IN THE MATTER OF AN ARBITRATION

BETWEEN:

Canadian Union of Public Employees, Local 79

And

The City of Toronto

Regarding Certain Grievances of Peter Mitchell (C10-05-10122; C10-05-10177;

C11-12-027 and C11-06-0280)

Before: Arbitrator Brian Mclean

Appearances:

For the Union: M. Russel et al

For the City: A. Esonwanne et al

Date of Decision: July 22, 2014.

This award concerns four grievances carried to arbitration by the union respecting the grievor Peter Mitchell. Grievance C10-05-10122 was filed on April 6, 2010 and alleges that Mr. Mitchell was subjected to harassment by the City. Grievance C10-05-10177 was filed on May 14, 2010 and alleges that the City improperly noted Mr. Mitchell's absence on April 30, 2010 as a "Failure to Report". Grievance C11-06-0280 was filed on May 9, 2011 and concerns a three day suspension imposed on Mr. Mitchell. Grievance C11-12-0227 was filed on November 29, 2011 and concerns a ten day suspension imposed on Mr. Mitchell. The parties agreed that the harassment grievance filed on April 6, 2010 also encompassed allegations of harassment following that date, including an allegation that the employer disciplinary actions, which were the subject of the other grievances, also constituted harassment. I heard several days of evidence and argument concerning these grievances.

Mr. Mitchell traces his mistreatment at the hands of the City back to the start of his employment many years ago. He sought to rely on that treatment and that history as part of his grievances. However, the City objected to that evidence and, by award dated February 5, 2014, I restricted the harassment allegations that could be made in the grievances before me. Nevertheless, Mr. Mitchell's employment history provides important context to his allegations which are the subject of the grievances I heard. On that basis I set out some of that history as Mr. Mitchell perceives it.

Mr. Mitchell was employed by the City in 1985. He suffered an injury while working in the Public Works department. As a result of that injury he was

accommodated in various light duty positions. He has held a provincial disabled parking sticker for his vehicle since 1990 as a result, at least in part, of the injuries he suffered. For a period of time Mr. Mitchell worked at City Hall in a light duty position as a cleaner. He claims that while in that position in the early 2000s a supervisor referred to him as a "black boy". He filed a human rights complaint regarding that incident but the compliant was dismissed. A request for reconsideration was also dismissed.

On February 4, 2004 the Grievor was transferred to City Hall to work as a council receptionist (or, as it was known at the time, a "security receptionist"). The City's four council receptionists sit at the entrances to the secure parts of City Hall. They have two primary functions. The first is to greet visitors to City Hall who arrive to meet with City councillors or to attend meetings in the secure areas. The second major function is a security one, to ensure that only people with proper invitations actually go through the secure area and when they do, are properly logged in.

When Mr. Mitchell arrived to start at council reception he realized that his back injury limited his ability to walk from his car in the nearest parking lot to his workplace. As a result, he asked to be given a parking spot in the employee covered garage parking lot. He was told to contact the City's employee health services department to ensure that he qualified for disabled parking. Two days later he complained that he was being harassed, presumably as a result of the delay in the City's dealing with his parking requirements.

About a month after he started at council reception his application for disabled parking was approved and he was permitted to park in the employee garage. That same day he asked to be permitted to park in the "taxi tunnel" below City Hall. That request arose out of the fact that he drives a large vehicle which could not fit under a sign which was located at the entrance to the covered employee garage. However, the "taxi tunnel" had sufficient clearance for his vehicle. Mr. Mitchell was advised that his request to park in the taxi tunnel would have to be approved by a City organization known as the "Parking Group". While the parking authorities took no issue with the applicant parking in the taxi tunnel, since those spots were meant for councillors and other VIPs, permission had to be given by someone higher up and that permission was not granted in an expeditious fashion.

A week later, on March 11, 2004, Mr. Mitchell took matters into his own hands in a way which resulted in discipline which was challenged by the union at arbitration. By award dated September 8, 2008 arbitrator Luborsky found that Mr. Mitchell covered over the security camera which guarded the garage entrance and attempted to raise the sign that was interfering with his ability to enter the garage. Mr. Mitchell was suspended for ten days. At arbitration the arbitrator reduced the suspension to six days. The arbitrator took into account the "City's unreasonable delay in addressing the Grievor's legitimate concerns respecting disabled parking". On the other hand, the arbitrator found that Mr. Mitchell had not been truthful with management or in his evidence before him.

After Mr. Mitchell served his ten day suspension he continued to work at council reception. A number of things happened over the next few years which were the focus of the evidence and argument in front of me.

Investigation of Racist Email

On March 5, 2007 another council receptionist, CD, wrote Mr. Mitchell a "joke" email that all parties agree was racist. Mr. Mitchell was quite rightly extremely offended, hurt and angered by the email.

For reasons that are somewhat unclear, Mr. Mitchell did nothing about the email for a considerable period of time. He explained his delay by stating that his previous complaints had been ignored. This claim was technically untrue. His claims had not been ignored, they had been rejected. However, to give him the benefit of the doubt, he may have perceived the rejection of his claim as tantamount to ignoring it. In any event, before he complained, CD left work on sick leave.

It appears that Mr. Mitchell may have done nothing about the email except for a chance workplace encounter with a manager, Ms. C, in early November 2007. Ms. C. noticed that Mr. Mitchell appeared to be looking sad at work and asked what was bothering him. Mr. Mitchell explained about the email and Ms. C told him that she would do something about it. On November 5, 2007 Ms. C contacted

Kim Jeffries in human resources who advised Mr. Mitchell on November 7, 2007 that she had received the email and would follow it up. It appears that on November 9, 2007 Mr. Mitchell met Tim Ivanyshym, the City's Manager of Council Services, to discuss the matter.

Mr. Ivanyshym did not testify before me as he has retired from the City's employ and moved from the GTA, although it was possible for the City to call him as a witness. Nevertheless, I am able to determine, from the available evidence, what likely happened.

It seems likely that Mr. Ivanyshym spoke to CD about the email. She expressed her regrets to Mr. Ivanyshym and those regrets were communicated to Mr. Mitchell by email from Mr. Ivanyshym dated January 3, 2008 as follows:

> Peter: As per our discussion earlier today, I have spoken with [CD] on December 20th, 2007 regarding the e-mail she sent to you. As you know, [CD] has been off on LTD since mid April, 2007 to present. I mentioned to her that this e-mail was brought to my attention by you and that it is very upsetting to you. I mentioned that you had asked that I discuss this matter with her.
>
> [CD] mentioned that she shared many joke e-mails and laughs with you in the past and she recognizes that this particular e-mail was inappropriate to send/reply to you and meant no harm in her e-mail to you.

Mr. Mitchell did not express any concern about how his complaint was dealt with at that time. For example, he did not demand that CD be disciplined and he did not

seek any remedy. Even now, while the union alleges that the investigation of Mr. Mitchell's compliant was inadequate and, in its inadequacy, was harassing of Mr. Mitchell, it is quite unclear what more the union and Mr. Mitchell think should have been done, especially since Mr. Mitchell complained so long after the fact and CD was then on leave.

On the other hand, one does get the impression that the City did not treat the email with the kind of serious attention that it deserved. This impression carries weight because of the reference to the fact that CD said that she "shared many joke e-mails and laughs" with Mr. Mitchell in the past. This sort of idea was also raised by the City on one or two occasions during the hearing of this matter. In my view, this kind of idea has no place in a discussion of the email that was sent to Mr. Mitchell. There is a sort of implication in this idea that racist statements are somehow inoffensive and less hurtful because they take the form of jokes or because employees often joked around. There is another troubling implication: that Mr. Mitchell somehow lacks a sense of humour and has interrupted the "fun" because he did not appreciate the email. These implications are seriously misguided. There is simply no place for the kinds of words found in the email in the workplace. That is the end of the story. There is no relevance to the fact that these two employees joked around with each other and it is not clear that CD was told that.

In my February 5, 2014 award I found it appropriate to hear this allegation and, if appropriate, consider it as part of a pattern of harassing conduct but, given the passage of time, not to make any independent remedy for any inappropriate

conduct I might find management engaged in. With this is mind I make a couple of findings. First, that the City should have treated the matter more seriously. Second, however, that the City's failure to treat the matter more seriously (which may have given rise to a remedy had the complaint been made in a timely fashion) did not amount to harassment. There is no direct evidence, and I can draw no conclusion or inference on the evidence, that the City did anything here knowing that the Grievor would be adversely affected by what Mr. Ivsanyshym did. There is nothing before me to suggest that Mr. Ivanyshym did not simply believe that Mr. Mitchell wanted the affront acknowledged and that he accomplished that goal by speaking with CD and relaying the results of that conversation to Mr. Mitchell. Mr. Mitchell did nothing at the time to suggest that he was unhappy with Mr. Ivanyshym's handling of the matter. According to his evidence before me, he only raised the issue in 2012 when he filed a duty of fair representation complaint against the union.

Medical Emergency

In March of 2008 a visitor collapsed near Mr. Mitchell's work area. Mr. Mitchell tried to contact security to get assistance for the visitor, but was unable to speak with anyone there. Accordingly, he called 911. An ambulance attended and the paramedics worked on the visitor and eventually took him to hospital. While the paramedics were working on the visitor, a City nurse attended and attempted to assist. It appears that one of the paramedics yelled at the nurse to, essentially, let them do their work. Mr. Mitchell testified that the nurse was embarrassed by the treatment.

Mr. Mitchell's evidence in chief on his claim for harassment in connection with this incident was that "thereafter I noticed I wasn't being treated equally or fairly".

I find no basis for a claim of harassment here. There are no particulars testified to about how and by whom Mr. Mitchell was treated differently following this incident. Mr. Mitchell's complaint begs answers to questions such as why would anyone blame Mr. Mitchell because, on his evidence, a paramedic yelled at a City nurse? There is no suggestion that anyone articulated any concern about what Mr. Mitchell had done. The complaint really makes no sense.

I also note that despite the fact that Mr. Mitchell did <u>not</u> follow procedure when he tried to contact security before he called 911, he was not disciplined or even spoken to for it.

There was no harassment in connection with this incident.

Invitation to Transfer to North York

On March 2, 2010, Lori Brown sent Mr. Mitchell and another council receptionist, Ilda, an email as follows:

> Good morning, Peter, Ilda,

> An opportunity for one of you to work at North York Civic Centre Council reception has come up (either for a month or maybe on a permanent basis). Please let me know if you are interested.

Mr. Mitchell responded:

> Good morning Lori,
>
> My preference will be to keep on working where I am, at City Hall.

Mr. Mitchell testified that he viewed this as a way for the City to get him to leave City Hall and constituted harassment. Ms. Brown testified that she offered the position to Mr. Mitchell, not for any improper reason, but because she thought that it was possible it might be an easier commute to work for him and Ilda.

I have no reason to doubt Ms. Brown. She simply advised him of an opportunity to work in a different office and he simply responded that he preferred working at City Hall. There was nothing more to it than that.

I note two additional points. First, had the opportunity not been offered to Mr. Mitchell he might have had legitimate grounds for complaint. Second, in the absence of any suggestion that the City was trying to get rid of Ilda, it is difficult to see how the offer could be directed at Mr. Mitchell as he suggests.

I am satisfied there was no harassment in the offer to move to North York.

March 10, 2010 Letter of Expectation and Request for CCTV Recording

This is the circumstance which appears to have directly led Mr. Mitchell to file the harassment grievance C10-05-10122 on April 6, 2010.

The council reception area can be a high traffic location with a stream of visitors, employees and councilors accessing the secure area. Each person who worked in the secure area was provided with a security card which was both their identification and gave them access through a card swipe system. Prior to 2010, and at the start of 2010, council receptionists would push a button at their desks to open the door to the secure area once they had verified an individual's right to pass through.

In February 2010 the City advised council receptionists that a new procedure would soon be implemented under which council receptionists would no longer be expected to press the door opening button for City employees and councillors. Instead, such persons were expected to open the door themselves by using their personal security pass. City division heads were told of the change in late April 2010. The policy took effect in May 2010.

In early March 2010, prior to the implementation of the new policy, Mr. Mitchell got into a conflict with a councillor. The councillor did not testify in this proceeding so a determination of what occurred must be based on Mr. Mitchell's testimony.

Mr. Mitchell testified that the councillor wanted him to press the button to open the door for her. Mr. Mitchell viewed this as "special treatment" (presumably as a result of the soon to be implemented policy) and refused to do so. Mr. Mitchell testified that the councillor then yelled at him in a public area.

It would appear the councillor complained to management about Mr. Mitchell. On March 5, 2010 Mr. Richardson met with Mr. Mitchell to talk about what happened. Mr. Richardson noted that there was a customer service element to the job of council receptionist. In fact, the Operations Guide for Council Receptionists at City Hall contains a section entitled "Customer Service Tips" which states in part:

> Your customers are both the Councillors and their staff whom you represent, as well as members of the Public or of the Toronto Public Service.
>
> **Send a positive Attitude to All Your Customers**
>
> You send a positive attitude with your words, tone of voice and body language.

Following the meeting Mr. Mitchell was moved from the desk at "A" street to the desk at "B" street. The union does not grieve that decision on the basis that the move constituted a violation of a provision of the collective agreement. It appears the union accepts that, subject to harassment/discrimination, the City has the management right to place employees at particular work locations.

Mr. Mitchell then wrote an email to Mr. Richardson as follows:

> I Peter Mitchell employee #--------, receptionist from "A" Street is making a request for Security purpose the activities at the "A" Street reception area for the past ten (10) days from Monday February 22ndd 2010 to Friday March 5tyh 2010 the reason being what took place at the location, Street "A" during the past ten (10) day period.
>
> I am not requesting that this be released to me, just to be held for further investigation.

Mr. Richardson wrote back asking Mr. Mitchell to clarify what he was looking for. Mr. Mitchell replied in part: "However, at our meeting I was told that I'm not performing my job properly and was moved from the desk at "A" street to "B" street. I am asking that the CCTV recording be held where activities can be seen, hoping I get the opportunity to defend myself."

The CCTV recording was neither retained nor viewed. At the hearing before me Mr. Mitchell explained in evidence that he hoped the recording would show the councillor yelling at him.

On or about March 9, 2010 Mr. Mitchell wrote other councillors seeking his assistance with “harassment in the workplace”.

On March 22, 2010 Mr. Richardson provided Mr. Mitchell with a letter of expectation to confirm their March 5 discussion. The letter extensively quotes from the Operations Guide, including the excerpt set out above.

The City’s decision to move Mr. Mitchell from “A” street to “B” street was not grieved as a violation of the collective agreement except with regards to harassment. I am satisfied that there was no harassment in connection with this incident. Based on the facts before me, it appears that Mr. Mitchell began to enforce the new security card/door opening policy before it was put into place in May 2010. In doing so, he refused a proper request by a councillor to push the button to open the door for him. In refusing to do so, he relied on a policy that would be in place two months later. The councillor got angry at him and yelled at him. The councillor later made a complaint and the City reacted, not by disciplining him, but by formally reminding him of his customer service obligations, and by moving him to “B” street.

In my view the City’s actions were measured and appropriate. Mr. Mitchell should have opened the door for the councillor since the policy was not in effect yet and, in any event, as a matter of customer service. If he had a concern that the councillor was asking for “special treatment” he should have raised that with his superior not with the councillor, again, especially since there was no policy

justification for what he was doing yet in place. While the councillor may have been wrong to yell at Mr. Mitchell one can understand her frustration with Mr. Mitchell. In such circumstances the yelling did not constitute, by itself, harassment. Moreover, a letter of expectation, which is not disciplinary, is an entirely appropriate response to behaviour on the part of Mr. Mitchell which is difficult to understand. Furthermore, the City was under no obligation to retain the CCTV recording and in declining to do so did not harass Mr. Mitchell.

Failure to Report Notation

On or about April 19, 2010 Mr. Mitchell learned that there was an opening in the schedule of his medical specialist which would allow him to see his doctor on April 29 and 30, 2010, which was earlier than anticipated. Accordingly, he wrote Ms. Brown on April 20 and requested that he be permitted to take vacation on those days. Ms. Brown responded by email that he could have April 29 off, but he could not have April 30 since she had already granted vacation to another council receptionist on that day. Mr. Mitchell responded that the days were important to him because of the medical aspect:

> *Mr. Mitchell*: Lori these days are important to me, it's regarding my arm I only found about it yesterday by mail and will ask you to reconsider.

Ms. Brown: Peter, I can give you Thursday April 29 but I'm sorry I don't have any staff to cover on Friday April 30 (Ruth and Al are on vacation, Susan has commitments at Scarb.cc that day).

Mr. Mitchell: Lori as I mentioned it's regarding my injury with two days scheduled Thursday and Friday, I have to be there.

Ms. Brown: Can it be rescheduled? I don't have staff, I have to consider operations here at work…

Mr. Mitchell: Lori these two days have to go together. At the meeting we had I mentioned that I will get short notices for appointments, this was during the introduction of back to work.

Ms. Brown: and I have accommodated you every time, this time I cannot, please reschedule.

Mr. Mitchell did not attend for work on April 30 and did not call in to say that he would not be at work. Mr. Mitchell was not suspended or given a written warning for his failure to attend work and call in. However, his time for April 30 was entered as "failure to report" in the City's time management system which may be viewed as a form of discipline.

Ms. Brown testified that she had given Mr. Mitchell vacation days for medical purposes on short notice before, but on this occasion she simply could not accommodate him. Ms. Brown asked clerks, support assistants, who worked in the secure area and who normally helped out if they needed coverage, to help out but they were unavailable since they had their own shortage, as a result of absences, to

deal with. She asked around to see if there were other employees in other departments that could provide coverage but there was no one available.

Under cross examination Ms. Brown confirmed that there were occasions when the entire complement of council receptionists was absent to attend department meetings and the City provided coverage. Ms. Brown noted, however, that these were short term absences, not a full day. The employees who provided coverage for those meetings worked in a different department. She asked the employees that usually covered for those instances if they could cover for Mr. Mitchell on April 30 but they were unavailable. She could not "order" them to provide coverage since they were in a different department.

The City in cross examination of Mr. Mitchell noted that he had on at least one occasion complained by email that there were insufficient council receptionists at the desk (three rather than four). On that occasion he stated: "I have several concerns, first regarding the staffing of council receptionist. We should be four and with only three of us at present there are difficulties functioning especially at "B" and "C" Streets whenever there is a person away or off for lunch or break one has to go to the other door to let someone in while the phone is ringing and/or other people is waiting to be attended to. I believe the solution to this would be to have another person in place as to have full function of this service to councillors". Management responded: "we do not have funding to engage another receptionist for the complement. We will have to operate with only two receptionists during breaks". The City notes that if it had provided Mr. Mitchell the day off it would have had only two council receptionists in place.

I fully understand why Mr. Mitchell is angry that Ms. Brown did not give him the day off and marked his absence as a failure to report. Perhaps had he known at the time that Ms. Brown went to some effort to find a replacement for him he would not have been upset. At least then, he could have appreciated that Ms. Brown was not trying to "get" him but actually wanted to find a way for him to take the day off.

The Union did not suggest that employer's actions violated any specific part of the scheduling or vacation clauses of the collective agreement. What happened here was simply a decision made by Ms. Brown that the City needed at least three council receptionists that day. Based on his earlier email to management regarding staffing, that is a position Mr. Mitchell would have supported -until he needed the day off. Given the efforts that Ms. Brown went through to try to find a replacement for Mr. Mitchell and the fact that she gave the previous day off without issue I see no basis in the suggestion that she was harassing Mr. Mitchell.

I am also moved by the fact that in marking Mr. Mitchell's time entry accurately- as a failure to report- the City did not take any other disciplinary action. The City could have treated Mr. Mitchell's absence as a serious "no show- no call" (it is difficult to understand why he did not call to say he would be absent) or even insubordination. In my view, Ms. Brown's failure to take any other more significant steps shows that, rather than harassing him, she was actually somewhat sympathetic to his circumstance.

Move to C Street

On December 22, 2010 Mr. Richardson sent an email to all of the council receptionists advising them that he was adjusting the "Street" assignments as a result of CD's return from sick leave. The email stated in relevant part: "With Al going to the Mail room in the new year, we will have [CD] sit at B street which used to be her home location and we will have Peter sit at C street". Mr. Richardson testified that he also spoke to each of the council receptionists individually about the change.

Mr. Mitchell was upset about the move. He had set up his personal belongings at the desk at B Street and he felt that he should remain there and CD should come back to C street. He did not see the need to move.

Mr. Richardson testified that in the new year, when the change in Streets was supposed to take effect, Mr. Mitchell did not move to C Street. Mr. Richardson asked him on at least three occasions to move and he did not do so.

Mr. Mitchell's version was that in the new year he attended at his desk at B Street. Mr. Richardson told him he should be sitting at C Street. Mr. Mitchell told him that it was easier for CD to go to C Street. He does not suggest that he ever

complied with Mr. Richardson's direction, however he denies that he ever directly refused it either.

Mr. Mitchell spoke with a councillor who happened to be present. The councillor said "Peter why don't you go to C Street?" and Mr. Mitchell explained his reasoning. The councillor suggested that Mr. Mitchell should speak to the ombudsperson and Mr. Mitchell replied that he had already done that with no success. Mr. Mitchell later wrote the councillor an email seeking assistance but got no response.

The next day Mr. Mitchell wrote an email (in relevant part) to Mr. Richardson as follows:

> Robin pleased be advised that I'm feeling very stressed from the happenings at work and didn't have much sleep last night. I'm unable to attend work today.

Mr. Mitchell testified that he wrote it because of the harassment and distress he was feeling. He believed that he was being badly treated by being "reassigned constantly". Mr. Mitchell was absent under a doctor's care for months. He did not file a grievance about the treatment until he was disciplined upon his return to work at the end of April 2011.

On May 2 or 3, 2011 Mr. Richardson and Ms. Codrington, met with Mr. Mitchell and a union steward, Jim Livock, to review the events in early January. Following the meeting the City provided Mr. Mitchell with a letter suspending him for three days as follows:

> On January 5 and 6, 2011, you were instructed, on more than one occasion, that you were to move from the reception desk at B street to the reception desk at C Street. On both occasions, you failed to follow these directives.
>
> On January 7, 2011, you did not report for work. Instead you sent an email at 8:50 a.m. advising that you were unable to work due to stress. You did not provide any further information or attempt to contact the office except to send in a Doctor's note, upon our request made by registered mail.
>
> On May 2, 2011, we held an investigation meeting in the presence of your Union representative Jim Livock, Una Codrington, and myself, and provided you with the opportunity to defend your actions. You failed to provide a reasonable explanation for your behaviour.
>
> In view of the foregoing, and in consideration of your overall disciplinary record, you are hereby suspended for three (3) days without pay.
>
> The suspension will be served on Tuesday, May 10, Wednesday May 11 and Thursday May 12, 2011. You are to return to your regularly scheduled shift on Friday, May 13, 20111 at 8:00 am at Reception C.
>
> Be advised that further incidents and/or misconduct warranting discipline will lead to further disciplinary action being taken.
>
> The City of Toronto cannot and will not tolerate the kind of conduct and behaviour as demonstrated by you. It is a serious violation of your employment contract obligations and such conduct has a detrimental impact on the Division's ability to provide security and reception services to the public and Council offices for which we are all responsible.

> If there are reasons for your behaviour or conduct that you feel are personal and/or confidential, I recommend that you contact Employee Assistance Program Services …

There is no doubt that the City could have allowed Mr. Mitchell to retain his desk at B Street. That being said, the decision to move him was a rational one. There was no dispute that CD had occupied B Street prior to when she went off on sick leave and it was natural for her to return to her old desk. Had she not been reassigned to her old desk on her return from medical leave she may have grounds for complaint. In addition, management had an honestly held belief that Mr. Mitchell was somewhat lacking in the way he provided customer service. I do not take this to mean that he necessarily did anything wrong (although there were complaints about him from a few councillors), but that he was not as outgoing or as customer service orientated as others. Since "C Street" was less important from a customer service perspective, it was an appropriate management decision to place him there. I see no evidence that there was any element of harassment in management's decision.

It is clear and obvious that in January Mr. Mitchell was challenging management's decision that he work at C street. He was doing so by remaining at the B street desk. If he had a concern with the direction given to him his obligation was to comply with the direction and then file a grievance ("work now, grieve later"). In not complying on multiple occasions over two days Mr. Mitchell was insubordinate.

That being said, in my view the discipline imposed on Mr. Mitchell, a three day suspension, was too harsh. A one day suspension was more appropriate. A suspension of that length would have driven home to Mr. Mitchell the impropriety of what he was doing and would have given him the chance to correct his ways. A one day suspension for an offence like this in these circumstances is more in keeping with the theory of progressive discipline, especially as practiced at the City, than the three day suspension that was imposed.

Una Codrington Becomes Supervisor

In or about April 2011 Ms. Codrington became the City's supervisor of council and support services in the City Clerk's Office, supervising Mr. Mitchell and the other Council receptionists. Ms. Codrington replaced Ms. Brown.

Parking Issues

Mr. Mitchell's concerns about parking have a long and difficult history which is discussed above. On his return from the ten day suspension (later reduced), for covering the security camera and modifying the parking sign, Mr. Mitchell continued to press the parking issue. Mr. Mitchell wrote a City councillor on November 21, 2006 to ask for assistance with his parking issue. There is then an email dated March 8, 2007 from the City's manager of Security notifying Mr. Mitchell that his security card had been amended to give him access to the taxi

tunnel so he could park there. Following this, Mr. Mitchell parked in the taxi tunnel for a number of years without issue.

However, on June 10, 2011 Ms. Codrington spoke to Mr. Mitchell about the taxi tunnel parking. She advised that there was construction in Nathan Phillips Square in front of City Hall (above where the parking was located) and that as a result there would be fewer parking spots. Accordingly, he would was to be given a new place to park. By email that same date she confirmed the conversation and confirmed that he had a provincial parking permit and that he was to provide a copy of it.

Mr. Mitchell responded by email as follows:

> Hi Una,
>
> Regarding our verbal conversation this morning you mentioned that Mohammad [from Security] asked you to discuss with me about my parking in the taxi tunnel due to ongoing construction on NPS [Nathan Phillips Square] and the reduction of employee parking.
>
> I explained to you that this parking has been granted to me for the permit I possess.
>
> [permit information omitted]
>
> Is it possible to park in the official garage as I have been before being designated parking in the taxi tunnel, you mentioned that my vehicle wouldn't fit in the official garage. Una this is the same vehicle I have been parking in the official garage before designated to the taxi tunnel I know there are several Handicap spots unused daily in the official parking.

I would appreciate this request until the NPS construction is over and back to the taxi tunnel.

Your appreciation to this matter is greatly appreciated.

Ms. Codrington responded by email the same day by requesting a photocopy of Mr. Mitchell's parking permit and asking him to complete a "parking declaration" which was a form required of employees who needed disabled parking. Ms. Codrington did not respond to Mr. Mitchell's request to be put in the official garage.

Mr. Mitchell filled out the declaration and filed a copy of his disabled parking permit. In cross examination he said that he was not complaining that Ms. Codrington did not have areason to ask him for his parking permit information. Initially he claimed that Ms. Codrington did not tell him the reason he was required to move his parking spot. However, after being pointed to his own email which begins: "Regarding our verbal conversation this morning you mentioned that Mohammad [from Security] asked you to discuss with me about my parking in the taxi tunnel due to ongoing construction on NPS and the reduction of employee parking.", he eventually appeared to reluctantly acknowledge that she had spoken to him to explain the problem.

Mr. Mitchell did not like the parking lot where he was assigned. It was the same lot where he had parked some time ago, and at that time he had on one occasion slipped and fallen on ice. Also, on one occasion he had been given a parking ticket

while parking there. Mr. Mitchell complains that the City's only response to the ticket was to give him money to pay for the ticket. He testified there were three available disabled spots for him in the taxi tunnel which could have been offered, but in not making the offer of those spots, the City was harassing him.

I see no evidence that the City was harassing Mr. Mitchell in dealing with the parking issue. Ms. Codrington was advised by the City's security office that due to construction Mr. Mitchell was required to give up his spot in the taxi tunnel. She conveyed that information to Mr. Mitchell. There is no evidence that the security department was "out to get" Mr. Mitchell after he had parked in the taxi tunnel for years without incident. There is no evidence that Ms. Codrington did anything other than relay the security department's requirement and formalize Mr. Mitchell's right to have disabled parking (which he admits was not done for no reason).

Mr. Mitchell says that there were three parking spots in the taxi tunnel which were never used, but he has provided no evidentiary basis for that claim. It may be that the parking spots were often empty when he arrived and left work but he had no way of knowing what occurred with those parking spots during the work day. His testimony amounted to speculation.

I am therefore satisfied that the City did not harass Mr. Mitchell when it decided to move his parking spot because of construction at City Hall.

Uniforms

Mr. Mitchell testified that a further incident of harassment against him concerned the City logoed shirts that he was required to wear to work. He testified that he (and the other council receptionists) were provided with five shirts, three of which were long sleeve and two of which were short sleeve. Mr. Mitchell testified that he had a medical condition which made it difficult to wear the short sleeve shirts and therefore he never wore them. As a result, Mr. Mitchell says, he laundered his long sleeve shorts more often and the shirts began to wear out. He says that he asked to be issued only long sleeve shirts or to be issued two additional long sleeve shirts but they were not provided.

He was embarrassed to wear the worn out long sleeve shirts so he began to wear his own personal (non- uniform) shirts. Mr. Richardson and Ms. Codrington told him that he was required to wear the shirts that he had been issued. Mr. Mitchell explained that his shirts were worn out. Ms. Codrington told him to bring the shirts in so that she could look at them. Mr. Mitchell did so and she told him the shirts were fine and that he was required to wear them. She and Mr. Richardson examined the shirts and they both agreed the shirts were still in good condition.

Neither the shirts nor pictures of the shirts were put into evidence. There was no suggestion that Mr. Mitchell no longer had possession of the shirts. The City notes that between the time the shirts were issued to Mr. Mitchell and the time that he

had the discussion with management about the shirts he had been absent for work for approximately 22 months as a result of illness. In other words, the average length of time he was required to wear a particular shirt was not that different than any other council receptionist.

Ms. Codrington testified that when she advised Mr. Mitchell of her conclusion he became upset. He moved close to her and said "you are quick to remind me that you are my supervisor". Ms. Codrington was cross examined extensively on this point. However, since it formed no part of any discipline issued to Mr. Mitchell I need not determine exactly what occurred.

Mr. Mitchell testified that Ms. Codrington was lying when she gave her evidence on this point and that her testimony was another instance of her harassing him.

I am unable to find harassment in this instance. It was open for Mr. Mitchell to provide physical evidence or photographs to demonstrate that the shirts he was required to wear were worn. He did not do so. In these circumstances I have no reason to prefer the evidence of Mr. Mitchell over that of the City's witnesses. Moreover, it is not at all clear that the requirement to wear a worn shirt (unless it was done to deliberately antagonize the grievor- and there is no evidence of that) is, by itself, harassment. I do not find, on a balance of probabilities, that Ms. Codrington was lying in her evidence before me on these issues and, in any event, doubt that dishonesty in testifying at arbitration constitutes workplace harassment.

Letter of Expectation

On August 30, 2011 Ms. Codrington provide Mr. Mitchell with a non- disciplinary letter of expectation regarding the fact that he had allowed a visitor to enter the secure area without signing them in. The incident had occurred on August 17, 2011 and an investigation meeting was held with Mr. Mitchell and a union representative on August 22, 2011. Mr. Mitchell did not remember the visitor in question and had no answer to the assertion that he had let the visitor through. The letter was not grieved.

I see no basis on which to conclude this was harassment. Again, rather than disciplining Mr. Mitchell for what the City viewed as a breach of its rules and procedures, the City dealt with its concern in a way that was designed to get the message across but have less impact on Mr. Mitchell's employment.

Long Term Disability

Initially it appeared that Mr. Mitchell complained that the way his long term disability application was dealt with constituted harassment. This suggestion is reflected in my February award. However, Mr. Mitchell testified that the harassment arose out of the fact that he was required to go on disability assistance and not with how the City handled his claim. As a result, I need not comment on this.

Personnel File

On September 14, 2011 Mr. Mitchell sent Ms. Codrington an email seeking an appointment to see his employee file. Ms. Codrington directed Mr. Mitchell to LR, who was located at Metro Hall, to set up an appointment. On September 15, 2011 Mr. Mitchell sent LR an email asking to set up an appointment so that he could see his file as soon as possible. There is no evidence before me that LR or Mr. Mitchell knew each other or even had heard of each other prior to their email exchange. The email exchange continued as follows:

> LR: Good Morning Peter, Sure, no problem. May I ask what exactly you are looking for?
>
> Mr. Mitchell: L everything that is in my file.
>
> LR: Okay, I have to check. If there is any sensitive documents (discipline) or you need copies, you have to go thru Corporate Labour Relations. Please send me your personnel number.
>
> Peter Mitchell: L in my e-mail to you at 8:20 AM I sent you my Personnel info which is ###### hope this is satisfactory.
>
> LR: Hello Peter, I have reviewed your file and returned it to the Central Records Room. As stated in my previous email, since your file contains sensitive documents, please set up an appointment with HK from Corporate Labour Relations.

The name and contact information of the Labour Relations consultant for City Clerks was provided to Mr. Mitchell and he obtained his file. Mr. Mitchell says he was harassed because L.R. asked him what in his file he was looking for and did not simply turn the file over to him. L.R. did not testify.

The Union did not suggest that the City's handling of Mr. Mitchell's request to review his file violated the applicable employee file provisions of the collective agreement and no grievance was filed in that regard.

I am unable to see any harassment in the way that the City handled Mr. Mitchell's request to see his file. L.R. had no reason that I am aware of to harass Mr. Mitchell and the idea that she would randomly do so is illogical. It is equally consistent factually and more consistent logically that the reason L.R. asked Mr. Mitchell what he was looking for in his file was that she wanted to assist him; perhaps if there was one document he was looking for she could simply send it him without the necessity of him attending at her office, which was at Metro Hall, some distance from City Hall, where Mr. Mitchell worked. There is no suggestion and no evidence that L.R. was not complying with City policy in the way that she handled Mr. Mitchell's request given that it contained what the City viewed as sensitive documents.

I am therefore satisfied that harassment has not been demonstrated in this instance.

Mail Sorting

The mail sorting issue is central to the dispute between the parties. However, the essence of the dispute changed during the hearing in a way that was troubling to me. At the outset of the case, the argument advanced by Mr. Mitchell appeared to be that Mr. Mitchell was suddenly given new duties (sorting mail) in 2011 and his harassment claim, and the discipline eventually imposed, arose out of this fact. As a result of this allegation, the employer led considerable evidence about Mr. Mitchell's duties. Disputes arose, which occupied significant hearing time, about whether Mr. Mitchell had notice of certain policies and procedures and which version of those policies and procedures were in place at particular times. However, by the time Mr. Mitchell's testimony had concluded it was clear that much of the time spent on these issues had essentially been wasted as it was obvious that Mr. Mitchell had sorted the mail for many years. Accordingly, I will not spend a great deal of time here describing these factual issues and determining them.

As noted, Mr. Mitchell started working as a council receptionist in about 2002. Within two to four years of that time (Mr. Mitchell testified that it was in 2004 or 2006) the council receptionists were assigned the task of sorting councillors' mail. The essence of the task is that a mail clerk would bring bundled mail up to the council reception area and place it on a credenza in front of the councillors' mail slots. Bundles were placed on three credenzas, one for each of the "streets". Each of the council receptionists, including Mr. Mitchell, then sorted the mail and placed it in the slot of the corresponding councillor.

It would appear that almost from the beginning, Mr. Mitchell complained that he should not be doing this job. He took the position that a mail clerk should have been sorting the mail. There is no comprehensive evidence before me of how his complaints were dealt with over time. However, there is an email dated March 8, 2008 wherein he asked Ms. Li whether there "has been any progress made regarding putting of the mail into the boxes [mail slots] by the mail clerk instead of us receptionists" ? Ms. Li replied: "The mail issue requires a more thoughtful discussion in terms of how we manage the mail distribution at City Hall. I need to have further discussions with my other directors and managers to work out a process that is both efficient and customer friendly. I will not have a solution to this until I have a chance to do that".

It would appear, therefore, that Mr. Mitchell and the other council receptionists sorted mail from at least 2006 until at least 2011. Mr. Mitchell testified in re-examination that he sorted mail in 2011, at least sometimes.

As a result, it is clear that sorting mail was part of the job of a council receptionist and had been for some time. Whether that activity is part of the job description or in the operations policy binder, about which much evidence was adduced, is therefore something of a red herring. I note, however, that a reference to mail sorting has been in the Council Receptionist Policies Binder for some time, including times when Mr. Mitchell agreed he had read the binder.

The incident which gave rise to the grievance occurred in November 2011. At that time Ms. Codrington or Ms. Li received a complaint from a councillor that her mail had not been sorted and that the councillor's mail was sitting bundled on the credenza. There is no dispute that the mail in question was mail that the City says should have been sorted by Mr. Mitchell.

Ms. Codrington testified that she asked Mr. Mitchell to sort the mail. He responded that he was not going to do it, that he was not a mail clerk. Mr. Mitchell, according to Ms. Codrington, acknowledged they had discussed the issue more than once.

The other incident relied on by the City in its letter to justify a ten day suspension involved an all staff meeting held on November 22, 2011. "All staff meetings" involved all of the employees in the department (about 50 employees attended) and were held periodically. At the meetings management would give updates about accomplishments over the past year and initiatives that would be undertaken in the upcoming year. Mr. Mitchell did not feel that he should be required to attend such meetings as they frequently involved subjects that did not concern him at all.

At the meeting in question, employees were asked near the conclusion of the meeting whether they had anything to say. Mr. Mitchell took the opportunity to complain about the way he was being treated, including the fact that he had been required to move from B Street to C Street. Winnie Li, testified that she advised

Mr. Mitchell at that time that if he had personal concerns he should discuss them with his manager at a different meeting.

Following the all staff meeting, Mr. Richardson met with Mr. Mitchell who declined union representation. They asked him why he was not sorting the mail. He did not provide a reason. The next day he again failed to sort the mail. Ms. Codrington asked him to do it but he did not do so. Finally, Ms. Codrington told Mr. Mitchell to go home for the day. Mr. Mitchell did not immediately comply. He asked Ms. Codrington to put her direction in writing. Ms. Codrington refused to do so and advised Mr. Mitchell that if he did not leave she would call security. Mr. Mitchell replied "Do what you have to do". Ms. Codrington called security and officers attended and escorted Mr. Mitchell to the public area of City Hall.

Mr. Mitchell's version of events is largely the same as the City's. However, he disagrees that he ever specifically refused an order from Ms. Codrington to sort the mail. He explains that he wanted something in writing before he left because he was afraid the City would discipline him for leaving his post without permission.

On November 29, 2011 Mr. Richardson sent Mr. Mitchell a letter imposing a ten day suspension as follows:

> On Monday, November 21, 2011, your supervisor, Una Codrington, was informed of complaints regarding mail being left on top of the mail boxes and not placed in the Councilor's respective mail slot at Reception C.

Upon investigation, it was noted that this was not the only occurrence, but it has happened several times in the past few weeks. At approximately 2:30 p.m., your supervisor inquired as to why the mail was left out and not placed in the appropriate boxes; you responded by saying "I am not a mail clerk". You were told that this duty falls within the purview of your job. Accordingly, you were instructed to place the mail in the appropriate boxes. You refused to perform your duty.

An investigative meeting to follow-up on your insubordinate behavior was then scheduled for Tuesday, November 22, 2011.

Prior to the investigative meeting taking place, in fact on the same day the meeting was scheduled to be heard, you attended an all staff meeting in Council and Support Services. In the presence of your colleagues and management, you proceed to speak to all in attendance about how you have been treated unfairly. Your behavior was both inappropriate and unwelcomed.

At the investigative meeting, later that day, Tuesday, November 22, 2011 at 3:30 pm you refused Union representation. We reminded and strongly encouraged you of your right to representation; again, you declined to have Union representation present.

At that meeting you were reminded that sorting and putting mail in the boxes is a part of your regular duties. We also discussed your inappropriate comments at the CSS all staff meeting.

You failed to provide a reasonable explanation for your insubordinate behavior.

On Wednesday, November 23, 2011, at approximately 11:15 a.m., your supervisor was notified that the mail had not been attended to. Once again, you were given a directive to sort the mail and place it in the slots. Again, you refused to perform your duty.

You were then advised that as a result of your insubordinate actions, you were beig sent home with pay pending further investigation, and you would be instructed in writing when you should return to the workplace.

You refused as reasonable directive to leave your workstation, therefore security was called and you were escorted out.

In the past six (6) months you have served a three (3) day suspension, without pay, for failure to follow management directives, served on May 10, 11th and 12th, 2011. On August 30, 2011 you received a Letter of Expectation, with respect to the roles and responsibility of Council reception staff.

As discussed with you on previous numerous occasions, you are required to adhere to the office procedure established by the City Clerk's Office. These procedures and expectations are not onerous and are for the mutual benefit of the clients we serve, including members of Council and their staff.

In view of the foregoing and in review of your disciplinary record, you are suspended for ten (10) days, without pay, for behavior tantamount to insubordination.

***

Be advised that the City of Toronto cannot and will not tolerate the kind of behavior as demonstrated by you. It is a serious violation of your employment contract obligations and such conduct has a detrimental impact on the division's ability to provide services to the public for which we are all responsible.

If there is a reason for your behavior that you feel are personal or confidential, I recommend that you contact Employee Assistant Program services…

Be advised that further incidents will result in further disciplinary action being taken up, to and including termination.

In my view, there is no basis on which I could conclude that anything in relation to the mail sorting issue constituted harassment. For years Mr. Mitchell had a problem with doing mail sorting. He did not believe it should be part of his job duties. For some reason he decided in November 2011 to make a stand- he would

refuse to sort the mail. He continued to refuse (whether he actually said "no" or he just did not sort the mail is irrelevant- he made his intentions clear) even after being specifically told to sort mail.

The "work now, grieve later" principle applies to these circumstances. Mr. Mitchell had a concern about sorting the mail for years. He had ample opportunity to file a grievance concerning the City's requirement that he sort mail. However, for reasons which were not explained before me, he did not file a grievance. Instead, he took matters into his own hands and repeatedly engaged in behavior which was insubordinate.

I note that Mr. Mitchell was not singled out to be required to sort mail. All council receptionists were required to and did do it. I also note that the City's decision to require Mr. Mitchell to sort mail did not come out of the blue. The City acted after receiving a complaint from a councillor. There is no basis for me to conclude that the City was harassing Mr. Mitchell when it required him to sort mail.

The Union argued that there was an exception to the "work now, grieve later" rule for an employee who was subject to harassment. I agree there may well be circumstances where harassing behaviour on the part of employer representatives could be refused without disciplinary consequences. However, such circumstances would be rare and would likely involve something like a requirement that the employee engage in demeaning activity. In my view, the circumstances before me do not come anywhere near that point.

I also find nothing inappropriate about Ms. Codrington's decision to call security to have Mr. Mitchell removed from the workplace. At the time she called security Mr. Mitchell was defying her direction to do his job (sorting the mail) and was refusing her legitimate direction to leave the premises. Mr. Mitchell explains that he was refusing to leave because he had a concern that the City would say that he had left work without permission. I do not accept that explanation. The City had done nothing which would justify such an assumption. Moreover, if that concern was legitimate he could have written an email to the City after he left or simply told a co-worker or his union representative what had happened. I believe that his request for written confirmation was a way to impede Ms. Codrington's authority.

Similarly, I do not accept Mr. Mitchell's explanation regarding his conduct at the staff meeting. He strikes me as an intelligent man. In my view, he knew full well that it was not appropriate for him to raise that kind of personal issue at that meeting. He was just acting out in response to the fact that he was shortly to attend a meeting to investigate his refusal to sort mail and because he objected to being required to attend staff meetings.

That being said, I am satisfied that a 10 suspension was not appropriate, considering all of the circumstances. In my view, given that Mr. Mitchell (now) has a one day suspension on file, it was appropriate that he be suspended for three days for his refusal to sort the mail despite being repeatedly asked to do so and to leave the workplace when directed. The behaviour at the meeting, while

warranting some disciplinary response, does not significantly add to the insubordinate conduct which is covered by the three day suspension.

Voluntary Separation Offer

There was some evidence led that suggests Mr. Mitchell believes that the City's offer to him of a voluntary severance package constituted harassment against him. On January 7, 2013 all four council receptionists were advised that the City could offer one of them a voluntary separation package. Anyone interested in the offer were required to fill out an application form. Mr. Mitchell did so.

By letter dated January 28, 3013 the City advised Mr. Mitchell that his application had been approved and his last day of employment would be February 28, 2013 in accordance with the program's parameters. Later Mr. Mitchell withdrew his application and the City recognized that he had not resigned/ retired.

As with the offer to move to North York, Mr. Mitchell would have had a better claim to have been mistreated if, unlike the other council receptionists, he had not been offered the chance to voluntarily separate or, had the City tried to hold him to his resignation. In the end, however, he was treated the same as everyone else and was given something that he applied for. I am unable to discern any harassment in these circumstances

Harassment Grievance

It appears to me that whatever happened to Mr. Mitchell in early 2000 has affected him deeply. That incident, the failure of his efforts in the Human Rights process, and the CD email have unfortunately become the lens through which he views how he is treated by the City. My assessment of all of the evidence is that viewed through this lens, treatment which is based on no ill will against him at all (and in fact may be done to try to assist him) sometimes becomes a slight to Mr. Mitchell which he perceives as harassment. On the other hand, when Mr. Mitchell views management's actions in response to his own conduct through this lens, he fails to see how the City must respond to his behaviour and, indeed, on how his behaviour adversely affects others.

In Toronto Transit Commission and A.T.U. (Stina) (2004), 132 L.A.C. (4th) 225 Arbitrator Shime discussed the meaning of the term "harassment" at p.241:

> Harassment includes words, gestures, and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands or other unpleasantness. A single act, which has a harmful effect, may also constitute harassment.

In a grievance which alleges harassment the onus is on the union to establish that the grievor has been harassed. Moreover, an "objective standard is to be applied in determining whether workplace abuse and/or harassment have occurred, as opposed to the subjective impressions of the alleged victim" (*Cara Operations Ltd.*

and Teamsters, Chemical, Energy and Allied Workers Union, Local 647 (Palmieri) (2005), 141 L.A.C. (4th) 266 (Luborsky). In applying such an objective standard it would, in my view, be rare for legitimate disciplinary responses to the grievor's misconduct to constitute harassment. Those circumstances do not exist here.

As discussed above, I am unable to conclude that Mr. Mitchell was harassed by the City. Grievance C10-05-10122 is accordingly dismissed. Similarly, the City's decision to discipline Mr. Mitchell for failing to report was justified for the reasons described above and Grievance C10-05-10177 is also dismissed.

I have decided to allow Grievance C11-06-0280 and Grievance C11-12-0227 in part, for the reasons set out above. The suspensions in connection with those grievances are reduced to a one day suspensions and a three day suspension respectively. Mr. Mitchell is to be fully compensated for any financial losses suffered for two days with respect to Grievance C11-06-0280 and seven days with respect to Grievance C11-12-0227.

I remain seized should there be any difficulties implementing this award.

Brian McLean

_____

Brian McLean

Toronto, Ontario

July 22, 2014.