IN THE MATTER OF AN ARBITRATION

BETWEEN

YEE HONG CENTRE FOR GERIATRIC CARE

(the "Employer")

and

SERVICE EMPLOYEES' UNION, LOCAL 1 CANADA

(the "Union")

GRIEVANCE OF CLORINE CAREW
(GRIEVANCE NO. 100-230-351)

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Employer:
Kathryn Ball – Gibbs & Associates
Lloyd Del Rosario – Director of Resident Care
Gary Sumner

For the Union:
Meg Atkinson – Caley Wray
Graeme Moore – SEIU Local 1 Union Representative
Hazeline Aaron – Union Steward
Clorine Carew - Grievor

HEARINGS HELD IN TORONTO, ONTARIO ON FEBRUARY 4, MARCH 1 AND APRIL 12, 2019. WRITTEN SUBMSSIONS RECEIVED UP TO APRIL 23, 2019.

AWARD

INTRODUCTION

[1] This matter concerns an April 24, 2018 grievance filed by the Union alleging that the Employer terminated the employment of Clorine Carew (the "grievor") without just cause.

[2] The Employer operates four nursing homes, which cater to the Chinese Canadian and South Asian Canadian communities. One of the nursing homes is located in Markham, Ontario, (the "Markham Home"). The Markham Home has 125 beds, located on five floors. Each floor is divided into a North side and a South side.

[3] The Union represents all employees employed by the Employer at the Markham Home, save and except supervisors, persons above the rank of supervisor, office and clerical workers, social workers, chaplain and summer students.

[4] The grievor was terminated on April 24, 2018 for entering three residents' rooms on three different occasions. The Employer alleges that the grievor entered the three residents' rooms with ill intentions, searching through their personal belongings for potential valuables. The Employer also alleges that the grievor mislead them during the investigation and did not demonstrate any remorse. The Employer submits that the grievor's misconduct violates their policies and has given rise to a breakdown in trust. In all the circumstances, the Employer asserts that they had just cause to terminate the grievor's employment.

[5] The Union acknowledges that the grievor entered three resident's rooms. However, the Union asserts that the grievor did not have any ill intentions and she did not violate any of the Employer's policies. Rather, the grievor was performing work and/or providing necessary supplies to the residents. The Union takes the

position that the Employer did not have just cause to terminate the Grievor's employment.

[6] The parties agreed that in order to respect the privacy of residents, I would not identify the residents by name or by the room in which they reside. Instead, I will only refer to the residents as Resident "A", "B" and "C".

THE EVIDENCE

[7] In relation to one of the alleged incidents, the Employer relies on a video captured on April 7, 2018 by Resident A on his computer's camera. The Union strenuously objected to the admission of the video. After hearing brief submissions, I advised the parties that I required evidence to provide context before I could rule on the objection. In my opinion, it was most expedient to mark the video as an exhibit, subject to the Union's right to argue that the video is not admissible and the right of both parties to argue as to what, if any, weight ought to be given to the video if I were to subsequently rule that it was admissible.

[8] The Employer also tendered a number of other documents authored by persons who they indicated would not provide oral evidence under oath in these proceedings. The Union also objected to the admissibility of these documents on the basis of the rule against hearsay. In the interest of providing an expedited hearing, I marked the documents as exhibits, advising the parties that they could make submissions on the admissibility of the documents and what, if any, weight ought to be given to the documents if I were to rule that they are admissible.

[9] I refused to admit into evidence a document referred to as an "investigation report" authored by Carmen Zhou, who was the Assistant Director of Resident Care (ADRC) during the relevant period of time. The investigation report was a summary of Ms. Zhou's findings with respect to the grievor's alleged misconduct. The Employer sought to have the investigation report admitted without calling Ms. Zhou to testify. The Union objected to the admission of the investigation report,

arguing that it was hearsay. I agreed with the Union's submission and advised the Employer that I would not admit the investigation report without Ms. Zhou appearing to verify the authenticity of the investigation report and providing the Union with an opportunity to cross-examine.

[10] Despite my ruling during the hearing, the Employer raised the issue again in final argument. Therefore, I feel compelled to include my reasons for excluding the investigation report in this award. I note that the investigation report includes a summary of what Ms. Zhou was told by residents who the Employer advised at the outset they were not prepared to call as witnesses in this proceeding. The investigation report is clearly hearsay and the Employer sought to rely on the investigation as proof of the assertions found therein. The Employer's only explanation for not calling Ms. Zhou as a witness was that she was no longer employed by them, but they provided no reason why she could not be summoned to testify in this proceeding.

[11] In *R. v. Starr* [2000] 2. S.C.R. 144, the Supreme Court of Canada indicated that all existing traditional hearsay exceptions can be challenged under the principled approach, which has the requirements of reasonable necessity and reliability. In this case, I am of the view that the Employer has not satisfied the requirements of reasonable necessity and reliability. I have not been provided with any explanation as to why Ms. Zhou cannot testify, other than the fact that she is no longer employed. I also question the reliability of the contents of the investigation report. The investigation report is based upon information provided by the three residents and two employees. The employees testified in this proceeding and the Union had the opportunity to cross-examine. So I already have the employees' evidence, which as will be noted below consisted mostly of what they were told by the residents. However, the residents did not testify in this proceeding and the Employer refused to make them available for cross-examination. Therefore, the entire basis of the investigation report was hearsay evidence or evidence that I have already been provided through witnesses at the

hearing. Furthermore, the conclusions found in the investigation report are the opinions of Ms. Zhou and are directly on point with the very issue I am asked to resolve in the grievance (i.e. did the employer have just cause to terminate the grievor).

[12] At this point it should be noted that, in addition to the two employees who provided hearsay evidence, I allowed the Employer to tender other hearsay evidence from the residents, subject to argument as to what weight, if any, I should give such evidence. This evidence was evidence provided to Lloyd Del Rosario, the Director of Resident Care (DRC) who testified in these proceedings and was the person who ultimately made the decision to terminate the grievor's employment.

[13] In my view, the investigation report is not reliable evidence as it contains conclusions based on evidence from others that was not taken under oath nor tested in cross-examination. The investigation report has little probative value and the contents are highly prejudicial to the grievor. The information found in the investigation report was already placed before me and the hearsay evidence was also admitted but with the stipulation that the Union could argue admissibility and weight during final argument.

[14] During final argument, the Employer raised a new argument that the investigation report ought to be admitted under the business records exception found in the *Evidence Act,* RSO 1990, c. E. 23 s. 35(2).

[15] In my view, the investigation report does not fall within the business records exception. The business records exception is based on an acceptance that records kept in the usual and ordinary course, such as time keeping records, are accurate and reliable. The investigation report in this matter was not created in the usual and ordinary course of business. The Employer's business is not investigations. Rather, the investigation report was created with the specific intention of supporting the Employer's decision to terminate the grievor's

employment. In this regard, the investigation report is to some extent self-serving and its creation was for the purpose of justifying the termination that has been grieved. Furthermore, as indicated above, I have serious concerns about the reliability of the contents of the investigation report when both the author and the residents are not made available for cross-examination.

[16] The Employer tendered a number of awards admitting evidence under the business records exception. All of the awards provided by the Employer were distinguishable based on the facts before the arbitrator. For instance, in *Toronto Community Housing Corporation and TCEU, Local 416* 2012 CanLII 85556 (ON LA), Arbitrator Howard Snow allowed the introduction of WSIB records. This case is clearly distinguishable, as WSIB records are kept in the usual and ordinary course of the WSIB's business of adjudicating claims and the authors are not compellable as witnesses. The situation before Arbitrator Snow clearly fell within the principled approach of necessity and reliability. In addition, the records at issue were kept in the ordinary course of the WSIB's business. The Employer did not provide one case where an investigation report was admitted into evidence without the need to produce the author or the persons who provided the author with the information found in the report.

[17] I acknowledge that arbitrators have the discretion to admit hearsay evidence pursuant to s. 48(12)(f) of the *Labour Relations Act, 1995*, S.O. c 1, Sch. A (the "*Act*"). I also acknowledge that in the usual course an arbitrator may accept such evidence and then assess the weight after hearing final submissions as I have done with the other hearsay evidence and the video evidence tendered in this proceeding, see *Re City of Toronto and CUPE, Local 79* (1981) 33 O.R. (2d) 512 (Ont. Div. Crt.). However, in my view it would be entirely unfair to the Union and the grievor to admit the investigation report without producing the author. As indicated earlier, the content of the report is based mostly upon information provided by residents who also will not be testifying in this proceeding. The conclusions of the report are already before me in the termination letter and

evidence of Mr. Del Rosario. The Union disputes the information and conclusion set out in the investigation report. In fact, this entire proceeding relates to the same subject matter as the findings in the investigation report, which addresses the very issue I am tasked with resolving.

[18] After carefully considering the parties' submissions, I find that the investigation report cannot be relied upon and is not admissible in these proceedings. In these circumstances, the prejudice outweighs the probative value of the evidence. Therefore, in the interest of providing a fair hearing, I am refusing to admit the investigation report. I also do not consider it appropriate to exercise my discretion to admit the investigation report, see *Peterborough Victoria Northumberland & Clarington Catholic District School Board v. O.E.C.T.A.* (2011) 207 L.A.C. (4th) 335 (Luborsky).

[19] I now turn to the evidence that was admitted and presented in these proceedings.

[20] In addition to the documents admitted into evidence, I heard from a number of witnesses.

[21] The Employer called three witnesses to provide oral evidence at the hearing. Mr. Del Rosario provided evidence of his involvement in the investigation and his decision to terminate the grievor's employment. Two bargaining unit members also testified with the assistance of a Mandarin speaking interpreter. Dannie Sun is a registered Practical Nurse (RPN) who worked with the grievor on the 5th floor. Jin Qu is a Personal Support Worker (PSW) who also worked with the grievor on the 5th floor.

[22] The Union called only one witness, the grievor. The grievor is a 57 year old single woman who was employed by the Employer at the Markham Home as a PSW. The grievor immigrated to Canada from Jamaica in the early 1990's. Prior to her employment with the Employer, the grievor was employed at two other long

term care facilities in Toronto. In total the grievor has approximately 25 years of experience working as a PSW. The grievor began her employment with the Employer in October 2008, initially as a part-time employee. After approximately five year's employment the grievor secured a full-time position. At the time of her termination, the grievor was working day and evening shifts on the 5th floor at the Markham Home. The grievor has never been previously disciplined.

[23] The PSW position provides essential direct care to residents for all their activities of daily living. These duties include assisting residents with their personal hygiene, feeding, dressing, cleaning and monitoring. By all accounts, the PSWs have a busy day attending to the residents' needs. There is also no dispute that the PSW position is a position of trust that involves caring for very vulnerable residents.

[24] The role of a PSW and Employer's operation at the Markham Home is governed by the *Long-Term Care Homes Act*, S.O. 2007, c.8 (*LTCHA*), which includes a *Resident's Bill of Rights*. The Employer has an obligatory *Mission, Vision and Values Statement* that is consistent with the *Residents' Bill of Rights* and includes acting ethically and in a trustworthy manner. In addition, the Employer has a *Code of Ethical and Professional Conduct*, which includes respecting the privacy and dignity of residents as well as being truthful and trustworthy. All PSWs, including the grievor, receive mandatory training every year with respect to the *Resident's Bill of Rights* and the Employer's *Code of Ethical and Professional Conduct*.

[25] The events giving rise to the grievor's termination occurred in March and April 2018 on the day (7:00 am– 3:00 pm) and evening shifts (3:00 pm-11:00 pm). During this period of time, the grievor was working on the 5th floor, which has 50 beds (25 beds on each side). The PSW work assignments rotate among the PSWs on the fifth floor so they are exposed to working with all the residents who reside on the floor. The fifth floor has three PSWs assigned to each side (north and south) on the day and evening shifts. Two PSWs are assigned to assist 10 residents (also

referred to as “beds”) and the third PSW is assigned 5 residents together with other duties including providing residents on their side with a snack and bathing/showering a number of residents.

[26] The first allegation to come to the Employer’s attention occurred on the evening shift of April 7, 2018. The events transpired in the room of Resident A who is a 65 year old male, who suffers from flaccid quadriplegia. Resident A uses a wheelchair for mobility and a catheter for bladder elimination. Resident A does not have any cognitive impairment, although he does suffer from an anxiety disorder. The witnesses all confirmed that Resident A was cognitively alert and able to use a computer and communicate clearly about his needs.

[27] The evidence indicates that it was well known that Resident A does not want anyone to enter his room without his consent. This was communicated to employees on March 2, 2018 during a floor meeting. In addition, Resident A has a sign indicating “STOP” attached to a piece of fabric that was hung across his door.

[28] Ms. Qu indicated that she would not normally go into Resident A’s room without him being present. However, she indicated that employees would go into Resident A’s room to change the bed linen when requested by the resident. Ms. Qu also confirmed; it was only recently that Resident A had become more concerned about people going into his room.

[29] Mr. Del Rosario indicated that at some point on April 8 or 9, 2018, Ms. Zhou advised him that Resident A told her that he had a video he wanted to show her. Mr. Del Rosario determined that he, Ms. Zhou and a social worker would meet with Resident A to view the video.

[30] Mr. Del Rosario indicated that Resident A explained that he had noticed “things being misplaced” and so he left his computer open with the video camera operating when he left his room that day. Mr. Del Rosario then indicated that he viewed the video.

[31] The video on Resident A's computer was taken on April 7, 2018 at approximately 5:00-5:30 pm. The video is not very long, running approximately two minutes and 35 seconds. At approximately 0:0:59 one can see shadows outside the door. The video then depicts the grievor entering Resident A's room at approximately 0:1:05 holding a mug. The door to the room is left wide open and the grievor appears to put her hand into and rummage through a green shopping bag from 0:1:13 to 0:1:36. The grievor is looking away (actually directly towards the camera) while her hand is in the green bag. The grievor then appears to quickly look into the green bag. Then the grievor quickly looks into two bedside table drawers at 0:1:37. The grievor appears to then pick something up off the floor and places it on the side table at approximately 0:1:43. The grievor exits the room at 0:1:51 and shadows can be seen outside the door until 0:2:03. The actual time the grievor is in Resident A's room is less than one minute and the door is wide open the entire time.

[32] Resident A advised Mr. Del Rosario that the grievor did not have his permission to come into his room. According to Mr. Del Rosario, Resident A was also concerned about retaliation from staff if they knew he was leaving his computer's video camera on. Mr. Del Rosario reassured Resident A that no retaliation would occur, and he then downloaded a copy of the video.

[33] Mr. Del Rosario acknowledged that the Employer has a policy relating to surveillance inside residents' rooms. The policy indicates that, "Surveillance should be avoided where possible." However, the policy also provides that residents who are capable of making decisions for themselves may choose to have surveillance in their rooms. The policy also provides for signage indicating that a room is under surveillance being "normally required".

[34] On April 11, 2018 at approximately 2:15 pm a meeting was held with the grievor. The Chief Steward attended to provide the grievor with Union representation. Mr. Del Rosario, Ms. Zhou and Grace Fu (HR Advisor) attended for the Employer. According to Mr. Del Rosario, he interviewed the grievor and

notes were taken by Ms. Fu during the meeting. Mr. Del Rosario indicated that during the meeting it was pointed out to the grievor that she was not assigned to care for Resident A, although the grievor was assigned to provide a snack to residents, including Resident A. The grievor was asked if she went into Resident A's room on April 7, 2018 around 5:00-5:30 pm? The grievor indicated that she did not think there was a reason to go into Resident A's room, except for giving a snack. The grievor then recalled meeting Resident A in the hallway at dinner time and being asked to provide him with an incontinence pad also known as a "liner". The grievor indicated that she picked up a liner from the "clean room" and brought it to Resident A's room. The grievor indicated that the "strip" (cloth with stop sign) was not attached and the door was "a little bit open." The grievor indicated that she entered Resident A's room and left a liner on a chair inside his room. (The notes of Ms. Fu also reflect the grievor indicating she left the liner on the table). The grievor then left the room, replacing the strip across the door. The grievor then recalled that Resident A had also asked for a gown, but she did not have a gown. The grievor also indicated that she looked in Resident A's room for a gown.

[35] Mr. Del Rosario indicated that he spoke to Resident A about the grievor's version of what occurred on April 7, 2018. According to Mr. Del Rosario, Resident A denied requesting a liner from the grievor. Resident A recalled the grievor coming to his room after he had seen the recording, around 7:00 pm, and asking him if he had a gown and he told her that he had a gown. The Resident then provided a written statement confirming the information provided to Mr. Del Rosario.

[36] Mr. Del Rosario testified that Resident A used a liner, but the usual practice was not to enter his room to provide him with a liner. Instead, staff would leave the liner on a rail next to his room.

[37] Ms. Qu also testified about the practice of leaving the liner outside the door. Ms. Qu described the liner as being approximately 4 inches by 11 inches and

Resident A would only use it at night.[1] Ms. Qu also indicated that sometimes she would put a liner or a gown in Resident A's room upon his request. According to Ms. Qu, Resident A also liked the "good gowns".

[38] At the hearing, the grievor denied any knowledge of a practice where a liner would be left on the railing outside Resident A's room. The grievor did not think it was appropriate to leave a liner on the railing as other residents might take it. The grievor indicated that Resident A only used the liners at night, but he would on occasion ask for additional liners and have more than he required in his room. According to the grievor, Resident A was known to have liners in his green bag or in his side table.

[39] The grievor testified at the hearing, that she recalled working April 7, 2018 on the evening shift. She was working on the north side and responsible for snack and showering five residents. One of the residents she was required to shower was Resident A. Resident A was taken to the shower before dinner around 4:00 - 4:30 pm. After the shower and on the way back to his room he asked for a liner. The grievor was not sure if she gave him a liner at this point. The grievor indicated that she was running late after taking Resident A back to his room. The grievor recalls trying to get organized for dinner when Resident A came by on his way to the dining room. At this point, Resident A asked for a liner again. The grievor says she went to another resident's room, located next to Resident A's room, to get a mug to fill with hot water for a resident. Then the grievor went into Resident A's room to see if he had a liner. The grievor acknowledged putting her hand into the green bag. The grievor indicated that her initial feeling around with her hands in the green bag was to try and feel for a liner. The grievor explained that Resident A would keep liners in the green bag, and she thought that perhaps he put a liner in the green bag after his shower. The grievor said she did not initially look into the bag as there were papers in the bag and she did not want to look through the

[1] It was agreed that the liner appeared to be about 6 inches wide and 14 inches long, which when folded (as depicted in a picture that was entered as an exhibit) was 6 inches by 5 inches and about half an inch thick.

papers. She says she then quickly took a look into the green bag to be sure she did not miss a liner. The grievor also admits looking in the bedside drawers. According to the grievor, she saw liners in the bed side drawers. The grievor also indicated that Resident A again asked for a liner later that evening when she saw him in the dining room.

[40] During Mr. Del Rosario's investigation into the April 7, 2018 incident, he became aware of two more incidents involving the grievor entering two other resident's rooms. The specifics of the two other events were provided by Ms. Sun and Ms. Qu.

[41] Ms. Sun testified that on March 7, 2018, at around 7:30 - 8:00 pm she observed Resident B coming out of her room in a wheelchair. Resident B's room is on the south side. Ms. Sun described Resident B as being "very angry" and had a "look of fear" indicating that a "black person" had entered her room. Resident B described the person in her room as looking "strong" and having a "rough attitude". Ms. Sun indicated that she thinks Resident B said something about her drawer being open, but she provided no details. Ms. Sun also recalls Resident B indicating that she had her eyes closed when the person entered her room and by the time, she opened her eyes the person had left her room.

[42] Ms. Sun said she reported this information to the ADRC and to the employees on the next shift.

[43] Ms. Qu also testified about the March 7, 2018 incident. According to Ms. Qu, she was with another PSW named Rita and nurse "Dannie" (Ms. Sun) around 7:00 pm when she saw Resident B in a wheelchair outside her room. Resident B was "very angry" and looking "afraid" saying "that black person is a bad person". According to Ms. Qu, Resident B did not elaborate on why she was making such a statement. Ms. Qu stated that they "could not get information from her (Resident B)." Ms. Qu indicated that they calmed the resident down and returned her to her room.

[44] Resident B was 103 years old at the time of the incident and her care plan indicates she was prescribed hydromorphone and Tylenol for pain. Ms. Sun indicated that Resident B would decline to take her medication on occasions and there was no notation in her medical records of medication being dispensed on the evening in question.

[45] Ms. Sun believed that the incident occurred after break time and before snack time, between 7:30 pm and 8:00 pm, but she could not recall the specific time. Ms. Qu believed the incident occurred sometime between 7:00 pm and 8:00 pm.

[46] The grievor testified that she was working the E1 shift on March 7, 2018, working on the north side. However, on this date she was also assigned to give snack to all 50 residents on both sides (north and south). The grievor recalls entering Resident B's room to give snack and turn off her call bell. The grievor indicates that Resident B was in bed at the time and appeared asleep with her eyes closed.

[47] Both Ms. Sun and Ms. Qu confirmed that Resident B would frequently use the call bell. According to Ms. Sun, sometimes Resident B would use the call bell for no apparent reason. On some occasions, Ms. Sun would respond to the call bell and find Resident B either pretending to sleep or in no need of any assistance. Ms. Sun also confirmed that were occasions when Resident B would engage the call bell soon after someone had responded to the call bell, without any reason for requesting assistance. Ms. Qu had similar experiences with Resident B repeatedly pressing the call bell for assistance for no apparent reason or while pretending to be asleep in bed.

[48] The call bell records for Resident B on the night in question reflect the use of call bells four times (6:02:02 pm for 5:03 minutes, 6:08:32 pm for 6:25 minutes, 6:30:48 pm for 1:09 minutes and 8:11:03 pm for 4:45 minutes).

[49] Ms. Sun indicated that the grievor was not assigned to the south side on March 7, 2018. However, Ms. Sun could not recall if the grievor was assigned to give snack on both sides that evening.

[50] The third incident occurred on March 27, 2018. Ms. Qu was the only witness for the Employer with first-hand knowledge of what occurred. Ms. Qu could not recall the specific date when she testified at the hearing. According to Ms. Qu, she and the grievor were assisting a resident who shared a room with Resident C. The room was partitioned by a curtain that ran through the middle. Ms. Qu indicated that at the time of the incident, Resident C was in the shower with a different PSW. The resident they were assisting required total care and two people to transfer her. Ms. Qu and the grievor were assisting the resident with her preparation for dinner. After completing the two person transfer, Ms. Qu observed the grievor go around the room's curtain partition, which was two thirds closed, and then return. Ms. Qu could not see what the grievor was doing on the other side of the curtain. Ms. Qu independently offered that the grievor had no reason to go over to Resident C's side of the room. Ms. Qu also independently offered during her evidence, without any prompting, that Resident C did not need to have her bed linens changed.

[51] Resident C is 80 years old and generally independent. There is no dispute that she provides her own bed linens.

[52] The evidence of both Ms. Qu and the grievor confirm a tense relationship where Ms. Qu would constantly check on the grievor's work.

[53] Ms. Qu offered, without any prompting, that she had "heard money got stolen". I must note that there is absolutely no evidence before me that anything was taken from any of the three resident's rooms. In my view, Ms. Qu's evidence demonstrated a strong bias against the grievor with a propensity to give answers against the grievor before being questioned by counsel.

[54] The grievor testified about the incident involving Resident C. The grievor recalled assisting Ms. Qu with the resident who required a two person transfer. The grievor says she observed another PSW assisting Resident C with her shower. According to the grievor it is customary to change the linens on the beds when a resident is showered. The grievor advised that she checked Resident C's bed and determined that it did not need changing. At that time she noticed bed linen that she believed must have been left by the night staff. The grievor took the bed linens because Resident C provided her own bed linens.

[55] The grievor was interviewed once again on April 16, 2018. The same people who attended the April 11, 2018 meeting were in attendance at this meeting.

[56] Mr. Del Rosario indicated that Ms. Fu took notes at this meeting as well. The notes are four pages long and indicate that the meeting was held between 10:10 am and 11:15 am. The Union objected to the admission of the notes. While no explanation was provided as to why Ms. Fu could not be called as a witness, I nevertheless admitted the notes, subject to argument as to their weight.

[57] During the April 16, 2018 interview, the grievor was asked about the incident involving Resident B. The grievor acknowledged that she was not assigned to care for Resident B on that evening. However, the grievor indicated that she went into Resident B's room because a call bell was activated, and no one was answering the call bell. The grievor indicated that she went into the room and turned off the call bell and came out, then Resident B pressed the call bell again.

[58] The grievor was also asked about the incident involving Resident C. The grievor acknowledged going into Resident C's side of the room, but she said she was only on that side of the room to check if the bed linen needed to be changed.

[59] The grievor was also asked again about the incident involving Resident A. The grievor advised that she had a liner with her when she went into Resident A's room. The grievor acknowledged entering Resident A's room and looking through the green bag. According to Mr. Del Rosario the grievor was asked if she looked into Resident A's bedside drawer and she said "no". The notes also reflect the grievor saying "no" to the question "Did not look into his drawer".

[60] At the hearing, the grievor indicated that she did not recall if she was asked if she looked in the bedside drawers. The grievor explained that it was not until she saw the video that she recalled quickly looking in the drawers and seeing liners.

[61] On April 19, 2018, Mr. Del Rosario and Ms. Zhou interviewed three residents, including Resident A. Resident A was asked if he "usually put valuables into the green bag." Resident A replied that his wallet was usually kept in the green bag and usually a small amount of cash is also kept in the green bag after shopping. It does not appear that Resident A was asked if he kept liners in the green bag.

[62] On April 24, 2018, Mr. Del Rosario met with the grievor and once again asked her about the three incidents. The grievor maintained that she was only in Resident A's room to provide him with a liner. The grievor also indicated that she was only in Resident B's room to turn off a call bell that was not being answered. It was put to the grievor that she was just maintaining the same story that she had provided earlier. The grievor agreed. Mr. Del Rosario asked a for a few minutes to discuss the situation with Ms. Zhou and Ms. Fu. The meeting then resumed, and the Chief Steward asked to see the video. Ms. Fu refused to show the video. The grievor was then advised that she was being terminated. Subsequently, Mr. Del Rosario provided the grievor with a letter confirming that her employment had been terminated.

[63] I note that at their highest, the Employer's allegations are that the grievor entered the three residents' rooms without any reason and with the alleged intent

to take valuables. As stated earlier, there is absolutely no evidence that anything was taken from the three resident's rooms.

DECISION

[64] Article 3A of the Collective Agreement provides, among other things, that the Employer may discharge, suspend or otherwise discipline employees for just cause. Therefore, the resolution of the grievance requires determining the following three issues:

- Did the Employer have just cause to impose some discipline? If so,
- Is the penalty of discharge just in the circumstances? If not;
- What alternative measures should be substituted as just and reasonable?

[65] The onus is on the Employer to prove that they had just cause to terminate the grievor's employment.

[66] The first issue involves making findings of fact based on all the evidence. The evidence must be sufficiently clear and cogent that I am satisfied, on the balance of probabilities, that the grievor committed the alleged misconduct, see *F.H. v. McDougall*, [2008] S.C.R. 41.

[67] The Union has challenged much of the Employer's evidence as being inadmissible and unreliable as either hearsay or improperly gathered video surveillance. According to the Union, the evidence at best raises suspicion but it does not meet the burden of proof required to find that the grievor acted with ill intentions, see *Axis Logistics v. UFCW, Local 175 (Kelloway)* 2000 CarswellOnt 9374 (Haefling).

[68] In general, evidence is admissible if it is relevant and not excluded under any rule of law or policy. As acknowledged earlier in this award, labour arbitration is designed to provide an expeditious and fair method for resolving disputes during the term of a collective agreement. To that end, the legislature has seen fit to provide arbitrators with the power to accept oral or written evidence, "whether

admissible in a court of law or not", see s. 48 (12)(f) of the *Act*. At the same time, it is unfair to rely exclusively on hearsay evidence to uphold an employee's discharge from employment, see *Re Girvin et al. and Consumers Gas Co.* (1974), 1 O.R. (2d) 421 (Div. Crt).

[69] In terms of the admissibility of video evidence, there are two lines of arbitral thought on the issue. On the one hand, a number of arbitrators admit video evidence solely on the basis of relevancy. This line of reasoning is found in the decision of Arbitrator Michael Bendel in *Energex, Tube and Unifor, Local 523* (2013) , 238 L.A.C. (4th) 431. On the other hand, there are many arbitrators who take a more principled labour relations approach, subjecting relevant video evidence to a balancing of interests test to determine if the evidence ought to be excluded as an invasion of the employee's reasonable expectation of privacy. This balancing approach is found in Arbitrator Michel Picher's award *Canadian Pacific Ltd. And B.M.W.E. (Chahal)* (1996), 59 L.A.C. (4th) 11.

[70] The two deeply divided arbitral approaches to the admissibility of video evidence is set out in great detail and analysed by Arbitrator Christopher Albertyn in *Centenary Health Centre v, C.U.O.E.* (199) 77 L.A.C. (4th) 436. Ultimately, Arbitrator Albertyn accepts the reasonable balancing of interest's approach as being most compatible with labour relations principles.

[71] I agree with Arbitrator Albertyn that the reasonable balancing of interest's approach is to be preferred. The reasonable balancing of interest's approach is consistent with the well accepted test found in *KVP Co. Ltd. And Lumber & Sawmill Workers' Union Local 2537* (1965), 16 L.A.C. 73, which is the approach arbitrators have applied to situations involving employee privacy, including searches and drug and alcohol testing, see *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.,* [2013] 2 S.C.R. 458.

[72] In my view, analysing the admissibility of surveillance or video evidence solely on the basis of relevance ignores the labour relations policy considerations

that are at the heart of collective agreement arbitration. Good labour relations require trust, co-operation and both the union and the employer acting in good faith. If the strict rules of evidence were to apply, then the legislature would have had no reason to have arbitrators appointed and provide them with the discretion found in s. 48(12) (f) of the *Act*. In my view, a more nuanced approach is required that recognizes the labour relations policy considerations, including the fact that when management exercises their rights in a manner that may result in discipline, then they must do so reasonably, see *Metropolitan Toronto (Municipality) v. C.U.P.E.* (1990), 74 O.R. (2d) 239 (C.A.).

[73] I am also of the view that the admission of video evidence must be examined in context. In this regard, the situation before me is quite different from all the awards provided to me by counsel. In this case, it was not the Employer who undertook the surveillance. Rather, it was Resident A who felt the need to leave his computer camera on and record what was occurring in his room. One cannot forget the fact that the location of the surveillance was Resident A's personal space and *de facto* home. Resident A clearly had a reasonable expectation of privacy and the right to protect his personal items located in his personal space.

[74] I acknowledge the Union's submissions relating to the grievor's expectation of privacy. Resident A's room is part of the grievor's workplace. However, it is also Resident A's home and the grievor is usually only working in this area while Resident A is present or to attend to his needs. The grievor agreed that Resident A had a right to privacy in his room and that she would only have reason to go into Resident A's room to address his needs. Resident A has the predominate privacy interest in his room. In this regard, Resident A's room is no different than any other home that can also be a workplace. In my view, any expectation of privacy that the grievor might have is minimal and far outweighed by the more reasonable expectation of privacy held by Resident A.

[75] Furthermore, the Employer has an obligation under the *LTCHA* to provide a safe and respectful environment for residents. In my view, the Employer had an obligation to investigate the circumstances surrounding what was recorded on the video. The video depicts what appears to be a serious invasion of Resident A's private belongings. In these circumstances, the Employer acted reasonably by taking a copy of the video and conducting an investigation.

[76] The Union asserts that the video should not be admitted into evidence because it was taken in violation of the Employer's own policy. I disagree with the Union's assertion, noting that the Employer's policy specifically contemplates that residents may decide to have surveillance in their rooms. The policy also clearly states that the Employer may use surveillance in actions against employees "as appropriate and permitted by applicable law." It is clear to me that the Employer's policy is a balanced and reasonable attempt to be respectful of residents needs as well as the privacy of all. The policy indicates a preference not to use surveillance, but the policy does not prohibit residents from choosing to have surveillance in their room, nor does it prohibit the use of surveillance in any investigations. I do not see the Employer's policy as being an impediment to accepting the video as evidence in these proceedings.

[77] The Union also asserts that the video is hearsay and should not be admitted without the attendance of Resident A to verify the accuracy and authenticity of the video. The Union provided a computer print-out of the general details of the video from the copy they were provided by the Employer. The Union also relies on a *New York Times* article "Here Come the Fake Video, Too" by Kevin Roose dated March 4, 2018. The Union asserts that video may easily be altered, and the accuracy of the video cannot be determined without Resident A testifying.

[78] I disagree with the Union's submission on this point. First and foremost the video evidence is not hearsay, it is real evidence that is relevant to the matter before me. In the absence of any concerns about the accuracy or alteration of the

video or labour relations concerns, it is *prima facie* admissible as relevant evidence.

[79] The computer print-out provided by the Union does not provide me with any information that would challenge the accuracy of the video. The information is relevant to the Union's copy of the video and not the actual video downloaded from Resident A's computer. The Union has not undertaken or provided any forensic or other evidence indicating that the actual video downloaded by Mr. Del Rosario is not accurate.

[80] In fact, there is plenty of evidence to support a finding that the video is an accurate recording of what occurred in Resident A's room on April 7, 2018. The grievor admitted, during the investigation before she was terminated, that she entered Resident A's room and searched the green bag. The grievor also confirmed during her evidence that she is the person depicted in the video and the events depicted are accurate. The grievor readily admitted to looking into both the green bag and in the side table drawers.

[81] The uncontested evidence of the Employer is that the video was captured on Resident A's computer and Mr. Del Rosario testified that he downloaded the video with Resident A's permission.

[82] In my view, the video is accurate, relevant and admissible in these proceedings, but subject to argument over the weight to be provided to the video evidence in light of all the other evidence tendered in these proceedings, see *R. v. Nikolovski* [1996] 3 S.C.R. 1197.

[83] Accepting that the video is admissible, I now turn to consider the other evidence tendered in this proceeding.

[84] The video clearly depicts suspicious activity on the part of the grievor. The content of the video, at face value and without any explanation, would lead one to

suspect that the grievor was engaging in nefarious conduct by invading Resident A's privacy and possibly searching for valuables to misappropriate. The grievor clearly has a duty to explain what she was doing in Resident A's room on April 7, 2019.

[85] The grievor has provided an explanation both during the Employer's investigation and when she gave evidence at the hearing. According to the grievor, she was in Resident A's room looking for a liner. The grievor states that she believed she had permission to enter Resident A's room in order to address his request for a liner. If I accept the grievor's explanation, then it necessarily follows that she is not guilty of the allegations made by the Employer that she had "ill intentions".

[86] Assessing the grievor's evidence involves making a determination about her credibility. The following passage from *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.) is often cited when credibility is an issue:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in that half-hidden lie, and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say 'I believe him because I judge him to be telling the truth' is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[87] I find that the grievor gave her evidence in a straight forward manner and she did not try to mislead during her evidence. The grievor presented as a caring and compassionate woman who feels strongly about the work she performs. The grievor clearly is not very sophisticated or highly educated. During her testimony,

she became confused at times by some of the questions, but once the question was clarified, the grievor gave a straight forward answer.

[88] The grievor readily admitted that she had a duty and responsibility to make residents feel safe and secure. The grievor did not try to evade questions or argue with counsel. Rather the grievor tried to answer the questions as best as she could recall. The grievor openly admitted that she may not recall some of the events that occurred on the days in question. But this is not surprising as the job of a PSW is quite laborious and busy.

[89] I acknowledge that there are some inconsistencies between the grievor's evidence and what she is alleged to have told the Employer during the two interviews. However, the inconsistencies were minor in my view and I accept that the grievor was confused about the nature of the first interview and nervous during all the interviews.

[90] I have concerns about the accuracy of the notes, particularly in the absence of the author testifying. I am also concerned about the failure of the Employer to show the grievor the video and provide her with a copy of Resident A's statement during the investigation. While the grievor was told about the contents of the video, she was never shown the actual video or provided with a copy of Resident A's statement during the Employer's investigation. In my view, the Employer ought to have shown the grievor the video and provided a copy of Resident A's statement during the investigation and before they terminated her employment.

[91] I also acknowledge that the grievor provided additional information during her testimony. However, most of the additional information was in the form of elaborating or clarifying her assignments on the dates in question and what she recalled about the three incidents. For instance, the information about showering Resident A on April 7, 2018 was not elicited during the Employer's investigation. I note that the grievor's evidence on this point was never contradicted or challenged.

The same can be said about the grievor's recollection about being responsible for snack on both the north and south side when she was alleged to have entered Resident B's room on March 7, 2018. Neither Ms. Sun nor Ms. Qu provided evidence to contradict the grievor and the Employer did not challenge the grievor on any of this new information. In the absence of evidence to the contrary I accept the grievor's evidence.

[92] So while the grievor's evidence was not entirely consistent, it was in my view credible and sufficiently reliable to rebut the inferences that might be drawn from the video. In other words, I accept that the grievor entered Resident A's room to determine if he had a liner, which he had earlier requested on two occasions.

[93] The only evidence contradicting the grievor's explanation is Resident A's signed one page statement. This statement is hearsay and I am of the view that it can be given no weight in the absence of the Resident A confirming the accuracy of the statement under oath. The evidence does not meet the test of reasonable necessity or reliability. The Employer has provided no good reason why Resident A could not testify, other than inconvenience. I am also very concerned about the reliability of the evidence in light of the fact that the grievor has raised concerns that she was set up by Resident A.

[94] I also have concerns about how the investigation was conducted and the failure to call Ms. Zhou who authored the investigation report and Ms. Fu who took notes. The Employer did not conduct formal interviews with any of the witnesses. Instead, the Employer appears to have just asked Resident A to write down a very brief statement to contradict the grievor. As indicated earlier, the Employer failed to show the grievor the video or the statement during the interview. While the grievor was told about the contents of the video, she should have been shown both the video and the statement, then asked to provide an explanation. In my view, it would be entirely unfair to rely on Resident A's statement in these circumstances to uphold a termination.

[95] In terms of the evidence concerning the March 7, 2018 incident involving Resident B, I have a number of concerns with respect to the evidence tendered by the Employer.

[96] First, the evidence of what Resident B told Ms. Sun and Ms. Qu is clearly hearsay elicited from a 103 year old resident that was not recorded contemporaneously.

[97] Second, the recollections of both Ms. Sun and Ms. Qu are not entirely clear with respect to what occurred. Ms. Qu indicates that Resident B said, “that black person is a bad person”, but did not elaborate on why she made such a statement. Ms. Sun indicated that Resident B advised that her “eyes were closed” when the “angry” “black person” was in her room. This evidence is less than clear and cogent of any nefarious misconduct. Even if I were to accept the evidence of Ms. Sun and Ms. Qu, the most I can take from their evidence is that Resident B was upset because a “black person” was in her room. There is absolutely no evidence that anything was taken and apparently no one thought it necessary to investigate the event until after April 7, 2018.

[98] This brings me to the next issue I have with the Employer’s allegation relating to the incident involving Resident B on March 7, 2018. I have great difficulty accepting the Employer’s evidence relating to this incident because nothing appears to have been done to investigate the incident until after the April 7, 2018 incident, one month later. The evidence of Ms. Sun is that she reported the incident to the ADRC (Ms. Zhou) and the employees on the next shift. There is nothing recorded in any of the nursing records about this event. The ADRC did not testify in these proceedings to explain why nothing was done to investigate the incident until after April 7, 2018. The passage of time and the lack of any contemporaneous investigation leaves me with serious doubts about the reliability of the evidence.

[99] The grievor gave evidence that on March 7, 2018, she was responsible for snack on both sides. The Employer called no evidence to contradict the grievor on this point. The grievor also recalled going into Resident B's room to turn off the call bell. The grievor believed that the call bell was pressed twice. The call bell records indicate that Resident B engaged the call bell four times that evening. I accept that the grievor had a reason to enter Resident B's room that evening at least to provide a snack and she may well have also entered the room to turn off a call bell. I find that the evidence is not sufficiently clear and compelling to convince me, on the balance of probabilities, that the grievor entered Resident B's room with the intent to misappropriate valuables.

[100] Turning to the third and final incident relied upon by the Employer, I note that the evidence relied upon by the Employer is exclusively from Ms. Qu. As I earlier noted, Ms. Qu demonstrated a clear bias against the grievor. Ms. Qu was quick to give an answer favourable to the Employer, before she was even asked a specific question. Ms. Qu's evidence, at its highest, indicates that the grievor went around a partially closed curtain into Resident C's side of a room for a very short period of time. This apparently all occurred within the view of Ms. Qu. There is no evidence of anything being reported missing from Resident C's room.

[101] It seems odd to me that if Ms. Qu thought the grievor was acting inappropriately, why did she not take issue with the grievor's conduct or immediately report the matter to management. This is particularly so, where the uncontradicted evidence indicates that Ms. Qu found it appropriate to question the quality of the grievor's work on many other occasions.

[102] The grievor has provided an explanation for why she went over to Resident C's side of the room. I accept the grievor's explanation. Once again, I find that the evidence is not sufficiently clear and compelling to convince me, on the balance of probabilities, that the grievor entered Resident C's side of the room with the intent to misappropriate valuables.

[103] In summary, I find that the evidence before me is not sufficiently clear and cogent to satisfy the burden of proving, on the balance of probabilities, that the grievor committed the alleged misconduct. There is no doubt in my mind that the Employer had reason to investigate the incident involving Resident A. The video recorded what appears to be a disturbing invasion of Resident A's privacy. However, the grievor has provided an explanation that I accept her evidence. The only evidence to contradict the grievor is hearsay that I find is not reliable and I give it no weight. The Employer has also not proven that the grievor committed any misconduct relating to the other two allegations. Therefore, I find that the Employer did not have just cause to discipline, let alone terminate the grievor's employment.

[104] The Employer submits that should I find that termination is not reasonable, then I should none the less refuse to reinstate the grievor. Instead the Employer suggests that I ought to award damages in lieu of reinstatement.

[105] It is well accepted that an award of damages in lieu of reinstatement is an "exceptional" remedy ordered only in "extraordinary circumstances" where the employment relationship is no longer viable, see *A.U.P.E. v. Lethbridge Community College* [2004] 1 S.C.R. 727.

[106] A list of the factors considered by arbitrators and relied upon to find that the employment relationship is no longer viable and exceptional circumstances exist to justify an award of damages in lieu of reinstatement is outlined in *Humber River Regional Hospital and ONA (Taylor)* 2012 CanLII 42059 (ON LA).

[107] The evidence in this case does not disclose that the employment relationship is no longer viable and cannot be sustained. I am satisfied that the grievor can be returned to the workplace, although it may be better that she not be assigned to work with Ms. Qu or attend to Resident A. The Employer's subjective lack of trust and belief that their reputation may suffer is not enough to convince me to exercise my discretion to provide such exceptional and extraordinary relief.

[108] I acknowledge that the grievor holds a position of trust, being responsible for the care of the Home's extremely vulnerable residents. The residents of a long-term care home are entitled to have their privacy respected as well as being treated in accordance with the *Residents' Bill of Rights*. If the Employer was able to prove to me, on the balance of probabilities, that the grievor engaged in dishonest misconduct, then I would have no hesitation in upholding the termination in the face of a denial, see *Versa-Care Centre of Bradford and CLAC (DB)* 2005 CarswellOnt 12048. However, the Employer has not met the burden required to uphold discipline, let alone termination.

[109] The Employer submits that they are in a very difficult position and they really can't call residents to testify. I appreciate where the Employer is coming from, but I am of the opinion that at the end of the day an employee who may lose their job is entitled to a fair hearing. As Dickson C.J. observed in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, dissenting, at p. 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.

[110] A termination or dismissal may only be upheld after a fair hearing where the Employer has provided evidence that meets the legal burden of proving that they had just cause, on the balance of probabilities. A termination based on hearsay and mere suspicion is simply unacceptable.

[111] The Employer, in this case had options to address their concerns, which would have respected residents' rights. The Employer could have invited the Union to participate in the investigation by attending interviews with the residents and witnesses in a collaborative effort. The Employer could have also recorded interviews with the residents. Finally, the Employer could have requested that the

residents be accommodated by having me attend at the Markham Home to receive the residents' evidence. The Employer did not exercise any of these available options. Instead, they ask me to accept mostly hearsay evidence to uphold the termination of a discipline free employee who they suspect of having ill intentions to misappropriate valuables from residents. In my view, sustaining a termination in such circumstances is untenable.

[112] Accordingly, and for all the reasons stated above, I find that the grievance must be allowed. The termination letter is to be removed from the grievor's file. The grievor is to be reinstated in her employment without loss of seniority or service as soon as practical, although the Employer may place the grievor on a different floor. The Employer is to compensate the grievor for all lost wages, less mitigation.

[113] I remain seized to address any issue fairly raise by the grievances but not addressed in this award.

Dated at Toronto, Ontario this 13th day of May 2019.

John Stout- Arbitrator