IN THE MATTER OF GRIEVANCE #318 S10/13 DATED MARCH 20, 2013, ON BEHALF OF WINNIFRED LEONARD;

AND IN THE MATTER OF AN EXPEDITED ARBITRATION OF THE SAID GRIEVANCE

BETWEEN:

**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400,**

UNION,

AND:

**BEST WESTERN SEVEN OAKS INN REGINA, SASK,**

EMPLOYER.

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**AWARD**
May 29, 2013

T. F. (TED) KOSKIE, B.Sc., J.D.

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**Date of Hearing:** May 13, 2013

**Place of Hearing:** Regina, SK

**Appearances:** Dawn McBride, for the Union
Glen Weir, for the Employer

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## I. BACKGROUND

[1] United Food and Commercial Workers, Local 1400 ("UFCW") lodged a grievance (the "Grievance") alleging that Best Western Seven Oaks Inn Regina, Sask ("7-Oaks") unjustly terminated its member, Winnifred Leonard ("Leonard").[1]

[2] Pursuant to the provisions of section 26.3(1) of *The Trade Union Act*[2] (the "*Act*"), the parties agreed to refer the Grievance, including the question as to whether same is arbitrable, to the Saskatchewan Minister of Labour Relations and Workplace Safety (the "Minister") for resolution by expedited arbitration.

[3] Pursuant to the provisions of section 26.3(3)(a) of the *Act*, the Minister appointed me as arbitrator to hear and determine the matters arising out of the Grievance.

## II. FACTS

[4] Leonard commenced employment with 7-Oaks since January 2001. She works as a server and host, at times with some supervisory responsibilities, in 7-Oaks' restaurant, lounge and banquet facilities. The only discipline allowed on her personnel file by the Collective Bargaining Agreement between the parties[3] (the "CBA") is a written warning (the "Warning")[4]. The Warning related to an incident where Leonard helped another 7-Oaks' employee–Leonard's daughter–with cleaning her hostess' area after having finished work and timed out. Leonard said she was just trying to be helpful. She said she did not grieve the Warning, because she did not think it meant anything. She said 7-Oaks did not ask her to sign the Warning. She said that if 7-Oaks had asked her to sign the Warning, she would have grieved it.

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[1]Exhibit G-2, Grievance #318 S10/13 dated March 20, 2013

[2]R.S.S. 1978, c. T-17

[3]Exhibit G-1, Collective Bargaining Agreement

[4]Exhibit U-5, Warning dated December 9, 2012

[5] Leonard's work schedule varies from three to six days per week. Cumulatively, it amounts to approximately one-half of full time. Leonard has another job working as a cashier at a local Co-op in Regina. Though she makes more money working at the Co-op, Leonard says she treats her employment with 7-Oaks as her primary job. She says that is because she has been there so long.

[6] Article 10.08 of the Collective Bargaining Agreement between the parties[5] (the "CBA") provides that "the Employer will allow part time employees to restrict their availability." Following that provision, Leonard restricted her employment with 7-Oaks such that she would be available for evening employment with the Co-op. She did not restrict her availability at other times.

[7] Sometime in mid February 2013, Leonard booked and paid $300.00 for her attendance at a marketing/sales event scheduled for March 17, 2013, in Saskatoon. On March 5, 2013, Leonard made a written request (the "Request") to 7-Oaks to take that day off.[6]

[8] 7-Oaks posts schedules one week in advance.[7] Leonard testified that, while not engraved in stone, the normal practice was to submit requests for days off approximately one week before the posting. Leonard testified no one ever told her a specific time to submit such requests. As well, she testified that 7-Oaks did not tell her that she did not submit her Request on time. Testifying for 7-Oaks, Glenn Weir ("Weir") said he "speculates" the past practice is two weeks, not one. He said he "thought" there is a written policy, but did not produce same at the hearing. He also testified that 7-Oaks has no evidence to establish Leonard was aware of a requirement for two weeks' notice.

[9] On March 10, 2013, 7-Oaks posted the schedule for the week of March 17 - 23, 2013.[8]

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[5]Exhibit G-1, Collective Bargaining Agreement

[6]Exhibit U-4, Request for Time Off dated March 5, 2013

[7]Exhibit G-1, CBA, Article 10.07(a)

[8]Exhibit E-3, Schedule for March 17 - 23, 2013

Leonard testified that between March 5, 2013, and March 10, 2013, 7-Oaks did not respond to her Request. Leonard said Joanne Vorreiter. 7-Oaks' Banquet Manager ("Vorreiter") told her she was "in trouble." However, Leonard testified Vorreiter did not tell her she could not take the day off. Leonard did say, however, that Vorreiter did not tell her she could. Weir testified that Vorreiter was in charge of scheduling and the decision to deny Leonard's request was hers. She told him that on March 5, 2013, she told Leonard she could not take the day off. She also told him that on March 10, 2013, Leonard again asked her if she could take the day off and she again said no. Finally, she told him her decision was based on the reason given by Leonard for her request and the fact that a reservation for one hundred people would cause brunch on March 17, 2013, to be very busy and they would therefore need everybody. It bears noting that 7-Oaks did not produce Vorreiter as a witness to testify at this hearing, nor did it provide any reason for its failure to do so.

[10] Leonard testified that she took it upon herself to try to find someone to work her shift on March 17, 2013. She spoke with Crystal Dieter ("Dieter") on March 16, 2013. Dieter was qualified to do the job and agreed to fill in for her. Leonard said her and other employees "switched" shifts all the time. She said this was a practice 7-Oaks was aware of. She never "dreamed" 7-Oaks would fire her for making the arrangement. She testified she would have worked the March 17, 2013, shift if 7-Oaks had specifically told her she could not take the day off or could not switch shifts with another or she could not find someone to fill in for her.

[11] Leonard called the office on March 16, 2013. No one was there to answer the telephone. She left a message that Dieter would cover for her and that she would not be in on March 17, 2013. Leonard was confident Vorreiter would get the message the next morning.

[12] When Leonard came in to work on March 18, 2013, Vorreiter gave her a written immediate termination of her employment.[9]

[13] Glenn Stewart ("Stewart") testified that UFCW represents the certified employees at

[9]Exhibit E-2, Termination Report dated March 17, 2013

7-Oaks and UFCW has employed him as one of its service representatives for the past twenty years. UFCW has assigned him responsibility for the employees at 7-Oaks and has done that for approximately eleven years. Part of his responsibility is preparing and filing grievances. He has always sent grievances to the General Manager at 7-Oaks. 7-Oaks has never asked him to do differently. It has never been an issue until after UFCW referred this Grievance to arbitration.

[14] Stewart testified that he prepared and delivered the Grievance to Weir at noon on March 20, 2013. Weir does not take issue with that.

[15] Stewart says he subsequently discussed the grievance with Weir at a meeting scheduled for 3:00 p.m. on March 20, 2013, to discuss another matter. At that time, Weir provided Stewart a copy of the Grievance with a notation written by him at the bottom saying "A document explaining the 'just cause' has been served to Glenn Stewart. No further recourse."[10] The document referred to is a letter dated March 18, 2013.[11]

[16] On March 20, 2013, Stewart asked Weir if 7-Oaks could do something different with respect to Leonard. Stewart says discussion on that and other options took place over the next number of days. He says, however, that by April 9, 2013, he came to the conclusion that the discussions would not persuade Weir to change 7-Oaks' position. He tendered an e-mail thread to corroborate his position.[12]

[17] UFCW referred the Grievance to arbitration.[13] The e-mail thread previously referenced basically sets out the parties' positions in connection therewith.[14]

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[10]Exhibit U-1, Grievance with 7-Oaks Response dated March 20, 2013

[11]Exhibit U-2, Letter dated March 18, 2013, from 7-Oaks to UFCW

[12]Exhibit U-3, E-mail Thread between UFCW and 7-Oaks dated from April 9 to 16, 2013

[13]Exhibit E-1, Letter dated April 9, 2013, from UFCW to 7-Oaks

[14]Exhibit U-3, *supra*, footnote 12

## III. ISSUES

[18] 7-Oaks has raised the preliminary issue of whether the Grievance is Arbitrable. This issue has two parts. The first is whether the grievance procedure set forth in Article 19 of the CBA has been properly followed. The second is whether UFCW referred the Grievance to arbitration within the time constraints set forth in Articles 19 and 20 of the CBA.

[19] The issue on the Grievance proper is, simply stated, whether 7-Oaks had just cause to dismiss Leonard. If it did not, the issue then is whether I should substitute same with some other penalty.

## IV. AWARD

[20] I find UFCW properly followed the grievance procedure set forth within Article 19 of the CBA. I also find UFCW referred the Grievance to arbitration within the time constraints set forth in Articles 19 and 20 of the CBA.

[21] I find that 7-Oaks has failed to prove just cause for dismissing Leonard and I allow the grievance. I direct that 7-Oaks reinstate Leonard to her position without loss of pay or benefits and that the discipline be removed from her file.

[22] The parties asked that I remain seized of the question of any matter that may arise out of implementing this decision. I do so and will reconvene the hearing at the request of either party.

## V. REASONS

### A. IS THE GRIEVANCE ARBITRABLE?

[23] Article 19.01 of the CBS provides as follows:

> Every effort shall be made to settle all grievances promptly and fairly as follows:
>
> Step 1
>
> The employee, with or without the Shop Steward, or Union Representative, at the employee's option shall present the grievance in writing to their department manager within fourteen (14) days of the event giving rise to the grievance. If the employee fails to do so, the grievance will be deemed conclusively to have been waived and forfeited. The department manager will render a written decision within four ( 4) days.
>
> Step 2
>
> If a satisfactory settlement is not reached at step 1 or, if the department manager fails to render a written decision within seven (7) days, the grievance will be submitted in writing to the General Manager or their representative. The General Manager, or their representative, shall render a written decision to the grievor, shop steward and the Union Representative within seven (7) days. If a satisfactory settlement is not reached at step 2, or if the general manager fails to render a written decision with seven (7) days, the matter may be referred to arbitration.

[24] 7-Oaks first argues that Step 1 of Article 19.01 mandates that the "employee"–meaning Leonard–must present the Grievance to her department manager–meaning Vorreiter. In the case here, 7-Oaks says it was Stewart that presented the Grievance, not Leonard. It also says the Grievance was presented to Weir, not Vorreiter. Finally, it argues that the words "shall present" mandates the presentation of the Grievance via a meeting that must include the presence of Leonard, which did not happen. It therefore argues that I must deem the Grievance conclusively to have been waived and forfeited.

[25] At the outset, UFCW argues that the language of Article 19.01 does not require:

a) the presentation of the Grievance in person; and

b) an in person meeting with the presence of Leonard.

[26] In considering this matter, my goal is to ascertain the meaning of the Article and to give effect to the intention of the parties when they entered the agreement as so expressed. In so doing, I am entitled to look at the plain meaning of the article in the context of the collective bargaining agreement.[15] I am unable to find any words in Article 19.01 to support the 7-Oaks

[15] *UFCW, Local 1400* v. *Real Canadian Superstores* (2012), 392 Sask. R. 124 (Q.B.)

interpretation. Frankly, to import such a meaning into Article would run contrary to the CBA and, in particular, the following provisions:

> ARTICLE 1 - PURPOSE
>
> 1.01 The purpose of this Collective Agreement is to . . . to provide for the prompt and equitable disposition of grievances . . . .
>
> . . .
>
> ARTICLE 4 - RECOGNITION
>
> 4.01 The Employer recognizes the Union as the sole collective bargaining agency for the employees covered by this Agreement, and hereby consents and agrees to negotiate with the Union through its designated bargaining representatives on all matters relating to rates of pay, hours of work, and other working conditions of employees covered by this Agreement.
>
> 4.02 Management Rights
>
> . . .
>
> (b) The Employer will act reasonably and in good faith and will not exercise its management rights in conflict with the provisions of this Agreement.
>
> . . .
>
> ARTICLE 17 - GENERAL
>
> . . .
>
> 17 .04 The Employer deserves the right to continue, and will continue to provide all rights, benefits, privileges, practices, and working conditions, that were in place prior to this Agreement which employees enjoy, receive, or possess, that are not specifically mentioned in this Agreement shall continue unchanged, unless negotiated otherwise between the Union and the Employer.

[27] In addition, it would run contrary to the state and climate of employer-employee relations existing at the time of the Grievance.

[28] Stewart testified he has always presented grievances. This is consistent with UFCW's role as exclusive bargaining agent. Stewart testified he always presented grievances to the General Manager. He said that had never been an issue. In fact, even with the case here, Weir responded to the Grievance with notations on the Grievance document and by separate letter. 7-Oaks took no objection to the manner of presentation until after the referral to arbitration.

[29] Stewart also testified that he has frequently met with 7-Oaks to discuss and negotiate grievance issues without the presence of the grievor. Again, he says that has never been an issue.

[30] Weir did not challenge any of Stewart's testimony concerning past presentations of grievances and attendances of grievors. In fact, his testimony confirmed it. He did testify that, at a bargaining session addressing revision of the CBA, he advised he wanted the past practice to change. However, though he confirmed his view that the CBA "needs to be cleaned up," he also stated no new language was negotiated and agreed to. He also confirmed 7-Oaks provided no written notice to UFCW concerning its view on the practice.

[31] Even if I am wrong with my assessment of the issues to this point, I am of the view 7-Oaks would be estopped from changing the established practice in this regard. By its conduct, 7-Oaks has represented to UFCW that it will follow the established practice. The conduct is clear and unambiguous and supported by the evidence before me. Had UFCW been aware of 7-Oaks intention to abandon the practice without negotiating new language, it could have insisted upon bargaining language for same. This constitutes a detrimental reliance.

[32] As an alternate position, UFCW argues waiver. It says that if I find mandatory provisions consistent with 7-Oak's position, I should imply waiver from the fact that 7-Oaks failed to object to a violation of same at the first opportunity. In essence, it says it would be unfair if 7-Oaks were allowed to proceed with a procedurally defective grievance only to later be allowed to raise that defect as a procedural bar.

[33] Though I have ruled to the contrary, if I am incorrect with my interpretation of Article 19.01, I agree with UFCW's argument. The evidence supports it. 7-Oaks replied to the Grievance. It did not object to compliance with Article 19.01 until after UFCW referred the Grievance to arbitration. I rule 7-Oaks did not lodge an objection at its first opportunity and several opportunities afterwards.[16]

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[16] See *Re Dominion Stores Ltd. and RWDSU, Local 414*, [1981] 1 L.A.C. (3d) 436 (McLaren, Spaxman, Sargeant)

[34] Article 20.01 of the CBS provides as follows:

> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any questions as to whether the matter is arbitrable or where an allegation is made that this agreement has been violated, either of the parties may, within fourteen (14) calendar days after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice will, within fourteen (14) calendar days, advise the other party of the name of its appointee to the arbitration board.

[35] 7-Oaks argues that UFCW is outside the time constraints provided in this Article. It references Leonard's termination date as March 18, 2013, the Grievance date as March 20, 2013, and the reference to arbitration date as April 9, 2013. 7-Oaks says the reference to arbitration was twenty-one days after the termination date and nineteen days after the Grievance date. It argues both dates are greater than fourteen days and, hence the referral to arbitration is out of time.

[36] Not surprisingly, UFCW disagrees. It argues the clock starts ticking from the time the grievance procedure is exhausted. It further argues UFCW referred the Grievance to arbitration before the procedure was exhausted and therefore same is in time.

[37] I agree with UFCW's position. The evidence establishes that discussions directed at resolution of the Grievance were continuing as late as April 16, 2013. I therefore find that the reference to arbitration took place well within the time constraints provided for in Article 20.01.

[38] As an alternate position, UFCW urges me to exercise the authority given by section 25(2)(f) of the *Act* to waive the time constraint of Article 20.01. That section reads:

> **Powers of arbitration board, binding effect of findings of, etc.**
>
> . . .
>
> 25(2) An arbitrator or the chairperson of an arbitration board, as the case may be, may:
>
> . . .
>
> (F) relieve, on terms that, in the arbitrator's opinion, are just and reasonable, against breaches of time limits set out in the collective bargaining agreement with respect to a

grievance procedure or an arbitration procedure;

[39] Though I have ruled to the contrary, if I am incorrect with my interpretation of Article 20.01, I find, under all of the circumstances, it just and reasonable to waive any breach of time limit set forth in Article 20.01.[17]

## B. THE GRIEVANCE

[40] At the outset, I note the parties both take the position the following provisions of the CBA do not apply to this case:

> ARTICLE 14- LEAVE OF ABSENCE
>
> . . .
>
> 14.05 Employees shall be entitled to leave of absence without pay and without loss of any rights or benefits under this Agreement, for other good and sufficient cause. Such request shall be in writing and approved by the Employer. Such approval shall not be withheld without just cause. All benefit premiums will be paid by the employee.
>
> . . .
>
> LETTERS OF AGREEMENT
>
> . . .
>
> #1 Re: Six Day Schedules:
>
> It is agreed that while employees will not normally be scheduled to work more than five (5) days per week, it is agreed that in some circumstances it may be appropriate for an employee to be scheduled for six (6) days in a week. Such schedules will be by mutual agreement and offered in order of seniority in a department.

[41] 7-Oaks admitted that employees have made their own arrangements to switch shifts. However, it maintains this is not a regular practice. This is something Leonard disputes. She says it is.

[42] 7-Oaks says it denied Leonard's request for the day off "due to business and also

[17] See *Re Dominion Stores Ltd. and RWDSU, Local 414, supra*, footnote 16

consideration of the nature for the day off requested." It says it told this to Leonard twice. On the last occasion, 7-Oaks says Leonard said she "had already made plans and that she would have to decide about work or going to the event." Leonard disputes these statements. She says 7-Oaks never told her she could not take March 17, 2013, off. I infer that also means she says 7-Oaks never told her any reason she could not take the day off and did not give the response maintained by 7-Oaks.

[43] 7-Oaks argues Leonard displayed a high-handed manner of disregard for management and 7-Oaks' standard procedure for scheduling. 7-Oaks says this an act of calculated insubordination that furnished just cause for immediate termination. 7-Oaks concluded its argument by saying that this was uncharacteristic of Leonard. 7-Oaks described Leonard as a good person. Leonard denies any disregard for management. She also denies any disregard for the standard practice for scheduling. On the contrary, she says she followed the standard practice for scheduling.

[44] UFCW referred me to *Wm. Scott & Co.*[18] That case provides the following guidance:

> ... [A]rbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

I am satisfied these are appropriate considerations for me in the case here.

[45] UFCW argues Leonard is a long term employee who is honest, dedicated and helpful. Aside for the incident that is the subject of the Grievance, 7-Oaks does not dispute this contention.

[46] UFCW says Leonard did not make up and excuse or lie to get out of work. It says it was not unusual for employees to exchange shifts. It says Leonard called others and found a qualified person as a substitute. 7-Oaks does not dispute these contentions.

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[18] [1976] B.C.L.R.B.D. No. 98

[47] UFCW argues there is no direct evidence to contradict the evidence of Leonard.

[48] I note that 7-Oaks did not call Vorreiter to testify. I am of the view Vorreiter might reasonably have been expected to provide relevant evidence. Much of what Weir testified to was based on what Vorreiter had told him. Vorreiter could have given evidence with respect to most points of contention and dispute between the parties, particularly as they relate to whether Vorreiter told Leonard she could not take the day off and her reaction to same. I infer that her evidence, had it been presented, would not have been favourable to 7-Oaks. As an additional consequence, wherever the evidence of Weir conflicts with Leonard, I prefer and accept the evidence of Leonard.

[49] I find there is no direct evidence of a policy breach, of an intentional disregard of 7-Oaks or of jeopardizing 7-Oaks by Leonard. Based on all of the circumstances of this case, I find Leonard has not given just and reasonable cause for some form of discipline by 7-Oaks. I therefore rule no discipline is warranted.

Dated at Saskatoon, Saskatchewan, on May 29, 2013.

T. F. (TED)KOSKIE, B.Sc., J.D.,
ARBITRATOR