File: 166-2-26720

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

BARRY JOHN GREEN

Grievor

and

TREASURY BOARD (Transport Canada)

Employer

Before: P. Chodos, Vice-Chairperson

For the Grievor: Peter Barnacle, Counsel, Canadian Air Traffic Control Association

For the Employer: Ronald Snyder, Counsel

Heard at Ottawa, Ontario,
February 25, 1998.

This matter has a rather unusual history. The grievor was terminated from his employment as an air traffic controller effective May 29, 1995. Mr. Green grieved his termination and ultimately referred the grievance to adjudication. The adjudicator, Board Member Rosemary Simpson, heard this matter over an extended period of time; following nine days of hearing, Mrs. Simpson issued her decision dated June 14, 1996, denying Mr. Green's grievance. An application for review was made on behalf of the grievor to the Federal Court, Trial Division, and on July 8, 1997 Mr. Justice Cullen rendered his judgment which contains the following order:

> *IT IS HEREBY ORDERED that this matter be referred back to a different adjudicator to determine the appropriate penalty, taking into consideration the principles of corrective and progressive discipline, and the reasons of this decision. ...*

As a consequence of this judgment, which we are advised, has been appealed to the Federal Court of Appeal, this matter was referred to the undersigned: Court file A-542-97.

At the commencement of the hearing, I determined that the record upon which this proceeding should be based is the adjudication decision of Mrs. Simpson, the exhibits which were filed as part of that proceeding, and the affidavits of Mr. Monte Pacey and Mr. Steven Cooper who are, respectively, the Ontario Regional Director of the Canadian Air Traffic Control Association, and the Regional Staff Relations Officer, Ontario Region, Transport Canada; these affidavits were filed in respect of the application for review in the Federal Court, Trial Division. The parties did not submit any additional evidence.

As the Federal Court judgment reported as *Green* v. *Canada (Treasury Board)* (1998), 134 F.T.R. 108 is at the core of this proceeding, it is appropriate to note at some length the relevant portions of that decision:

> *The facts in this case are not in dispute, and, save for the relevant contents of the adjudicator's decision, need not be repeated here in detail.*
>
> *After 23 years as an air traffic controller, the applicant was terminated from his employment for disciplinary reasons on May 29, 1995. His discharge letter indicated that his actions had "demonstrated a gross disregard for the*

responsibilities of [his] position," potentially jeopardizing the safety of the flying public.

The applicant grieved his discharge to the Public Service Staff Relations Board. The adjudicator denied his grievance on the basis of the gravity of the misdemeanour; the adjudicator's disbelief that such an incident would not be repeated; and the conclusion that the employer's decision to terminate the applicant's position was not unreasonable because the bond of trust between it and the applicant had been irretrievably broken.

THE ISSUES

The applicant submits that although there is cause for discipline in this case, the adjudicator erred in failing to reinstate the applicant with a reduced disciplinary record. The applicant further submits that the Adjudicator erred in denying the grievance.

(page 110)

...

However, although I am not prepared to interfere with the adjudicator's finding regarding remorse, I do feel compelled to examine this finding in relation to the adjudicator's assessment of an appropriate penalty. In my view, the finding of a lack of remorse is part and parcel of a finding of an inability or unwillingness to rehabilitate oneself. In this regard, the adjudicator specifically reasoned:

> *The grievor's counsel urged me to find that this isolated incident in Mr. Green's long 23 to 24-year career as a controller was unlikely to ever occur again. I wish I could believe that that would be the case.*
>
> *Considering the grievor's good record and long service I searched the evidence for signs of remorse or appreciation of the implication of his actions.*

The adjudicator then went on to conclude that there were no signs of remorse. This finding is at the bottom of the conclusion of a lack of rehabilitative potential, evinced by the statement "I wish I could believe that that [the unlikelihood of repetition of a similar grave misdemeanour] would be case." Clearly, on the basis of the applicant's perceived lack of remorse, the adjudicator felt that the applicant could not be rehabilitated.

The Ontario Court of Appeal in College of Physicians and Surgeons of Ontario v. Gillen (1993), 13 O.R.(3d) 385,

upheld the Divisional Court on the issue of the relationship of remorse to appropriate penalty. In that case, the Disciplinary Committee found that the applicant had denied his conduct and not faced up to the problem. The Ontario Court of Appeal, at page 386, found that under no circumstances should denial serve to increase what would otherwise be an appropriate penalty. Compare this to the case at Bar, and the finding that the present applicant lacked remorse and the conclusion of a lack of rehabilitative potential. I agree with the reasoning of the Ontario Court of Appeal, and apply it to the present case.

It is not clear from the adjudicator's reasons that she was "punishing" the applicant for his attitude, or if the adjudicator had concluded that the only way to protect the flying public was to uphold the applicant's dismissal from his job. However, in the context of the applicant's 23 unblemished years of service as an air traffic controller, I believe that concern for the flying public was not foremost in the adjudicator's mind when she made her decision.

Issue 3: Assessment of mitigating factors

The applicant submits that the adjudicator failed to consider a number of matters in her assessment of mitigating factors. The core of the applicant's submissions concern the adjudicator's findings that I have already canvassed, above. The applicant submits the additional point that the adjudicator failed to consider corrective discipline principles of the application of progressive discipline in consideration of the good record and long service of the applicant.

Analysis: It is increasingly the trend, in labour arbitration decisions, for adjudicators to apply the theory of progressive or corrective discipline when considering the appropriate penalty to impose. Although such trends are by no means binding on labour relations tribunals, I believe that, in the circumstances of this case, the adjudicator was obligated to look at corrective discipline for the applicant, and clearly state in her reasons why she would reject corrective discipline for the applicant. She was obligated to look at corrective discipline because of the applicant's long career of good service that the adjudicator acknowledged the applicant had with the employer.

However, in her lengthy, 24-page decision, the adjudicator makes not one mention of corrective discipline as it would apply to the matter before her. I cannot even infer that the adjudicator considered corrective discipline as a substitution for the penalty of discharge. There is no

language to that effect in the adjudicator's decision. There should have been.

Another problem with the adjudicator's assessment of mitigating factors, and her non-assessment of corrective discipline, is that there is no indication that the adjudicator considered the ramifications of dismissal for the applicant. The ramifications constitute an important mitigating factor in this case. The dismissal of the applicant in this case does not amount to the same thing as an employer's dismissal of a plumber, electrician, or even lawyer for that matter. A plumber, electrician, or lawyer could each find work elsewhere within their profession. However, the dismissal of the applicant, in this case, means that, for the rest of his life, the applicant cannot work at a professional level as an air traffic controller, despite the fact that he had done so in a commendable manner for the past 23 years. Surely, this is an important mitigating factor to be considered when determining the appropriate penalty in this case.

It should be pointed out that counsel for the respondent, in written and oral arguments, dealt in a comprehensive fashion with most of the applicant's allegations concerning mitigating factors. However, the two most important factors in the circumstances of the applicant; i.e., his acknowledged long and untarnished work record and the ramifications of dismissal, were not addressed by the adjudicator. In the context of these two mitigating factors, it was incumbent on the adjudicator to seriously consider the possibility of corrective discipline as a substitution for the penalty of dismissal. This, she did not do. The adjudicator's decision is thus not supportable by the evidence that was before her. Curial deference, as set out by this Court, cannot be accorded to such a decision.

CONCLUSION

Air traffic controllers perform duties of the utmost importance to public safety. They operate under stressful conditions, and sometimes workplace demands are made of them which may seem to be very heavy or unreasonable to the average working person. However, air traffic controllers are professionals, and presumably are well-trained in their professions. That they operate under stressful conditions and are sometimes subject to heavy work demands comes as no surprise to them.

The applicant was working alone when he left his post unattended for about half an hour. This was at a time when, in his own words, planes were "flying all over the place." Although he notified Sault Ste. Marie and Toronto that he was

> *leaving, he did not announce when he would be back. He neglected to change the ATIS broadcast message to reflect his absence. Those needing to use the airport would have assumed that he would be back in a few minutes, as is usual when, for example, an air traffic controller leaves to use the washroom facilities.*
>
> *But, the applicant did not return in a few minutes. Instead, after performing some necessary toiletries, he went to the airport restaurant and had lunch there. He did not check back in to his post before he went for lunch. He did not bring his lunch back to his post to eat there. He did not even rush back to his post upon his return, but instead lingered for a few minutes at the Administrative Secretary's desk.*
>
> *A lot of confusion ensued at the airport and in the airspace as a result of the applicant's actions. <u>A potentially hazardous situation was thus created.</u> (my emphasis)*
>
> *There is no indication that the applicant had ever done such a thing in the past.*
>
> *There is no issue as to the necessity of disciplinary action in this case. The issue is the severity of the penalty imposed. In my view, the adjudicator erred in her assessment of the mitigating factors by ignoring relevant evidence before her. The factors that she ignored are so significant that I conclude that the adjudicator's decision is based on an error in law, and is patently unreasonable.*
>
> *(pages 114 to 116)*

<u>Argument</u>

Counsel for the employer referred to several findings of facts made by the adjudicator in the first instance. He noted Mrs. Simpson's finding that this case was about a controller who disregarded basic principles of air traffic control by leaving the tower unmanned for 35 minutes, thereby jeopardizing the safety of the travelling public. Mr. Snyder referred to the testimony of Mr. Mel Cooper, Superintendent of Tower Operations, Ontario Region, who outlined the "life threatening" incidents which arose from the grievor's conduct. Counsel for the employer maintained that these incidents could have resulted in loss of life and serious damage to property. Mr. Snyder submitted that had that been the consequence of these events, there would be no question that the grievor's employment should be terminated. Mr. Cooper testified that where aircraft are concerned there is no room for confusion; yet,

Mr. Green himself stated to Ms. Lillian Shelsted, an Administrative Clerk at the Sudbury Control Tower that *"planes were flying all over the place ..."* (page 8 of adjudication decision). Mr. Snyder noted the adjudicator's observation that *"Mr. Green, as an experienced controller, knew what he was supposed to do. He simply decided on May 9 to go for lunch and disregarded these basic principles of air traffic control."* Mr. Snyder maintained that there is no rationale or mitigating circumstance which can outweigh the very serious nature of the grievor's misconduct. Mr. Snyder referred to Mrs. Simpson's conclusion that:

> *Leaving the tower unmanned during advertised hours while aircraft were actively using it is a grave misdemeanour warranting discharge. I have considered all the mitigating factors suggested by counsel for the grievor and must find that they are insufficient to mitigate the penalty of discharge.*
>
> (page 23)

Counsel for the employer submitted that this case is on all fours with the adjudication decision in *Whittley* (Board file 166-2-16199). That case concerned an air traffic controller working alone at the North Bay Tower; Mr. Whittley left the tower unattended for 20 minutes during which time one aircraft departed, and another one landed on the same runway within the same minute. The adjudicator in this case upheld the discharge, notwithstanding that the grievor had 15 years of service as a controller. Counsel maintained that the adjudicator's conclusions in the *Whittley* case are equally applicable to the instant case.

With respect to the principles of progressive discipline, counsel submitted that it is trite law that certain acts of misconduct warrant outright dismissal. In support of this submission, counsel cited the judgment of the Supreme Court of Newfoundland in *Murphy* v. *Sealand Helicopters Ltd.* [1988] N.J. 319. This case involved a pilot who landed his helicopter in dangerous conditions, thereby causing serious damage to the aircraft; as a consequence he was dismissed. In an action for wrongful dismissal the court concluded that there was just cause for termination, notwithstanding that the plaintiff had a satisfactory record of several years' employment with the employer, the court finding that *"The consequences to the travelling public, the passengers in this case, was extremely serious and that danger to life was involved."*

Mr. Snyder referred to evidence, which he argued, demonstrates that the grievor has failed to recognize the seriousness of his actions, and indicates that the grievor might very well react in the same way again. Mr. Snyder referred to the grievor's answers to questions put to him by the employer, which were reflected in a document submitted as Exhibit E-22. It is noted in Exhibit E-22 that the grievor stated that he left a safe operation and would go to lunch again under the same circumstances. Furthermore, in his testimony the grievor observed that Mr. Cooper had overreacted to the events of May 9th (pages 17 and 23 of the adjudicator's decision).

Mr. Snyder submitted that, while I cannot judge the credibility or sincerity of the witnesses, I can clearly consider the pernicious nature of the grievor's actions, and his cavalier attitude towards his own conduct. Mr. Snyder submitted that the bonds of trust between the grievor and his employer are irrevocably broken. Accordingly, even if I find that termination is overly harsh, it would be inappropriate to reinstate the grievor. Rather, the grievor should be awarded pay in lieu of reinstatement, equivalent to one month's salary. Alternatively, if reinstatement is ordered, it should only be as of the date of the issuance of this decision. Mr. Snyder also urged that in the event of reinstatement, with the consent of both parties, the grievor should be deployed in another position; if the parties are unable to agree, the grievor should be provided with additional compensation in lieu of reinstatement to his former position.

Counsel for the grievor submitted that the Federal Court's determination does not require that I make findings on any issue other than the application of progressive discipline. In any event, there should be no presumption that the only penalty that protects the public is discharge. Mr. Barnacle disputed the employer's characterization of the potential risk arising from the grievor's conduct in leaving the tower unattended. He noted the evidence of Mr. Scott Taylor, the controller responsible for the North Bay sector, at the Toronto Air Traffic Control Centre, to the effect that when a tower is unattended, as is the case for the Sudbury Control Tower at night, the control zone reverts to Class E airspace (p. 9 of the adjudicator's decision). Mr. Barnacle also referred to paragraphs 5, 6 and 7 of Mr. Pacey's affidavit, as well as paragraphs 7 and 8 of Mr. Cooper's affidavit, which he maintained demonstrate that the consequences of not staffing a tower for any given period have been exaggerated by the employer. He also referred to the evidence demonstrating that pilots can choose to land, notwithstanding the absence of a controller, based on their own

discretion. Mr. Barnacle submitted that the employer's policy and practice envisage a control tower being empty for periods of time. He also noted Exhibit E-8, the employer's log, which demonstrates that in any given year there are a number of occasions when for varying periods of time a control tower is unstaffed. Counsel submitted that, while he is in agreement that it was inappropriate for the grievor to be absent, this offence is not nearly as serious as the employer is suggesting.

Counsel also noted that contrary to the *Whittley* case (supra) Mr. Green did give notice of his absence, that is, he sent faxes indicating when he left and when he returned. Mr. Barnacle also maintained that, whatever confusion existed at the time, it was exacerbated by the Toronto Area Control Centre's lack of understanding of the ATSAMM.

Counsel for the grievor also maintained that the *Whittley* case is distinguishable on other grounds as well. Mr. Whittley had made plans to fly his plane from the airport two hours prior to the end of his shift; the adjudicator found that he had no intention of going for lunch notwithstanding his testimony to that effect. Furthermore, Mr. Whittley was found to have damaged property, falsified the duty log, as well as to have left his shift two hours early. There is also evidence of premeditation in the *Whittley* case (supra) in that he had made plans some time before to leave his shift early, as reflected in the flight plan which he had filed. Counsel also submitted that the *Sealand Helicopters* case (supra) is an inappropriate precedent as it concerns a wrongful dismissal action before the courts, not an arbitration involving discipline. Mr. Barnacle submitted that arbitrators dealing with discharge grievances apply different sets of principles than do the courts in wrongful dismissal cases. Counsel referred to a number of adjudication decisions including *Fortin* (Board file 166-2-17772), in which a radio operator was given a ten-day suspension for closing down a flight service station without authorization and in direct defiance of his manager. Notwithstanding the adjudicator's finding (at page 13) that *"By his actions, airmen flying in that area were put in danger for their lives and equipment was in peril",* the adjudicator reduced the penalty to a five-day suspension.

Counsel argued that arbitrators have applied corrective discipline even in the most serious of offences. In support of his submission counsel noted the adjudication decisions in *Macdonald* (Board files 166-2-15227 and 15228); *Douglas*

(Board file 166-2-18237) as well as arbitral awards in *Boise Cascade Canada Ltd.* (1991), 20 L.A.C. (4th) 355, *Ontario (Worker's Compensation Board)* (1995), 45 L.A.C. (4th) 257, *Bay d'Espoir-Hermitage-Fortune Bay Integrated School Board* (1995), 46 L.A.C. (4th) 141, *New Dominion Stores and Retail Wholesale Canada* (1997), 60 L.A.C. (4th) 308, *Alcan Smelters and Chemicals Ltd.* (1991), 23 L.A.C. (4th) 257, and *Simon Fraser University and A.U.C.E., Local 2* (1990), 17 L.A.C. (4th) 129.

Counsel also referred at length to the chapter on discipline in *Canadian Labour Arbitration*, (3rd ed.), (1996), by Messrs. Brown and Beatty and in particular to the subheadings concerning mitigating factors for discipline, the principles governing progressive discipline, and the issue of rehabilitative potential. Mr. Barnacle noted that the generally accepted test is that if the employer's interest can be protected by another sanction, then discharge is not warranted. In essence, arbitrators must balance the employer's concerns against the employee's interest in the job; accordingly, the arbitrator must consider various mitigating factors including seniority and the economic hardship faced by the grievor. With respect to the latter, as was noted by Mr. Justice Cullen, the grievor's termination has particularly harsh consequences, given the realities applicable to air traffic controllers. Mr. Barnacle also referred to paragraph 7:4428 of *Canadian Labour Arbitration*, which notes that *"The employment record is a particularly significant mitigating factor",* an observation which was also made by Mr. Justice Cullen.

Counsel also maintained that there is evidence suggesting that Mr. Green's state of mind at the time may have been a factor in his uncharacteristic behaviour; he referred to Mr. Green's testimony at page 12 of the adjudication decision that he was *"very angry at management leaving him alone";* in addition, Ms. Shelsted acknowledged in cross-examination that Mr. Green *"might have been angry and upset".* Counsel submitted that there is no evidence demonstrating that Mr. Green cannot be rehabilitated with a lesser penalty.

With respect to the question of the appropriate penalty which should be imposed in lieu of discharge, Mr. Barnacle submitted that a three year suspension is an unheard of disciplinary measure; furthermore, the length of time involved in the adjudication process was not under the grievor's control and, accordingly, it would be inappropriate that the whole burden for this period of time should fall on the

grievor's shoulders. In the circumstances, counsel suggested that an appropriate response would be a five to ten-day suspension and a further three month period of leave without pay, representing a reasonable proportion to be assessed against the grievor for the delay in the process.

In rebuttal counsel for the employer submitted that the evidence demonstrates that there was a great deal of confusion in respect of the appropriate airspace as a result of the grievor's actions, and this confusion is not attributable to the Toronto ACC. Mr. Snyder submitted that it was also clear that Mr. Green did not act in accordance with the ATSAMM and had not done a number of things that he was required to do in the circumstances. He noted that as a result of Mr. Green's action, the pilots made assumptions about conditions which were not factual. Mr. Snyder also stated that the entries in the log book concerning absences for brief periods do not provide a complete picture; there is no indication as to whether there was any traffic on those occasions. Furthermore, virtually all of the absences were of very brief duration.

Mr. Snyder also argued that there was premeditation here in that Mr. Green was intent on going for lunch whether or not there were safe conditions. He also submitted that this case is entirely different from the facts in *Fortin* (supra); radio operators do not provide guaranteed separation; the level of service they provide is entirely different from controllers; furthermore, unlike Mr. Fortin, Mr. Green did not provide proper notice of a shut down, thereby generating considerable confusion. Mr. Snyder also noted Mrs. Simpson's finding of fact, based on Mr. Green's testimony, that there was no indication of remorse from the grievor, even at the hearing. In this context, Mr. Snyder noted the observation concerning rehabilitative potential in *Canadian Labour Arbitration*, that *"Basic to this general approach is an assessment of the grievor's ability and willingness to reform or rehabilitate himself so that a satisfactory employment relationship can be reestablished ..."*. (paragraph 7:4422). Mr. Snyder maintained that there is no such evidence in this case; on the contrary, the grievor has not truly acknowledged his wrongdoing or accepted his responsibility.

Reasons for Decision

The circumstances of this case pose something of a dilemma for the undersigned. In accordance with the order of the Federal Court, it is my responsibility to reconsider the issue of the appropriate penalty. However, I do not have the advantage of the *viva voce* testimony of the various witnesses who appeared before Mrs. Simpson, in particular the testimony of the grievor. Given the nature of this case, it is difficult to overstate the importance of being able to listen to such testimony at first hand, and to have an opportunity to observe the demeanour of the witnesses. The observations and conclusions outlined below are necessarily constrained by these limitations.

It is self-evident that an adjudicator cannot properly determine the appropriate penalty without considering the nature of the misconduct which led to the disciplinary sanction imposed by the employer. It should be made clear that in the proceeding before me there is no dispute that there was indeed misconduct on the part of the grievor; furthermore, counsel for the grievor has readily recognized that the misconduct warranted a sanction of some significance. However, Mr. Barnacle maintains that there are critical facts here which serve to mitigate the ultimate penalty of discharge. Lest there be confusion in this respect, it is important to observe that arbitrators have universally accepted that there are some employment offences, some acts of misconduct, which are so egregious that the only appropriate response is to terminate the employment relationship regardless of the consequences for the grievor. On the other hand, the principles of progressive discipline and issues such as the rehabilitative potential of the offending employee are equally important and also universally recognized as requiring consideration on the part of an arbitrator or adjudicator. I have considered all of these factors in arriving at the following conclusions.

The fundamental question I have to address is whether Mr. Green's conduct on May 9, 1995, in leaving his post for a 30 minute lunch break, is so serious as to override any mitigating factors applicable to the grievor, in particular his 23 years of discipline-free service, and the undisputed fact that, should his termination be upheld, Mr. Green will never be able to work in his chosen career again. Both parties have referred at length to the *Whittley* decision (supra), the employer arguing that this

case is on all fours with that decision, the grievor's counsel submitting that it is readily distinguishable. In my view, in a number of important respects the grievor's conduct in this case was quite different from that of Mr. Whittley. Mr. Whittley had filed a flight plan for himself prior to the commencement of a shift, thereby clearly demonstrating his intention to leave his shift two hours early. Accordingly, there was no question in the *Whittley* case that the grievor had acted with premeditation. The adjudicator also found that the grievor's explanation that he left the tower for 20 minutes for a washroom break was not credible. Thus, at page 35 of the decision, the adjudicator notes that: *"I am more inclined to the view, on the balance of probabilities, that his actual departure for Florida rather than the need for a washroom relief break and a sandwich was Whittley's true intent when he left the control tower at 1227, or thereabouts, on 23 March 1986."* That is, Mr. Whittley was found to be dishonest, and entirely motivated by selfish concerns which had nothing to do with any bodily needs or personal stress. In contrast, Mr. Green testified that he had been troubled by personal problems with respect to his marriage and that he was also upset upon discovering that the other controller assigned to the tower on his shift had called in sick that day, resulting in his being left alone in the tower; in addition, he had soiled himself as a result of being unable to get to the bathroom on time. While these circumstances do not excuse his actions, they do explain why an experienced controller with 23 years of unblemished service would engage in apparently uncharacteristic behaviour and manifest such a lapse of judgment. While the grievor's evidence in this respect is largely uncorroborated, the employer has not provided any evidence which would suggest some ulterior, nefarious motive for his conduct. If Mr. Green was not under some stress or in an emotional state, why did he, with many years of evidently unblemished experience, act in the manner that he did? Again, this does not excuse his behaviour, but it does suggest that what happened was an impulsive, spontaneous act which is out of character and not likely to be repeated.

Undoubtedly the employer acted in good faith when it considered that in light of the very onerous responsibility which the Air Traffic Control System must bear, it had to err on the side of caution when considering the appropriate penalty to impose on the grievor. Nevertheless, I am not persuaded that a lesser penalty would not have achieved the desired result. In this respect, I would note the following passage from

Professor Palmer's text, *Collective Agreement Arbitration in Canada*, (i.e. Palmer and Palmer, (3rd ed.) *Butterworths,* (1991) (at page 294):

> *... If an employer is going to deviate from the accepted approach of progressive discipline he must at the very least come forward with clear and compelling justification for discharge as the only response reasonably available to him.*

I would also note in this context that for the most part arbitrators are of the view that the determination of an appropriate penalty should not be a mere formulaic exercise. Thus, even serious acts of misconduct such as theft and assault have nevertheless been the subject of a wide range of mitigating considerations. In *Canadian Labour Arbitration*, by Messrs. Brown and Beatty, the learned authors note the following:

> ***7:4400 Mitigating Factors***
>
> *Although many of the grounds relied upon by arbitrators in ameliorating the discipline initially invoked by the employer are peculiar to the nature of the misconduct engaged in by the employee, or to the employment context in which the incident took place, there are a large number of diverse circumstances surrounding the employee's culpable behaviour, and other additional factors pertaining to the grievor's personal circumstances which are common to all categories of disciplinable misconduct. In considering and weighing the presence, or indeed absence, of such factors arbitrators have attempted to individualize and personalize the disciplinary system to the particular circumstances of the grievor.*

The authors then referred to the well known case of *Steel Equipment Company Ltd.* (1964), 14 L.A.C. 356 (Reville), where the learned arbitrator lists ten factors which can serve to mitigate the penalty imposed by the employer.

Clearly, the factor which weighs most heavily in respect of mitigation is the grievor's employment record. As Messrs. Brown and Beatty have observed:

> ***7:4428*** *Employment record. It is unlikely that there is any other factor about which arbitrators will inquire, and on which they will rely, with more consistency and regularity in determining whether to ameliorate a disciplinary penalty, than the existence of a long and unblemished employment record. In all but the most extreme cases, and perhaps cases involving a relatively mild disciplinary sanction, arbitrators have allowed employees with such a service record to draw*

> *upon it, much like a bank account, when on some isolated occasion they have misconducted themselves in some manner or another. That is, in fashioning the appropriate sanction, arbitrators have reasoned that when, in relatively isolated instances, an employee's conduct falls below the accepted norm, his behaviour should properly be measured against his years of productive and acceptable service. Thus, just as the doctrine of the culminating incident recognizes the propriety of imposing more severe penalties on an employee who persistently falls short of the expected norm, arbitrators are equally sensitive to the realization that an employee, who on an infrequent and isolated occasion misconducts himself, is likely to respond positively to much less serious forms of disciplinary sanction.*

It need hardly be stated that the grievor's 23 years of service must weigh heavily in the balance. I have concluded therefore that a discharge is too harsh a penalty in these circumstances.

Accordingly, for the reasons noted above, the grievance is partially sustained. Counsel for the grievor has acknowledged that a suspension is in order here; in my view a suspension without pay of three months would convey to the grievor the seriousness with which his misconduct is viewed. I am also taking up Mr. Barnacle's suggestion that an additional period of leave without pay should be assessed, recognizing that the grievor should share with the employer the burden of the delay resulting from the adjudication and judicial process. Therefore, I am directing that the grievor be considered on leave without pay for an additional period of three months. I would note that compensation for the remaining retroactive period prior to reinstatement is subject to the usual requirements respecting mitigation of damages. I shall remain seized with this matter for a period of six weeks from the date of this decision, in the event that the parties encounter difficulties in implementing this award.

P. Chodos,
Vice-Chairperson.

OTTAWA, April 6, 1998.