employees only, provided that the burden falls on junior employees, and no senior employee is disadvantaged relative to a junior employee. But if a night maid is unwilling to work days, then her seniority rights need not be respected relative to a junior maid who continues working days.

For these reasons, the policy grievance is denied.

RE EDITH CAVELL PRIVATE HOSPITAL AND HOSPITAL EMPLOYEES' UNION, LOCAL 180

H. A. Hope, L. Leibik, L. Page. (British Columbia) June 29, 1982.

Discipline and discharge — Incompetence — Demotion for failure to meet job requirements — Standard of just cause.

[See *Brown & Beatty*, 7:3510; 7:3544]

EMPLOYEE GRIEVANCE alleging unjust discipline. Grievance allowed.

S. Yandle, for the union.
W. Devine, for the employer.

AWARD

I

In this arbitration the union grieves the dismissal of a long service employee, Fe Datwin, who was employed as chief cook in the private hospital operated by the employer in Vancouver. The grievor was first employed on June 21, 1973, and was dismissed on November 6, 1981. Initially, she was a dietary aide, was promoted to assistant cook and became chief cook in February of 1976. The dismissal notice was dated November 2, 1981, and it reads as follows:

> As you have chosen not to submit your resignation, you are now being dismissed — effective Friday, November 6, 1981. Among the reasons for your dismissal are those outlined in the letters of August 25 and October 27 of this year. The monies owing you will be mailed (and registered) to you no later than November 13, 1981.

The letter was signed by Ellen Fraser, the manager of the hospital. Initially, Mrs. Fraser acted as counsel for the employer but Ms. Devine was appointed to replace her during the arbitration. The letter of October 27, 1981, referred to in the dismissal notice was also signed by Mrs. Fraser and contains the following introductory paragraph: "This is to officially inform you that your services are no longer required at the Edith Cavell Hospital." The last two paragraphs of the letter read as follows:

With this letter I am requesting your resignation.

Please have it in the office at the earliest possible time. Should you choose not to resign, then we will have no other recourse but to dismiss you.

Those two paragraphs are of significance because Mrs. Fraser took the position that the letter of October 27, 1981, was not a dismissal. In her submission the letter was a request to resign. We disagree. In its form and content it is a dismissal made subject only to the right of the grievor to elect resignation if she so desires.

Returning to the letter of October 27, 1981, the employer sets out, in effect, two reasons for the dismissal. Those are:

[a] Specifically, the last incident, whereby the ordering of supplies was neglected, leaving the hospital without sufficient food.

[b] Added to this, the food supplies which were available were directed to inappropriate destination (staff), which resulted in depriving our patients of the food intended for them.

The letter of August 25, 1981, contains the following complaints:

[a] You have never reported the condition of your cutlery storage bin or other pieces of furniture within your department.

[b] Your report on the available equipment and supplies was inadequate and incorrect. We found a good supply of glasses, bowls, small plates, fruit napes, cups and silverware . . . all of which you told us were in poor supply at our June meeting.

[c] We found the storage rooms were badly organized and items were hidden behind the staple supplies.

[d] The inventory is up to date and we have been able to arrive at some real costs for food for the government inquiry.

[e] It has been brought to my attention that you are often out of the kitchen . . . visiting the laundry, talking to other staff and spending time in the staff room that is not break time or your lunch time.

The collective agreement contains the following provision with respect to disciplinary matters:

Article IV — Section 5(e)

Art. 4(5)(e) Disciplinary action grievable by the employer shall include written censures, letters of reprimand, and adverse reports of performance evaluation. An employee shall be given a copy of any such document placed on the employee's file which might be the basis of disciplinary action. Should an employee dispute any such entry in his/her file, he/she shall be entitled to recourse through the grievance procedure and the eventual resolution thereof shall become part of his/her personnel record. Upon the employee's request any such document, other than the official evaluation reports, shall be removed from the employee's file after the expiration of 18 months from the date it was issued provided there has not been a further infraction. The Employer agrees not to introduce as evidence in any hearing any document from the file of an employee, the existence of which the employee was not aware at the time of filing or within a reasonable period thereafter.

. . . . .

Art. 4(7)(a) Employees dismissed for alleged cause shall receive from the Employer written notice setting out the reasons for dismissal at the time of dismissal.

The union raised the objection at the commencement of the proceedings that the letter of dismissal dated November 2, 1981, did not set out the reasons for the dismissal. We do not find procedural inflexibility any less desirable in dealing with the employer than it is in dealing with the union. The letter of dismissal incorporates the two previous letters by reference. We find that to be adequate compliance with the provisions with respect to the collective agreement dealing with the requirement of the employer to give reasons for dismissal.

We find, however, that the employer is limited to the matters raised in the three letters. In the course of the proceedings the employer sought to rely on a disciplinary letter contained on the employee's file dated November 30, 1977. Prior to the arbitration a request was made to have that letter removed from the file of the grievor, pursuant to the provisions of the collective agreement. The union position was that the letter had been left on file due to oversight and that the grievor was entitled to have it removed because it fell within the criteria of the provisions of the collective agreement. In particular the uncontested evidence was that the necessary 18-month period after November 30, 1977, had elapsed.

Mrs. Fraser took the position on behalf of the employer that the letter was placed on file prior to the existence of the current collective agreement and fell outside the perimeters of the provision. We reject the argument. A collective agreement must receive a reasonable interpretation and the clear benefit contemplated on behalf of the employee is that good conduct will be rewarded by the reinstatement of what is in effect a clean record. It would do abuse to the clear intent of the provision to limit its application to disciplinary action taken during the life of the collective agreement. There is no time-limit expressed with respect to when an employee may invoke the rights conferred under the provision. We find the letter falls within its terms and it must be ignored in this arbitration.

Mrs. Fraser, in her capacity as counsel, led the evidence of the employer to support the dismissal. In addition, she conducted cross-examination of the grievor and made the submissions previously referred to on behalf of the employer. On the resumption of proceedings on March 20, 1982, Ms. Devine appeared as counsel

on behalf of the employer. On April 3, 1982, the arbitration was concluded. At the commencement of proceedings on April 3, 1982, Ms. Devine gave notice to the union and to the board that the employer would not seek to sustain the dismissal of the grievor but would argue as an alternative that her conduct was deserving of discipline and that the appropriate response of the employer would have been a disciplinary demotion from chief cook to dietary aide. She further gave notice that the employer would take the position that the circumstances permitting the employer to make an informed assessment of the appropriate disciplinary response did not become known to the employer until February 10, 1982, the opening day of these proceedings. On that day the union provided the employer with a copy of a letter prepared by the grievor in answer to the complaints of the employer. The letter was dated September 3, 1981. The facts surrounding the letter were that it was first handed to Mrs. Fraser in a union-management meeting on October 29, 1981. At that meeting Mrs. Fraser had an opportunity to read the letter and, in fact, read it aloud. The letter was retrieved by the union and hence the employer did not have a copy of it. Essential to the submission of the employer is that if the letter had been in its possession at an earlier date it would not have responded with the imposition of a dismissal. We will deal with that submission later. On the resumption of proceedings on April 3, 1982, the employer led rebuttal evidence that also will be dealt with later in this award in its chronology. We now return to consider the evidence led by the employer in that portion of the proceedings when Mrs. Fraser was appearing as counsel on its behalf.

II

The circumstances surrounding the dismissal were fraught with informality. Some doubt emerges as to whether it was the intention of the employer to dismiss the employee at all. Mrs. Fraser gave evidence and said that the dismissal letter of October 27, 1981, was given to the grievor in the union-management meeting on October 29, 1981. She said no further action was taken because the employer was waiting for a response from the grievor to the letter with the expectation that her difficulties in job performance would be discussed and a determination would be made as to how her performance could be improved in the future. That posture on the part of the employer is inconsistent with a discharge, despite the language of the letter. Mrs. Fraser said that it was only when the grievor failed to take the initiative to

have the matters discussed further that the letter of November 2, 1981, formalizing the dismissal was sent. In considering that unusual approach to a dismissal we must have in mind the fact that the allegations made against the grievor as a basis for discharge appear to relate to poor job performance rather than specific disciplinary infractions.

It is recognized in arbitral jurisprudence that poor job performance can be treated as culpable or non-culpable by the employer. It was difficult on the portion of the case presented by Mrs. Fraser to determine which position was being taken. There appears to be no assertion that the deficiencies in job performance alleged by the employer arise from any deliberate conduct on her part. Rather, in her evidence, Mrs. Fraser seemed to indicate that the grievor simply did not possess the qualifications necessary to perform her job. We conclude, having regard to the onus imposed upon the employer, that the assertions with respect to poor job performance are non-culpable and the employer must meet the test applicable to a dismissal on that basis. It is not open to an employer alleging a want of job performance to merely castigate the performance of the employee. It is necessary that specifics be provided. An employer who seeks to dismiss an employee for a non-culpable deficiency in job performance must meet certain criteria:

(a) The employer must define the level of job performance required.

(b) The employer must establish that the standard expected was communicated to the employee.

(c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.

(d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.

(e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

On the application of that test the employer fails. The employee was chief cook in the hospital for several years. There was some evidence that a staff re-organization had resulted in the employer

removing from the grievor some of her duties due to an increase in the work-load. In addition there was evidence of a restructuring of the work schedule of the grievor that complicated the manner in which she was required to discharge her duties. Some of the deficiencies alleged against the grievor by the employer were duties she had not performed and had not been required to perform for a significant period of time prior to the dismissal. The position taken by Mrs. Fraser in that regard was a technical one. She produced a copy of the job description for the position occupied by the grievor and sought to impose on her an obligation to perform all of the duties set out in the job description. We repeat, the facts in evidence were that the grievor had not been performing some of those duties for quite some time with the knowledge and apparent direction of the employer.

It was quite apparent on the evidence that the employer was not satisfied with the job performance of the grievor in some of its aspects and equally obvious that the employer had accepted her level of job performance for a number of years. Mrs. Fraser asserted that the incidents were demonstrative of a continuing pattern of behaviour, but standards of proof and degrees of particularity are intrinsic to the grievance and arbitration process. It is extremely difficult for an arbitrator to assess subjective evaluations of work performance. We repeat, it is necessary in each case to establish a requisite standard of job performance and provide evidence of a failure of the employee to meet that standard. Mrs. Fraser revealed herself in the evidence as a woman of sophisticated business acumen and considerable energy and expertise in her chosen profession. She did not, with respect to her, demonstrate a sure grasp of the industrial relations and arbitral principles applicable in a collective bargaining milieu. Those observations are not intended as criticism of Mrs. Fraser whose business and administrative skills became apparent in the arbitration. It is to acknowledge that industrial relations is an expertise unto itself that can elude a senior management whose views of managements rights may be more parochial than the adversarial reality of collective bargaining relationship advises or permits.

Included in the collective bargaining rights of employees is the right of limited job security described by the Labour Relations Board of British Columbia in *Wm. Scott & Co. Ltd. and Canadian & Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. 1, [1976] W.L.A.C. 586. On p. 3 the chairman of the board said as follows:

> As a result, an employee who has served the probation period secures a form

> of *tenure*, a legal expectation of continued employment as long as he gets no specific reason for dismissal. On that foundation, the collective agreement erects a number of significant benefits . . . The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law, especially of one who has worked under it for some time under the agreement, is a qualitatively more serious and detrimental event than it would be under the common law.

In this dispute it became clear that the employer did not appreciate the necessity to follow certain prescribed steps in dealing with an employee whose performance is questioned. Particularly troublesome is a want of recognition of the need to formalize the disciplinary process and record it in terms that affords to the employee an opportunity to exercise collective bargaining rights. The subject is again addressed in general terms in the *Wm. Scott* case on p. 3 as follows:

> At the same time, the standard collective agreement also provides the employer with a broad management right to discipline its employees. If an individual employee has caused problems in the work place, the employer is not legally limited to the one, irreversible response of discharge. Instead, a broad spectrum of lesser sanctions are available: verbal written warnings, brief or lengthy suspensions, even demotion[s] . . . Because the employer is now entitled to escalate progressively its response to employee misconduct, there is a natural inclination to require that these lesser measures be tried out before the employer takes the ultimate step of dismissing the employee, and thus cutting him off from all of the benefits associated with the job and stemming from the collective agreement.

In this collective agreement, as in many collective agreements, the employer must exercise its right to impose discipline within the confines of the collective agreement and responsive to the rights of the employee secured under the provisions of the *Labour Code*, R.S.B.C. 1979, c. 212, in the collective agreement itself and as identified and expressed in arbitral jurisprudence. In this collective agreement, as noted previously, the disciplinary initiative of the employer is inhibited. The employer cannot rely on any written or verbal warnings given to an employee unless the provisions of the collective agreement have been met. Article 4, s. 5(a) requires that an employer provide the employee with a copy of any document intended to constitute a warning as to job performance and afford the employee an opportunity to respond. That same article requires that an employer not introduce in evidence any disciplinary document without having afforded to the employee a full opportunity to meet and challenge its disciplinary consequences. Those expressed rights are not accommodated by an informal approach to the imposition of discipline, including

warnings as to job performance that may later form a foundation for the dismissal or other discipline of the employee.

In this dispute the only document filed by the employer that can meet the provisions of art. 4, s. 5(a) is the letter of August 25, 1981. That letter was the subject of a grievance filed by the grievor on September 2, 1981, wherein the criticisms of her job performance were placed in contest. We do not draw the inference that the letter of criticism was inspired by anti-union malice. But the employer has not succeeded on a balance of probabilities in establishing that the grievor was guilty of conduct deserving of discipline and hence she is entitled to reinstatement to her position and to compensation for her lost wages. We do not agree with the union's position that the evidence sustains the inference that the action taken by the employer was entirely without foundation. Our difficulty arises as a result of the failure of the employer to pursue its dissatisfaction in a manner that would permit this board to adjudicate that dissatisfaction and assess its implications in terms of the right of the employer to impose discipline. We can only repeat that the obligation of the employer in a collective bargaining relationship in response to dissatisfaction with job performance is to identify that dissatisfaction to the employee in the form of written warnings, with or without the threat of discipline thus affording to the employee an opportunity to respond to the allegations. It is on such a factual background that an arbitration board is able to assess the rights and obligations of the parties and adjudicate on whether conduct deserving of discipline has been established.

In rejecting the submission of the union with respect to its characterization of the motivation of the employer we do not want to be understood to imply that the reinstatement of the grievor is under some cloud or subject to the inference that she has committed conduct deserving of discipline but has escaped the consequences by some technical want of proof. The grievor is entitled to reinstatement and compensation because the employer has failed to establish on a balance of probabilities that she has committed any act deserving of discipline. Our reservation with respect to the extremity of the union position is that the evidence does not sustain the extreme inference that the employer was motivated by anti-union malice. It is in response to that extreme inference invited by the union that we emphasize that all enployees are required to meet a reasonable standard of job performance and the decision of this board does not represent an endorsation of the job performance of the grievor. It merely

reflects the facts, that is, that the employer was obviously dissatisfied with the job performance of the grievor but failed to establish a basis for that dissatisfaction that would justify the imposition of discipline.

III

It is in that posture that we now turn to the alternative position taken by the employer during the course of the arbitration that the appropriate discipline to impose upon the grievor would be a demotion. A disciplinary demotion imposes upon the employer the onus of establishing on a balance of probabilities that the employee concerned has disclosed a want of ability to perform the job to an appropriate standard and that the failure to perform arises from deliberate acts on the part of the employee. The nature of a disciplinary demotion and the onus imposed upon the employer was discussed in *Re Cominco Ltd. and U.S.W., Local 480* (1975), 9 L.A.C. (2d) 233 (Weiler). In that case Professor Weiler was speaking as chairman of the Labour Relations Board of British Columbia and he described a disciplinary demotion on p. 237 as follows:

> By contrast, disciplinary demotion occurs when some specific action by the employee, viewed by management as misconduct, precipitates a decision to remove the employee from his job and then transfers him to a lower-rated position. If the circumstances surrounding that decision indicates that the demotion is really a penalty imposed . . . then that is to be treated by arbitration as a disciplinary demotion.

Professor Weiler then goes on to give consideration to a number of the authorities dealing with the concept of a disciplinary demotion and observes that the response of arbitrators generally is that a demotion is an unsuitable penalty if it is intended purely as a disciplinary response. On p. 238 he considers the necessary criteria that will permit a demotion as an act of discipline: "Demotion as a disciplinary measure has been held to be proper where the immediate offence of the employee testifies directly to his unsuitability for the particular job which he has held."

In measuring the evidence adduced by the employer in this case against that standard, we are compelled to conclude that the employer has failed to establish conduct deserving discipline in the first instance and has failed to establish a want of performance sufficient to sustain the inference on a balance of probabilities that the grievor is not suited to perform the job of cook. She has occupied that position for a number of years and, even though she has attracted a measure of criticism from the employer, there is insufficient evidence to sustain the inference that she cannot

perform the job if she receives adequate guidance and supervision from the employer. In the result the grievance must be granted and the grievor is entitled to receive compensation for her lost wages from the date of dismissal.

The union has added to its claim of compensation a claim for the payment of interest on the wages withheld by reason of the dismissal. The question of whether an arbitrator has the jurisdiction to award interest is now beyond doubt, at least in British Columbia. Bouck J. dealt with that issue in *Westcoast Transmission Co. Ltd. v. Majestic Wiley Contractors Ltd.*, Vancouver Registry — C811610, September 10, 1981 [reported 31 B.C.L.R. 174]. That case was brought before him under the provisions of the *Arbitration Act* of British Columbia but the resolution of the jurisdictional question has equal application to an arbitration brought under the provisions of the *Labour Code* of British Columbia. He first addressed the subject in broad terms on p. 29 with an extensive review of the applicable authorities and the *Court Order Interest Act*, R.S.B.C. 1979, c. 76, and concluded on p. 32 as follows [pp. 192-3]:

> Any statutory remedy a court of law could or must apply also binds the arbitrators. The Court Order Interest Act compels a court to add on to a pecuniary judgment interest from the date the cause of action arises until judgment. Similarly the arbitrators are required to add on to the award of damages . . . interest from the date of the cause of complaint until the date of the award.

The union relied on a number of recent arbitral decisions to support its contention that the payment of interest in addition to compensation for lost wages is necessary to meet the fundamental aim of compensation. In particular the union relies on *Re Air Canada and Canadian Air Line Employees' Assoc.*, unreported, March 24, 1981 (Picher) [reported 29 L.A.C. (2d) 142]. That decision is a lengthy canvass of the appropriate law on the question of jurisdiction and the propriety of including interest as part of the compensation package. On p. 18 [p. 153] she concluded a review of the leading authorities as follows: "The Court [Supreme Court of Canada] has emphasized that the object of awarding such damages is to put the aggrieved party into the position he would have been in if there had been no violation of the collective agreement."

The arbitrator then gave consideration to the ingredients necessary to put an aggrieved employee into the position he would have occupied if the breach of the collective agreement had not occurred. On p. 19 [p. 153] she said as follows:

> Is interest an appropriate item in a damage award? As the Supreme Court of Canada noted at p. 6 D.L.R., p. 126 S.C.R. of the C.B.C. decision [*Assoc. of Radio & Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Corp.* (1973), 40 D.L.R. (3d) 1, [1975] 1 S.C.R. 118, [1974] 1 W.W.R. 430], the object of awarding damages is "to put the injured party into the position in which he would have been had the contract been performed". This common law principle, rooted in the law of contract, has long been applied by both Courts and arbitrators to assess damages for the breach of a collective agreement.

The arbitrator then gave further consideration to the law and concluded that she had the jurisdiction to award interest and that it was appropriate to compensate the grievor in that case for loss of use of the money represented by wages for the relevant period. For my part, the significance of the decision is its equation with respect to compensation, that is, that compensation is intended to place the aggrieved employee in the monetary position he would have occupied if the provisions of the collective agreement had been performed. It is that thematic test as to the effectiveness of compensation that should guide the discretion of an arbitrator in seeking to determine whether interest should be awarded and in what amount. The first thing to be noted is that the grievor in this case was not entitled to receive wages in advance of having performed the work and would be receiving those wages periodically throughout the term of enforced absence from work. If she is to be restored to the position she would have occupied if the dismissal had not occurred, the award of interest should reflect the actual length of time over which she has been out of the money she would normally have received. Secondly, the interest must be calculated in response to the actual measure of her loss. On the evidence the grievor was in receipt of unemployment insurance benefits. It is conceded in the evidence that she is required to account for and pay back those benefits but that does not detract from the fact that she has had the use of those benefits throughout the period of enforced idleness and they should be accounted for in calculating the extent to which she has been out of money over the relevant period.

The union urges that we adopt a formula used by the Ontario Labour Relations Board whereby the wage loss is calculated, divided in half and interest is made payable at the prime rate of lending for the relevant period. In our view interest should be calculated at the rate payable by the Registrar of the Supreme Court of British Columbia under the provisions of the *Court Order Interest Act* for the period in question of the wages payable for the period of time after they became payable to the date of this award

with an appropriate accounting for the unemployment insurance benefits of which the grievor had use during the period. In the event there is any difficulty calculating the amount of compensation and interest we will retain jurisdiction to solve the dispute. The union has asked that certain benefits be restored to the grievor with the deduction of the cost of restoring those benefits from her compensation and we agree with that disposition of the claim.

Before disposing of the question of compensation we must deal with a submission of the employer that the grievor has failed to take reasonable steps to mitigate her loss. It is settled law that the onus of establishing a failure to take reasonable steps to mitigate a wage loss lies upon the employer: see *Red Deer College v. Michaels et al.* (1975), 57 D.L.R. (3d) 386, [1976] 2 S.C.R. 324, [1975] 5 W.W.R. 575. In this case the grievor gave evidence of persistent attempts to obtain alternate employment within her qualifications. She registered for employment with Canada Manpower and she made numerous personal applications to various health institutions. The employer suggests that the grievor failed to seek employment as an aide as opposed to a cook, a position for which she was qualified, and therefore failed to establish reasonable efforts to mitigate. No evidence was led that the grievor failed to consider any available work and we cannot find that her response to her dismissal was unreasonable with respect to her efforts to find alternate employment. We must find that the employer has failed to establish that the steps taken by the grievor to mitigate her loss were unreasonable. In the result the grievance is granted, the grievor is reinstated and she is entitled to be compensated on the formula set out with this board reserving jurisdiction to resolve any disputes as to the amount of compensation.

[L. Page dissented.]

RE CITY OF HALIFAX AND INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 268

S. B. Outhouse. (Nova Scotia) March 31, 1982.

Discipline and discharge — Probationary employee — Standard of just cause.

Probationary employee — Discharge grievance — Standard of just cause.

[See *Brown & Beatty*, 7:5020]