

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HECKETT, DIVISION OF HARSCO CORPORATION
- the Employer

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL 8782
- the Union

AND IN THE MATTER of a grievance of Tom White

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Edward N. Stoner	- Counsel
Paulo Almeida	- Superintendent
Ian Kirk	- General Manager
Val DaMota	- Supervisor
Pat Pivni	- Manager, Human Resources and Benefits

On behalf of the Union:

J. P. Grant	- Advocate
Stewart Patterson	- Grievance Committee, Local 8782
Branko Jagonic	- Unit Chair
Tom White	- Grievor

Hearing held May 16, 2002 in Hamilton, Ontario.

AWARD

I. INTRODUCTION

Tom White grieved his dismissal for theft. The Union submitted the penalty of dismissal was too severe as the grievor had taken only items for use at work. The Employer and Union further disagreed as to the admissibility of both videotape evidence and evidence of statements made by the grievor during the grievance process.

II. THE FACTS

The Employer, Heckett, provides services at many steel mills. Here the Employer recycles by-products created at the Lake Erie Steel plant.

The bargaining unit consists of some 14 employees of whom the grievor is the most senior. The grievor has worked for the Employer in this location since 1993 but was employed by the Employer at another location from 1989 to 1993. He had no record of prior discipline. He is married, has two children and has been unable to find another job since his dismissal.

The Employer's entire building is open to employees when management staff are present. When the members of management are absent, half the building is kept locked. The locked half of the building contains a lab area where supplies are stored, as well as an office area.

The Employer supplies gloves for the employees and the gloves are normally stored in the lab area of the building. The practice is for management staff to leave a supply of gloves in the employee lunch room before departing for the night. If management forgets to leave gloves, or if an employee needs anything from the locked part of the building during the night, the employee is to contact a member of management and have that person come to the plant and retrieve the needed item(s).

On the night of March 13-14, 2002, the grievor worked the 11 pm - 7 am shift. He was one

of three bargaining unit employees who worked that shift. No managers were at work then. When management staff failed to leave gloves in the lunch room for this night shift, the grievor opened the locked door and took a package containing several pairs of gloves, instead of contacting a member of management to come to the plant. He then left the door unlocked and took the pair of gloves he needed, leaving the remaining gloves in the lunch room for use by other employees.

There was also a coffee machine in the employee lunch room for use by employees during breaks. The employees were expected to bring their own coffee. The Employer had a supply of coffee, sugar and cream for management staff which was stored in the administrative office located in the locked area of the building. If employees failed to bring their own coffee and asked management for the Employer's coffee, management routinely supplied it.

Later in the same March 13-14 shift, the grievor realised there was no coffee in the employee area. He re-entered the previously locked area and took coffee, cream and sugar for his use and his co-workers' use in the employee lunch room.

On the morning of March 14 the Employer confronted the grievor who, after initial denying his actions, admitted he had entered the locked area and taken the gloves, coffee, sugar and cream. The Employer witness, Paulo Almeida, testified that the grievor also admitted to taking rags. Although at the hearing the grievor was unable to recall whether he had taken rags, I accept both that the grievor took the rags and that he admitted taking the rags when confronted by the Employer on the morning of March 14.

March 14 the grievor also acknowledged that he was aware of the proper procedure of calling management when items were required from the locked portion of the building. He indicated that he was sorry.

The Employer initially suspended the grievor and then later dismissed him. The Employer did not provide the grievor with a written statement of reasons for dismissal but instead conveyed its reasons orally through the Union. It was agreed that the reasons for the dismissal were the above conduct during the shift on March 13-14, 2002, conduct to which the grievor admitted. Mr. Almeida, the Employer's sole witness, said he had provided input into the decision that led to the dismissal, that he had recommended dismissal based on his knowledge of the Employer's practice including the Hodges case, *infra*, but that he had not made the dismissal decision.

The grievor had received the Plant Rules and the Code of Conduct.

III. COLLECTIVE AGREEMENT PROVISIONS

The following are the relevant provisions of the parties' 1997-2003 collective agreement.

SECTION 3 - MANAGEMENT'S RIGHTS

3.01 . . . Without restricting the generality of the foregoing, management's functions shall include:

(a) The right to maintain order, discipline, and efficiency and in connection therewith to adopt and put into effect and post reasonable rules and regulations which will not be used for the purpose of discrimination against any employee or to avoid the provisions of this Agreement; the right to discipline and discharge employees for just cause. . . .

SECTION 17 - GRIEVANCE AND ARBITRATION PROCEDURE

...

17.15 5. No evidence shall be presented in arbitration that was not presented in the prior steps of the grievance procedure.

As contemplated in Section 3.01, the Employer has established both "Plant Rules and Regulations" and a "Code of Conduct", the relevant portions of which are:

PLANT RULES AND REGULATIONS

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13 Removal of Company property or property of the steel company without authority will be justifiable cause for dismissal.
...

CODE OF CONDUCT

... [Employer] assets must be used only for proper purposes. Improper uses include unauthorized personal appropriations or use of [Employer] assets, . . . (at page 9)

IV. EMPLOYER POSITION

The Employer submitted the matter was straightforward. The grievor admitted his conduct was improper; the Union agreed with that view. The grievor was aware that the misappropriation of Employer assets was a violation of the Plant Rules and the Code of Conduct. The gloves, the coffee, etc., were all Employer assets. The fact that the Employer would supply the goods if asked did not justify his behaviour.

There was no compelling reason for the grievor to take the gloves or the coffee. The Employer had dismissed other employees for theft and those dismissals had been upheld by arbitrators. The Employer decision in this case was thus consistent with its prior practice.

The Employer asked that the grievance be dismissed.

The Employer referred to the following: *Heckett, Division of Harsco Corporation and the United Steelworkers of America, Local 8782 (Hodges grievance)* (August 26, 1997), unreported (Cocker) and *Heckett Multiserv and the United Steelworkers of America, Local 7577 (Taylor grievance)* (May 17, 2001), unreported (Abramsky).

V. UNION POSITION

The Union submitted that the facts in this case differed from those in the cases cited by the Employer, one of which (Hodges) was known to Mr. Almeida and relied upon by him in recommending the grievor's dismissal. The Union asked that I draw an adverse inference from the Employer's failure to call the person who decided to dismiss the grievor.

The Union submitted that there was no pre-meditated intent to steal, that the items taken were for use only while at work and were not taken home. The punishment here did not fit the crime. The Union submitted that the Employer had not given adequate consideration to the grievor's seniority, family situation and record of employment.

The Union asked that I reinstate the grievor and substitute a short suspension for the dismissal.

The Union referred to the following: *Re Hoffman Meats Inc. and United Food & Commercial Workers, Local 139* (1991), 20 L.A.C. (4th) 348 (Samuels) and *Re MacMillan Bloedel Ltd. and Communication Energy & Paperworkers Union, Local 1* (1996), 59 L.A.C. (4th) 84 (Glass).

VI. CONCLUSIONS

In dismissal cases I consider three questions as follows:

1. *Did the grievor's conduct justify a disciplinary response?*
2. *If so, was dismissal an excessive form of discipline?*
3. *If dismissal was an excessive response, what penalty should be substituted in all the circumstances of the case?*

1. *Did the grievor's conduct justify a disciplinary response?*

As the grievor, the Union and the Employer acknowledged, the grievor acted improperly in entering the locked area and taking the gloves, coffee, etc. The Union and Employer further agreed that some measure of discipline was warranted.

This matter was considered a theft issue and common sense says an employee should not steal from an employer. The Employer's rules prohibit theft, and its practice over several years reinforces that position. This Employer treats theft very seriously and has discharged employees caught stealing.

But breaking the Employer's rules does not constitute theft. Theft as used in the labour relations context is similar to theft in the criminal sense. Theft involves taking something for one's own benefit and thereby depriving the owner (commonly the employer) of the item and it involves taking the item without having a claim to it.

Consider, for example, the two cases cited by the Employer and involving this Employer. In *Hodges* the grievor broke into an Employer gas pump and took gasoline for his personal vehicle. He used his vehicle to get to and from work but did not use it as part of his work. In *Taylor* the grievor took two flashlights from the Employer's premises. In both cases it was clear that the intent was to make use of the Employer's property for the employee's own benefit while away from work. In both cases the arbitrators found deliberate acts of theft and upheld the dismissals.

Consider the items involved here. The gloves were items used for work and were supplied to employees by the Employer. Gloves were routinely supplied by the Employer as part of the employee's equipment and routinely set out on the lunch room table at night for employee use. However, the Employer's managers left on March 13 without ensuring that gloves were left out for the night shift. While the proper approach would have been for the grievor, or a fellow employee, to call a member of management and have him/her return to the plant and

retrieve the gloves, there was agreement that the gloves were needed and no suggestion that there was any basis on which they would not be supplied. I conclude that in the common use of theft the grievor did not steal the gloves as he had a claim to the gloves and, more importantly, he did not deprive the Employer of the gloves but instead put the gloves to precisely the use the Employer intended.

While he was taking the gloves, the grievor took rags which the Employer supplies to employees and which are used by employees. Although the evidence on the use of the rags was limited, it appeared that gloves and rags were treated in a similar manner by the Employer and were taken for similar purposes by the grievor and I conclude he did not steal the rags either.

The matter of the coffee appears somewhat different. When the grievor noted that the employee lunch room had no coffee, he went to the administrative office and took coffee, sugar and cream. While members of management provided employees with those supplies for the employee lunchroom when asked, it was clearly understood that employees should not simply take those supplies without obtaining permission.

There was no evidence and no suggestion that the grievor took any of the coffee, sugar and cream for use away from work. Admittedly he took the coffee supplies to satisfy his personal desire for coffee during his lunch or coffee break, but I conclude from the evidence about the lunch room, the coffee machine, and the provision of coffee by management on request, that drinking coffee was anticipated by and known to the Employer and perhaps was intended, in part, to help maintain productivity. Although the Employer routinely supplied coffee when employees ran out of coffee and asked for supplies, and while I find the grievor thought he would be given coffee if anyone had been at work to ask, nevertheless he had no claim on the coffee similar to that on the gloves or the rags and I conclude that, in the normal sense of stealing, he stole the coffee, sugar and cream.

To summarize the grievor's actions, he first entered the room to get the gloves which he and his co-workers needed. He thus initially entered for a purpose related to the requirements of his job. While he violated the rules in not calling management, it was done in the interests of getting on with the job and supplying gloves that he and his fellow employees needed, and he did not steal the gloves. Later he entered the area a second time to get coffee supplies which, despite his having been given or loaned coffee by each of the three current members of management, I have concluded was theft. While his actions were wrong and constituted theft, I note that he did not intend to take, and did not take, any items out of the plant and he did not take any items for his use away from work. Nevertheless, I conclude that in entering the locked area and in taking the coffee, sugar and cream the grievor acted improperly and that his actions justify a disciplinary response.

2. *If so, was dismissal an excessive form of discipline?*

Finding that the grievor engaged in misconduct, including theft, does not end the matter. Dismissal is not an automatic response to theft. The Union submitted that the penalty of dismissal was too severe.

I view discipline as being corrective in nature. That is why progressive discipline is used. Employers are normally expected to begin with a mild form of discipline in order to reinforce with an employee the Employer's expectations in terms of conduct on the job. It is expected that mild discipline will correct an employee's misconduct. More serious forms of discipline may be imposed later if the employee does not conform to the expectations - that is if the milder discipline does not correct the problem.

Moreover, an employee who has worked for an employer for many years without any record of discipline would normally be thought to be more deserving of the application of progressive discipline than would an employee who had worked for only a short time or who

had a record of prior discipline. That is because an employee who has worked for a long time without discipline has demonstrated an ability to meet the employment expectations and, having done so, is an employee who is thought likely to correct that behaviour if his misconduct is brought home to him by the use of progressive discipline.

In some instances of serious wrongs the Employer may move directly to more serious forms of discipline such as suspension or dismissal but that should be based on a conclusion that the employee's conduct cannot be corrected by the use of a milder form of discipline. I heard no evidence to suggest that the Employer considered any lesser form of discipline, nor to indicate why it concluded the use of progressive discipline would be unsuccessful in correcting the grievor's conduct, nor to explain why it chose to move directly to dismissal.

The grievor had worked for the Employer for a long time without any record of discipline. He was the senior employee in the unit and some of his actions, such as getting gloves, were done to assist his colleagues. There was nothing in the evidence to suggest that he was now incapable of working and meeting the Employer expectations, as he had for so many years. I conclude that the grievor was a person whose conduct was capable of being corrected by a lesser form of discipline. In these circumstances I conclude that moving directly to dismissal as the form of discipline was excessive.

3. *If dismissal was an excessive response, what penalty should be substituted in all the circumstances of the case?*

Entering the locked area and the theft of the coffee are serious matters and the penalty imposed should be one which conveys to the grievor that his conduct was wrong and is not to be repeated. I think that a suspension without pay would have been reasonable and would have conveyed that message. In my view a suspension of two weeks without pay would reasonably balance the seriousness of the grievor's misconduct with the grievor's clear

disciplinary record and long service.

Discipline should also convey to other employees the expectations of their employment. A two week suspension would convey to all other employees that actions like those of the grievor are not condoned.

I thus substitute a suspension of two weeks. The Employer is directed to promptly reinstate the grievor with full seniority and benefits and to pay him from Monday April 1, 2002.

Rulings made regarding evidence of videotapes and of grievance meetings

Finally, I wish to record two rulings I made during the hearing.

The Employer sought to lead evidence regarding videotapes to explain how it had decided to confront the grievor. The Employer acknowledged that it had not provided any information to the Union about videotapes during the grievance procedure nor at any point prior to the day of the hearing. The Union submitted that under Section 17.15 of the collective agreement (*supra*) the Employer could not lead such evidence.

I ruled that the Employer could not lead the intended evidence for two reasons:

1. The parties had agreed under this collective agreement that the Employer could not lead evidence which it had not presented in the grievance procedure; and,
2. I saw no need for any evidence as to why the Employer had confronted the grievor, as the grievor had admitted his actions.

Secondly, the Employer sought to lead evidence of admissions allegedly made by the grievor during a grievance meeting. The Union objected.

I ruled that I would follow the usual practice and decline to hear evidence as to what took place during the grievance meeting for the following reasons:

1. The reasons for dismissal were based on actions the grievor had admitted when confronted on March 14 and there was no attempt to avoid those admissions; and,
2. The nature of the grievance procedure is such that parties should be encouraged to have a full and open discussion without fear that something said or done at that time will act to their detriment in a later arbitration.

In summary, I substitute a two week suspension for the dismissal. The Employer is directed to reinstate the grievor and to provide him with back pay from April 1.

I will remain seised to deal with any matters which may arise in the implementation of this award.

Dated in London, Ontario this 13th day of June, 2002.

Howard Snow, Arbitrator