IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF THE GRIEVANCE OF GRIEVOR MP

BETWEEN:

THE CITY OF CALGARY

("the City")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 38

("the Union")

Before a Panel of P. Smith, Chair, L. Huebscher, Union Nominee, and D. Laird, City Nominee, on December 3-6, 2012, and November 18, 2013 at Calgary, Alberta

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Appearances:

For the City	For the Union
Rebecca Pitts, Counsel	William Johnson, Counsel

AWARD

I. INTRODUCTION

This matter involves the grievance by MP ("the Grievor). It is a tragic case. The Grievor was sexually assaulted on a number of occasions in November and December 2010 by Terry Mutton ("Mutton"), a senior foreman. Mutton was a member of CUPE 709 and held or had held local, provincial and national executive positions with CUPE. The Grievor was a Clerk in District 6 of the City's Roads division. Mutton worked in the same place and reported to Mike Wierzbicki ("Wierzbicki"), the Manager of District 6 who in turn reported to Dean Bell ('Bell"), the Manager of Road Maintenance. Bell reported to Ryan Jestin ("Jestin"), the Director of Roads. At the time of the events in question Mutton was on track for a

promotion to a trainer foreman position at the Manchester roads site. The Grievor, with reason, viewed Mutton as a powerful person in the workplace.

The sexual assaults and the aftermath including the largely flawed nature of the City's response at all levels in the City's Roads' Division had significant and lasting impacts on the Grievor. She sought redress through the grievance process and through a complaint to the Alberta Human Rights Commission. By agreement with the Human Rights Commission all matters and claims, including those within the jurisdiction of the Commission, and any tort claims that the Grievor might have, were referred to this arbitration panel for resolution.

While the first three days of hearings dealt with the factual circumstances giving rise to the grievance, which will be described in Part II of this award, the primary issue between the parties was not whether the events complained of by the Grievor had occurred (although the City did attempt through its evidence to offer explanations for some of those events), but what damages were properly payable to the Grievor for what happened to her. To that end, a significant amount of evidence was tendered by agreement at the last day of the hearing in November 2013.

II. THE SEXUAL ASSAULTS AND THE CITY'S RESPONSE

The essential facts respecting this matter were in large part unchallenged by the City and formed part of the instructions to the medical expert jointly retained by the City and the Union and whose report was entered as part of Exhibit 51-2. We rely upon that document and other information provided by witnesses during the hearing or through exhibits in setting out the facts below.

The Grievor was sexually assaulted by Mutton on November 8, 15, 16, 17, 18, 22, 23 and 24, 2010 while working as a Clerk in District 6. The assaults consisted of fondling while she was at her desk. Both she and Mutton worked in the office at District 6. For the most part other workers assigned to District 6 worked outside the office. The Grievor reported the assaults to Wierzbicki on November 24, 2010. For the purpose of the agreed facts to be provided to the independent medical expert (Exhibit 51-2), the City and the Union agreed that the Grievor did not provide a name to Wierzbicki. As an observation it appears that the Grievor did give enough information to Wierzbicki about the number and location of the assaults for him to have at least a clue as to who was perpetrating them. In any event he and the Grievor talked about an extension to her desk to make it more difficult to approach her from behind (which was installed two weeks later). Wierzbicki then left on a one week vacation and left Mutton in

charge of District 6. The City's witnesses agreed that even if Wierzbicki did not know the name of the individual who assaulted the Grievor, his handling of the matter was entirely improper.

Mutton continued to assault the Grievor during the entire week of November 29, 2010. Fearing, with reason, that she would not be believed she and her husband, in whom she had confided about the assaults, installed a spy camera on December 2,2010 and Mutton's assault of December 3, 2010 was caught on camera. The Grievor's husband contacted Jestin and a meeting was arranged for December 10, 2010. They met with Bell. The Grievor described the assaults and provided still pictures from the camera. Bell returned the photos to the Grievor. There were discussions at that meeting about a number of items including the necessity for an investigation and information about counseling.

After the meeting Bell sent an e-mail to Corporate Security about the allegations. In his evidence he said that he knew something had gone terribly wrong and knew what his next steps would be – reporting to Corporate Security so an investigation could be launched and suspending Mutton. In his report to Corporate Security he did describe the photos as "in his opinion, inconclusive".

On December 13, 2010, Mutton was suspended. After his suspension without pay, his union (CUPE Local 709) advised that because of his health issues which were exacerbated by stress Mutton would be seeking S. & A. benefits. That ultimately occurred. In an e-mail produced as part of Exhibit 6, on December 16, 2010, Pamela Gouw reports on a conversation with Bell where she indicates that she spoke to Dean and "*he thinks that we should lift the SPI if Terry is approved for S & A benefits. He wants to tell Terry that he will need medical clearance to RTW and then needs to speak to Dean when he is able to return to work as Dean may have to discipline or move him to a different work area dependent on the outcome of this investigation*".

There was a second meeting with the Grievor on December 14, 2010 at which she was advised of the need to cooperate with corporate security, and that criminal proceedings were separate from employment proceedings. She was later that day advised that she would have to talk to either Corporate Security or Human Resources that week. Exhibit 4, an e-mail from Andrea Adams summarizes those events. Adams indicated to the Grievor that there was pressure to get the investigation started because there was a City employee suspended. The Grievor said she would be calling the police and did so that day. The police attended the worksite on December 15, 2010 and later picked up the pictures. The Grievor remained in the workplace.

On December 20, 2010 when she arrived at work it appeared that her keyboard had been sabotaged with what she thought was rat poison. Management was concerned that it was part of the "rat culture" that was well known to exist among outside workers at the City (and which the panel heard evidence about from Len Fagnan, a CUPE national representative). An investigation was commenced but never completed. As a result of that incident the Grievor was moved to the Manchester facility.

The Grievor's first visit to her doctor (Dr. David) respecting the assaults was on December 29, 2010. He diagnosed her as suffering from acute stress. His medical records were produced as Exhibit 48-1.

On January 3, 2011, the Grievor advised Bell that Mutton was going to be charged by the police. He was charged on January 5, 2011(and ultimately on December 11, 2011 pled guilty to the charge and was sentenced on April 18, 2012 to 90 days incarceration to be served intermittently to be followed with two years' probation).

On January 6, 2011 Bell directed the Grievor to return to District 6 which produced an increasingly agitated response from the Grievor through an e-mail chain, Exhibit 11. At this time the investigation with respect to the keyboard was outstanding. The e-mail chain started with an e-mail from Wierzbicki suggesting that the contaminants on the keyboard were mouse droppings, and a pointed response from the Grievor which resulted in a rebuke of the Grievor from Bell, who said that "*Mike was and will soon again be, your supervisor. You need to think hard about how you speak to people, specifically the lack of respect that you consistently display. I suggest you re-read the city's Respectful Workplace policy. Consider this counseling*". It ended with Bell's e-mail of January 4, 2011 telling her that he was too busy to "*bandy words*" with her and telling her to report to District 6.

On January 5, 2011, the Grievor filed a complaint that she was being followed by Bell to her home. The City conducted an investigation and the final report, dated January 13, 2011, concluded that Bell was not following her as he was elsewhere at the time.

On January 6, 2011 Wierzbicki issued a memo to all district employees (copied to Bell) respecting "In House Rules" (Exhibit 14). Two of the paragraphs in that memo could only be interpreted as applying specifically to the Grievor.

On January 6, 2011 Bell was advised by another City employee that the Grievor had said she was going to meet with the mayor (Exhibit 15) and later that day a meeting was arranged with City management and H.R. employees to discuss what they were going to do with the Grievor. At that meeting it was

agreed that the City would require the Grievor to attend a mandatory IME with Dr. Spivak on January 10, 2011. A letter to that effect was delivered to the Grievor on January 7, 2011.

When the Grievor showed up for the IME she found out that Dr. Spivak was a psychiatrist and that the City would receive his report. The Grievor refused to go through with the assessment. The Grievor had previously booked the week of January 10, 2011 as vacation. She also attended upon Doctor David again on January 10, 2011 and reported upon some of the events. Dr. David observed that she was upset and diagnosed an Adjustment Disorder.

After her one week vacation the Grievor returned to work at District 6. The City, notwithstanding the fact that the Grievor had not claimed any absence due to sickness, required her to provide a fitness to return to work certificate from her family doctor. That request was sent to her by Wierzbicki (Exhibit 19). In response to that directive the Grievor attended again on Dr. David who in his notes reported continued anxiety about the events and reporting adverse effects on her relationship with her husband and other effects on her. Dr. David's assessment was one of anxiety and recommended a plan of follow up for counseling to deal with post-traumatic features, but provided a letter indicating that the Grievor was fit for work which was provided to the City on January 18, 2011.

When she returned to work at District 6 on January 19, 2011, Wierzbicki reviewed rules of conduct with her (Exhibit 14) and she was advised that since she was fit for work she had to be responsible and accountable for her actions. The e-mails contained in Exhibit 11 were discussed and she was advised that moving forward "*any types of disrespectful workplace behavior will be dealt with in a disciplinary manner*". The Grievor took exception to this and asserted that she was being blamed for what had occurred but she was the victim.

Sometime after this meeting for unknown reasons Wierzbicki asked her to return keys to various doors which the Grievor had been given and had for a long time as part of her job. No explanation was provided for this request.

On January 24, 2011, the Grievor contacted her Union and a grievance (Exhibit 21) was filed on January 25, 2011. Among other things the grievance asked that she be transferred out of District 6 and alleged that the City had breached the no discrimination clause of the Collective Agreement. On January 27, 2011 she made a complaint to the Alberta Human Rights Commission alleging sexual discrimination.

After the grievance was filed the Grievor was temporarily transferred to District 7.

Mutton resigned from the City on January 28, 2011 electing to take retirement. In response to that Bell advised that "*based upon the events leading up to his retirement, he is eligible for the benefits but not for the vacation bonus. His rehire status will be 'do not rehire'*" (Exhibit 23).

On February 4, 2011, Bell on behalf of the City replied to the grievance asserting that "*I am satisfied that management acted appropriately*" (Exhibit 24). On cross examination at the hearing, Bell said that he did not know that Corporate Security had, in the context of their investigation of the Grievor's complaint about him, reached the conclusion that the Grievor was the subject of a sexual assault (Exhibit 12), and when he wrote Exhibit 24 he had not made up his mind about whether there had been a sexual assault.

The Grievor was at District 7 until April 2011. A number of events occurred at District 7 that caused the Grievor distress. A foreman called her a 'short shit' on February 14, 2011 The Grievor complained and the foreman apologized indicating that he had said it in humour and said it to others including his girlfriend. On March 2, 2011 the light bulb in her personal lamp was removed. The Grievor took offence and management arranged for a replacement. She sent an e-mail to her co-workers stating "*I am just a human being. I have a heart*".

The Grievor was off work on S & A benefits from March 2 to March 13, 2011. On March 7, the Grievor attended again upon Dr. David relating continuing stress and its adverse effects on her. Dr. David diagnosed her with PTSD and while she was reluctant to take time off, she agreed to take some time to rest. On March 7, the employee who had been transferred to District 6 to accommodate the Grievor's temporary transfer to District 7 returned to work at District 7. From that time both she and the Grievor were at District 7 and the Grievor did District 6 timekeeper work at District 7.

On March 14, 2011 at the next stage of the grievance process Jestin replied to the grievance, stating "*I find no violation of the Collective Agreement...*"(Exhibit 29).

After the return to work of the District 7 timekeeper the Grievor was required to move from office to office for a location to work. When there was no desk available on April 11, 2011, a makeshift arrangement was provided. This upset the Grievor and she was off work from April 11, 2011 to June 8, 2011 on S. & A. benefits. On May 11, 2011, her family doctor directed that the Grievor was not to return to Roads. She was then placed in a one year term clerical position in a different department based at City Hall. She worked in that position from June 8, 2011 to August 3, 2011. In that position management had performance issues with the Grievor and were in discussions with the Union about them.

III. SUBSEQUENT EVENTS

The Grievor has not returned to work at the City. On August 9, 2011 she was admitted to hospital as the result of suicide ideation. Commencing in January 2011 the Grievor has attended upon a number of different counseling/medical therapeutic services as set out Exhibit 48. On August 19, 2012 she was again admitted to hospital with suicide ideation, after which she attended a day program at the Rockyview Hospital. She was discharged on the understanding that she was to attend the Sunridge Medical Health Centre which commenced on December 19, 2012. She continues to see her family doctor, Dr. David approximately every two weeks.

The Grievor currently receives disability benefits provided through Great West Life, a plan that is paid for entirely through employee contributions (rendering the payments tax free to the Grievor) and which contains a specific right of subrogation (Exhibit 51-14), as does the Agreement between MEBAC and the City (Exhibit 51-13)which provides for a framework for the various Collective Agreement benefits including long term disability. The LTD benefits paid to the Grievor represent 67% of the first $1038.46 of bi-weekly earnings, 55% of the next $3461.54 of bi-weekly earnings and 50% of the balance of such earnings (Exhibit 15).

The Union and the City jointly retained a psychologist, Dr. Judith Daylen, to conduct an independent medical assessment of the Grievor. In that report (Exhibit 51-3) Dr. Daylen identified a number of psychological difficulties and concluded that "*the sexual assaults and their aftermath are the primary causal factor in (the Grievor) having developed most of the psychological difficulties described in the preceding section of this report*". The aftermath included a number of the incidents in the workplace after the assaults were reported and which are described in this award and further listed by Mr. Johnson as part of the requested assessment (Exhibit 51-2, Part I, Mental Distress) and Dr. Daylen specifically found "*all of the incidents listed by Mr. Johnson have negatively affected (the Grievor's) functioning, exacerbating and extending the psychological difficulties described above*". Dr. Daylen concluded that the Grievor's "*prognosis is very guarded*" but that her "*psychological functioning will improve to some extent when the arbitration process s brought to a close, and (she) is not repetitively triggered by this process*". Dr. Daylen finally concluded that the Grievor "*will require extensive treatment in order to improve her functioning*', likely for a period two to 5 years and made a number of recommendations with respect to the nature of the treatment program to be utilized. Dr. Daylen also had access to the Grievor's prior medical records which reflected prior mental health issues which had been successfully treated.

The Union also provided economic evidence as to the Grievor's loss of earnings, both past and future, based upon certain assumptions. The City's expert pointed out certain errors (Exhibit 51-7), some of which were conceded by the Union's expert resulting in a revised report (Exhibit 51-8). Both reports provide a range of income loss depending on assumptions with respect to the potential return to work date and the range of earnings that might be expected upon a return to work.

The Union also provided a report (Exhibit 51-10) from a vocational rehabilitation consultant who, having reviewed all of the medical and other information about the Grievor including the Grievor's employment file with the City (Exhibit 51-12,) concluded that the most likely scenario for the Grievor of eight he postulates is that the Grievor will never again be competitively employed. He notes however that that scenario is based upon the conclusion that there will be no substantial improvement in the Grievor's mental health functioning, or consistent gains in her behavior presentation.

With respect to her current mental health status, the Union called her current treating psychologist, Dr. Megan McElheran. Dr. McElerhan suggested that the Grievor's progress in recovery has been adversely affected by this process and there is a significant need for closure and validation. The Grievor continues to have a very poor energy level and ability to focus and continues to exhibit major PTSD and depressive symptoms. She has persistent and profound sleep disturbance and cannot sleep without drugs. Her day to day functioning is highly compromised and she is largely housebound. Her ability to cope with stress is very limited and she is highly vulnerable to even slight disturbances and stress. Any dealings with the City are a trigger to difficulties, as she feels betrayed, harassed and intimidated by the City. The current plan for treatment is four attendances a month but up to this time only one time a month has occurred because of cost of $200/hour.

IV. POSITION OF THE PARTIES

Both parties submitted extensive written briefs with respect to this matter. The following represents a summary of their submissions.

The Union

This City's misconduct in this case involves a multitude of hostile and insensitive acts against the Grievor starting with the numerous sexual assaults perpetrated by Mutton and compounded by the misconduct of those entrusted with the obligation of investigating and dealing with the aftermath of the sexual assaults, all of whom failed in fulfilling that obligation. All of this misconduct stemmed from what can

only be viewed as an attempt to contain the knowledge of and the response to the events within the Roads Division.

In the circumstances, there is ample authority for this panel to award compensatory, general and punitive damages against the City for the treatment the Grievor suffered at the hands of Mutton, and the City's significantly flawed investigation. This panel has the jurisdiction to provide remedies for the City's breaches of the Collective Agreement, to enforce the remedies under the Alberta human rights legislation and to allow any recoveries stemming from torts against the Grievor.

The Union seeks general damages in the sum of $150,000, compensatory damages for past and future loss of income in the sum of $944,266.00 and punitive damages in the sum of $75,000.00. It claims breaches of sections 103.03, 106.01 and 106.02 of the Collective Agreement, section 7(1) of the Alberta Human rights act, R.S.A. 2000, c. A-25.5, and section 2(1) of the Occupational Health and Safety Act, R.S.A. 2000, c. O-2, and asserts that the Grievor is entitled to damages for the torts inflicted upon her. In considering damages the panel is entitled to consider the subsequent conduct of the City in dealing with the misconduct of its employee, Mutton: *Elgert v. Home Hardware Stores Ltd.,* [2011] A.J. No. 560.

Section 106.02 of the Collective Agreement requires the City to provide a harassment free workplace and to respect the dignity and rights of co-workers. Based upon the definition of harassment adopted by Arbitrator Ponak in *United Food and Commercial Workers Union, Local 401 and Canada Safeway Limited (Grievance of DM)* at p. 69, the Grievor was harassed on multiple occasions. Further as Arbitrator Ponak noted at p. 71-72, the employer when allegations of harassment have been made has an obligation "*to maintain safe and healthy workplaces for all employees and must be prepared to (take) steps that are reasonable in the circumstances. This usually requires timely investigation and, in needed, intervention*". The employer fails in its obligation when it "*was not prompt, diligent, or thorough in its efforts to deal with a serious workplace problem*" (Arbitrator Ponak at page 761 quoting Arbitrator Goodfellow in *Goodyear Canada* at paragraph 43) and as a consequence fails to meet the requirements to provide for the health and safety of workers required by section 2(1) the *Occupational Health and Safety Act.*

In this case the Grievor was subjected to various forms of harassment and the City failed to fulfill its obligations to respond promptly, diligently and thoroughly.

General Damages

The Grievor is entitled to general damages flowing from the breaches of the Human Rights Act, in addition to breaches of the Collective Agreement and the torts committed against her. General damages are awarded as a matter of course in human rights decisions: *Berry v. Farm Meats Canada Ltd.* (2000), ABQB 682. That authority also rests with arbitrators: Brown & Beatty, *Canadian Labour Arbitration*, 4d, p. 2-24.

Principles applicable to the award of such damages were reviewed by the Ontario Human Rights Tribunal in *Arunachalam v. Best Buy Canada Ltd.* [2010], O.H.R.T.D. No. 1987, and cited by the Alberta Court of Appeal in *Walsh v. Mobil Oil* [2013], A.J. No. 695. The Court of Appeal at paragraph 60 summarized the criteria set out in *Arunachalam* as follows:

> The first aspect is to characterize the injury based on the nature of the discriminatory conduct, depending for example, on how serious or prolonged the conduct was. The second is to recognize the complainant's particular experience in response to the discrimination. To the extent that a complainant has experienced particular emotional difficulties as a result, this will likely increase the amount of the award.

Arunachalam provided more content to those criteria at paragraphs 52-55.

The City's approach to this matter is to limit its focus to the misconduct of Mutton and Wierzbicki, but the City's misconduct extends well beyond those two. The extent of the misconduct is relevant to the issue of remedial consequences: *Robichaud v. Canada Treasury Board* (1987), 40 D.L.R. (4th 577, [1987] 2 S.C.R. 84. Where the employer effectively put the focus on the employee claiming harassment and de-emphasized the responsibility of the employee and its employees to avoid the harassment, the employer will be exposed to liability to the employee for the adverse consequences arising from the hostile workplace: *Hinds v. Canada (Employment and Immigration Commission)* (1988), 120 C.H.R.R. D/5683 at p. D/5693, para 41611; *Broadfield v. DeHavilland/Boeing of Canada Ltd.* (1993), 19 C.H.R.R. D/347.

The City failed in its obligation to the Grievor to provide support both after the November 24, 2010 meeting with Wierzbicki and the December 10, 2010 meeting with Bell.

When the events that occurred in this case as summarized in the information provided to Dr. Daylen and overwhelmingly supported by the evidence before the tribunal, the medical evidence and other evidence provided in Exhibit 48, and the evidence provided in Exhibit 51, including Dr. Daylen's report are reviewed there is no doubt that the Grievor is entitled to significant general damages for the injuries

suffered by reason of the harassment and lack of support in the workplace. The Union referred to comparable awards which support its claim to $150,000 in general damages: *Nagy v. Canada* (2006), ABCA 227; *Sultz v. Canada (Attorney General)* (2006), BCJ 121.

The Grievor has suffered severe and continuing mental distress as a result of the conduct of the City, the ramifications of which are probably lifelong. The relevant criteria and decisions dealing with comparable circumstances and injuries justify an award of $150,000.00.

Loss of Income

Pursuant to section 32(1)(iv) of the Alberta Human Rights Act a complainant may be compensated "... for all or any part of any wages or income lost..." and concepts such as reasonable notice upon termination are not relevant. The City's offer of November 27, 2012 based as it was upon a severance pay calculation was predicated upon an irrelevant factor. Principles with respect to calculation of damages for lost wages or income are set out in the following cases: *Impact Interiors Inc. v. Ontario (Human Rights Commission)* [1998], O.J. No. 2908, *Piazza v. Airport Taxicab (Malton) Assn.* [1989] O.J. No. 94, and *Walsh v. Mobil Oil Canada.*

Applying the principles set out in those cases, the Grievor is entitled to damages for lost income from the time she was last at work for the City until the expected date of her retirement. It is unlikely that the Grievor will resume employment with the City based upon Dr. Daylen's observations. However vocational consultant's report (Atkinson) considers that she will be competitively unemployable or only marginally employable. Her loss of income is causally linked to the City's misconduct which caused sufficient mental distress that she now suffers a mental disability and is unable to currently work, and is likely unable to ever return to work.

Assuming that the Grievor will not be able to return to work her loss of income totals $726,322 for future loss of income and $135,630 for past loss of income, together with pension benefit losses of $82,314.

In determining the Grievor's past and future loss of income no sums should be deducted on grounds that she is currently and may continue to receive disability benefits. Such benefits are not deductible from such an award to reduce the City's exposure in the case of a plan funded entirely by the employee, nor in the case of a plan which confers a right of subrogation upon the party paying the benefits: *Cunningham v. Wheeler* [1994] 1 S.C.R. 359. Both apply in this case. Premiums for the long term

disability plan are payable entirely by the employees. Both the Great West Policy and the MEBAC agreement contemplate subrogation.

Even if there is any merit to the argument by the City that this principle does not apply in a human rights context (and such a limitation is not implicit in any fashion in the Cunningham decision) which would include even a plan with subrogation rights, the Grievor's claim also involves a tort, as well as a breach of contract. Further, she will not be made whole for losses caused by reason of the tort committed against her, the breach of her human rights and the breach of the City's obligation under the Collective Agreement if the City is allowed to deduct disability payments from any loss of income claim, simply because of the subrogation right that exists in the contract.

Punitive Damages

The Supreme Court of Canada in *Whitten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595, set out the principles applicable in determining whether punitive damages ought to be awarded. An arbitrator has the ability to award punitive damages: *G4S Secure Solutions (Canada) Ltd. v. U.F.C.W., Local 333* (2012) 218 L.A.C. (4th) 313; *Re Bethany Care Society and United Nurses of Alberta, Locals 91 and 173* (2000) 87 L.A.C. (4th) 216, *Re Eurocan Pulp & Paper Co. and Communications, Energy and Paperworkers Union of Canada, Local 298* (2001) 99 L.A.C. (4th) 24, *Re North Bay General Hospital and Ontario Public Service employees Union* (2006) 154 L.A.C. (4th) 425, *Coca-Cola Bottling and C.A.W., Local 385* (2011) 211 L.A.C. (4th) 341, *Canada Post Corporation and Canadian Union of Postal Workers* (2011) 204 L.A.C. (4th) 4, and Ottawa-*Carleton District School Board and E.T.F.O.* (2012) 216 L.A.C. (4th) 333.

The Supreme Court of Canada has recognized the broad remedial powers of arbitrators to craft remedies appropriate to the factual matrix before them (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals [2011] S.C.J. No. 59*), a jurisdiction that is specifically conferred on this panel by section 104.05 of the Collective Agreement. A jurisdiction similar to what is expressly contained in section 104.05 of the Collective Agreement is found in section 242(4) of the *Canada Labour Code*. That section has been interpreted as granting jurisdiction to award punitive damages: *Beardy v. Lake St. Martin First Nation* [2008] C.L.A.D. No. 359, *Joseph v. Tl'ast'en First Nation* [2012] C.L.A.D. No. 184 (aff'd [2013] F.C.J. No. 841).

In addition to the flawed response by the City to the sexual assaults, the City's response to the grievance process was also flawed. The grievance process is designed to resolve conflicts through constructive dialogue as prescribed in section 103.03 of the collective agreement, and such expectation of

participation and resolution has been recognized by the jurisprudence: *Re International Association of Fire Fighters, Local 626, and Borough of Scarborough* (1972) 24 L.A.C. 78 *Re City of Calgary and Canadian Union of Public Employees* (1979) 22 L.A.C. (2d) 434, *Re Ottawa Humane Society and Ottawa-Carleton Public Employees Union (Wheatley)* (2005) 137 L.A.C. (4th) 337. The employer's response in the process must be reasonable: *Re York University and York University Faculty Association* (1980) 26 L.A.C. (2d) 17, *Alberta v. Alberta Union of Provincial Employees* [1995] A.J. No. 385.

The City's response in the grievance process was both unreasonable and arbitrary and thus was in breach of the Collective Agreement.

The Grievor's claim to punitive damages is based upon an actionable wrong . The City's breach of its obligation to act reasonably and not arbitrarily in the grievance process and the breach of the specific obligations in section 103.03 are separate actionable wrongs upon which a claim to punitive damages can be based, as is the City's breach of the peace of mind obligations contained in section 106.02 of the Collective Agreement and the obligation to ensure the health of workers.

The conduct of the City justifying punitive damages is apparent from the evidence before the panel, including the flawed investigation and response, and the insensitive and inappropriate response in the grievance process given the information known to both Bell and Jestin. The lack of a considered or any reasonable response in the grievance process is demands "*retribution, deterrence and denunciation*" for the cavalier responses that were given by Bell and Jestin. The Grievor was a victim but there was no recognition of that by the City in any fair, and open fashion. There has been no remorse or acceptance of responsibility by the City.

The Union referred to comparable cases with respect to punitive damages and those cases justify an award in the range of $75,000: *Elgert v. Home Hardware*.

The Union also submitted that the Grievor is entitled to special damages caused by the City's breaches of its statutory and contractual obligations, namely, the cost of counseling, and the fees incurred to retain counsel with respect to her human rights complaint, and to bring action against the City.

The City

The City accepts that the Grievor suffered a significant medical impact from the sexual assaults and the events that followed those assaults. At issue is the appropriate remedy.

The correct approach to determining damages in this case is set out in *International Brotherhood of Electrical Workers, Local 254 v. Calgary (Harlow)* [2004 A.G.A.A. No. 26. That case recognized that general damages for injury to dignity and self-respect or pain and suffering such and mental anguish were appropriately recoverable for breach of contract or by reason of prohibited discrimination under the Alberta Human Rights Code. However that power to award damages with respect to the breach of a human right does not include the power to award punitive damages. Moreover the conduct complained of in this case is not such that punitive damages should be awarded. While there was poor decision making throughout, which compounded an already horrible situation, the City disputes that there was any concerted effort to contain and hide the situation in Roads. A report of the incident was made shortly after it was reported to Bell to Corporate Security which is external to Roads as is Human Resources to which a report was made also. While the City fell short in its obligations and its employees made bad decisions, the evidence falls far short of proving the kind of misconduct and malice which would attract punitive damages.

With respect to loss of income, this case involves unique issues in the context of a labour arbitration. This is not a case where an employee has been terminated. The Grievor continues to be an employee of the City, receiving LTD benefits and continues to participate in the Local Authorities Pension Plan and accrue service and seniority for the purposes of the Collective Agreement, and is eligible for benefits under MEBAC. She can receive disability benefits for as long as she is disabled up to the age of 65. There is consequently no pension loss.

The City disputes any suggestion that the Grievor is entitled to claim income loss without any deduction for disability payments. The Supreme Court of Canada case relied upon by the Union arose in the context of a civil suit where the Court was considering a claim in tort law, and has never been applied in the labour arbitration context, where the parties are governed by a Collective Agreement. The parties cannot rely upon tort law and must have regard to the intentions of the parties as revealed by the terms of the Collective Agreement. A more relevant decision is that of the Supreme Court of Canada in *Sylvester v. British Columbia* [1977] 2 S.C.R. 315 where the Court stated that whether LTD benefits are deductible from damages awarded for wrongful dismissal depends on the intention of the parties to the employment contract. In *McKendrick v. Open Learning Agency* [1997] B.C.J. No. 22673 the Court held that LTD benefits offset damages awarded for wrongful dismissal, even though the employee paid 100% of the premiums for LTD benefits because the Court concluded that the LTD benefits were a benefit arranged by the employer and intended to be a substitute for the employee's regular salary and not a

private insurance arrangement between the employee and insurer. The LTD benefits coverage in this case is exactly that, a benefit arranged by the employer and intended to be a substitute for the employee's regular salary.

Moreover it is entirely inappropriate in the context of a claim for lost income arising as part of a human rights complaint: *Koeppel v. Canada (Department of National Defence)* [1997] C.H.R.D. No. 5. Awards in such cases are to provide redress for a loss but this does not require an award when the complainant has not actually suffered a loss. If the complainant receives income replacement no loss has been suffered or only a loss to the extent of the difference between the payments received and the total wages lost.

While the Grievor is receiving less than her regular income that is what the Union and the City have agreed a disabled employee would be entitled to in these circumstances.

As to general damages, the City suggests that the damages sought by the Union are excessive having regard to comparable cases. The City referred to *Pawlett v. Dominion Protection Services Ltd.* [2007] A.J. No. 1364, *J.C. v. Shaw* [2011] B.C.J. No. 2329, *Walsh v. Mobil Oil Canada* [2013] A. J. No. 695, and *Greater Toronto Airport Authority v. Public Service Alliance Canada, Local 0004* (C.B. Grievance) [2010] C.L.A.D. No. 127 where damages awarded for conduct of a similar nature was considerably less than what is being sought by the Union. The cases relied upon by the Union there was essentially conclusive evidence of long term persistence of the injuries suffered and no potential recovery. No such evidence exists in this case.

With respect to future loss of income, the City has not terminated the Grievor. It would be inappropriate to award such damages to the Grievor when she remains an employee receiving the benefits to which she is entitled by the provisions of the Collective Agreement. Further the cases relied upon by the Union to support s significant award for loss of future income had the benefits of significantly more reliable evidence to determine the loss of future income, and that the continuing loss was causally linked to the actions of the employer.

The City also asserted that the Grievor's claim for special damages for fees related to her hiring counsel to advance her human rights claim and to bring action against the City were not warranted in an unionized workplace where the Union is the exclusive bargaining agent.

V. DECISION

The issue before us is to determine the appropriate quantum of damages which the Grievor is entitled to because of a series of events that occurred in 2010 and 2011, which resulted in serious and life altering adverse impacts upon the Grievor. The Grievor is currently wholly disabled, and has been unable to work since August 2011. It is impossible to predict with certainty when she might be able to resume some useful work or even whether she will ever be able to work. She is not functioning in her personal relationships and is essentially housebound. The effect of the events upon her and her family has been devastating, with no end in sight. What is particularly troubling is what occurred after she reported the sexual assaults perpetrated upon her. While the City witness who attempted to explain away the events said in evidence that he and others at the City were always concerned about the Grievor's health and welfare and that their failures were the result of decisions that only in hindsight were bad decisions, the credibility of those assertions must be measured not by what was said at the hearing but what was actually done at the critical times. When that conduct is examined the only conclusion that can be reached is that there was a total failure on the part of those responsible to meet the obligations under the Collective Agreement, human rights legislation, occupational and health safety legislation and the City's Respectful Workplace Policy (Exhibit 35).

The City's failure is not just the failure of a single employee, Mutton, to respect the Grievor. His conduct alone, for which the City is vicariously responsible, represents a gross violation of the Grievor. One can only assume that he thought he could take advantage of a vulnerable employee without repercussions. However his conduct is only the first of a number of serious missteps carried out by those charged with the obligation of protecting and supporting an employee harassed and abused in the workplace. The City's Policy specifically sets out Leadership responsibilities in section 10. Those leaderships responsibilities include "*taking appropriate action in a prompt, impartial and confidential manner when Respectful Workplace Policy issues come to your attention*", "*supporting all parties involved in resolving issues under the Respectful Workplace Policy,*", and "*making sure no person suffers reprisal as a result of making a complaint, or for providing information*". The history of this matter demonstrates that at best there was a flawed observation of these directions and at worse no compliance at all. In the result the Grievor was a treated as a problem to be managed, as opposed to a victim to be supported, and it is that treatment which contributed significantly to the ultimate state in which the Grievor finds herself.

Some of the failures are more severe than others. Instead of immediately starting an investigation the first manager to whom the Grievor reported the assaults, Wierzbicki, left on vacation and left the abuser

in charge of the worksite. The second manager, Bell, to whom she brought concrete evidence in the form of pictures from a spy cam installed at her desk, thought her evidence was inconclusive and did not remove her from the workplace or apparently take any steps to ensure that there were no reprisals until after rat poison was spread on her keyboard. He only then removed her from the workplace, but prior to the completion of the investigation into the rat poison allegation (which has apparently never been completed), he directed her to report to work at the same workplace, and took offence when she complained about her safety (and the minimization of the issue by her immediate manager describing it as mouse droppings), and counseled her for being disrespectful. When she suggested she was going to the mayor he and others agreed that she should be sent for an IME with a psychiatrist (although in fairness that occurred at the same time that she made an unfounded allegation that she was being followed home by Bell). When she refused to proceed with that IME, she was told that she had to have a fitness to return to work certificate from her doctor even though she was on vacation and had not claimed she was sick. When she returned to work, Weirzbicki reviewed with her rules he had sent out (half of which could only have related to her) and counseled her that any disrespect would result in discipline.

She was only removed from the worksite when her doctor said that she had to be removed and her Union intervened. But she was only transferred to a temporary ad hoc location which caused additional stress.

In the face of all of this both Bell and his Manager Jestin asserted in the grievance process that there was no merit to the Grievor's grievance. This is notwithstanding the obligation in the Collective Agreement in section 103.03 that "*The City and the Union jointly recognize the desirability of resolving conflicts through the use of good judgement, communications and clear directives by all parties*". Such a provision is consistent with jurisprudence respecting the grievance process, that "*the parties must conduct themselves during the course of the grievance procedure in such a way as to respect the process that process is intended to narrow and define the issues which will ultimately [proceed before a board of arbitration if full settlement is not achieved" (Re Ottawa Humane Society and Ottawa Carleton Public Employees Union (Wheatley)* at p. 341). Counsel for the City suggested that the panel ought not to place any weight on the response by management in the grievance process as those are frequently pro forma in nature. However it is the pro forma response which in this case demonstrates that the procedure was not respected, and in so doing the Grievor was further marginalized in the process instead of supported. With the information available to them this panel finds it difficult to accept that managers' responses in

the grievance process were anything but unreasonable and arbitrary, contrary to the very purpose of that procedure.

Therefore in the result the relevant facts are that:

1. The Grievor was sexually abused on multiple occasions;

2. Steps that were taken by managers to deal with the situation were not supportive as contemplated by the City's Policy and worsened the situation perhaps dramatically;

3. The sexual abuse and its aftermath had serious and continuing adverse impacts upon the Grievor;

4. Expert evidence by an independent psychologist jointly retained by the City and the Union confirms the assaults and their aftermath caused the serious, adverse and continuing impacts upon the Grievor's functioning, and her ability to work, and that her prognosis is guarded with at least 2 to 5 years of treatment required to improve her functioning;

5. Her current treating psychologist confirms that her functioning remains severely compromised, and that she is essentially housebound;

6. She has not worked since August 2011;

7. Her relationships with her family and in particular her husband has been severely and adversely impacted.

The City acknowledges these facts, but asserts that the Union's claims for damages in the circumstances are excessive.

Our task is to determine the appropriate range of damages. The Union claims general, punitive, and special damages, and compensation for loss of past and future income. The City does not dispute that the Grievor is entitled to some general damages, but essentially asserts that the Grievor is entitled to nothing else in the circumstances.

We have considered each of the heads of damages.

General Damages

The Union seeks $150,000 in general damages. The City says that such a claim exceeds any reasonable range of general damages found in the jurisprudence.

The Union cites two cases in support of its position, *Nagy* and *Sultz*. In *Nagy*, Ouelette, J. reviewed the Supreme Court of Canada's cap on general damages and the purpose of general damages which is to provide "*reasonable solace for the injuries which have reduced or impaired a previous ability to enjoy life*"(para. 132). However, in *Nagy*, while the mental injuries and impacts suffered by Nagy were similar to those suffered by the Grievor, her injuries had continued for 17 years at the time of the trial of the matter. Nagy was awarded $150,000 in general damages. In *Sultz* the Court assessed her injuries, similar to those of the Grievor, by comparison to cases where plaintiffs had been inflicted with life-long injuries, as Sulz had the kind of lasting injury which she would be "*forced to deal with for the rest of her life*". Sulz was awarded $125,000. Applying the inflationary factors referred to at page 16 of 16 of Exhibit 56, those awards, in 2013 dollars, amount to $173,400 and $141,750 respectively.

The City cites *Pawlett, J.C. v. Shaw, Walsh,* and *Greater Toronto Airport Authority.* Pawlett was awarded $25,000 in general damages where she suffered some adverse effects from a sexual assault for a few months. J.C. was awarded $70,000 in general damages (reduced by 15% for a pre-existing condition) where she did suffer some ongoing emotional and psychological trauma but had functioned well in new employment within two week s after leaving the workplace and had succeeded in personal relationships, and was "*fairly recovered*" the same year that the assault occurred. Walsh was awarded $35,000 for general damages but it is not entirely clear that Walsh suffered the kind of mental injuries that the Grievor did or for the period that she has. In *Greater Toronto Airport Authority*, the grievor was awarded $50,000 in damages for mental stress and extended pain and suffering arising from the employer's breach of contract. It is not entirely clear the extent of the injury suffered and its impact on the grievor in that case, but they do not appear comparable to those of the Grievor in this case.

In considering this matter we are satisfied that the Grievor has suffered significant, life changing injuries which will continue to adversely affect her. While we acknowledge that in *Nagy* and *Sulz* the Court had the certainty of many years of suffering and limited functioning having been documented, the injuries that the Grievor has suffered and continues to suffer and the effect on her enjoyment of life, compounded with the injury to her dignity caused by the discriminatory conduct, and the exacerbation of the negative impacts of the sexual discrimination by management's complete failure to protect and

support her and comply with the Collective Agreement and the City's Policy, fully support a significant award of general damages. Given however that the independent expert indicated that a rehabilitation program as recommended by her may result in improvement in the Grievor's functioning, we conclude that the award should be somewhat less than the *Nagy* and *Sulz* cases and assess such damages at $125,000.00.

Loss of income

There is no dispute that the Grievor is unable to work, and has been unable to work since August 2011. Further, the Union's evidence suggests that she may never be able to return to productive employment. That evidence was not challenged in any substantial fashion by the City. At the very least a return to employment is unlikely unless she has successfully completed the treatment program recommended by the independent psychologist. There is also no reliable evidence which contradicts the assertion by the Union that the inability to work is caused by the injuries inflicted upon the Grievor by the events giving rise to this grievance.

In these circumstances the Union asserts that the Grievor is entitled to past and future loss of income. This claim is complicated by the fact that the Grievor is currently receiving disability payments (which are less than what she would have earned if she had continued in her position with the City) and has not been terminated by the City. The City says that this circumstance disentitles the Grievor to claim any loss of income because she is receiving what the Union and the City have negotiated as wage replacement for those who are disabled. The panel rejects that argument in its entirety. It is the panel's view that the Union would have had to specifically negotiate away the employee's right to claim for loss of income caused by human rights violations or breaches of the Collective Agreement versus loss of income caused by non culpable injury or sickness and that such an agreement would have to be specifically and expressly included in the Collective Agreement. No such express provision is included in the Collective Agreement or the MEBAC agreement (and it would probably be unenforceable at least with respect to human rights damages). We therefore conclude that the receipt of disability payments and the fact that the Grievor has not been terminated does not preclude a claim for loss of income suffered as a result of the City's wrongful acts.

A second issue however arises with respect to the payment of disability benefits. The City asserts that any such payments should be deducted from the calculation of income loss to essentially avoid what it perceives could potentially mean double- dipping by the Grievor. The City takes particular exception to

the Union's assertion that the City's disability program funded as it is entirely by employee contributions is within the ratio of the *Cunningham & Wheeler* decision of the Supreme Court of Canada as an insurance policy, the benefits of which are not deductible from income loss awards. We however find that it is not necessary to deal with the City's argument in that regard, because even if the insurance policy exception does not apply so as to preclude deduction of disability benefits, the second exception set out in *Cunningham* clearly does. Both the MEBAC Agreement and the Great West Policy provide for subrogation rights. In such case, and whether or not such right is exercised, the disability benefits are not deductible from loss of income awards.

We therefore conclude that the Grievor is entitled to claim for loss of income that she has suffered and her disability benefits need not be deducted from that award. The issue then becomes what is her income loss. That loss is calculated by reference to what she would have earned if she had not been harmed by the events of 2010/2011. That involves a consideration of how long she would have worked, and when she can be expected to resume work and what she might earn when and if she resumes work. Both the City and the Union provided expert evidence which set out a range for loss of income. After corrections to the Union's original report, the differences between the City's and the Union's expert primarily arises because of two factors – the discount rate assumption utilized and the application of a part-time contingency by the City's expert.

The Union's expert took the position that the part-time assumption was not an appropriate assumption given that the trend is for older women to work full-time, with part- time work occurring to deal with child care and family issues. The City's expert based his conclusion on actual census data. Save for those two items the calculations are relatively close and include contingencies for potential disability during the balance of the Grievor's working career.

With respect to the discount rate, each expert explained in detail the basis for their selection of discount rates. Just as was noted by the trial judge in the case cited by the Union's expert at page A-11 of Exhibit 8, both experts had valid arguments. The major difference between the two experts was the comparable period selected for determining the real interest rate. The City's expert used several decades of data, and the Union's expert used more recent data. In the result, the City's expert assumed a discount rate of 2.75% but the Union's expert assumed a lower discounts rate that varied over time to reflect market realities (0.8 to 2.0). Using longer periods over which interest rates may have varied widely to obtain an average is not a method that lacks validity, but it may distort data that covers a restricted time period which is subject to for example a lower rate trend which is not expected to

change dramatically over the forecast period. On the other hand using too short a period for analysis may in fact embed a trend that is not sustainable over the longer term. The City's expert also pointed out that even assuming the validity of a shorter term analysis for the determination of real interest rates, the Union's expert 's assumptions do not accord with evidence available at the current time with respect to the trend in interest rates both for government bonds and corporate bonds nor the likely effect on interest rates resulting from the massive government deficits. In other words the key assumption that the trending downward and low interest rates that characterized the last few years is not one that one should reasonably expect to continue into the future, based on the latest data available.

Both experts assume that she will retire at age 55. Both experts assume a pension loss in scenarios that contemplate her returning to productive work but not with the City. There will be no pension loss if she remains on disability until she retires as she accrues pensionable service while on disability, or if she returns to work at the City. The former assumption is not without support, but given the evidence before the panel the latter is unlikely.

In calculating what the Grievor would have earned with the City the Union's expert added inflationary increases and a 1% productivity factor. The City's expert challenged the productivity factor on the basis of historical data. Again the Union's expert relied on market based data to project future productivity increases based upon more recent and not long historical periods.

Both experts considered two scenarios arising from the medical evidence, that she would not earn any income for two years from 2013, and that she would not earn any income for 5 years and a variety of scenarios as to the level of income that she would earn. The Union's expert included a scenario that she would not return to work at all.

Neither expert was cross-examined on the reports submitted in evidence as Exhibits 51-5, 51-7 and 51-8. Both, judging from their resumes, are experts in their field. It is left for the panel to determine which of the disputed assumptions should apply in determining the Grievor's income loss. We have carefully reviewed each expert's explanation of the selected assumptions. We are satisfied that assumptions based upon more recent data coupled with future forecasts based upon what actual players in the market are accepting for returns on long term investments represents a more reliable basis for determining the discount rate. We reach this conclusion because in our view the more recent past in a downward trending and static market is more predictable of the future than history or overly long

periods which incorporate trends that are unlikely to be reflective of the future. However we share some of the concerns expressed by the City's expert about over reliance on recent data that is reflective of a trend that other evidence suggests may be unduly pessimistic about interest rates. In the result we are of the view that while the City's expert's discount rate is too high, the Union's expert's rate is too low. What rate to suggest is a difficult task. We agree with the Union's expert that a static rate over the entire period is not reflective of market realities in the current market. Shorter term investments usually generate lower returns in this market. However given the various contingencies and assumptions that apply to such determinations for the sake of simplicity we would apply a single discount rate for the purpose of calculating future loss of income for the whole period. Of necessity this rate is somewhat arbitrary and represents our best effort at an appropriate balancing of the issues raised by each expert. We adopt a rate of 2.25% as the effective discount rate.

With respect to the part time discount applied to the without incident income that the Grievor may have earned, we agree with the City's expert. The City's expert relied upon actual data from Statistics Canada as to what older female workers are actually doing. This is more akin to the market based approach that the Union's expert espouses in defence of the discount rate that he selected. We also note that the Grievor's history, even without the incident which gave rise to this grievance, is such that it is not unreasonable to conclude that she is more likely than not to have opted for part-time work as she aged in the workforce, consistent with what is clearly occurring in the market. We therefore accept the City's expert's part-time contingency in the calculation of what the Grievor would have earned with the City if the incident had not occurred.

However, the most important issue with respect to future loss of income is how long the Grievor will be unable to work, and if she can work, where she might work, and how much she might be expected to earn compared to her income with the City if this incident had not happened. As both experts assume that she will retire at 55 and we accept that is a reasonable assumption, the range for loss of future income is from 2 (based on the minimum length of the treatment program required to improve her functioning to 9 years (based upon the assumption that she will retire in 2022 at age 55).

We have limited evidence to assist us in this task. She has not worked since August 2011. She is seriously disabled by mental illnesses. The Union's vocational expert concluded that the most likely scenario is that she will never be competitively employed due to a number of issues and Dr. Daylen concluded that she will be unable to return to work until she receives adequate treatment (2 to 5 years). However, Dr. Daylen does not conclude that she will never return to work although she will need

significant support to do so. Dr. Daylen also points out however that work is important to the Grievor , and that returning to work is an important component of her further mental health. We expect that will be a significant motivator for the Grievor and her support network to do what is necessary to achieve a return to work for the Grievor. Dr. Daylen also concludes that it would not be in the Grievor's best interest to return to work at the City although the Grievor wants to return to work when she is able at the City. It is uncertain and speculative whether she will return to work at the City. We consider it unlikely given the advice that the Grievor has received in that regard but it would be something that would not require consideration by her until the end of her treatment program and we would anticipate that by that time she would be sufficiently improved to make decisions in her best interest.

Given the limited nature of the evidence we consider it unlikely that the Grievor will be incapable of ever returning to work, and therefore reject any scenario which suggests that she will never return to work and never earn any income from employment prior to her likely retirement in 2022. We do believe however that given her current circumstances together with the description of her current diagnoses, that recovery will be a long and difficult one. The Grievor has recovered in the past from serious mental issues with appropriate treatment, but the circumstances in this case appear more severe and intractable. Given that we are of the opinion that the most likely scenario is a graduated return to work starting in 2018. We are finally of the opinion that it is unlikely that she will return to any position at the City given Dr. Daylen's observations, and she will seek other employment outside the City. We agree with the comments of the vocational counselor that there will be difficulties associated with that (her age alone would create barriers to certain employment) and therefore are of the opinion that any income she earned from employment would be modest compared to her likely income with the City if this incident had not happened.

In the result we conclude as follow with respect to loss of future income:

1. The Grievor will return to work July 1, 2018,
2. She will not return to work at the City;
3. She will earn $30,000 a year;
4. She will retire in 2022;
5. Her future loss of income is $512, 149 (as shown in Table 9 of Exhibit 8) reduced by the following adjustments:

(a) Apply the 10% part-time contingency to her without incident earnings with the City as proposed by PETA Consultants in Exhibit 7, p. 3-4 for the purpose of calculating future (and not past) loss of income;

(b) Apply a discount rate of 2.25%.

In addition to future loss of income she is entitled to $135,630 for past loss of income and $68,242, less the reduction due to the application of a 2.25% discount, for pension loss (as set out in Table 9 of Exhibit 8). This pension loss represents the present value of the future pension loss arising from her not returning to work and not being employed by the City after July 1, 2018, thereby ceasing to accumulate pensionable service at age 51.

Punitive Damages

The Union put forward a strong case with respect to punitive damages in the circumstances of this case, focusing on the conduct of the City's managers and in particular their responses in the grievance process. In the Union's view, this was conduct equivalent to what occurred in cases where the liable party persisted in denying the undeniable to the last moment. We might have been inclined to view these arguments with some favour, but one of the principles set out in the *Whitten* decision is that punitive damages are only awarded when the compensatory damages are insufficient to accomplish the purpose of retribution, deterrence and denunciation. In this case a significant award of compensatory damages has been made. If there was any need for deterrence we are of the view that an award at the level granted in this decision will accomplish it. We therefore decline to award punitive damages.

Special Damages

The Union seeks special damages. Two of the three claims relate to claims for legal fees. There is nothing before us which would support awarding fees for retaining independent counsel in these circumstances. We therefore decline to award such fees as special damages.

The third claim is a claim for the costs of therapy recommended by Dr. Daylen which, based on dr. McEleran's evidence, will cost $200.00/hour. The Union seeks $28,800. We are of the opinion that the requirement for therapy was the result of the misconduct of the City's employees. We therefore direct that the City to pay the sum of $28,000 by way of special damages.

Conclusion

This is a tragic case, and as observed by the Union a unique case. The particular circumstances of a vulnerable victim, and insensitive management has created a situation that no-one wanted but which has cost the Grievor a great deal in terms of her health and well-being, and her future. It is to be hoped that the resolution of this matter will allow the Grievor to move forward toward recovery from her illness, an illness which may have never occurred or at least the severity of which may have been greatly reduced if there had been an earlier recognition and validation of the merits of the Grievor's complaint and the effect that the sexual assaults had upon her. We cannot restore what was taken away from the Grievor but we can compensate her for her losses which this award has done.

In the result we make the following award of compensation to the Grievor:

1. General Damages in the sum of $125,000;
2. Loss of past income in the sum of $135,630;
3. Loss of future income of $512,149 less the reduction arising from the application of the 10% part-time contingency and the application of the discount rate of 2.25%;
4. Pension loss of $68,243, less the reduction arising from the application of the discount rate of 2.25%;
5. Special damages in the sum of $28,000.

This award will have tax consequences but we make no comment with respect to that matter. We expect that the Union's experts will complete the necessary calculations to include the adjustments that we have made to the loss of future income calculation to be provided to the City for its review. We reserve jurisdiction to deal with any issues that may flow from this award.

We thank counsel for their excellent assistance in this difficult matter.

Ms. Huebscher concurs in this decision. Mr. Laird dissents, except that he agrees that no punitive damages should be awarded.

Dated the 16th day of December, 2013.

Phyllis Smith, Chair