

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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

A & M COOKIE COMPANY OF CANADA

- The Employer

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION
LOCAL 175

- The Union

AND IN THE MATTER OF the grievance of Martin Watson

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Dirk Van de Kamer	- Counsel
Jerry Osier	- Director, Human Resources
Dave Ertel	- Sanitation Supervisor

On behalf of the Union:

Georgina Watts	- Counsel
Wendy Absolom	- Union Representative
Joanne Ford	- Union Steward
Martin Watson	- Grievor

Hearing held October 12, 2005, in Kitchener, Ontario.

AWARD

I. INTRODUCTION

In this grievance the grievor was disciplined for refusing to “sign off” on a review of the safety requirements for a recurring overtime shift. The Union alleged that the discipline imposed was unjust.

II. THE FACTS

A & M Cookie Company of Canada, the Employer, makes cookies in a plant in Kitchener. The United Food and Commercial Workers International Union, Local 175, the Union, represents the employees, including Martin Watson, the grievor.

The grievor has worked for the Employer and the predecessor owners of the plant since 1986. In the spring of 2005 he worked as a general labourer on the evening shift and his duties included cleaning ovens and other tasks.

In addition to the cleaning done by members of the production staff such as the grievor, cleaning was also done by a sanitation crew of some 10 employees who worked the night shift. On the Friday/Saturday night shift the sanitation crew gave the plant a more thorough cleaning as production had finished for the week. The Friday night crew was supplemented by some 25 production employees.

Employees were selected for this overtime work by seniority from among those who signed a weekly sheet requesting volunteers. As a senior employee, the grievor worked the shift whenever he wished to do so.

Several employees who worked overtime on the Friday night shift had been injured in early 2005 while cleaning on this overnight shift - one worker had fractured an elbow, another worker received a back injury, and a third worker had several fingers caught in a roller. Because of these injuries Dave Ertel, the supervisor of the sanitation crew, decided to review the safety practices with the production employees who worked overtime on the Friday night shift. The supervisor prepared a safety memo in which he reviewed the safety procedures and requirements. Starting in early April 2005, at the beginning of each Friday night shift the supervisor reviewed the safety issues with those employees who had not had the review. The text of the April 8-9 "talk" was introduced in evidence.

FRIDAY NIGHT SAFETY TALKS. April 8th - 9th /05

Based on the number and seriousness of the injuries that have taken place in the safety/cleaning crew, I feel I have no option at this point in time but to implement a no tolerance approach to safety violations. My intent and focus is to eliminate any further incidents and protect all my employees from potential injuries.

In this respect I expect all employees to follow all the policies and procedures that are part of the sanitation cleaning process especially including lock out/tag out procedures when cleaning equipment. I further expect that each one of you working in sanitation and cleaning will feel free to approach me directly at any time concerning safety policy and procedures if you do not clearly understand what is required of you to carry out your duties in a safe manner.

Given these expectations, it must be clearly understood that anyone who knowingly violates safety policy and/or procedures will be disciplined accordingly up to and including discharge. I sincerely hope that such discipline is not necessary as we are all here for the same purpose to do our jobs effectively and safely.

I have valued your hard work and efforts in the past and hope we can all work together as a team in the future.

Thank You all
Dave Ertel
Sanitation Supervisor.

Please sign below.

The supervisor asked the employees who wished to work the overtime to sign off on the memo to indicate they had understood the approach to safety. With one exception, every employee who was asked to sign did so and continued working the shift. The one exception was the grievor. He indicated to the supervisor that he understood the safety procedures and would follow them, but he declined to sign the memo. The supervisor sent the grievor home that night.

The sanitation supervisor posted a notice asking for volunteers for the following Friday night shift and the grievor signed his name. However, the supervisor did not select the grievor for the work. When the grievor inquired as to the reason he was not selected, he was informed by the supervisor that he would not be able to work that overtime shift until he signed the memo regarding safety. Each week until mid-July the grievor signed the notice for volunteers for the overtime shift but he was not given the work. Since mid-July the grievor has not sought to work the Friday night sanitation shift for personal reasons. The grievor had not signed the safety memo as of the date of the hearing.

The supervisor said his intention had been to have all employees sign the memo before they worked their first overtime shift. He said he had tried to ensure that he did as he had planned but he acknowledged that with the many changes in persons working the shift, he may have missed someone on their first shift.

At the hearing the Employer advised that a review of their records indicated two employees had worked three overtime shifts before signing the safety memo and that a third employee worked one overtime shift before signing. The first of the shifts worked by those three had been July 29, 2005, after the grievor stopped volunteering for the overtime.

The grievor gave two reasons for not signing the memo.

First, he said that the Union had advised him when he started working not to sign things and that he did not even have to sign his pay cheque.

However, several examples of the grievor having signed similar sign up sheets were presented in evidence - "Inspection and Use of Hoists", "Lift Truck Seatbelt Policy" and an untitled document to the effect that scrapers were no longer to be used as knives.

The use of "sign up" sheets has been common in this workplace for many years as a means of demonstrating that employees have attended a particular demonstration or course. It was unclear why the grievor had signed in some instances but not this.

Secondly, the grievor said he felt that the safety memo amounted to an improper downloading of responsibility for safety from the supervisor to the employees. Employer counsel took the grievor through the memo in an attempt to determine what portion represented an improper downloading of responsibility. The grievor was unable to indicate any particular aspect as constituting downloading but he repeated his view that, looked at in the entirety, the memo amounted to a downloading of responsibility for safety.

III. PROVISIONS OF THE AGREEMENT

The relevant provisions of the parties' 2003-2006 collective agreement are as follows:

ARTICLE 4 - RESERVATION OF MANAGEMENT RIGHTS

4.01 . . . the Union acknowledges that it is the exclusive function of the Employer to:

- a) . . . make, alter and enforce from time to time rules and regulations, policies and practices to be observed by its employees; discipline . . . employees for cause, . . .
- . . .
- c) operate and manage the business in all respects . . . including the right to determine the ...

direction of the work force. . .

...

IV. POSITION OF THE EMPLOYER

The Employer acknowledged that the grievor was a senior employee who performed his duties well.

There had been health and safety issues on this sanitation shift in early 2005 and because of this the sanitation supervisor prepared a safety memo and required all employees who wished to work the Friday night sanitation overtime to sign the sheet. It was reasonable for the Employer to require the grievor, and anyone else who wished to work the Friday sanitation shift, to sign off on the safety memo.

It made sense to have a signature on this memo as it would facilitate proof that the grievor had been advised of the safety procedures, especially if there were to be a change in the supervisor. This approach was sanctioned by Article 4, Management Rights. If the Employer was unable to require that employees sign a reasonable document such as this one, then the Employer would lose its right to manage.

Sign offs are common in this workplace. The grievor signed off on other policies and practices.

The grievor's sustained refusal to sign was insubordination. Under the "work now, grieve later" approach, the grievor should have signed and then grieved.

As for the grievor's concern that the Union had advised him years earlier not to sign

documents, he had , in fact, signed other similar documents over the years and this was not a valid explanation for refusing to sign off on this memo.

As for the grievor's suggestion that this was an improper downloading of responsibility, the Employer said that was a bizarre interpretation of the document.

This was not double discipline. The grievor was denied the overtime work each week until he signed, something which he had still not done.

Nor was this an instance of the discriminatory application of discipline. The supervisor attempted to have all employees sign on their first shift; he made it clear that had been his intention throughout. While he had not actually done as he had planned, missing two employees for three shifts and another employee for one shift, this does not amount to discrimination in the application of discipline.

The Employer relied upon the following authorities: Brown and Beatty, *Canadian Labour Arbitration, Third Edition*, (Canada Law Book, updated to April 2005) Section 7:3610 Refusal to follow instructions; *Clearbrook Grain and Mill and United Food and Commercial Workers, Local 1518* (1999), C.L.A.S.J. Lexis 6756, C.L.A.S.J. 628691, 58 C.L.A.S. 56 (Longpre); *Goodyear Canada Inc. v. United Steelworkers of America, Local 628 (Denman Grievance)* [2001] A.G.A.A. No. 54 (Anderson); and *Lucerne Foods Ltd. v. International Union of Operating Engineers, Local 955 (Ressler Grievance)* [2004] A.G.A.A. No. 24 (Tettensor).

V. POSITION OF THE UNION

The Union noted that the grievor testified that he had read the memo and understood it. It

was not clear why he refused to sign the memo. The grievor had some hesitation that if he signed the Employer might later use it against him, or that he would be at fault in some way. Given the contents of the memo, the grievor's hesitation was understandable.

There was no insubordination here. There was no rude behaviour. The grievor did not act in an unsafe manner. The grievor was fully trained in all the safety procedures. There was no cause for discipline.

In addition, the grievor was first suspended for only one shift and then later he was suspended for another 13 shifts. This amounts to a double penalty and an employee should only be subject to discipline on one occasion for any one wrong.

Finally, some employees were allowed to work for up to three shifts without signing the safety memo. This amounts to discrimination in the Employer's administration of the discipline and invalidates the grievor's discipline.

The Union asked that I declare the discipline to have been without just cause and order compensation for the lost hours of work.

The Union relied upon the following cases: *Re Oxford Pendaflex Canada Ltd. and Printing Specialties & Paper Products Union, Local 466* (1976), 14 L.A.C. (2d) 104 (Schiff); *Re AGT Ltd. and International Brotherhood of Electrical Workers, Local 348* (1996), 58 L.A.C. (4th) 330 (Lucas); and *Re Calgary Co-operative Association Ltd. and Calco Club* (1991), 23 L.A.C. (4th) 142 (McFetridge).

VI. CONCLUSIONS

Before getting into the specifics of this matter, I wish to acknowledge that in many ways this is an unfortunate case. It seemed the sanitation supervisor and the grievor got themselves in a stand-off where neither was prepared to back down. The supervisor's intentions were fine and the grievor, on the other hand, had worked this shift for many years without indication of any safety violations. The grievor informed the supervisor that he understood the safety requirements and intended to follow all of them. In retrospect, it is unfortunate that this issue has now come to arbitration.

In discipline cases I follow a three step analysis as follows:

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 in all the circumstances of the case?

1. Did the conduct of the grievor justify a disciplinary response?

The Employer had a reasonable concern about safety on the Friday/Saturday sanitation shift. In response to this concern the Employer reviewed the safety procedures with employees working overtime on that shift and sought to ensure that they understood the procedures by having employees sign the safety memo.

Employers have a legitimate concern for the safety of their employees and can reasonably be expected to take steps to confirm that their employees are familiar with the safety procedures and that workplace injuries are minimized. Apart from the provisions of the collective agreement, I think any employer who did as this Employer did by reviewing safety

procedures and seeking to have them followed would be acting reasonably and responsibly.

Under this collective agreement, Article 4 (above) allows the Employer to make and enforce rules and regulations, policies and practices. It is clear in this Article that the parties contemplated the possibility of the Employer taking steps to ensure employees conducted themselves in a certain manner at work. While there are limits on that ability, the Employer has made various pronouncements on safety for many years (e.g. use of knives, seatbelts, and hoists) and the parties must have intended that the Employer could make and enforce rules and regulations, policies and practices about an issue as central to the workplace as employee safety at work.

If the collective agreement contemplates that the Employer can make and enforce safety policies and practices, as I conclude it does, how is the Employer to enforce them? In particular, is it reasonable to conclude that the parties intended that employees might be required to acknowledge that they had read and understood the policy or practice?

The collective agreement speaks generally about the Employer making and enforcing policies and practices. The history of this Employer has been to review these with employees and have employees sign a sheet of paper to indicate that they have been informed about the particular topic. This was done, for example, with the documents about the “Inspection and Use of Hoists”, “Lift Truck Seatbelt Policy” and to the effect that scrapers were no longer to be used as knives. Given the frequency of safety pronouncements and the common use of sign offs by this Employer over many years, I conclude the parties intended that one of the approaches which the Employer could use in order to enforce a policy was to require the employees to sign off on a memo such as this one reviewing safety procedures.

If the Employer can adopt safety policies and practices and require employees to sign off on them, what can the Employer do if an employee refuses? An employee's refusal to sign off when required will ordinarily give the Employer cause for discipline.

However, in this instance there were a number of reasons advanced which might suggest that discipline was improper.

First, the Union submitted that the Employer had acted in a discriminatory manner by disciplining the grievor but not three other employees who were allowed to work in late July, or later, before being required to sign off on the safety memo.

Although consistency in the treatment of employees is required for discipline to be considered just, I do not think the Employer should be held to a standard of absolute equality.

In any event, I note first that although the Employer allowed other employees to work before the Employer reviewed the memo with them, no one other than the grievor refused to sign and no employee, including the grievor, was allowed to work after refusing to sign.

On the issue of the failure to request signatures on the first shift, I note that the supervisor testified that his intention was to review the memo with all employees on their first Friday/Saturday shift but he acknowledged he may have missed some employees, and that the Employer's records later showed he did initially miss some employees. The first time the supervisor missed a new employee on this shift was in late July, nearly four months after he began his review of safety requirements. There was a regular change in the employees working overtime on this shift and I do not think that the fact the supervisor did not catch every employee at the start of their first shift is evidence of discrimination which would

prevent the Employer from disciplining the grievor.

Secondly, the grievor testified that when he started working the Union advised him not to sign things. This evidence was unclear and in any event was contrary to the grievor's own practice which involved signing off on a number of other policies or practices dealing with safety issues. I do not accept this as a valid reason for the grievor's refusal to sign in this instance.

Thirdly, although the grievor testified that he felt the supervisor's memo amounted to an improper downloading of responsibility for safety, the grievor was taken through the text of the memo and was unable to point to anything in the document which he considered downloading of responsibility. I do not accept the grievor's contention that this memo reflects a downloading of responsibility for safety.

I conclude that the Employer had cause for discipline.

2. *Was the discipline imposed an excessive form of discipline?*

I have found that there was cause for some form of discipline. The Employer refused to allow the grievor to work the Friday/Saturday overtime and the question is this: Was that discipline excessive?

As "cause," often called "just cause," is a common issue, I offer first a few general comments on the concept relevant to this case.

The purpose of any discipline, other than discharge, is to correct behaviour, not simply to punish an employee. If discipline is to be for cause, the discipline should be intended to

motivate the employee to modify his or her behaviour.

In order for discipline to be for cause, the measure of discipline must bear a reasonable relationship to the gravity of that employee's wrong. A mild wrong ordinarily merits a mild response, and a serious wrong ordinarily merits a serious form of discipline.

Finally, in order to be "just" the discipline must relate not simply to the wrong committed. Discipline must also be appropriate to the particular employee, given his or her length of service, previous employment record, etc. Because of this, employees with more seniority or with better discipline records receive more favourable treatment, in the sense that what is "just" for those employees may be a milder form of discipline than that given another employee.

I subscribe to the above and believe that it is the proper approach when interpreting and applying this collective agreement which requires cause for discipline.

Applying the principles to this case, I note firstly that the discipline consisted of refusing to allow the grievor to work the overtime sanitation shift until he signed off on the sanitation safety memo. The discipline was clearly intended to motivate the grievor to change his behaviour.

Secondly, the discipline bore a clear relationship to the wrong. The grievor was allowed to work his regular shift but was not allowed to work overtime on this sanitation shift until he accepted the Employer's approach to safety on the sanitation shift by signing the form.

Thirdly, the wrong and the penalty bore a reasonable relationship to each other in terms of severity. When the grievor declined to sign off in this situation when other employees were

happy to work the overtime, it was not a particularly serious matter, but the penalty selected was also not a particularly serious one. While the grievor did not get paid for the overtime, he also did not work those hours.

Finally, the grievor had considerable seniority and a good work record. As such he would ordinarily be entitled to a lesser penalty than would other employees with worse records. But it is difficult to think of a lesser form of discipline which would motivate the grievor to change, which would seem appropriate to the wrong, and which be more appropriate given the grievor's record.

A review of these basic concepts suggests that the discipline was reasonable.

However the Union submitted that this discipline ran afoul of the double penalties principle. I and many other arbitrators subscribe to the view that an employer can only discipline an employee one time for any one wrong. For example, if an employer first suspends an employee it would be improper for that employer to later conclude the penalty was too mild and dismiss the employee.

The Union submitted that what the Employer had done here violated this double penalty principle. The Union said that the first time the grievor refused to sign off on the memo he was simply sent home. The Union said that the next week the Employer imposed a second penalty for his original refusal in the form of a 13 week suspension from that overtime shift. In my view this is an incorrect summary of what occurred. Had the grievor signed off during the second week he would have been able to work the overtime sanitation shift. Similarly if he signed during the third week, he could have worked the overtime shift. In other words, the discipline each week related to his failure to sign that week. It is incorrect to assert that the Employer imposed another lengthy penalty in the second week for the

grievor's original refusal to sign. Instead the grievor was disciplined in the same manner each week for another wrong which was similar to his original wrong.

I conclude that the discipline in this case was within the range of "just" discipline for this grievor's misconduct. It follows that I find the discipline was not excessive.

3. *If the discipline was excessive, what penalty should be substituted in all the circumstances of the case?*

As I have concluded that the discipline was not excessive, it is unnecessary to consider this question.

The grievance is dismissed.

Dated at London, Ontario this 12th day of November, 2005.

Howard Snow, Arbitrator