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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ZEHRS MARKETS,
A DIVISION OF ZEHRMART LIMITED
- The Employer

-and-

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 1977
- The Union

AND IN THE MATTER OF the grievances of Wade Shaw

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Carole Hoglund	- Counsel
Sharon Hughes	- Manager Industrial Relations
Jeff Gibson	- Store Manager

On behalf of the Union:

John L. Stout	- Counsel
Jim McLean	- Business Agent
Wade Shaw	- Grievor

Hearings held January 5, March 29 and April 1, 1999.

AWARD

INTRODUCTION

The grievor was observed stealing merchandise from the Employer. When the Employer confronted the grievor, he admitted his theft. The Employer suspended and later discharged the grievor who grieved both his suspension and discharge.

The primary issue before me was whether the penalty of discharge for the theft was excessive.

THE EVIDENCE

Zehrs Markets - the Employer - operates supermarkets, including one in Orangeville which is staffed twenty-four hours per day. There are some 190 unionized employees and one store manager.

Wade Shaw - the grievor - worked at the Orangeville store from 1986 until 1998. He began as a part-time employee and became a full-time employee in 1990.

The grievor was one of four employees working the July 23-24, 1998 night shift. On occasion the grievor had served as night crew chief but on that shift he was a member of the crew. About 5:00 o'clock in the morning the grievor collected damaged goods in a shopping cart and he picked up and placed in the cart a large box of Tide laundry detergent. Approximately thirty minutes later he took his cart to the front of the store and then carried the box of Tide out of the store to his car and placed it on the back seat.

Jeff Gibson currently works as a store manager in another of the Employer's supermarkets.

On July 24 Mr. Gibson was temporarily assigned to the Orangeville store to assist the store manager. Mr. Gibson arrived outside the store shortly before 6:00 a.m. and saw the grievor leave the store and take the box of Tide to his car.

The night shift finished work at 7:30 a.m. Shortly before 7:30 Mr. Gibson asked the night crew chief to gather the night employees for a brief meeting. Mr. Gibson reminded the employees of the Employer's purchase policy and asked the employees whether they followed the Employer's purchase policy. The employees, including the grievor, all replied in the affirmative.

As the night crew left the store the crew chief told the employees, including the grievor, that if they had anything from the store they should get rid of it. The grievor went to his car and Mr. Gibson followed. Mr. Gibson observed the grievor remove a box from his car and testified that it appeared that the grievor slid the box under the van parked beside the grievor's car. The grievor acknowledged removing the box of Tide but denied sliding it under the van. Mr. Gibson approached the grievor's car and made eye contact with the grievor. Mr. Gibson testified that the first words spoken were the grievor's and were as follows - "Is there some way around this?" and "Can we work this out?". The grievor testified that Mr. Gibson spoke first and asked him how he would like to handle this, to which the grievor said he replied "The best way possible. I'd like to go inside and pay for it." The grievor testified that he had decided to pay for the Tide.

The grievor and Mr. Gibson agreed that Mr. Gibson then encouraged the grievor to be honest and tell the store manager the truth. The grievor collected the box of Tide, went back into the store and later met with the store manager in the presence of a Union representative. The grievor informed the manager that he had taken the box of Tide to his car and had not paid for it. The manager made certain that the grievor knew of the Employer policy on

purchasing products and then informed the grievor that he was suspended pending further investigation.

The grievor was charged under the Criminal Code with the theft of the Tide. The Union advised the grievor to be cautious about what he said to the Employer. During the following weeks the Employer attempted to contact the grievor to investigate the matter further but was unable to secure the grievor's cooperation in discussing the matter. As for the criminal charge, the grievor entered a guilty plea and was given probation and required to perform community service.

In late September 1998 the grievor sent the Employer a brief statement acknowledging his breach of the purchase policy and apologising for the ordeal caused by his error. He expressed the hope that his career with the Employer could be salvaged.

By letter dated October 1, 1998 the Employer terminated the grievor's employment for "breach of trust, dishonesty and breach of Company Purchase Policy".

Because of its concern regarding theft by both its employees and its customers, the Employer had developed a clear company-wide employee purchase policy indicating that all employees must pay for all products immediately after selection. The policy indicated that violation of the policy was grounds for dismissal. The Employer circulated its policy to employees, posted a notice in the employee lunch room regarding this policy, and reminded employees of the policy through articles in its employee newsletter. The Employer's consistent response to employee theft has been dismissal.

The grievor testified that he was aware of the Employer's purchase policy and its approach to employee theft; he said he had been informed of the policy by the store manager. He

knew the Employer's response to employee theft was discharge.

The grievor is 29 years old. He completed high school and has one and one-half years of university education. He lives in a common law relationship with a part-time employee of the Employer. His wife has two children from a prior relationship and together they have an infant daughter who was born prematurely in April 1998. Following his suspension the grievor was without work for some two weeks. He then found another job where he was still employed at the time of the hearing. He indicated that his income in his new employment was less than it had been with the Employer, that it was a longer trip from his home to his new work and that he preferred both his work and his fellow workers at the Orangeville store.

PROVISIONS OF THE COLLECTIVE AGREEMENT

The following is the relevant provision of the parties' collective agreement:

ARTICLE 4 - DISCHARGE AND DISCIPLINE

4.01 No employee shall be discharged or disciplined except for just and sufficient cause. . . .

POSITION OF THE EMPLOYER

The Employer said the grievor's theft of the box of Tide was dishonest, a breach of trust and a violation of its purchase policy. As such it went to the root of the employment relationship and was a fundamental breach of trust.

The Employer submitted that its business was vulnerable to theft, given the nature of its operation with the store staffed 24 hours per day by 190 employees and only one manager. The Employer had to trust its employees. The grievor had sometimes acted as night crew

chief and, as such, the grievor had been responsible for the night crew. Thus the Employer had to trust the grievor not to steal. The Employer's concern for theft had caused it to take extensive steps to inform employees of its purchase policy, a policy which the grievor understood. The Employer's concern about theft was the reason the Employer discharged employees who stole. Discharge for theft would deter other employees who might consider the theft of the Employer's goods. The grievor's actions must be assessed against the background of his position of trust, the Employer's significant theft problems and the grievor's awareness of the Employer's position on employee theft.

The Employer said this was a planned and deliberate act of theft. The grievor had no intention of paying for the Tide. He had the box of Tide in his cart for approximately 30 minutes before taking it to his car. He then had an additional one and one-half hours while still at work when he could have reconsidered. Finally, before leaving work, the grievor met with Mr. Gibson who reminded him of the Employer's purchase policy. The grievor indicated to Mr. Gibson that he was following the policy. As the grievor left the store the crew chief told him that if he had any product he should dump it, and that is what the grievor attempted to do with the Tide.

The Employer submitted that there was nothing to justify mitigation of the penalty. Reinstatement of the grievor would amount to the application of a "one theft" rule and would be inappropriate. The Employer asked that the grievances be dismissed.

The Employer referred me to and reviewed the following awards: *Re Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers, Local 9-14* (1973), 4 L.A.C. (2d) 148 (Palmer); *Re United Electrical Workers & Canadian General Electric Co. Ltd.* (1958), 8 L.A.C. 238 (Little); *Re Loblaws Supermarkets Ltd. and United Food & Commercial Workers, Local 1000A* (1990), 10 L.A.C. (4th) 425 (Thorne); *Re New Dominion Stores (Division of Great Atlantic & Pacific Co. of Canada Ltd.) and Retail, Wholesale & Department Store Union,*

Local 414 (1992), 28 L.A.C. (4th) 53 (Grant); *New Dominion Stores, A Division of The Great Atlantic & Pacific Company of Canada Limited, and Retail, Wholesale & Department Store Union Local 414* (April 13, 1993), unreported (Brent); *Re Great Atlantic & Pacific Co. of Canada Ltd. and Retail, Wholesale & Department Store Union, Local 414* (1991), 23 L.A.C. (4th) 269 (Thorne); *Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414* (1982), 6 L.A.C. (3d) 193 (Kates); *Loblaws Supermarkets Limited and United Food and Commercial Workers, Local 1000-A* (September 6, 1994), unreported (H. D. Brown); *Commercial Workers International Union, Locals 175-633 and Miracle Food Mart of Canada Limited* (September 24, 1991), unreported (Foisy); *The Great Atlantic and Pacific Company of Canada Limited and Retail, Wholesale & Department Store Union, Local 582* (May 19, 1987), unreported (Kilgour); *Re Canada Safeway Ltd. and United Food and Commercial Workers, Local 401* (1996), 58 L.A.C. (4th) 59 (Randall); *Canada Safeway Limited and United Food & Commercial Workers Union, Local 832* (July 19, 1996), unreported (Teskey); *Re Codville Co., Division of Oshawa Holdings Ltd. and Retail Wholesale & Department Store Union, Locals 454 & 480* (1991), 17 L.A.C. (4th) 289 (Priel); *Re Zellers Inc. and United Food & Commercial Workers Union, Local 175* (1996), 54 L.A.C. (4th) 176 (R. L. Levinson); and *Zehrs Markets, A Division of Zehrmart Limited and United Food and Commercial Workers Union, Local 1977* (March 15, 1999), unreported (Herlich).

POSITION OF THE UNION

The Union submitted that this was not a premeditated theft. The grievor had made no attempt to conceal the Tide - instead he had taken the largest box available. If it had been a planned theft, it was a poor plan. There was no deception and no attempt to hide the box, for example, in the trunk of his car.

The grievor had acknowledged to the store manager that he had taken the Tide. The grievor had apologised, had been polite and co-operative. He entered a guilty plea in the criminal charge and was given probation and required to perform community service. There was a good chance of rehabilitation.

The Union reviewed the grievor's personal situation and sought reinstatement of the grievor without compensation but with no loss of seniority. The Union asked that the period of time the grievor was off work (July 24, 1998 until the date of reinstatement) be recorded as a suspension. Implicit in the Union's submission that I substitute a suspension for the discharge was an abandonment of the grievance against the Employer's suspension from July 24, 1998 until the dismissal on October 1, 1998.

The Union reviewed the awards relied upon by the Employer and referred me to the following additional awards: *Re National Grocers Co. Ltd. and Teamsters Union, Local 419* (1983), 11 L.A.C. (3d) 193 (Langille); *Re International Minerals and Chemical Corp. Canada Ltd. and Energy & Chemical Workers Union, Local 892* (1990), 12 L.A.C. (4th) 244 (Norman); *Re New Dominion Stores and Retail, Wholesale & Department Store Union, Local 414* (1993), 31 L.A.C. (4th) 412 (Stewart); *Re New Dominion Stores and Retail Wholesale Canada (U.S.W.A., Local 414)* (1997), 60 L.A.C. (4th) 308 (Beck); *Re Canpar and Transportation Communications Union* (1997), 66 L.A.C. (4th) 1 (M. G. Picher); *Re Stelco Inc. (Hilton Works) and United Steelworkers of America (Currie)* (1994), 40 L.A.C. (4th) 229 (Tacon); and *Re Loeb Inc. and United Food and Commercial Workers Union, Local 175* (1998), 75 L.A.C. (4th) 277 (Pineau).

CONCLUSIONS

I usually follow a three step analysis in discipline cases:

1. Did the conduct of the grievor justify a disciplinary response?
2. If so, was the discipline imposed an excessive form of discipline? and,
3. If the discipline was excessive, what penalty should be substituted?

Did the conduct of the grievor justify a disciplinary response?

The grievor did steal the Tide and was caught. The Union accepted that the grievor's actions were wrong and that his conduct merited a lengthy suspension. I agree that the grievor's theft from the Employer was wrong and that his misconduct justified discipline.

Was discharge an excessive form of disciplinary response?

The Union submitted that the penalty of discharge imposed by the Employer should be reduced to a lengthy suspension. The Employer asked that the discharge be maintained.

The collective agreement requires just cause for dismissal. There is no provision in this collective agreement which specifies dismissal for theft. Thus theft does not automatically lead to discharge and the usual approaches in assessing just cause should be followed. I begin with a general discussion of just cause before moving to its application in this case.

Systems of employee discipline for just cause are commonly seen as being designed to correct employee behaviour. In any event, I believe the purpose of the system of employee discipline for just cause in this collective agreement is to correct employee misconduct. It is this view of the corrective purpose of discipline which forms the basis for the use of progressive discipline.

With progressive discipline, employer's are expected to impose progressively more serious

forms of discipline upon an employee in order to correct that employee's improper behaviour. An employer commonly begins with a verbal warning about misconduct, progresses to a written warning if misconduct continues, and then imposes suspensions if the behaviour persists. If that series of increasingly severe disciplinary sanctions does not cause the employee to correct his or her misconduct, then the employer may move to discharge the employee.

But there is no magic in progressive discipline - it is intended for use in cases where the employee's conduct is such that it can be corrected and in cases in which the misconduct is not excessive. In other words, if the employee's misconduct is not something which can be corrected through progressive discipline, or if the misconduct is particularly serious, the penalty of discharge may be the first form of discipline imposed.

Finally, in order for discipline to be for just cause the discipline imposed must bear a reasonable relationship to the seriousness of the employee's wrong. Moreover, "just" discipline must be assessed not simply in relation to the wrong, but must also be assessed for its appropriateness for the particular employee, given his or her length of service, previous employment record, awareness of employer expectations, etc. Because of this, employees with better discipline records or with more seniority, to mention only two considerations, ordinarily receive "better" treatment in the sense that what is just for those employees may be a milder form of discipline than that which would be imposed upon another employee for the same misconduct.

Turning now to the details of this case, in considering another penalty I look first to whether the grievor's conduct was subject to correction by a lesser penalty. Most employees know that theft from their employer is wrong. Employees of this Employer have been clearly advised of that fact by the Employer and the grievor acknowledged that he knew the

seriousness with which the Employer treated theft and knew that the Employer's response to theft was discharge. The grievor knew theft was wrong. His theft was not a spur-of-the-moment action. The grievor stole the Tide and did not take appropriate steps to pay for the Tide after Mr. Gibson met the employees and reminded them of the Employer's purchase policy. I thus doubt that a lesser penalty would correct the grievor's behaviour in this instance.

In considering a lesser penalty I next assess the seriousness of the grievor's misconduct. Theft from one's employer is frequently a serious matter. Any employer should be able to trust its employees not to steal from it. Given the nature of the supermarket business, it is necessary for this Employer to be able to trust its employees not to steal. It is particularly important that the Employer can trust those employees who work the night shift at a time when there are few other persons in the store. Thus I find that the grievor's theft is a serious matter, a point accepted by the Union in its submission that a lengthy suspension be substituted for the dismissal.

Since the grievor's misconduct was not the sort of misconduct which would be amenable to correction through some lesser penalty, and since the grievor's theft was a serious matter, is there any basis for concluding that the penalty of discharge was excessive?

In *Re Canadian Broadcasting Corp. and C.U.P.E.* (1979), 23 L.A.C. (2d) 227 (Arthurs), Arbitrator Arthurs reviewed various factors which might justify the substitution of a lesser penalty in a theft case. This list of factors is frequently quoted and used in theft cases - see, for example, its use in *National Grocers* (Langille), *New Dominion Stores* (Beck) and *Zehrs Markets* (Herlich), *supra,* three of the cases relied upon by the parties. This list was referred to by both counsel during argument. This list of factors is simply that - factors which in other cases have been found to be helpful in assessing whether discharge was a just penalty

or whether another lesser penalty should be substituted. I consider each of the nine factors:

1. *"bona fide* confusion or mistake by the grievor as to whether he was entitled to do the act complained of"

   The grievor acknowledged that he knew of the Employer's purchase policy and there was no claim of confusion about his right to take the Tide.

2. "the grievor's inability, due to drunkenness or emotional problems, to appreciate the wrongfulness of his act"

   There was no evidence of any such factor which would have prevented the grievor from understanding that his theft was wrong.

3. "the impulsive or non-premeditated nature of the act"

   While the Union suggested this theft was impulsive, the grievor did have at least 30 minutes with the Tide in his cart before he took it from the store to his car and he had another hour and a half before the shift ended to reconsider his actions. He took no steps to correct his conduct, even after Mr. Gibson reminded him of the purchase policy.

4. "the relatively trivial nature of the harm done"

   While there was only one item involved, I conclude that the theft of this one item from the Employer's store is not a trivial matter.

5. "the frank acknowledgement of his misconduct by the grievor"

   The grievor could have acknowledged his theft to Mr. Gibson in the meeting near the end of his shift. He did not, although I accept that doing so in front of his co-workers would have been particularly difficult. When he was confronted by Mr. Gibson outside the store he did acknowledge his misconduct, and he repeated his acknowledgment to the store manager. However he later declined to participate in the Employer's on-going investigation.

6. "the existence of a sympathetic, personal motive for dishonesty, such as family need, rather than hardened criminality"

While the grievor advised the store manager of money problems in the meeting held following the theft, there was no evidence at the hearing from which I might conclude that such concerns led to the theft.

7. "the past record of the grievor"

   The evidence indicated that the grievor had been a good employee.

8. "the grievor's future prospects for likely good behaviour"

   It would have been very difficult to have predicted that the grievor would steal from the Employer and it is now very difficult to make any reliable predictions about his future conduct. The grievor testified that he regrets his theft. He indicated he would not steal again if reinstated. However, I believe that if the grievor had been asked before the theft, he would have denied that he would steal from the Employer.

9. "the economic impact of discharge in view of the grievor's age, personal circumstances, etc."

   The grievor rapidly found other employment and that fact, together with his age and educational background, suggests there is nothing in this case to make discharge a particularly onerous penalty for the grievor in comparison with the impact that discharge would have upon another employee.

My review of the above factors suggests one item that would support a lesser penalty (the grievor's past record) and two which are equivocal in their impact (the grievor's acknowledgement and the prospects for future good behaviour). However, taken as a whole, those factors do not suggest that the penalty of discharge was excessive.

The parties referred me to numerous other cases of theft and made submissions on the appropriateness of discharge for theft. I will not review those many awards here; I agree with the parties that these awards turn on their own facts, as just cause for discipline cases normally do.

Finally, I have considered whether there were any other factors unique to this case. While I note the grievor's preference for this job because of its proximity to his home, its higher pay and more congenial working environment, I have found nothing which persuades me that discharge was excessive. I conclude that discharge was not an excessive penalty for the grievor's theft.

If the discipline was excessive, what penalty should be substituted?

As I have concluded that discharge was not an excessive penalty, it is not necessary to consider this third issue.

For the above reasons, both the grievance regarding the suspension and the grievance regarding the discharge are dismissed.

Dated at London, Ontario this 21st day of April, 1999.

Howard Snow, Arbitrator