashion. The specific times and dates were only provided to the Union shortly before the arbitration. The Union says that constitutes a denial of basic procedural fairness. At the relevant time, the grievor only had a five minute meeting during which he was immediately handed a five day suspension. As a result, the Employer did not determine whether the grievor was working in a dusty environment that day or was on a die transfer. The Union asserts that in 2014 the grievor's office environment was moved to a cold, dusty space near the baler. It says that they were poor working conditions for someone with his duties. The Union maintains that the grievor did work in a unique position and needed an office. Furthermore, he was breathing significant amounts of dust every day and needed to take breaks. The Union notes that the grievor repeatedly raised his concerns about his working environment with management. He had also staged a work refusal for which the response was only a two week transfer.

The Union argues that the Employer undertook surveillance of the employees' lunch breaks because it had concerns about production but there were no concerns about the grievor's work. The Union asserts that there is no evidence that the time the grievor took on lunches or breaks had any impact on production or the die work.

The Union also contends that the Employer did not particularize the break policy or communicate any concerns to the employees. It did not post any concern about productivity or employee lunches on either bulletin board. The Union argues that the testimony from both Union and Employer witnesses disclosed that the employees take breaks when they see fit as long as production is not affected. It says that the Employer had fostered a casual culture about breaks up to that point. Everyone knew that the twenty minute breaks were not strictly enforced. Furthermore, employees working on machines can take breaks when jobs are running. Many people left the plant to get food in spite of the Company rule prohibiting leaving the premises. The Union also maintains that employees can take a break and go to the lunchroom or outside if there is too much dust from the baler. It submits that, as a result of this break culture, employees, including the grievor, were entitled to be warned that there would be consequences if they did not start following the rules.

The Union argues, in the alternative, that even if there were some grounds for disciplining the grievor for his breaks, he was singled out for harsh treatment. It contends that the other employee who was disciplined for taking an extended break only received a written warning even though it was his second infraction. The Union maintains that the five day suspension given to the grievor was, therefore, excessive. It says that the Employer was not able to provide evidence of any other discipline that anyone had received for excessive breaks, including Mr. St. Thomas who was seen in the lunchroom with the grievor.

The Union submits that the Employer is not alleging that the grievor received greater discipline because he had repeat extended lunch offences but, if that were the case, its managers should have spoken to him the first time they noticed that he was late returning from lunch or in the lunchroom. It maintains that the Employer's approach was contrary to the purposes of corrective discipline.

The Union argues that there is no relationship among the various issues for which the grievor was disciplined because none of his behaviour was repeated. It says that demonstrates that he is responsive to discipline. Therefore, according to the Union, there was no justification to escalate the discipline to five days when he had been discipline free for 17 months after the three day suspension. It notes that the three day suspension letter says that there will be further discipline for further incidents "of this nature". The Union contends that it was, therefore, unreasonable to give him a five day suspension for his first lunch break infraction.

The Union acknowledges that the grievor posted the notices about the Teamsters on the union and company bulletin boards near the punch clock but denies that the grievor distributed them elsewhere in the plant. It also asserts that the Employer ought not to be able to dictate what is posted on the union board.

The Union argues, as well, that the rule against posting without permission is not strictly enforced and that employees post things on the company's board all the time. It contends that there is no process in place to enforce the rule. The Union maintains that the grievor was not aware that he needed to seek permission. It argues, further, that the company never sought to determine who had defaced its own notices when they were written upon. The discipline was, therefore, discriminatory. The Union contends that the discipline was also discriminatory because no effort was made to find out who put up the other postings or who printed them from the computer.

The Union asserts that the Employer reacted emotionally and viscerally to the postings. It denies that they were a safety issue and notes that the Employer just took them down.

The Union also argues that the grievor was exercising his right to free expression by posting the notices and that they did not interfere with any of the Employer's interests. Furthermore, it asserts that there were no complaints from other employees. The Union maintains that the posting did not provide the Employer with cause for discipline but it says that if it did, a five day suspension was a disproportionate response.

The Union also denies that the grievor was insubordinate. It argues that there is no evidence that the grievor has a history of insubordination or refusing direction even though he was required to work in a cold, dusty environment. The Union denies that the Employer's evidence demonstrates anything except that the grievor engaged in negotiation about the optimal way of performing his die man responsibilities. It says that the grievor's dedication to his die man responsibilities is not insubordination. It also asserts that he was not insubordinate just because he expressed his opinion.

The Union argues that the grievor had a sincere and honest belief that he would be unsafe if he worked on the 618. It says that he had not worked on a machine for five years except for 15 to 30 minutes on the 618 and, as a result, had a real fear of injuring his back. The Union submits that the grievor had two back injuries and one dental injury in the two years prior to his termination. One of the back injuries required an extended period of accommodation.

The Union acknowledges that the grievor was also concerned that he had a lot of his die work to do and that was always a priority for him. However, according to the Union, the grievor always compromised with the company if the direction given to him interfered with his die man responsibilities. It says that on May 26 no compromise was possible

because of the safety issue. The Union maintains that if the grievor's only concern had been his die work, he would have gone to the 618 even if he did not want to just as he always had in the past.

The Union asserts that the Employer has not provided any evidence that the grievor worked a full overtime shift on the 618 machine. It says that, in contrast, the grievor gave a detailed explanation of what happened on the one overtime shift that he worked on the 618 as a feeder. The Union contends that he had reason to believe that it would be unsafe given what it did to his back that time. The Union maintains that there is no incident report from the time the grievor worked on 618 because Mr. De Los Santos took him off the machine and, therefore, avoided an incident to report about. The Union submits, as well, that the grievor is not a crew member on that machine. It says that new crew members get training on where to put their hands and that there is no guard on the tamper. They also learn how to stop the machine and on the lock out and tag out procedures.

The Union acknowledges that it has the onus of demonstrating that the grievor falls within the safety exception of the "obey now grieve later" rule and that it has met it. It argues, however, that the Employer did not follow its work refusal process when the safety issue was raised so there was no just cause for discipline.

The Union submits that all of the witnesses testified that safety was put at issue in the course of the conversation before the grievor was sent home but that Mr. Terryberry dismissed the concern. The Union maintains that he should not have been dismissive because other employees had complained after working as feeders on the machine. The Union asserts that Mr. Terryberry's hostile manner exacerbated the situation. It contends that he was required to take proper steps to evaluate the concerns raised by the grievor and the Union even if the grievor's inexperience on the machine was the only issue raised. According to the Union, Mr. Terryberry was required under the process to involve the Union Health and Safety Committee member but that he sent Mr. MacNeal away instead. The Union asserts that Mr. Terryberry never even considered calling an inspector. It maintains that if Mr. Terryberry had followed the process he would have learned more about the legitimacy of the grievor's safety concerns.

The Union submits that Mr. Swartzman's evidence supports the legitimacy of the grievor's safety concerns. It says that the grievor raised his concern about his back with him on May 26, 2016 and also that Mr. Swartzman knew the grievor had a back problem because he had helped him to lift dies. The Union also notes that Mr. Swartzman said that feeding the 618 is a very physical job.

The Union argues that the grievor's fear was reasonable and that the average worker would find that the 618 was not a safe machine. It says that other employees were assigned to feed the machine and asked to be transferred out. The Union contends that other employees had complained of soreness and injuries after working on the machine. Furthermore, according to the Union, the grievor was not experienced on hand feeding that machine except for one limited occasion in which he did not have the physical capacity to do it. The Union submits that any employee with the grievor's back problems would have exercised the same judgment given his past experience on the 618 machine.

The Union also maintains that the Employer had the people it needed to do the work on May 26 because someone did come in on overtime to feed the 618 machine.

The Union asserts that the Employer's failure to meet its obligations with respect to investigating the grievor's safety concerns eliminates any culpability on the grievor's part. It submits that, in the alternative, even if there was some cause for discipline, termination was an excessive penalty. The Union argues that the grievor's response to the direction he was given was safety driven and did not affect the bond of trust with the Employer. It notes that the grievor was a long term employee. Furthermore, the Union submits, the Employer had not tried more moderate discipline. It contends that the principles of progressive discipline are not applicable because the three suspensions were related to different subject matter so there was no evidence of recidivism. The Union maintains that the prior discipline on the grievor's file was for unrelated behaviour. It says that this incident was the first of its kind, not a culminating incident of insubordination.

The Union did not allege a violation of the *Ontario Human Rights Code* at the outset of this case. However, it argues that since the Employer submitted the grievor's HRTO complaint into evidence, the arbitrator should find that the grievor was subject to discrimination on the basis of age and disability contrary to the *Code*. It says that a younger, able bodied person would have been able to do the work on the 618 machine. It asks for an order that the Employer pay the grievor $10,000 in damages for breach of the *Code*.

The Union refers to the following awards: *I.A.M., Local 890 v. S.K.D. Manufacturing Ltd.*, 1969 CarswellONT 1051; *Re Miracle Food Mart and U.F.C.W.* (1988), 2 L.A.C. (4th) 36 (Haefling); *Purolater Inc. and TC, Local 31 (Smith), Re,* 2015 CarswellNat 5537 (McEwen); *Air Canada and C.A.W., Loc. 2213 (Mitchell),* Re, [1993] C.L.A.D. No. 1214 (Frumkin); *I.B.E.W., Local 213 v. Jim Pattison Sign Co.*, 2004 CarswellBC 3348 (Dorsey); *Gainers Inc. v. U.F.C.W., Local 280-P,* 1996 CarswellAlta 1594 (Beattie); *H.M. Trimble & Sons (1983) v. I.U.O.E., Local 115*, 1994 CarswellBC 3224 (Kinzie); *Boeing Canada Technology Ltd. v. C.A.W., Local 2169*, 62 L.A.C. (4th) 395 (Hamilton); *Canada Malting Co. and UFCW, Local 1118 (Allen), Re*, 2015 CarswellAlta 1382 (Sims).

The Employer replies that progressive discipline was appropriately applied in these circumstances because each time the grievor failed to meet the company's expectations the discipline went up a step.

The Employer also replies that it did not discipline employees more harshly if they took more extended lunches and there was, therefore, no obligation to talk to them about their behaviour at the time it was observed. It says that Mr. Nigro did not need to speak to the grievor about why he was in the lunchroom because he could observe what he was doing.

The Employer also replies that the grievor did not need more information in the meeting about his lunches than he was given. It asserts that if the grievor had been transferring a die the week before he was disciplined he would have said that.

The Employer denies that it failed to investigate who put up the other postings. It says that Union never cross-examined Mr. Crosbie or anyone else about finding them.

The Employer replies that there is no evidence that anything was posted on the Employer's bulletin board without permission. It says that if the grievor had asked for permission it would have been denied and the Union could have filed a complaint under the *Labour Relations Act, 1995* if it thought his rights were violated. It insists that there is no issue with respect to freedom of speech in these circumstances since the discipline was for failing to seek permission.

The Employer also replies that there is no evidence that the grievor has a history of negotiating with management about his duties. It says that management made the rules and the grievor was required to follow them even if he objected.

The Employer replies, further, that no evidence about discrimination on the basis of age or disability was presented and there are no grounds to find that there was a breach of the *Code* or to order damages.

DECISION

The Employer has relied upon progressive discipline to justify its termination of the grievor. However, the two five day suspensions upon which the culminating incident relies were grieved. I will, therefore, deal with them in chronological order because a finding that there was no cause for one of the suspensions could affect later discipline.

Extended Lunches

The Employer imposed a five day suspension on the grievor for breaking the rule about lunch times. The only rule with which I was provided about lunch times is in the collective agreement and it says employees are entitled to two 10 minute breaks. However, the undisputed evidence was that everyone combined their two 10 minute breaks into one 20 minute break. There was also overwhelming evidence that people regularly took more than 20 minutes. Even Mr. Alarie testified that they were allowed a few minutes travel time on each side of the 20 minutes. However, there was no evidence that the employees were told how much time they could take and what would be considered too much. In those circumstances, if the Employer decided that employee lunches were too long, it was incumbent upon it to advise employees either that it was going to strictly enforce the breaks in the collective agreement or some other expectation. It would only be appropriate to impose discipline after employees were put on notice of the Employer's new expectations and given the opportunity to meet them.

There was also extensive evidence from both Union and Employer witnesses that employees take breaks other than lunch breaks. People working on machines can leave them and take a break when they are running. The grievor also took extra breaks. There was no explanation as to why the Employer accepted breaks from the other employees and not from the grievor. The grievor had been warned about being in the lunch room once before but he had also been told he could take breaks to get away from the dust and cold. The grievor's belief that he could take breaks is supported by the notoriety of his and the other employees' conduct. The grievor made no attempt to hide his presence in the lunchroom. There was a suggestion that he was sitting somewhat hidden beside the vending machine but the Employer's witnesses had no difficulty seeing him. Furthermore, when Mr. Nigro came in, the grievor made a joke about being caught but then got a drink and sat down. That is not the behaviour of someone who understands that he is doing something he is not supposed to be doing. I note, further, that the

Employer's witnesses agreed that there had not been an issue about the grievor's productivity. Therefore, having effectively condoned the grievor's lunches and breaks and not having put him on notice that it had different expectations, the Employer failed to demonstrate that it had cause to discipline the grievor.

The Employer also failed to provide the grievor with a meaningful opportunity to challenge its claim that he had extended his lunches or to provide an explanation. He was not provided with the dates and times he was alleged to have taken extended lunches or extra breaks until shortly before the arbitration. By that point, he could not be expected to remember what he was doing on those occasions. The Employer could have easily avoided that unfairness by having a real investigation meeting, providing the grievor with its evidence, and asking him why he was late returning from lunch or why he was in the lunchroom in the afternoon. The managers could also simply have asked him why he was in the lunchroom when they saw him there. Saying nothing merely provided support for his understanding that he was allowed to take a break.

The grievor provided evidence related to his working conditions that supported his claim that he was permitted to take breaks to escape the dust and cold. I note that he had participated in a work refusal only a few weeks before the period for which he was disciplined. Furthermore, Mr. Croken's evidence supported the grievor's testimony that he does leave the plant to transfer dies. Mr. Alarie testified that managers did not see the grievor carrying dies but they were not asked that and, in any case, it would be too late to challenge that now. Mr. Alarie testified in the hearing that the baler did not blow that week but, again, there was no way for the grievor to challenge that at this point. Furthermore, the grievor provided evidence that there was significant dust in his work area even when the baler did not blow. If the company had properly investigated the grievor's lunches and breaks the managers might have confirmed that the grievor had no excuses or it might have learned that the grievor took time away from his work area because of the conditions that he had raised with them many times. That would have provided the opportunity for them to tell him that was unacceptable and perhaps to have another discussion about what other options there might be. The grievor did not have a real opportunity to explain any of that because he was presented with a suspension letter already signed and was not provided with the details of the allegations.

I find that the Employer has not demonstrated just cause to discipline the grievor because it did not warn him that its rules about lunches and breaks, whatever they were, were going to be strictly enforced and because it did not provide him with a real opportunity to provide an explanation. The grievance dated March 23, 2015 is, therefore, allowed and the five day suspension will be removed from the grievor's record. He is to be reimbursed for five days pay.

Posting

The grievor may have believed that he could post something about the union on the union board without the company's permission. However, it was not reasonable for him to think that he could post something on the company's board that was designed to cause it to think that it was at risk of the disruption of a displacement campaign. I find that the grievor knew that he would not be permitted to post the notice on the company boards but he did it because he believed it would put pressure on the Employer during negotiations. It would not be reasonable for the grievor to think that the notice he put up was equivalent to posting a cottage for rent or tires for sale even if he thought that was

done without permission. However, there was no reason for him to think that anything was posted without permission. The company rules posted right beside the union board clearly say that permission is required. The grievor had worked for the company for 19 years and should have been familiar with rules so easily accessible even if they were not regularly reviewed in meetings.

The grievor knowingly broke a rule by posting on the company board near the punch clock so there was cause for discipline for that alone. I find, on the balance of probabilities, that he posted the other notices as well. The grievor had no choice but to admit he posted the one on the union board because he was caught on camera and the company board he admitted to was in the same area. I find that he posted the other notices as well because they were the same as the ones he admitted to posting and because he did talk to Mr. MacNeal about a displacement campaign. Furthermore, a copy of the notice was found in his temporary office in the shipping area. I, therefore, find on the balance of probabilities that he posted all of the notices. There was, therefore, cause to discipline the grievor.

Although the discipline letter of February 12, 2018, does not specifically refer to progressive discipline, the company's witnesses testified that they relied on the prior three day and five day suspensions in determining that another five day suspension was appropriate. However, I have found that there was no cause for the prior five day suspension. The grievor must be put in the position he would have been if the Employer had not violated the collective agreement by disciplining him in March 2015. If the grievor had not received the five day suspension on March 23, 2015, the Employer would not have been able to rely upon the three day suspension either. The collective agreement provides at Article 7 6 (ii):

> (ii) Union representation and management shall not consider any previous disciplinary action involving an employee provided that an eighteen (18) month period has elapsed from the date of the last infraction.

The three month suspension was imposed on December 4, 2013 so the Employer would not have been able to consider it on February 12, 2016. For progressive discipline purposes, the Employer was back at the first step. The appropriate discipline for simply posting something without permission would have been a written warning. However, I have found that the grievor put up four postings. Furthermore, by the grievor's own admission, the postings had the intent of pressuring the Employer. On the other hand, there was no evidence that the posting threatened anyone's safety as Mr. Alarie asserted.

The grievance is allowed in part. I have the authority pursuant to the *Labour Relations Ace, 1995* section 48 (17) to substitute a lesser penalty and I find that a one day suspension is appropriate in the circumstances. The grievor should be compensated for the other four days pay.

Insubordination

There is no dispute that at least one of the reasons that the grievor refused to go to work on the 618 machine on May 26, 2016 was that he still had die man work to do and he thought that should be a priority. There is also no dispute that at some point he claimed that there was a safety issue. The issue before me is whether that was a true concern or

whether the grievor just mentioned safety because he preferred to do his die man work and did not want to be found insubordinate.

There is evidence supporting the grievor's claim that he had a legitimate safety concern and other evidence supporting the Employer's contention that it was not legitimate.

The fact that the grievor had back injuries in the past and that he still got assistance lifting dies from time to time supports his claim that he had a legitimate safety concern. Furthermore, the grievor testified that he mentioned his back to Mr. Terryberry and Mr. Croken on May 26. Mr. Swartzman and Mr. MacNeal testified that he mentioned his back to them but did not confirm that it was mentioned to Mr. Terryberry and Mr.Croken. Mr. Swartzman's greater concern was his belief that the grievor was not trained and had no experience on any machines. The grievor's contention that he had a safety concern is also supported by his testimony that he had worked on the 618 machine for 15 or 20 minutes in the fall of 2015 and it had hurt his back so he stopped. Mr. Terryberry's and Mr. Croken's emails from May 26 indicate that while the grievor raised safety late in the conversation about working on the 618 it was before Mr. Terryberry mentioned insubordination. The grievor's claim that he had a safety concern is also supported by the fact that Mr. Swartzman and the grievor felt they needed to bring Mr. MacNeal with them to the meeting and he was the Health and Safety Committee representative.

On the other hand, there is much evidence to support the Employer's allegation that the grievor did not have a *bona fide* safety concern. Mr. Terryberry testified that when the grievor was first told he was going on the machine he said "Nah I'm not going to do that". Mr. Terryberry recorded that interaction in an email within an hour. The Employer's contention is also supported by the, essentially unchallenged, evidence that the grievor spoke first about having die man duties to finish and that they should be a priority. The Employer's claim that the grievor's safety concern was not legitimate was also supported Mr. Terryberry's and Mr. Croken's testimony that Mr. Swartzman did not mention the grievor's back to them. Mr. Swartzman first testified that he had mentioned the grievor's back and then agreed he might have spoken only about the grievor's lack of experience on the machine. Certainly Mr. Swartzman's main concern was the grievor's lack of experience because he thought that the grievor had not worked on any machines or had not done so for a very long time. However, that was not true. It does not appear that the grievor tried to clarify that at any point. The notes of the interview with Mr. Swartzman about May 26 do not indicate that he mentioned the grievor's back. Furthermore, the grievor said in his HRTO complaint that he had never been a crewman or worked on a machine but that was not accurate because he *had* worked on machines, including the 618. The Employer's position is also supported by Mr. De Los Santos' evidence that the grievor did work an overtime shift in the fall of 2015 prefeeding the 618 machine and by the notes indicating that the grievor acknowledged in the investigation meeting that he had worked a four hour overtime shift on that machine. The Employer's view is further supported by the fact that Mr. MacNeal did not say anything about health and safety when he was told to leave the meeting. Finally, the Employer's claim that the grievor did not have a health and safety concern is supported by the evidence that the grievor was only going to assist feeding the machine and was not being asked to operate it. According to the testimony, lock out/tag out is only used when someone is going to go into the machine and the E-Stop buttons are easily identifiable.

The parties agree that the arbitral jurisprudence establishes that an employee must "obey now and grieve later" unless they have a true safety concern. They also agree that

if an employee refuses to follow a work direction for alleged safety reasons the onus is on the Union to meet the tests set out in a variety of awards including *Re Steel Co. of Canada Ltd. and U.S.W. , Loc. 1005* (1973), 4 L.A.C. (2d) 315 (Johnston) cited in *H.M. Trimble & Sons (1983) Ltd. (supra).*

> The issue then becomes whether the grievor was justified in his refusal. His justification was that of danger to his health or physical well being. The onus is on him to establish this justification. Did he do so?
> ….
>
> From these [arbitration precedents] we take the following propositions against which to test the grievor's evidence and argument. These are: First, did he honestly believe his health or well being was endangered? Secondly, did he communicate this belief to his supervisor in a reasonable and adequate manner? Thirdly, was his belief reasonable in the circumstances? Fourthly, was the danger sufficiently serious to justify the particular action he took?

After considering the conflicting evidence I have concluded that the grievor failed the first part of the above test. He did not honestly believe his health or well-being was endangered. I find that he did not have a *bona fide* safety concern and only raised the safety issue because he wanted to continue his own duties and did not want to work on the 618 machine. I reach this conclusion somewhat reluctantly because workers should usually be given the benefit of the doubt as to their belief with respect to their safety concerns. That does not mean that their concerns will be determined to be based on a real hazard but only that it is better to err on the side of investigating a safety concern rather than dismiss it out of hand. A manager who does that takes a significant risk that the employee's belief will be found to have been a real one and that they should, therefore, have proceeded with the health and safety protocol. In this case, however, the grievor did not have a *bona fide* belief. I find that his testimony was unreliable because he changed his story according to his perceived interests. It was also inconsistent with all of the other witnesses on at least some important points. Most significant is my finding that he did work an overtime shift on the 618 machine six or seven months prior to May 26, 2016. I make that finding on the basis of Mr. De Los Santos' evidence and the grievor's response recorded in the notes of the investigation meeting. I also note the absence of any incident report from that shift indicating that the grievor had hurt his back. Furthermore, the grievor knows that he may be assigned to work on the machines so if his experience on the 618 had left him with the belief that doing that kind of work would hurt his back one would have expected him to provide medical documentation noting that restriction. The overtime shift he worked in the fall of 2015 was seven or eight months after he returned to full duties and those duties require heavy lifting. The fact that the grievor worked a four hour overtime shift on the 618 machine six or seven months before he was asked to work on it on May 26 also undermines any claim that he felt uncomfortable because he did not know the machine. Four hours was plenty of time to become familiar with feeding the machine. Furthermore, the grievor has been working around, and occasionally with, these machines for almost 20 years.

The grievor had two opportunities to explain to Mr. Terryberry why he did not want to work on the 618 machine and he did not mention his back or provide any credible safety concern. Mr. Swartzman said that he had never worked on a machine and Mr. Terryberry knew that was not true. I find that the grievor thought that if he raised a safety

concern he would not be required to do the prefeeding and he was prepared to make that false claim to avoid work that he preferred not to do.

Mr. Swartzman, however, acted in good faith. He had not worked at the company for very long and had never seen the grievor work on a machine. He believed, even a year and a half later when he testified, that the grievor had never worked on a machine or that if he had, it was many years before. If that were really true, his safety concern would have been justified.

The Union relies on the grievor's complaint to the HTRO but I find that what he recorded there is inconsistent with most of the other evidence. No one testified that safety was the grievor's first concern. Everyone, other than the grievor, testified that he said that he had other work to do. That was also recorded in both Mr. Terryberry's and Mr. Croken's emails. No one testified that anyone said anything about the grievor being a "crewman" or signing off on Lock out/Tag out at the time although Mr. Swartzman said that was his concern. Finally it was simply untrue that the grievor never worked on any machines as he also claimed in his complaint. I, therefore, do not find that the grievor's complaint to the HRTO is a reliable recounting of the events on May 26. The grievor also said in his complaint that when he was asked in the subsequent meeting if he had ever worked on the 618 he said no when, in fact, he said that he had worked on it for four hours of overtime and that is supported by Mr. De Los Santos' evidence.

The Union contends that the grievor should not be found culpable of insubordination because the Employer did not follow the Health and Safety protocol. It says that if it had, it would have acquired more information about the grievor's concerns. However, there was no more information to learn. At the end of such an investigation the Employer would know what it already knew i.e. that the grievor had worked on the 618 machine six or seven months previously, that there was no record of a health and safety issue at the time, and that the grievor had no medical restrictions.

The grievor and Mr. Terryberry were engaged in a test of wills that started early in the May 25/26 shift (perhaps even earlier than that). I note that they both felt it necessary to record their initial dispute. However, Mr. Terryberry was the grievor's supervisor and the grievor was, therefore, required to follow his direction to work on the 618 machine. I, therefore, find that the grievor was insubordinate in refusing to work on the 618 machine on May 26. The issue, then, is the appropriate discipline. The Employer had based its decision to terminate the grievor on progressive discipline and a culminating incident. However, for the reasons cited in the earlier sections, the only discipline left on the grievor's record on June 7, 2016 was the one day suspension I have substituted for the five day suspension issued on February 12, 2016. The Employer, reasonably, has not alleged that the grievor's insubordination was sufficient, on its own, to warrant termination and a one day suspension does not constitute sufficient prior discipline to support termination for a culminating incident. I must, therefore, exercise my discretion to substitute an appropriate penalty. I have considered that the grievor was in a somewhat desperate state on the May 25/26 shift. A new die man had been hired which made him feel like his job was threatened. Furthermore, at the age of 57 he was being assigned to midnights for the first time. May 25/26 was his first midnight shift and it started with being told there was a new load tag process that he had to do even though he did not think it would work. I also note that production did not suffer that night since someone did come in to work on the machine. However, while those are mitigating factors, there are also aggravating factors. The grievor's insubordination was

exacerbated by his attempt to use a false safety concern to avoid the work. It is a serious infraction for an employee to abuse their right to a safe workplace. Furthermore, the grievor has never acknowledged that his behaviour was wrong or shown any remorse. The next step in progressive discipline is normally a three day suspension. However, there is always discretion to impose greater discipline if the offence is sufficiently serious. In all of the circumstances I find that a five day suspension is an appropriate penalty for the grievor's behaviour on May 26, 2016. The termination grievance is, therefore, allowed in part.

I hereby make the following orders:

1. The five day suspension imposed on the grievor on March 23, 2015 will be removed from his file and he shall be reimbursed for five days pay at the rate payable on that date.
2. The five day suspension imposed on the grievor on February 12, 2016 will be reduced to a one day suspension and the grievor shall be reimbursed for four days pay at the rate payable on that date.
3. The grievor will be reinstated to his former position as soon as possible.
4. The grievor's record will reflect a five day suspension dated June 7, 2016. However, for the purposes of Article 7 6(ii) the discipline will be deemed to have been imposed as of the date he returns to work.
5. The Employer is ordered to compensate the grievor for wages and benefits lost as a result of his termination (taking into account the five day suspension) in an amount to be agreed by the parties.
6. The grievor will be credited with seniority for the period from June 7, 2016 to the date of his reinstatement.

The Union has asked that I find that the Employer violated the *Ontario Human Rights Code* and award damages for that violation. There was no evidence before me that supports a determination that the Employer violated the *Code* in disciplining the grievor or terminating his employment.

I remain seized in the event that the parties are unable to agree to compensation, including any issues related to mitigation. I also remain seized with respect to any other issues arising from the implementation of the above orders.

Dated at Toronto, February 23, 2018

Laura Trachuk
Arbitrator