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Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

BHARRAT DHANIPERSAD

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Paul Taylor, Representative

For the Employer: Sean Gaudet, Counsel

Heard at Toronto, Ontario,
May 28 to June 1, 2001.

DECISION

[1] Mr. Bharrat Dhanipersad (the grievor) was terminated from his employment as a Primary Product Inspector with the Canadian Food Inspection Agency (CFIA) by way of letter dated March 28, 2000.

[2] The letter of termination (Exhibit E-5) reads, in part:

This is to advise you that the investigation into your possession of product from Establishment 047, Maple Leaf Foods Ltd., on December 2, 1999, has been completed.

I have thoroughly reviewed the circumstances surrounding your case. The findings of the investigation reveal that you in fact had a combination of fresh and frozen product in your vehicle for which you were unable to provide proof of purchase when asked to do so by representatives of Maple Leaf Foods, Ltd. In addition, you attempted to mislead these representatives in that you were dishonest in your explanations for the absence of an invoice for the product. Moreover, it has been determined that you attempted on more than one occasion to implicate a co-worker by asking him to say that he had purchased the product.

Behaviour of this nature is unacceptable and is incompatible with the level of trust placed in the inspection staff of the Canadian Food Inspection Agency. By your actions, you have broken the bond of trust essential to maintain your involvement in the day to day inspection operations of the Agency.

In view of the above and in accordance with the responsibility delegated to me, I am terminating your employment for cause from the Canadian Food Inspection Agency effective close of business on Tuesday, March 28, 2000.

[...]

[3] The grievor filed a grievance on March 28, 2000 and asked to be returned to full employment without any financial loss.

[4] A total of eleven witnesses testified but neither side deemed it necessary to have them excluded from the hearing. Seven exhibits were tendered by the employer and one by the grievor's representative.

[5] At the outset of the hearing the grievor's representative conceded that the grievor was in possession of goods in his car which he had not paid for. However, the representative contended the grievor had simply forgotten to pay for these goods, and

there was no intent on the grievor's part to steal anything. In other words, this was an act of non-culpable misconduct, for which there was a reasonable explanation.

[6] The representative stated the explanation would be fully expanded upon in evidence, but in summary form the grievor was going through a difficult time in his personal life when the incident occurred. He had arrived late for work that day, having taken medication for depression the evening prior. The depression related to marital problems the grievor was experiencing at the time. The grievor had consumed alcohol the previous evening and there was a boiler explosion at the plant at which he was working when the incident took place. All of these events led the grievor to simply forget to pay for the product he took, and as such he lacked the intent to steal.

[7] During the evidentiary portion of the hearing the parties requested that I take a view of the location where the incident took place. Accordingly, we proceeded to the Maple Leaf Foods (MLF) chicken processing plant in Toronto to obtain a better appreciation of where a number of related events took place.

The MLF chicken processing plant is responsible for chilling, cleaning and cutting up chicken, packaging them and selling them to various retail outlets, as well as to Swiss Chalet restaurants.

Evidence

[8] Joe Costa is the production supervisor at MLF and is responsible for overseeing some 126 MLF employees who work at the plant in various capacities including the killing, cleaning and cutting up of the chicken. The MLF plant also has a number of CFIA poultry inspectors working there which is a requirement of any processing plant that wishes to have its product exported. Mr. Costa has no supervisory responsibilities for any CFIA employee.

[9] Mr. Costa explained that every Thursday, MLF offers its own employees the opportunity to purchase fresh chicken at a discount price. This offer was also extended to inspectors at that plant who worked for the CFIA. From time to time both groups could also purchase frozen chicken which had been returned to MLF from various retailers.

[10] This sale of product at MLF was known as the employee market.

[11] Individuals who wished to purchase fresh chicken would indicate their desire on a sheet of paper that was posted in the plant on the preceding Friday. In effect, they would pre-purchase fresh chicken, although no one was required to pay for the product until it was actually delivered on the Thursday.

[12] For MLF employees who had indicated a desire to purchase fresh chicken, their method of payment was salary deduction. For obvious reasons this option was not available to the inspectors who were employed by CFIA, so their method of payment was by cash.

[13] The employee market is set up inside the processing plant itself, and every Thursday the fresh chicken that has been pre-ordered is placed on skids. On those occasions when frozen product is available, it is on a first come, first serve basis.

[14] MLF foods operates a night shift that ends about 7:00 A.M. and the day shift commences at about 7:30 A.M.

[15] Employees coming off the night shift can pick up their pre-ordered fresh product at that time, as well as select any frozen product if it is available. An employee of MLF is assigned the temporary job of "cashier" and will record the purchase for any MLF employee so salary deduction can commence.

[16] In the case of a CFIA inspector who purchases product, an invoice is pre-printed for the fresh chicken and the inspector is required to pay for their product when they pick it up. If the inspector purchases frozen product, the "cashier" will write the purchase on an invoice and payment again is made at that time.

[17] Mr. Costa explained that the chicken comes packaged in styrofoam trays with a bar code sticker on each package. Either the purchaser or "cashier" will remove the bar code and the "cashier" will provide the purchaser with a copy of their invoice. A duplicate is kept by the "cashier".

[18] On December 2, 1999, Mr. Costa was told by a MLF employee that they had seen the grievor take a number of boxes of chicken into his office without paying for it first. Mr. Costa reported this to his boss, Bill Heipel.

[19] Mr. Heipel is the Production Manager with MLF. When he was informed by Mr. Costa that someone had seen the grievor take product from the employee market

without paying for it, he decided to go to an adjacent MLF building where he had a clear, unobstructed view of the exterior of the CFIA office.

[20] The two MLF buildings are joined by a covered walkway, and between the two buildings is an employee parking lot. Steps go up to the CFIA office door from the parking lot, with a landing on the top step.

[21] From Mr. Heipel's vantage point he looked through a window and saw three boxes of product on the top landing step outside the CFIA office door. While remaining there, he saw the grievor exit the CFIA office and put one more case of product on the landing.

[22] Mr. Heipel then observed the grievor put three cases of product in his car, and one more in his trunk. This took place at about 2:30 P.M.

[23] Following this observation, Mr. Heipel informed his supervisor, Mike Foster, that it was possible someone was stealing product.

[24] Mr. Heipel stated he then returned to the front office and checked the invoices to see if the grievor had in fact purchased the product.

[25] Although Mr. Heipel could not recall the criteria he used to determine that the grievor had not paid for the product, he testified he was satisfied that the grievor had not paid for it.

[26] Mr. Heipel spoke to Mr. Costa to see if Mr. Costa had seen the grievor pay for the product in question. Mr. Costa said he had not observed the grievor pay for that product, however he had seen the grievor pay for some other fresh product he had bought.

[27] Mr. Heipel asked Mr. Costa to accompany him outside to the parking lot to act as a witness. They waited by the grievor's car and at some time around 4:30 there was a loud explosion at the MLF plant. The grievor exited the building and Messrs. Heipel and Costa confronted him at his car.

[28] Mr. Heipel asked Mr. Dhanipersad if he had proof of purchase for the product in his car. Mr. Dhanipersad replied that he had purchased the product but had thrown the invoices in the garbage.

[29] Mr. Heipel informed the grievor that there was no proof of purchase, whereupon the grievor replied another inspector on the night shift had purchased the product for him. Mr. Heipel replied he had no proof of purchase that anyone on the night shift had bought the product either.

[30] At that point Mr. Heipel asked the grievor to open the trunk of his car. The grievor refused, replying that there was nothing there. Mr. Heipel asked again if the grievor would open his trunk, and this time the grievor acceded to the request.

[31] Mr. Heipel stated the grievor said he forgot he had put product in his trunk. Mr. Heipel said he had to return the four cases of product, but if Mr. Dhanipersad could provide proof of purchase there would be no problem. If not, there may be an issue.

[32] Mr. Heipel stated there was product in the car for which the grievor did have a receipt (Exhibits E-1 and E-2). However there was no proof of purchase for the three boxes Mr. Heipel had seen the grievor put in his vehicle, nor for the one box he saw the grievor put in his trunk.

[33] Mr. Heipel was asked by his counsel if the grievor said he forgot to pay for the product, and Mr. Heipel replied that the grievor did not say this. The grievor did not offer to pay for the product either.

[34] Mr. Heipel returned the four boxes of product back to the MLF plant, and informed his supervisor, Mr. Foster, about what happened.

[35] Mr. Foster is the Director of fresh processing and has been with MLF for some 30 years. When Mr. Heipel reported that he had confiscated the four boxes of product, both Messrs. Foster and Heipel reviewed the invoices and could not find any that corresponded to the products the grievor had taken.

[36] Mr. Foster stated he considered calling the police, and would have had it involved a MLF employee. In the past, incidents of theft by MLF employees had resulted in the police being called. However, in this case, Mr. Foster stated that as the individual in question was not a MLF employee, he did not call the police.

[37] Charles Watson, a fellow CFIA employee, testified that sometime around 7:30 that evening, Mr. Dhanipersad telephoned him at his home and asked him if he could

do the grievor a favour. Mr. Dhanipersad stated he had had a problem with some chicken, and asked Mr. Watson to say that he (Watson) had bought it. Mr. Watson replied he could not agree to do that.

[38] About 10 minutes after the telephone conversation ended, Mr. Dhanipersad called back, and again asked Mr. Watson to say he had purchased the chicken. Again Mr. Watson said he could not agree to do it.

[39] There was no dispute among the parties that earlier in the day Mr. Dhanipersad had approached Mr. Watson at work and asked Mr. Watson to buy some fresh chicken for him. Mr. Watson agreed to this, and Mr. Dhanipersad gave Mr. Watson \$20.00, which Mr. Watson took to the “cashier”, paid \$10.00 for some chicken and gave the invoice and change back to the grievor.

[40] The morning after the incident, Mr. Watson told his supervisor, Wendy Wolman, about the two telephone calls he had received the previous evening from the grievor.

[41] Also on December 3, Mr. Foster contacted Ms. Wolman, who was the veterinarian in charge, after having reviewed the invoices again to make certain one was not missed. Mr. Foster asked Ms. Wolman to contact the Toronto Regional Manager at CFIA, Dr. Hugh Baker, and inform him of the situation.

[42] Hugh Baker was the acting Inspection Manager, Toronto Region during the time of the incident. Dr. Baker is a veterinarian, and explained the overall responsibility of CFIA employees at meat or poultry processing plants. The CFIA employees enforce the *Hygiene Act*, certain parts of the *Health of Animals Act*, the *Food and Drug Act* and a number of other statutes.

[43] Dr. Baker also explained that the CFIA does move employees around from plant to plant at times, and this could include being placed in a competitor’s plant.

[44] Dr. Baker sent his supervisor, Josée Rousseau, an e-mail informing her of the recent developments. Ms. Rousseau contacted Dr. Baker and advised him that Donna Mullins from Human Resources would assist him and advise on the proper action to take.

[45] Ms. Mullins met Dr. Baker, and they commenced their investigation by interviewing Mr. Watson. The details of the telephone conversation Mr. Watson had with the grievor were reviewed.

[46] Then Dr. Baker and Ms. Mullins met with Mr. Foster at the MLF plant and the situation was reviewed. Mr. Foster asked Dr. Baker that the grievor not be allowed to ever enter and work at any MLF plant again.

[47] On Saturday, December 4, Dr. Baker contacted Mr. Dhanipersad at his home and asked him to go to the Toronto Regional office for a 10:00 a.m. Monday meeting.

[48] The grievor attended the meeting with his Union representative, Mr. Gary Dionne. Ms. Mullins also attended.

[49] At the meeting Dr. Baker explained there was a complaint letter from MLF poultry containing certain allegations of theft. Mr. Dionne stated the grievor was very emotional at the meeting.

[50] In response to Dr. Baker's statements, the grievor explained he had been having family problems and may have forgotten to pay for some chicken, and he wished to apologize to the company for doing so. Mr. Dhanipersad explained he had been up late the evening of December 2 talking to a friend about his marital problems. The friend gave Mr. Dhanipersad some pills, which were supposed to help him sleep. He took the pills that night together with some alcohol.

[51] Mr. Dhanipersad stated he had invoices for some of the product found in his car, but he admitted in the meeting he had product in his car for which there were no invoices. He stated he had taken the product and intended to pay for all of it, but it had slipped his mind. He had been confused due to recent family problems.

[52] At the conclusion of the meeting, Dr. Baker informed the grievor he was suspended with pay pending the completion of the investigation.

[53] In cross-examination Dr. Baker was asked if he had ever considered the possibility of relocating the grievor to another plant while the investigation was ongoing. Dr. Baker replied that it was considered, but was rejected because other plants would not be happy getting someone under investigation.

[54] Ms. Mullins introduced the notes she took at the meeting of December 6, which supports the explanations cited earlier (Exhibit E-4).

[55] On December 9, Mr. Foster met with Dr. Baker again to review the incident. Also in attendance was the CFIA Regional Director, Josée Rousseau. Mr. Foster told Ms. Rousseau that he did not want the grievor in any MLF plant as he could no longer trust Mr. Dhanipersad.

[56] Mr. Foster explained that the inspectors who work in the plant have access to the entire processing area, which may have some proprietary processing information and additionally, inspectors have access to confidential documents. In the past inspectors have worked in the MLF plant, then worked in a competitor's plant and it is expected that the inspectors will not disclose confidential information. The business is extremely competitive and such disclosure could be very harmful to the business. A great deal of trust is placed in the inspectors for these reasons.

[57] Dr. Baker and Ms. Mullins prepared their report on the incident and submitted it on February 1, 2000 (Exhibit E-3).

[58] The joint report of Dr. Baker and Ms. Mullins was sent to Ms. Rousseau for final determination. In reviewing the report, Ms. Rousseau testified she believed Mr. Dhanipersad was indeed trying to steal product from MLF. She stated there is no tolerance for theft among CFIA employees, as there is a great deal of trust placed in these individuals.

[59] Ms. Rousseau stated that she believed if Mr. Dhanipersad had, in fact, forgotten to pay, as he claimed, there were many occasions where he could simply have said so and offered to pay. He did not. He chose, instead, to lie, claiming to have an invoice. Then he tried to implicate another employee. These actions, Ms. Rousseau felt, showed intent.

[60] Ms. Rousseau also testified she considered transferring Mr. Dhanipersad, but felt she simply could not trust him to know what was right and what was wrong. Ultimately she felt termination was the only option she had, and she signed the letter of termination on March 28, 2000 (Exhibit E-5).

[61] Ms. Rousseau was asked in cross-examination if she was aware of the rumours that Mr. Dhanipersad had a problem in the past with alcoholism. She replied that she

was aware of this rumour, but was also aware that he had never raised this issue during the investigation.

[62] Two character witnesses were called to testify on behalf of the grievor. Both Ms. Prochowska and Ms. Fowler had known the grievor at work and had experienced no problems whatsoever with him. For that matter, no witness that had worked with Mr. Dhanipersad had experienced any difficulty with him in the past.

[63] The grievor testified with respect to the incident in question. He explained that he had been having marital problems which were taking a toll on him personally in the form of increased stress, and depression. He was under a doctor's care for depression.

[64] On the morning of December 2, 1999 the grievor was scheduled to work commencing at 7:30 a.m. at MLF, but he called in to say he would not be there in the morning as he was feeling fatigued, due to consuming some alcohol and taking some medication the previous evening.

[65] The grievor arrived at work sometime between 12:00 and 12:30 and commenced to do his work. In the early afternoon he purchased a box of frozen chicken from the employee market, then later asked Mr. Watson to buy more chicken for him.

[66] Sometime between 2:30 and 4:30 p.m., the grievor stated he took two boxes of chicken, removed the bar code and stuck the bar code on the wall behind where the "cashier" would set up shop. She was not there when he stuck the bar code on the wall.

[67] The grievor then took the chicken to his car without paying for it, but he did intend to pay for it later when the "cashier" was present.

[68] Towards the end of his shift, around 4:30 p.m., the grievor purchased more chicken from the "cashier" in the amount of \$150.00 (see invoices, Exhibits E-1, p. 1 and E-2). It was then that a loud explosion occurred at MLF, and Mr. Dhanipersad went outside to the parking lot to investigate the noise. While there he was approached by Messrs. Heipel and Costa and asked if he had invoices for the chicken in his car.

[69] Mr. Dhanipersad initially replied that he had the necessary invoices, and showed both individuals the invoices for the chicken that was actually purchased. They inquired about the other chicken, and Mr. Dhanipersad said he became confused, and

he was scared, so he stated that Mr. Watson had in fact purchased the other chicken for which there was no invoice.

[70] Mr. Heipel asked the grievor to open his trunk, and the grievor testified he was confused and forgot he had put chicken in his trunk. He did comply with the request, but he testified "I was confused. I was like out of my mind." The boxes of chicken were confiscated.

[71] About 7:30 that evening the grievor called Mr. Watson at his home, hoping to get out of trouble if he could convince Mr. Watson to agree to say he had bought the chicken. The grievor testified he thought, at that time, he would be accused of stealing the product.

[72] Asked whether he regretted the incident, Mr. Dhanipersad said he did and wished to apologize for it.

[73] In cross-examination the grievor admitted he knew he was not supposed to put product in his vehicle without paying for it, but if he had intended to steal the product, he would not have put the bar codes on the wall.

[74] Asked why he did not simply tell Mr. Heipel that the bar codes were on the wall, the grievor testified he simply forgot.

[75] The grievor admitted calling Mr. Watson around 7:30 that evening, and he agreed with the employer's counsel that he knew Mr. Watson could get in serious trouble if caught.

[76] In reply to some questions from the undersigned, Mr. Dhanipersad said he took the chicken at about 2:30 and put the bar codes on the wall. Then, at about 4:30 he bought more product, saw the bar codes on the wall but realized he did not have enough money to pay for them. He was going back to his locker to get more money when he heard the explosion, and went outside to investigate.

[77] The grievor acknowledged that at no time prior to this testimony had he ever said he did not have enough money to buy the product at 4:30, when he was purchasing other product.

Arguments for the employer

[78] The employer's obligation is to show, on a balance of probabilities, that Mr. Dhanipersad stole the product and did not intend to pay for it.

[79] As outlined in the *Pacific Papers Inc. and Communications, Energy and Paperworkers Union of Canada, Local 592* (81 L.A.C. (4th) 173), there are three elements the employer has to meet:

1. The employer must show there is a *prima facie* case of theft
2. It must be shown that the grievor's explanation is improbable
3. If items 1 and 2 can be shown, theft is established.

[80] If, however, it is determined that the grievor's explanation is probable, then the employer must show on the basis of clear and cogent evidence, that Mr. Dhanipersad committed theft.

[81] A review of the evidence indicates there is some agreement between the parties on certain issues. It is not disputed that Mr. Dhanipersad put four boxes of product in his car on December 2, 1999. It is also not contested that the grievor failed to pay for some or all of this product.

[82] The grievor admitted that what he did was wrong, and it was not disputed that by removing chicken before paying for it violated MLF policy governing the employee market.

[83] Up to the time of the hearing, Mr. Dhanipersad had stated he simply forgot to pay for the product. He blamed this forgetfulness on a number of factors, including his marital situation, medication and the taking of alcohol. Now he says he was tired on the day in question, and confused by the explosion.

[84] Did Mr. Dhanipersad intend to steal the product?

[85] During the interview conducted on December 6, 1999, the notes taken by Ms. Mullins indicate that Mr. Dhanipersad stated he took two boxes of chicken and put them in his car, intending to pay for them when the "cashier" returned to duty (see Exhibit E-3, p. 55).

[86] Later on, when the “cashier” was on duty, these same notes indicate he told the employer that he gave Mr. Watson some money to buy product for him. If true, the grievor could have paid for the product he stole at that point in time.

[87] Subsequent to this, when his shift was ending, he bought more chicken. Once again he could have paid for the product he had placed in his car, but he didn't. Originally he claimed he forgot to pay. Now, for the very first time, he said he didn't forget to pay, but rather he simply did not have enough money on him to pay for it. He had at least \$150.00 on him to buy the chicken as seen in the invoices he received. However, he now says he did not have the money to pay for the product he took earlier.

[88] In the parking lot, when Mr. Heipel confronted the grievor, Mr. Dhanipersad lied, saying he had in fact purchased all the product in his car. Then, he changed his story when Mr. Heipel informed him there were no receipts to show he had paid for the product. He then claimed a fellow employee had bought the product in question for him.

[89] If it were an honest mistake, and Mr. Dhanipersad had honestly forgotten to pay, then the normal reaction one can expect is for the person to say “I'm sorry. I forgot to pay.” A further natural reaction would be to offer to pay. If he had placed the bar code stickers on the wall as he said he did he would have stated as much to Mr. Heipel. That explanation would have resolved the matter then and there, but was never given to anyone, either at the December 6 meeting or subsequently. The first time it was heard was when he testified.

[90] The most serious act is Mr. Dhanipersad's attempt to implicate a fellow employee. This action is not contested. The grievor admitted he telephoned Mr. Watson at his home and asked Mr. Watson to lie for him. At no time has Mr. Dhanipersad ever offered an apology to Mr. Watson for what he tried to do to him.

[91] All of these objective factors show a *prima facie* case has been made that Mr. Dhanipersad intended to steal.

[92] The version offered by Mr. Dhanipersad is replete with inconsistencies and contradictions. Where other evidence conflicts with that of the grievor, the other witnesses' version should be preferred.

[93] Initially, Mr. Dhanipersad stated he had paid for the product but did not retain the receipt. Then he said Mr. Watson bought the product for him. Then he said he forgot to pay for the product. Now we hear he didn't actually forget to pay as he saw the bar code stickers on the wall, but rather he did not have enough money on him at the time to pay for the product.

[94] If this latter version is to be believed, then all the explanations about alcohol consumption, marital problems, pills, being tired, being scared and the boiler explosion become completely irrelevant. He stated he was paying for some product, saw the stickers on the wall but lacked sufficient cash to pay at that point in time.

[95] There has been no evidence introduced to say he told the "cashier" he would return with the money owing for the bar code stickers on the wall. That would be the logical thing to do, if this version were true.

[96] At the outset of the hearing, the grievor's representative stated the grievor forgot to pay and cited his marital situation as a contributing factor. Now the grievor says he did not have the money to pay.

[97] The evidence establishes that Mr. Dhanipersad intended to steal the product. Now we must turn our attention to the penalty portion.

[98] In this circumstance, the appropriate penalty is discharge. This is based on four factors:

1. The nature of the offence - it was theft
2. The severe aggravating factors
3. The bond of trust has been shattered, not just with the employer but with MLF as well.
4. Mitigating factors are not sufficient to outweigh the penalty.

[99] With respect to point number 1, theft is one of the most serious of employee offences. All the more so when it is against a client of the employer. That act impacts on the employer's reputation with the companies it operates with.

[100] Concerning point number 2, the grievor lied when confronted by Mr. Heipel. In fact he lied twice, the first time claiming he bought the product but did not keep the receipts and the second time saying a fellow employee bought the product for him.

[101] Another aggravating factor was his attempt to implicate Mr. Watson by asking him to lie.

[102] With respect to point number 3, the employer acts as a third party overseer, making sure the applicable laws and guidelines are respected by the industry they regulate. In so doing, CFIA employees have access to confidential information about the company's operation, and they are trusted with this information. Mr. Foster stated that he did not want Mr. Dhanipersad at any MLF plant in Canada, as he could no longer trust him.

[103] The employee's job is to inspect product, and employees can be moved from one company to another in doing this function. The employer's operations would be severely curtailed if it kept the grievor employed, but excluded him from working at any MLF plant.

[104] With respect to point number 4, the grievor bears the onus to show that there are substantial reasons as to why the penalty should be modified. To date, none have been forthcoming that justify modifying the penalty.

[105] Cases of interest on this topic, and related issues, can be found in the employer's Book of Authorities.

Arguments for the Grievor

[106] The jurisprudence referred to by the employer involves situations where the employee had an intent to commit theft. In the instant case there was no intent by Mr. Dhanipersad to commit theft.

[107] There are a number of mitigating factors in this case which should be considered in relation to the penalty. These mitigating factors are:

1. Seniority;
2. This was an isolated incident in an otherwise clean record;

3. Mr. Dhanipersad had good or satisfactory evaluations;
4. There were no criminal charges laid;
5. The product value was very low. At issue here is product that had been returned from grocery stores and would otherwise have gone to waste.

[108] The evidence has shown that Mr. Dhanipersad suffered from depression, stress and work related fatigue. Coupled with those factors was the fact he took some medication the night before the incident.

[109] The employer was aware of the problems Mr. Dhanipersad had, and had a duty to act on them (see, for example, PSSRB decision 166-2-618).

[110] In cases where it was shown there was no intent to steal, the penalty of discharge has been found to be excessive (see, for example, *MacMillan Bloedel Ltd. and Communication Energy and Paperworkers Union, Local 1*, (59 L.A.C. (4th) 84) and also *W.M. Scott and Co. Ltd. And Canadian Food and Allied Workers Union, Local P-162* [1977] 1 CLRBR PG 1.

[111] There has never been any motive established as to why the grievor would have wanted to steal some product.

[112] In determining the intent of Mr. Dhanipersad it is important not to simply look at the sequence of events and draw a logical conclusion as to what a reasonable person would have done. It has been shown that Mr. Dhanipersad was not in any condition to act in a way someone may expect him to have acted.

[113] Mr. Dhanipersad was not in a rational state of mind on the day of the incident.

[114] An important point is that the employer has a duty to help mentally ill employees. Although the employer gave the grievor an opportunity to explain his actions, they did not question him about his depression and assist in seeking out medical expertise.

[115] In cases involving theft, it has to be established that the employee is so untrustworthy that the employer can no longer rely on him. The employer should still be able to trust Mr. Dhanipersad, as there was never any intent to commit theft. The

grievor said he forgot to pay, and this is reasonable to accept given the testimony of the various witnesses.

[116] Initially, Mr. Dhanipersad did not have the money to pay for the product, and then when events unfolded he simply forgot to pay. He had it in his mind to pay, but with the events taking place in the parking lot, he simply forgot to pay.

[117] If it is decided that Mr. Dhanipersad has broken the bond of trust but, due to mitigating circumstances discharge is not warranted, but reinstatement is not appropriate, compensation in lieu should be awarded. In that case 1-2 years of pay is appropriate.

Reply of Employer

[118] The evidence indicates the employer did not take a passive role in the investigation. At the December 6, 1999 meeting the grievor was asked if there were any factors which could explain his behaviour, and he did not raise anything. Neither did his Union representative.

[119] As far as compensation in lieu is concerned, a more appropriate amount would be 3 months' pay.

Decision

[120] The employer's letter of termination of March 28, 2000 states that Mr. Dhanipersad was discharged for, essentially, three reasons, namely:

1. Having product in his car without proof of purchase;
2. Being dishonest in explaining the lack of an invoice;
3. Attempting to implicate a co-worker.

[121] There is no dispute that each of these took place. The grievor had product in his car for which he lacked proof of purchase. When confronted by Mr. Heipel, the grievor lied and stated that he had, in fact, purchased the product. Later that evening, Mr. Dhanipersad twice contacted a fellow employee, Mr. Watson, and tried to persuade Mr. Watson to lie for him.

[122] The events, as stated by the employer, are not contested. What is at issue here is the intent of the grievor. The employer states that the grievor intended to steal the product and this act, in combination with the other uncontested issues, caused a loss of trust in the grievor. The grievor on the other hand, claims he simply forgot to pay for the product, and there was never any intent to steal.

[123] Did the grievor forget to pay, or did he intend to steal the product?

[124] A similar situation arose in the *Canada Safeway Ltd. And United Food and Commercial Workers, Local 401* (94 L.A.C. (4th) 86). The arbitrator in that case stated at page 109:

The issue before me then, is not whether the Grievor did the things complained of, but whether she had the necessary intent required to make a finding of dishonest conduct. I accept that the proper interpretation of theft is that discussed at p. 94 in the Berto's case cited by the Union:

In my view, the proper definition of "theft" in the context of a collective agreement (unless other indications are to be found in the collective agreement) is not the definition in the Criminal Code nor dictionary definitions. The best test is: What is understood to be a "theft" in common usage? In my view, there can be no question that the dishonest intention or the intention to unlawfully benefit from another's property, is the crux of the meaning attached to "theft". Whichever way the term is defined, there simply cannot be a theft without a dishonest intention.

I also accept that since the Employer has proven that the Grievor was in possession of its property in circumstances requiring an explanation, the onus lies with the Grievor to provide a satisfactory explanation.

The Grievor claims that the greeting card incident was simply a matter of forgetfulness. She did not pay for the card because of forgetfulness and she did not remember not paying for the card because of forgetfulness. She further argues that impaired memory and lack of concentration are hallmarks of her diagnosed mental conditions.

[125] I too accept that the proper interpretation of theft is the dishonest intention or the intention to unlawfully benefit from another's property. Also, since there is no question here that the grievor had the chicken in his possession, the onus lies with Mr. Dhanipersad to provide a satisfactory explanation.

[126] What was the explanation?

[127] The very first explanation was advanced to Mr. Heipel, and that was that Mr. Dhanipersad had in fact purchased the product but had thrown away the receipt. It is not in dispute that this is what the grievor stated initially. We know this to be untrue.

[128] The next explanation again uncontested was that a fellow employee had purchased the product on behalf of Mr. Dhanipersad. We know this to be untrue.

[129] The next explanation was that the grievor simply forgot to pay. There were many causes advanced as to why the grievor forgot to pay, such as marital problems, stress, fatigue and medication combined with the consumption of alcohol. In fact, even in the opening remarks the grievor's representative stated this was a case simply of the grievor forgetting to pay for product and should be regarded as non-culpable misconduct.

[130] During the *viva voca* portion of the hearing, the grievor stated he did not, in fact, forget to pay but rather he did not have sufficient funds to pay when he was making another purchase.

[131] The testimony was that the grievor was on his way to his locker to get more money to pay for the product when he heard an explosion and went outside to investigate. Once outside he was confronted by Mr. Heipel, and he fabricated the story at that point.

[132] As indicated, I took a view of the premises and noted the location of the employee market, the locker area, the exit door and landing and the parking lot. The grievor said he was proceeding to his locker to get more money to pay for the product when he heard an explosion and went outside to investigate. From my observation, it would certainly be well under one minute for him to exit the building from having left the employee market to go to his locker.

[133] The grievor would have me believe that from the time it took to exit the building, while on his way to his locker to get more money to pay for the product he already had in his car, until the time Mr. Heipel confronted him, he forgot he had to pay for the product.

[134] I find this explanation too far fetched to believe. Surely if it were true he would have simply told Mr. Heipel he had been on his way to get more money from his locker and would offer to pay the required amount right then and there.

[135] The bargaining agent representative suggests I should not judge Mr. Dhanipersad's actions by comparing them to how someone else in a more reasonable state of mind might react. However, Mr. Dhanipersad stated he knew he had to pay for the product and was intending to do so right up to the time he exited the building. I am being asked to believe that the grievor's state of mind was reasonable up to the time he was about to exit the building (because he was on his way to get the money), then it became unreasonable when confronted by Mr. Heipel outside the building. I find nothing to support this proposition.

[136] I heard no medical evidence to suggest the grievor suffered from any illness which caused him to forget certain events. There was no evidence of any pattern of forgetting other events.

[137] There are also other aspects of Mr. Dhanipersad's conduct which lead me to believe he simply did not forget to pay for the product. When confronted by Mr. Heipel he lied. This is not the action of a completely innocent individual. However, even in the most favourable light to the grievor, if I agree he was confused then, surely any confusion would have been cleared up later that evening.

[138] Mr. Dhanipersad could have called his supervisor and explained there had been a gross mistake at the work place. Instead he chose to contact a colleague and attempted to implicate him in the charade. He did this in spite of the fact he knew, according to this testimony, that Mr. Watson would get in trouble.

[139] I am satisfied, based on all of the above, that, on the balance of probabilities, the grievor did not simply forget to pay for the product but rather he intended to steal it.

[140] This finding shows that the employer has demonstrated culpable misconduct on the part of Mr. Dhanipersad, and some disciplinary sanction is justified.

[141] I am also satisfied that the mitigating factors advanced by the bargaining agent are not sufficient to warrant an alteration of the penalty.

[142] Employees in Mr. Dhanipersad's position, that of a Federal Government food inspector, are in positions of trust. They are placed in various establishments with varying amounts of supervision. This employee has stolen not from his employer, but from a client of the employer, so to speak. But for the fact Mr. Dhanipersad was a Federal Government employee, the evidence indicated that such actions would attract the calling of the police to the work site. This is, in my view, a most serious act and certainly any client of the Federal Government, who is obligated to have a Federal Government employee at their work site, should be able to expect that employee to be honest.

[143] So the act of theft itself, in these circumstances, was serious. But the grievor chose to exacerbate the situation by lying, then by trying to implicate a fellow worker. All of these lead me to concur that the bond of trust was broken.

[144] In light of all of the above the grievance is hereby denied.

**Joseph W. Potter,
Vice-Chairperson.**

OTTAWA, July 17, 2001.