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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CENTRAL PARK LODGES LTD.

- The Employer

-and-

SERVICE EMPLOYEES' UNION, LOCAL 210

- The Union

AND IN THE MATTER OF the termination grievance of Nancy LaFleur

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

D. Brent Labord	- Counsel
Jean Piccinato	- General Manager

On behalf of the Union:

E. R. Durham	- Union Representative
Virginia Hills	- Union Representative
Sue Waters	- Chief Steward
Nancy LaFleur	- Grievor

Hearing held February 17, 1998 in Windsor, Ontario.

AWARD

I. INTRODUCTION

Nancy LaFleur grieved her December 1997 dismissal. She had 22 years seniority with the Employer.

This award addresses a preliminary issue raised by the Union:

> Did the failure of the Employer to provide the grievor and the Union with a letter confirming the discharge and giving all the reasons for the discharge, as required under Article 10 of the collective agreement, completely invalidate the discharge?

II. THE FACTS

The issue before me was raised as a preliminary matter. The parties agreed to the following facts as relevant to the determination of this issue.

The grievor's employment was terminated at a meeting which took place December 22, 1997 at the Employer's premises in Windsor. Sandy Lauder (Director of Operations for the Employer), the grievor, and Virginia Hills (a full-time Union Representative) attended the meeting. During the meeting the Employer's concerns regarding the grievor were outlined in very general terms, terms such as "improper behaviour" and "poor treatment of residents".

Later that same day the grievor filed the grievance before me in which she alleged that she had been "unjustly terminated".

On January 5, 1998 E. R. Durham, another Union Representative, wrote to Ms Lauder at her Toronto office. Mr. Durham wrote that "the Employer has failed to provide any particulars

or any reasons for the termination" and he sought "full & complete particulars". The parties agreed that the letter had been sent by fax to Ms Lauder's office, but for some unknown reason Ms Lauder had not seen the letter.

On January 7 the grievor's Record of Employment form was completed. The reason given for its issuance was termination.

A grievance meeting had been scheduled for January 16; however, prior to January 16 Ms Lauder contacted Ms Hills and the meeting was cancelled with the understanding that the meeting of December 22 would serve as the grievance meeting.

On January 14 or 15 Ms Lauder wrote to the grievor and sent a copy to Ms Hills. The letter was back-dated for December 22, 1997 and the text of the letter was as follows:

> This letter confirms my verbal advice that your employment was terminated effective December 22, 1997 for reasons as discussed.

On January 19 Mr. Durham wrote to Mr. Labord, Employer counsel, and confirmed his "request for the complete particulars upon which the Employer intends to rely".

Mr. Labord replied on January 28. He stated, in part, as follows:

> On December 22, 1997 a termination meeting was conducted with both Ms Lafleur and the union representative, V. Hills, in attendance. During that meeting the substance of the reasons for termination were communicated to Ms Lafleur.

Mr. Durham responded to Mr. Labord on January 29. He wrote in part as follows:

> . . . no incidents of any misconduct were relayed or disclosed either during the meeting of December 22, 1997 nor at any time since. . . .
> The Union again requests the full and complete particulars upon which the Employer intends to rely in order for us to prepare for hearing.

On February 10 Mr. Labord again wrote to Mr. Durham and provided four pages of

particulars of alleged misconduct. I received no evidence about any of those allegations. The parties acknowledged that the letter provided full reasons for discharge as required by Article 10.01.

Finally I was advised that the Employer failed to provide reasons or particulars at an earlier stage due to an "oversight by management".

III. PROVISIONS OF THE AGREEMENT

The following provisions of the Agreement were referred to in argument:

Article 7 - Union Committee and Representation:

. . .

7.03 (b) The Employer acknowledges the right of a seniority employee subject to written discipline to the presence of a Union Steward, or Union Committee member at the time the disciplinary action is to be taken if she so chooses and one is available in the facility. A copy of all written disciplinary action shall be sent to the Chief Steward at the same time such action is taken.

Article 9 - Grievance Procedure:

. . .

9.05 In dealing with grievances, the conferring parties or the Board of Arbitration shall have the power to:

a) Confirm the Employer's action
b) Reverse the Employer's action
c) Make any other arrangement which is just and equitable in the opinion of the conferring parties or the Board of Arbitration.

Article 10 - Discharge and Suspension Grievances:

10.01 The Employer shall not discharge or suspend any employee who has successfully completed his probation without just cause. **At the time of the discharge or suspension the Employer shall direct a letter to the employee(s) concerned confirming such discharge or suspension and giving all reasons for such action. A copy of the letter of discharge or suspension shall be mailed to the Union office on the same day that the employee is given the said letter.** Any claim of wrongful discharge or suspension shall be treated as a grievance, if a written statement of such grievance is delivered to the Manager of the Lodge

> within 10 calendar days after such notice of discharge or suspension was given to the employee(s) concerned. The grievance shall be processed commencing at Step 2 of the grievance procedure. [emphasis added]

IV. POSITION OF THE UNION

The Union submitted that Article 10.01 was clear and mandatory and that there were two questions:

1. Was Article 10.01 breached?
2. Does Article 10.01 provide a substantive right?

On the first question, the Union submitted the Article had been breached as reasons for the termination had only been provided some six weeks after the termination.

On the second question, the Union submitted the provision provided employees with a substantive right and that, given the breach by the Employer, the only solution was to set aside the termination as a nullity.

The Union referred to the following authorities: *Re Canada Post Corp. and Canadian Union of Postal Workers (Gibson)* (1992), 29 L.A.C. (4th) 7 (Burkett); *Re Northwestern General Hospital and Ontario Nurses' Association* (1992), 30 L.A.C. (4th) 95 (Starkman); and *Re Board of Governors of Southern Alberta Institute of Technology and Alberta Union of Provincial Employees, Local 039* (1993), 36 L.A.C. (4th) 406 (Clarke).

In reply to the Employer submissions, the Union submitted it had been prejudiced by the late provision of particulars in two ways:

1. It had lost the opportunity to resolve the matter in the grievance procedure; and,
2. At least one resident was no longer available to testify at an arbitration.

V. POSITION OF THE EMPLOYER

While the Employer acknowledged that it had violated Article 10.01, the Employer disputed the remedy suggested by the Union.

Article 10.01 required a letter to *confirm* the discharge. The letter was not an essential part of the actual discharge; it was not something which had to be done prior to the discharge. The agreement required the letter to be sent to the Union so that the Union would be aware of the discharge but Ms Hills was present at the meeting and the Union was thus aware of the discharge.

The Employer submitted that the violation here was a technical matter and that as an arbitrator I should address the substance and take a purposive approach. These parties specifically addressed the issue of remedy in Article 9.05 and empowered an arbitrator to make any arrangement which was "just and equitable". In this situation, the Employer submitted the remedy should not be one that rendered the termination null and void, as that remedy would not be just and equitable.

The Employer contrasted this right with the right provided under Article 7.03 (b) to have a representative of the Union present at the time disciplinary action was taken. A breach of that provision might lead to a declaration that the discipline be nullified but the breach here led to no prejudice and, in the absence of prejudice, it was wrong to nullify the termination.

The Employer submitted that a declaration of breach would suffice in these circumstances. In the alternative the Employer submitted that the grievor be compensated for the late delivery of reasons.

The Employer referred to the following additional authorities: *United Food and Commercial Workers International Union, Local 139 and Hoffman Meats Inc.* (July 3, 1990) unreported (Blair); and *Re Board of School Trustees of School District No. 13 (Kettle Valley) and Kettle Valley Teachers' Association* (1993), 37 L.A.C. (4th) 310 (Bird).

VI. CONCLUSIONS

The resolution of this preliminary matter primarily requires an interpretation of Article 10.01. In that process two principal questions arise:

1. Did the Employer breach Article 10.01?
2. If so, what is the remedy?

1. Did the Employer breach Article 10.01?

The Employer did not dispute that the provision had been violated, but it is necessary to review the breach prior to considering the remedy.

While Article 10.01 requires reasons "at the time of discharge", I do not believe the parties intended that the letter had to be prepared before or during the meeting, so as to be provided to the employee at the end of the meeting. Such a conclusion would suggest the Employer had to decide on the facts and the discipline before the disciplinary meeting. Instead I read Article 10.01 as permitting the imposition of discipline orally at a disciplinary meeting. The Employer is required to prepare a letter and provide it to the employee(s) and the Union but may do so after the meeting. Thus the parties use of "at the time of discharge" means that a letter should be provided very shortly after the meeting.

While I conclude that "at the time of discharge" does not require the letter to be available

before the meeting ends, nevertheless I find six weeks for the preparation of the letter is longer than contemplated by the agreement. Thus I find that the Employer did not, "at the time of discharge", direct a letter to the grievor and the Union "confirming ... discharge ... and giving all reasons" and, in so doing, the Employer breached Article 10.01.

2. What is the remedy?

Of course, the real issue between the parties was the remedy for the Employer's breach. The Union's submission that the discharge should be declared null and void raises two further issues:

- Does the agreement implicitly include nullification of the discharge as the remedy for the Employer's breach?
- If not, should the discharge nevertheless be invalidated as the remedy in this instance?

Does the agreement implicitly include nullification of the discharge as the remedy for the Employer's breach?

Article 10.01 requires a letter to be sent "confirming" a discharge. As I noted above, the discharge can take place prior to the Employer sending a letter. The confirming letter is to be sent to both the employee(s) and the Union. No reasons for requiring a confirming letter are provided expressly in the agreement and one is thus left to speculate as to the intent of the parties in requiring the letter. One purpose may have been to provide a basis for a decision on filing a grievance. Another purpose may have been to provide a clear statement of those issues which would be addressed in a grievance meeting or in an arbitration. One assumes the reason the letter must be copied to the Union is to make the Union aware of the discipline imposed and the reasons for it, so that it too can consider filing a grievance and

can more effectively represent its members in a grievance. However, neither anything in the article nor any of these assumed purposes suggest that the provision of a letter with full reasons for discharge is part of the process for the actual imposition of the discipline - rather it is something which can follow the discipline and *confirm* it.

I agree with Employer counsel in contrasting the right to reasons in Article 10.01 with the right provided in Article 7.03 (b) to have a Union Steward, or other Union representative, present at the time disciplinary action is taken. Having a Union Steward present at the time discipline is being considered may well influence any action which the Employer decides to take at such a disciplinary meeting. A Union representative at the meeting may be able to influence the decision taken by the Employer in the first instance (a point which reinforces my view that the Employer need not have its decision made and the discharge letter prepared for delivery at the disciplinary meeting). If discipline was imposed in the absence of the Union representative, and contrary to the rights provided in Article 7.03, it may be that an arbitrator would conclude the presence of a representative at the meeting was such an integral part of the procedure for the actual imposition of discipline that the discipline should be set aside in its entirety and treated as though it was null and void - that is treated as though it never existed and as though it was without any legal consequence from the beginning.

The Union has submitted that I should treat the late delivery of reasons in the same way as one might treat the failure to provide Union representation at a disciplinary meeting - the grievor's discharge should be treated as though it never existed and as though it was without any legal consequence from the beginning.

Such a conclusion is, in my view, contrary to the intention of the parties as demonstrated by the language which speaks of "confirming" the discharge. The use of the word "confirming" indicates to me that the discharge, or other discipline, exists and has legal consequences

before the letter is sent and that the letter itself, while required by the agreement, is to reinforce or support the discipline. The letter is something which follows the discipline and is not an integral or essential part of the actual imposition of the discipline, unlike the right of Union representation at the meeting.

I conclude that there is nothing in the language of the Article which would suggest that the only, or even the preferred, remedy for late delivery of reasons by the Employer is a complete setting aside of the discharge of the grievor, as though the discharge had never happened in law.

While I have placed no reliance on this next comment in reaching the above conclusion, I would note that the conclusion is consistent with the positions expressed in the letters of the parties and referred to above. In that correspondence there is no suggestion that the failure to provide a timely letter with full reasons had invalidated the discharge.

Should the discharge nevertheless be invalidated as the remedy in this instance?

Another way of considering the Union submission is to say that although nullification of the discharge is not required by the language of the agreement, nevertheless, because of the Employer's breach of Article 10.01, I should select nullification of the discharge as the remedy from the range of available remedies.

I note that the selection of remedy would ordinarily require a consideration of all the relevant evidence and this issue was argued on the basis of only a brief outline of the events related to the discharge.

A remedy is normally intended to compensate the party which has suffered from the breach,

intended to put the party into the position it would have been in had the breach not occurred. In this instance, while it is easy to see why the Union and the grievor would seek the remedy of nullification, it is not at all clear that some lesser remedy would be inadequate to cure the harm caused by the Employer's breach.

In particular I note that a grievance was filed the same day as the discharge. Even if the Employer had not violated the agreement in the manner in which it did, but had instead provided the letter with reasons in the time frame required by the agreement (on the following day for example), I do not think the letter would have altered either the timing or the form of the grievance which was filed.

The Union submitted that the opportunity to resolve the matter in the grievance procedure was lost. However, by agreement of Ms Lauder (the Employer representative who originally imposed the discharge) and Ms Hills (the Union Representative who attended the discharge meeting) the scheduled grievance meeting was cancelled. Thus it is difficult to see how the Employer's breach affected the conduct of the grievance procedure as the parties did not engage in any meetings or discussion about this matter as part of their grievance procedure.

The Union also suggested that it had been prejudiced by the fact that one of the residents was not available as a witness. This point was not mentioned in the agreed facts and I have no further information about it. I note that the Employer suggested if there was prejudice in this, it was more likely to be the Employer who was prejudiced through being unable to prove its allegations. In any event, even if I accept that the Union is disadvantaged by the absence of a witness, I do not see that this is a result of the late delivery of reasons. I am thus unable to conclude that the Union was substantially prejudiced by this factor.

Finally I note that one week before the hearing began the Union did receive full reasons in

the letter from Mr. Labord. Given this preliminary matter, the Union will have had full reasons on the substance of the grounds for the termination long before any evidence will be heard in this arbitration. The Union's ability to address the substance of the dismissal in the arbitration has thus not been substantially prejudiced.

To this point I have reviewed the facts and the collective agreement and found no basis to nullify the discharge. I now turn to the arbitration awards to determine whether they provide any assistance in resolving this issue. While the awards turn on the particular facts and the language of the collective agreements under consideration, the general approach followed in each of those cases can be briefly described.

In *Canada Post, supra*, the agreement required that discipline could only be imposed where reasons were provided to the grievor before or at the same time as the discipline was imposed. When that was not done, Arbitrator Burkett held that the notice was a mandatory requirement, the breach of which nullified the discharge. But in the case before me the letter is not a part of the imposition of discipline; rather the letter is something which follows the discharge and *confirms* the grievor's discharge.

In *Northwestern Hospital, supra,* the grievor was suspended indefinitely. The agreement required the provision of reasons within seven days and the reasons were not provided. Arbitrator Starkman found a breach but expressed the view that the "difficult question" was what remedy should flow from it. Arbitrator Starkman ultimately concluded that on the facts in that case the appropriate remedy was to nullify the indefinite suspension. It appears that an important consideration was the fact that the suspension was imposed pending further investigation, and thus the provision of reasons was part of the overall process for imposing discipline, unlike the situation before me where the reasons are to *confirm* the discharge.

In *Southern Alberta Institute of Technology, supra,* the Employer was required to provide reasons but did not do so until the opening statement at the arbitration hearing. The arbitration board interpreted the agreement as mandating the nullification of the discharge and, in the alternative, concluded that the grievor had been so prejudiced by the Employer's failure to provide reasons until the start of the arbitration hearing that the appropriate remedy was to nullify the discharge. In the case before me nothing in the collective agreement mandates the remedy of nullification of the discharge, and I have found that the late delivery of the letter did not cause significant prejudice to the Union or to the grievor.

In *Hoffman Meats, supra,* the agreement required that notice be given to the Union in writing within one day of the discharge of an employee. The employer did not provide that notice. Arbitrator Blair reviewed a number of other awards on this issue and concluded that the purpose of the provision was central to the remedy. In that case he noted that the notice to the union was required to be provided after the discharge and thus could not have been intended to allow the union to make submissions prior to the implementation of discipline. He then considered the effect on the union of the employer's breach, the question of the prejudice suffered by the union. He concluded that there had been no significant prejudice and thus limited the remedy to one of a declaration.

In *Kettle Valley, supra,* the employer had violated procedural requirements in the discharge of a teacher. Arbitrator Bird reviewed a variety of awards and decided not to nullify the discharge. He did however indicate that he regarded the employer's breach of the agreement as something to be considered after he had heard all the evidence and the final arguments of the parties.

To summarize, if the collective agreement stipulates that the parties intended nullification as the remedy for a breach, then that remedy is to be applied. Similarly if an employer erred

in the actual imposition of the discipline, such as failing to provide reasons in advance or failing to provide for union representation at the disciplinary meeting (assuming the collective agreement includes these requirements), then the remedy for breach would be to nullify the discipline. However, where the breach relates to some other employer function or duty, something which is not itself an integral part of the imposition of discipline, then the remedy of nullification would be selected only when that remedy was the most appropriate way of curing the harm done to the grievor or to the union.

Based on my analysis of the collective agreement, read in light of the above arbitral awards, I find nullification is not the appropriate remedy in this case. Nor do I think such a remedy would, in the words of Article 9.05, be "just and equitable". Thus I move to a consideration of what is the appropriate remedy.

I begin with a declaration that in failing to provide a letter and full reasons for some six weeks the Employer violated Article 10.01.

The Employer suggested that, at most, compensation in the form of lost wages should be provided for the period from discharge until the provision of the reasons. I have considered this submission but, in the absence of more evidence, it would be premature to make such a ruling now. Ordinarily the selection of a remedy for a breach of a collective agreement involves a consideration of all the circumstances. I do not now know all those circumstances and thus I have decided to order no other remedy at this time. If the Employer's breach had other consequences the evidence in the hearing on the merits will no doubt disclose those consequences and the parties are free to raise this issue in final argument. I will be in a position to deal with those issues once I have heard the relevant evidence.

In summary, in this interim award, I simply declare that the Employer breached Article 10.01

and that the breach does not the nullify the grievor's discharge. A further remedy, if any, will be considered after hearing the evidence and argument. The matter may be scheduled for further hearing.

Dated at London, Ontario this 16th day of March, 1998.

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Howard Snow, Arbitrator