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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CORPORATION OF THE CITY OF WINDSOR
- The Employer

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 543 -
"WINDSOR MUNICIPAL EMPLOYEES"
- The Union

AND IN THE MATTER OF the grievance of Ratha Chhim

Arbitration Board:	Howard Snow	- Chair
	Leonard P. Kavanaugh, Q.C.	- Employer Nominee
	Kendal McKinney	- Union Nominee

Appearances:

On behalf of the Employer:

Patrick Brode	- Counsel
Jacqueline Chan	- Student at Law
Jennifer Escott	- Infrastructure
Paul Walo	- Infrastructure
John Lechicky	- Human Resources

On behalf of the Union:

Stephen Krashinsky	- Counsel
Mark McArthur	- President Local 543
Teresa Fracas	- Chief Steward
Ratha Chhim	- Grievor

Hearing held November 4 and December 20, 2005, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This is a preliminary award in a dismissal case. The award addresses two issues of evidence: can the Employer introduce documents from an earlier discipline and can the Employer rely on new evidence to support this termination.

II. THE BACKGROUND

The City of Windsor, the Employer, dismissed Ratha Chhim, the grievor, in late 2004. The Canadian Union of Public Employees, Local 543, pursued the grievor's dismissal to arbitration.

During the first day of the hearing the parties engaged in discussions.

The second day the parties made opening statements and asked the board to rule on two issues of evidence. As the board had not heard evidence, I outline the facts as presented in the opening statements.

The grievor has worked for the Employer since 1998 as a computer assisted design (CAD) technician. We were advised that the grievor is addicted to gambling and to support his gambling addiction he has needed additional money.

In 2003 the grievor worked for outside builders using Employer time and equipment. He was fired for that, reinstated in a grievance settlement and, as part of the settlement, was required to attend a gambling addiction program. The 2003 termination notice was admitted in evidence and it referred to the violation of five of the Employer's standards of employee

deportment. Put briefly, those five violations were (1) engaging in matters of a personal nature during work, (2) insubordination, (3) theft, (4) abuse of public property or using that property without authorization, and (5) conduct bringing the service into disrepute. However, the termination notice and the five violations were general and the documents provided no information as to the grievor's misconduct.

The 2003 termination was grieved, a settlement was reached between the parties and Mr. Chhim was reinstated. The settlement was also admitted in evidence. Under the settlement the termination was rescinded and replaced by a twenty (20) day suspension. The grievor was to attend a program at either "Homewood" or "Brentwood" and his actual reinstatement was to follow the successful completion of either program. In addition, the grievor was to provide written progress reports confirming his attendance at a follow-up program. The grievor resumed work in February 2004.

The Employer alleged that later in 2004 the grievor entered a supervisor's office, took six of the supervisor's blank personal cheques, made the cheques payable to himself in varying amounts, forged the supervisor's signature on the cheques, and cashed four cheques for a total of approximately $1,800.00. At that point the supervisor was contacted by her bank. The supervisor confronted the grievor who confessed.

The grievor was then dismissed and his grievance dated December 20, 2004, is the grievance before us.

The parties proceeded through the grievance procedure, this arbitration board was selected and the hearing scheduled, all on the understanding that the grounds for termination related to the removal and cashing of the cheques as outlined above.

As for the first issue before this Board, the Employer sought to introduce two documents provided to the Union at the time of the 2003 suspension and which the Employer said would help to explain that suspension. The Union objected.

Secondly, the Employer learned for the first time in the summer of 2005 that the grievor had engaged in misconduct which it said was similar to that which prompted the 2003 suspension. The Employer located the information by examining the grievor's computer files. The Employer advised the Union of this information by letter dated November 2, 2005, two days before the first day of this hearing. The Employer sought to use the new information in support of the dismissal. It appeared that, had the Employer looked, it would have found this information earlier. The Union objected to the introduction of this material.

The issues now before this Board are:

1. Can the Employer introduce the additional documents from the 2003 suspension to provide the Board more detail? and,
2. As an additional basis for the current termination, can the Employer rely upon the recently located evidence suggesting that the grievor repeated the misconduct which prompted his 2003 suspension?

III. PROVISIONS OF THE AGREEMENT

The relevant provision of the parties' 2002-2004 collective agreement is as follows:

ARTICLE 9 - GRIEVANCE AND ARBITRATION PROCEDURE

9.04 (a) The Union and the Corporation shall be confined to the grievance and redress sought as set forth in the written grievance filed . . . No matter may be submitted to arbitration which has not been properly processed through all previous steps of the grievance procedure.

IV. POSITION OF THE UNION

As for the admissibility of the 2003 suspension documents, the Union submitted that we should only look at the grievor's record and the record of his earlier discipline was simply the termination and the settlement, both of which were before us, and not the documents which the Employer wanted to use to explain the discipline. Once a discipline matter has been settled, the parties are bound by the record; they cannot go back to the underlying facts and re-litigate the discipline.

As for the information found during the summer of 2005, the Union submitted that the information had been readily available prior to the grievor's termination. The Employer had not sought the information, choosing to terminate the grievor's employment on the basis of the theft. That theft had been the sole basis of the termination, the sole issue discussed in the grievance procedure, and the sole issue known to the Union for approximately one year - that is until just two days before the hearing. Theft was the basis upon which the grievor was dismissed and that was the issue we should arbitrate.

The collective agreement (article 9.04 (a), *supra*) indicates that the only issues to be arbitrated are those processed through the grievance procedure and the new concern had not been processed through that procedure and could not be arbitrated.

If the grievance had been heard promptly, the arbitration hearing would have been held in early 2005 before this new information was located and the Employer should not be able to benefit by this delay. The Union was prejudiced by the Employer's delay in locating and communicating the information.

The Union relied upon the following authorities: *Re Sunnybrook Hospital and Sunnybrook*

Hospital Employees Union, Local 777 (1987), 32 L.A.C. (3d) 381 (H.D. Brown); *Re Canada Post Corp. and Canadian Union of Postal Workers (Dwyer, 626-88-3-8637)* (1992), 24 L.A.C. (4th) 436 (Shime); *Re Doctor's Hospital and Ontario Nurses' Association* (1997), 65 L.A.C. (4th) 4 (M.R. Newman); *Re Mental Health Hospital Board, Edmonton and Health Care Employees Union of Alberta, Local 1* (1990), 12 L.A.C. (4th) 301 (Price); *Re United Steelworkers of America and Aerocide Dispensers Ltd.* (1965), 15 L.A.C. 416 (Laskin); *Re Loblaw Groceterias Co. Ltd. and Union of Canadian Retail Employees C.L.C.* (1973), 3 L.A.C. (2d) 325 (Adams); *Re United Rubber Workers and Seiberling Rubber Co. of Canada Ltd.* (1969), 20 L.A.C. 267 (P.C. Weiler); *Re Fuel, Bus, Limousine, Petroleum Drivers & Allied Employees, Local 352, and Air Terminal Transport Ltd.* (1970), 22 L.A.C. 143 (H.D. Brown); *Re Petro-Canada Lubricants Centre and Communications, Energy and Paperworkers Union, Local 593* (2000), 86 L.A.C. (4th) 36 (Marcotte); *Re City of Toronto and Canadian Union of Public Employees, Local 79* (2003), 121 L.A.C. (4th) 362 (R. Brown); *Re AFG Industries Ltd. and Aluminum Brick Glass Workers Union* (1998), 75 L.A.C. (4th) 336 (Herlich); *Re Sheraton Gateway Hotel and Hotel Employees Restaurant Employees Union, Local 75* (2003), 114 L.A.C. (4th) 242 (Tacon); and *Re Delta Chelsea Hotel and Hotel Employees Restaurant Employees Union, Local 75* (2002), 111 L.A.C. (4th) 22 (Surdykowski).

V. POSITION OF THE EMPLOYER

The Employer submitted that the 2003 documents should be admitted to flesh out the suspension, that is to explain that the earlier suspension was based on private work on Employer time using Employer equipment. The notice of termination and the memorandum of settlement provided inadequate information.

As for the information regarding private work on Employer time discovered in the summer

of 2005, the Employer said it was not a change in reasons for the current dismissal as the grievor had been fired for dishonesty and this new information simply reinforced the Employer claim of dishonesty.

The Employer relied upon the following: *Labour Relations Act, 1995,* Section 48 (12) (f); *Re City of Saint John and Canadian Union of Public Employees, Local 18* (1989), 4 L.A.C. (4th) 314 (Collier); *Re Board of Education for City of York and Canadian Union of Public Employees, Local 994* (1993), 37 L.A.C. (4th) 257 (Burkett); and *Re Air Canada and Canadian Auto Workers, Local 2213* (1999), 86 L.A.C. (4th) 232 (Brandt).

VI. CONCLUSIONS

The documents regarding the 2003 suspension

I begin by noting that nothing in this collective agreement provides any assistance in resolving the issue. Instead, this question must be resolved on the basis of an examination of fundamental principles.

This issue involves a conflict between competing labour relations values. The first such value is finality in dealing with grievances. If discipline is not grieved, the parties are bound by the discipline as imposed. Similarly, when a grievance is settled or adjudicated the parties are bound by the outcome.

In support of that value of finality, arbitrators have developed a practice of looking only at what is often termed the record of prior discipline. However else it might be described, this involves a limited review of the important elements of the previous discipline. Apart from supporting finality, this practice has the useful effect of focussing the hearing on the most

recent incident and facilitating the resolution of the new grievance.

On the other hand, a second labour relations value is the fundamental principle that the arbitrator should correctly dispose of the grievance. One of the reasons arbitrators look at the grievor's discipline record is to ensure that the penalty fits the individual. It is accepted that under a just cause provision an employee with a discipline free record should receive a lesser penalty than would an employee with a lengthy discipline record, assuming they both committed identical wrongs. What one regards as the record to be reviewed should be sufficient to enable the arbitrator to assess the appropriateness of the latest penalty.

Unfortunately the approach of limiting the evidence regarding the earlier discipline sometimes conflicts with an arbitrator's need for information about the earlier discipline in order to correctly dispose of the current grievance.

As an example, suppose that an employer disciplined two employees for different misconduct but conveyed the discipline in similar letters as follows "For reasons communicated to you in the meeting this morning with the union's chief steward, you are hereby advised that a formal reprimand is being imposed." Assume that six months later both employees were disciplined for swearing at a supervisor. While the prior discipline imposed on the two employees was the same, it would be important to know that six months previously one employee had been disciplined for swearing at this same supervisor while the other employee had been disciplined for leaving work to attend a funeral without having advised the supervisor. In assessing a just penalty for swearing it would be important to know that for one employee this was the second incident of discipline for swearing at the same supervisor, not simply that it was the second incident of discipline. Without looking behind those letters of discipline, that important difference is not apparent, and the discipline imposed might not be just.

Given the competing values, it is not surprising that arbitrators have frequently been confronted with the task of determining what constitutes the record of discipline for an employee.

In this case the documents relate to the previous suspension. As noted, an important role of an arbitration board is to determine whether the discipline being grieved is appropriate in all the circumstances of the case. It is important in evaluating the disciplinary record to know why that previous discipline was imposed. The documents currently before this board tell nothing about what the grievor did which led to that discipline. It follows that, in order to fulfil its role, the board should have additional information to explain that suspension.

Having decided that the board should have additional information, I turn to whether these two documents should be admitted. The two documents which the Employer sought to introduce explain the nature of the grievor's earlier misconduct. Those two documents were provided to the Union at the time of the earlier discipline and were at the basis of that suspension. Looking at the issue as a matter of general principle, then, I conclude that this is information which the board should have before it to properly fulfill its role in this grievance.

However, the Union submitted that we should not have the documents and referred us to several cases.

Probably the most frequently cited arbitration award on the issue of the nature of the material to be admitted regarding the grievor's prior discipline record is the *Sunnybrook Hospital* award, *supra*. In that case the discipline letters included detailed factual allegations and the union opposed the introduction of that level of detail. The board dealt with the matter fully and made a number of comments about how to reconcile the competing values involved:

> When a record of discipline is relied on . . . in assessing the extent of the penalty . . .in . . . progressive form of disciplin[e] . . . the importance of the record is **the general nature of the offence committed** and the penalty imposed. Where that action has not been challenged or was challenged but remains a matter of record of that employee, the employer and subsequently an arbitrator can rely on those facts, *i.e.,* **the nature of the offence** and the penalty imposed by the company, as constituting the "record" of discipline of the grievor. (at p. 384)
> As stated what is relevant for this board to consider is the employee's record which is **the statement of offence**, the date when it occurred and the penalty imposed and its disposition. The board need not know the factual allegations behind the record . . . (at p. 385)
> . . . what the record in this case shall contain . . . is **a statement of the general characterization of the incident** leading to discipline, the date of that action and the penalty imposed . . . (at p. 387)
> (Note: my emphasis throughout)

It is apparent that the Sunnybrook board was also of the view expressed above that an arbitration board needs to understand what misconduct led to the earlier discipline. The Sunnybrook award is an application of a similar balancing of competing labour relations values with respect to the particular facts before that board. The Sunnybrook board made a number of general statements about the approach to follow in balancing these interests. Applying the language of the Sunnybrook award to the facts of this case, the two documents already admitted provide neither "a general characterization of the incident" nor "the nature of the offence." The documents which the Employer now wants to introduce indicate the nature of the grievor's earlier misconduct and would be admissible applying the concepts in the Sunnybrook award.

I have reviewed the other awards cited on this point and, in my view, they add little. The arbitrator, or arbitration board, has to balance the competing interests involved in the particular case.

In this instance, whether I approach this issue directly as a matter of balancing finality with the correct disposal of this grievance, or apply the similar approach adopted in the Sunnybrook award for balancing those interests, I reach the same conclusion and the two documents are therefore admitted.

The documents regarding wrongdoing discovered after this dismissal

In order to deal with this issue it is helpful to outline how a dismissal grievance normally proceeds under a collective agreement which requires just cause.

Dismissal under a just cause standard has many aspects. One factor is that an employer will indicate its reasons when dismissing an employee. The union can then assess those reasons and decide whether to pursue a grievance. If there is a grievance, the parties routinely meet during the grievance procedure and discuss the reasons for the discharge. Many such grievances are resolved by the parties at that stage. If the grievance is not resolved, the union assesses whether the reasons advanced by the employer amount to just cause. If the union believes that there was not just cause, the union may pursue the grievance in arbitration.

In this case the usual steps were followed, this Board was appointed and dates for a hearing were set.

However, months after the dismissal the Employer found information which it wished to use to justify that discharge. The Union raised three related grounds in asking this board to refuse to admit that evidence.

This is a question of fairness in the arbitration process. The three alternative submissions speak to the issue of fairness but they come at it from different directions.

The Union first submitted that this issue was covered by the language of Article 9.04 (a) of this collective agreement, quoted above. Although Article 9.04 (a) deals with an element of fairness in the arbitration process, it does not address the issue of the use of information

discovered after the dismissal.

Article 9.04 (a) was intended by the parties to ensure that the parties use the grievance procedure. If an employee wishes to complain about being fired, the employee or the Union must file a written grievance and give the Employer an opportunity to resolve the complaint in the grievance procedure before that complaint can be arbitrated. Moreover, the written grievance must specify what is being requested by way of remedy. If, for example, the written grievance specified that the remedy sought was the severance pay owing under the employment standards legislation, the Union could not seek reinstatement of the employee in arbitration. This grievance is a dismissal grievance and the written grievance asks for full redress. Although the Article would prevent the Union from arbitrating the grievor's dismissal unless it had first grieved the dismissal and followed the grievance process, the Union has met those requirements. Article 9.04 does not require that every argument raised in an arbitration must first be considered in the grievance procedure and it would not prevent the Employer from using this information as a basis for dismissal.

Although I have concluded that the language of Article 9.04 of this collective agreement does not provide an answer to the Union concern, that article does call for fairness in one aspect of the arbitration process. I think that these parties who specified fairness in one area of the arbitration process would have likely intended fairness in related issues.

Regarding the Union's second submission, the Union said it was unjust in applying this just cause provision to allow the Employer to change the grounds for the discharge so late in the process.

In general labour relations terms, the fair resolution of grievances suggests that the nature of the difference will be clearly known by both parties at least by the time the Union pursues

a grievance to arbitration. If the Employer could, at that late time, change the grounds on which it dismissed the grievor, a disinterested observer might well say that such a change was unjust.

Arbitrators have over the years been confronted with this type of situation and the frequent response has been that of the above observer - to permit such as change would be unjust.

For example, in *Aerocide Dispensers, supra*, the board was confronted with a similar situation in which a discharge had occurred based on certain grounds and then, at the hearing, the Employer sought to advance other grounds. The Board commented as follows:

> The board is justified in a case of challenged discharge **to hold the employer fairly strictly to the grounds upon which it has chosen to act** against an employee who consequently feels himself aggrieved. This is not to say that the board should be overly technical in assessing an assigned cause of discharge but it does mean that it ought not to permit an assigned cause to be reformed into one different from it merely because the evidence does not support the assigned cause but rather one something like it. The parties prepare their submissions to arbitration according to the issues raised by the grievance and the answer or answers thereto, and the case comes to arbitration after having run the gauntlet of the grievance procedure and discussions therein. If another cause of discipline emerges from the evidence other than the one stated at the time, it is not an automatic conclusion that the employer would have treated it the same way merely because it finds it necessary to say so because of the turn of the evidence at the arbitration. (at p. 426-7) (my emphasis)

The Aerocide Dispensers approach has been frequently cited and has been influential since that award was issued in 1965. However, I acknowledge that this award has problems and that there are exceptions to the general rule expressed here, some of which are referred to in the arbitration decisions relied upon by the parties.

Among those factors which might lead to acceptance of a change in the reasons for dismissal or which, to put it differently, are exceptions to the above general approach, are:
- whether the Employer indicated at the time it imposed the discharge that it was continuing to investigate and would be relying on any additional misconduct it found, or
- whether the grievor had taken steps to keep the information hidden (see, for example,

Loblaw, *supra*), or

- whether the Employer could not otherwise have known of the information, or
- whether the information had been disclosed to the Union shortly after the discharge so that there was little surprise or prejudice.

In those situations, and no doubt others, it may be just to allow an employer to add additional reasons for the discharge or even change the reasons.

None of the above exceptions apply here. The Employer advised the Union very late in the process, there was no suggestion of an ongoing investigation, no hiding of information by the grievor, and nothing to justify why the Employer was so late in learning of the information or in then disclosing it to the Union.

On the general issue of allowing the Employer to change reasons at the arbitration stage, in this instance I note again the language of the collective agreement, Article 9.04 (a), which requires fairness in another aspect of the arbitration process and also the arbitral authority supporting the notion that a change in the basis for a dismissal late in the process would likely be unfair. Under this collective agreement I conclude that the parties intended this Board to review changes in the reasons for dismissal on the basis of fairness and, further, that the Employer should normally be held to the reasons it relied upon at the time of the dismissal.

I conclude that the Employer is limited to establishing just cause for this dismissal based on the theft of, and cashing of, the cheques. Since the documents the Employer wished to have admitted were in support of another wrong, the newly found documents regarding the grievor's work on Employer time using Employer equipment will not be admitted to support the grievor's dismissal.

It is unnecessary to consider the Union's third submission related to delay as a separate ground for refusing to admit the evidence.

Both parties directed their submissions to the use of the information found during the summer of 2005 to prove an alternative ground for the dismissal. The above decision is not intended to foreclose the admission of those documents for other purposes. Should the Employer seek to introduce the information for some other reason, such as whether dismissal was an excessive form of discipline, the parties can then address whether the evidence should be admitted for that purpose.

The hearing will resume as scheduled.

Dated at London, Ontario this 28th day of February, 2006.

Howard Snow, Chair

I concur, subject to the attached addendum — "Leonard P. Kavanaugh"
Leonard P. Kavanaugh, Q.C.

I concur — "Kendal McKinney"
Kendal McKinney