

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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ZEHRS MARKETS INC.,
A DIVISION OF ZEHRMART LIMITED
- The Employer

-and-

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION,
Locals 175 and 633
- The Union

AND IN THE MATTER OF the grievance of Chris Jones

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Carole Hoglund - Counsel
Sharon Hughes - Manager Industrial Relations

On behalf of the Union:

Georgina C. Watts - Counsel
Tim Oribine - Union Representative
Chris Jones - Grievor

Hearings held February 17, April 24, and May 29, 1997 in Windsor, Ontario.

AWARD

I. INTRODUCTION

The Employer discharged Chris Jones, the grievor, following his absence from work on November 8, 1996, and his failure to report that absence. The Employer submitted that the grievor's absence and failure to report, together with his prior discipline record, justified dismissal.

The Union submitted that the grievor's earlier discipline record, his November 8 failure to attend work, and failure to report his absence were all related to the grievor's alcoholism. The Union submitted that this was an appropriate situation for the exercise of arbitral discretion and asked that the grievor be reinstated on the condition that he remain alcohol and drug free and that he continue to participate in alcoholism treatment programs.

II. THE EVIDENCE

The Employer operates a retail grocery business. The grievor was employed at one of the Employer's Windsor stores as a baker.

The grievor is 26 years old. He began work as a part time employee in 1991. In 1993 he was promoted to full time baker, the position he held at the time of his dismissal.

The grievor began drinking alcohol while in his early teens. At that time he drank mainly on weekends with his friends but his drinking increased throughout high school. When the grievor dropped out of high school and began living on his own his drinking increased again.

The grievor also experimented with drugs. He used marijuana, hash, and LSD while in high

school. After he left high school he used cocaine because he was "bored" with what he referred to as "kiddie" drugs.

The grievor indicated that he had the following drinking pattern after leaving high school. He drank every day. He began drinking in the morning when he would have several beers - he indicated that he drank beer in the morning in the same way that many people drink coffee. His consumption of alcohol would double or triple on days when he did not work. He drank largely with friends but would drink with anyone.

The grievor was twice charged with driving offences related to his use of alcohol. His first offence was in 1990 or 1991, the second in 1992. For the second offence he was charged while on the way to work with operating a motor vehicle while under the influence. He indicated that he blew double the legal limit on the breathalyser. At that time he sought and obtained a leave of absence from the Employer to attend a treatment program. His leave request indicated as the reason "Rehabilitation, Brentwood Recovery Home for Alcoholics." He was on a leave of absence for some three months and did attend the Brentwood rehabilitation program, a residential program for drug and alcohol users located in Windsor. The grievor testified that his participation was largely motivated by his criminal charge and that he was participating to satisfy others and not because he perceived himself as an alcoholic in need of assistance.

Following his Brentwood program the grievor ceased the use of drugs and alcohol. However, a few months after the Brentwood program the grievor resumed his consumption of alcohol as he felt he was able to drink socially. He indicated that for the first month or so after he resumed drinking he was able to control his drinking. He testified that he then "fell off the wagon". An uncle with whom he was particularly close was diagnosed with cancer and died within a year. An aunt with whom he was also close was diagnosed with

cancer. The grievor testified that he commonly turned to alcohol to deal with stress and, with these additional stresses, he again turned to alcohol. The grievor's drinking became much heavier. He drank every day. He would drink at least twelve, and sometimes twenty-four, bottles of beer in a day. In addition, he drank hard alcohol. He indicated that his appearance deteriorated and that his consumption of alcohol affected his work.

In October of 1995 the grievor was reprimanded for not attending work. At the time he did not advise the Employer of the reason for his absence but in his testimony he indicated that he was drunk, incapable of doing the job, and simply concluded that he would not go to work.

In June of 1996 the grievor was again reprimanded for lateness and a failure to attend work. Again he did not provide the Employer with any reason for his absence, but he testified that he had been out drinking the night before and had had too much to drink.

Later in June, 1996 the grievor was suspended for three days for another failure to attend work and failure to notify the Employer. While he did not then provide the Employer with a reason for his absence, he testified that his absence was the result of his being drunk.

In July, 1996 the grievor was given a five-day suspension for failure to report to work and failure to notify. Again he did not indicate to the Employer the reason for this, but he testified that it was because he was drunk.

Finally on November 8, 1996, the grievor did not attend work, he did not advise the Employer in advance of his absence, nor did he advise the Employer of the reasons for his absence. However, he testified that once again his absence was due to his consumption of alcohol.

Ed Pflug is the Employer's District Manager for the store in which the grievor worked. He imposed the last three disciplinary penalties, that is the two suspensions and the dismissal. Mr. Pflug testified that the Employer used progressive disciplinary measures in order to correct behaviour problems.

Mr. Pflug testified that when he imposed the three-day suspension in June he inquired of the grievor whether he needed any help which the company might provide through the Employee Assistance Plan. Mr. Pflug indicated that the grievor simply shrugged and said no.

When Mr. Pflug imposed the five-day suspension in July, 1996 he again asked the grievor whether he had any problems for which the Employee Assistance Plan could provide help. Mr. Pflug described the grievor's behaviour at that time as rational and indicated that the grievor simply did not seem to care about either the three- or five-day suspension. Mr. Pflug advised the grievor in July when he imposed the five-day suspension that the next time the grievor failed to attend work when scheduled his employment would be terminated.

When the grievor did not attend work as scheduled on November 8, 1996, Mr. Pflug organized a meeting at the store for November 11. In attendance at the meeting were Mr. Pflug, the grievor, a union steward and the store manager. Mr. Pflug indicated that the purpose of this meeting was to determine why the grievor had failed to show up for work on November 8. Mr. Pflug began the meeting by ensuring that the grievor knew he had been required to work on November 8. He then reminded the grievor that he already had three- and five-day suspensions and that at the time of the five-day suspension the grievor had been advised that his employment would be terminated if he missed work again without a reason and without notifying the Employer. Mr. Pflug again reminded the grievor that he had previously inquired as to whether or not there were any problems in the grievor's life for which the Employee Assistance Plan could be of help. Mr. Pflug indicated that at this point

the grievor advised that he had a problem but that he was "not man enough to admit it". Mr. Pflug testified that at that time he did not know what the grievor meant. Mr. Pflug indicated that the grievor simply mumbled that he had slept all day, or slept in, as a reason for not attending work. Mr. Pflug testified that the grievor did not appear surprised that his employment was being terminated and described the grievor's attitude as one of "oh, well".

Mr. Pflug made the decision to terminate the grievor's employment and he based it on the grievor's record of progressive discipline and his failure to attend at work on November 8.

On November 14 the grievor filed a grievance in which he alleged unjust termination contrary to the just cause provisions of the collective agreement and contrary to the *Human Rights Code*.

During the period from November 11, 1996 to January 1, 1997 the grievor testified that he drank continuously. He described the period as "very scary". He indicated that he was drunk throughout the whole of this period, oblivious to the world, and that his "fuck you attitude kicked into full gear".

The grievor testified that when he woke up on January 1, 1997, he went to the fridge for a beer but there was none. He had no money to buy any beer and at this point he took a careful look at himself. He indicated that he saw a young man who looked middle-aged and did not know what he was going to do in the future. He said that he finally realized that he had a very big problem. He decided to seek help.

The grievor turned first to Mr. Oribine, his union representative, who directed him to another union representative in Windsor. The Union suggested various treatment programs. The grievor contacted the Windsor Regional Mental Health Clinic where he was assessed. The

grievor testified that the clinic staff concluded that he was an alcoholic. He was counselled by a clinic social worker for several weeks. He also began attending Alcoholics Anonymous meetings and described himself as an alcoholic. In late February the grievor attended a one-week session at the Detox Centre in Windsor, followed by a three-week program at the Westover Treatment Centre, a drug and alcohol treatment centre in Thamesville, Ontario. The grievor's week at the Detox Centre and his participation in the Westover program occurred shortly after the first day of the hearing.

On the first day of the hearing the grievor testified that he wanted to change his life. He said that he had attended the Brentwood program in 1993 for the wrong reasons. He indicated that he had not been at Brentwood for himself. Attending a treatment program because someone else wanted you to attend is not sufficient. He indicated that he realized that he had to say he was sorry to the company for what he did, that he acknowledged that he had not heeded the warning signals. While he had been drinking he simply "did not give a shit"; he did not care for himself or for anyone else. He understood why he was perceived as having been unconcerned when he received his suspensions and dismissal.

The grievor testified that he realized that he had lost his job and that it was the loss of the job which prompted him, after his six-week "bender", to realize that he had a serious alcohol problem. He acknowledged that his life could not go on as it had and that he had to straighten himself out. At that time he said that if he did not succeed in the Westover program he anticipated that he would be dead by the age of 40. He further indicated that he realized his battle with alcohol would be a long one but he thought that he had made the first steps to a new life. He anticipated that if he was reinstated he would be able to attend work regularly. In his view, if alcohol was not involved there would be no reason why he would be unable to attend regularly, or to call the Employer on those days when he was sick.

As noted, shortly after the first day of the hearings the grievor spent a week at the Windsor Detox Centre and then three weeks at the Westover Treatment Centre. He testified about his Westover experience on the second day of the hearings. He described the Westover program as a 21-day residential program based on the Alcoholics Anonymous (A.A.) program. He viewed Westover as a spiritually based program which provided participants with mechanisms to deal with other people and to deal with life. He said it opened up his life to a better understanding and a better outlook on alcoholism. He indicated that his time at Westover was the best experience he had ever had. He said he would encourage anyone with an alcoholism problem to attend the program. He viewed the Westover experience as better than Brentwood, and described it as a more in-depth treatment. In comparing his Westover experience with the Brentwood experience he indicated that while he was physically present at the Brentwood Clinic, he was not there mentally and that he had not been open, honest, or willing to participate in the Brentwood program. He regarded his Brentwood experience as a failure but felt much more positively about the Westover experience. In addition to the residential program, Westover offered an after-care program on a weekly basis in Windsor. The grievor indicated that he had been attending the after-care program.

In addition to the Westover after-care program the grievor testified that he was participating regularly in A.A. meetings, attending most nights from Monday through Friday. The grievor also indicated that he had a sponsor at A.A. with whom he had daily contact.

Tom Skinner, the grievor's A.A. sponsor, testified. Mr. Skinner stated that he is a recovering alcoholic. Mr. Skinner testified that he had first met the grievor at an A.A. meeting when Mr. Skinner had been the Chair of the meeting. Mr. Skinner said he had been approached by the grievor who indicated that this was his first meeting. Mr. Skinner had suggested to the grievor how the grievor could participate and felt that the grievor had listened and

participated in the program. Mr. Skinner became the grievor's A.A. sponsor after the Westover program and Mr. Skinner indicated that the grievor had participated actively in A.A. meetings. Mr. Skinner testified that in his opinion the grievor had been honest in his participation at the meetings and that the grievor now had his mind clear and straightened around. Mr. Skinner said that since becoming the grievor's sponsor he had spoken to the grievor on a daily basis either in person or by phone.

Mr. Skinner was asked what he felt were the grievor's chances of remaining sober. Mr. Skinner indicated that the chances were very good if the grievor continued to work at the program the way he was supposed to and that the grievor's performance so far had been good. He cautioned, however, that he could not change the grievor, the grievor would have to change himself.

Marcel Devos, a counsellor at the Westover Treatment Centre, testified. Mr. Devos was the grievor's primary counsellor at the residential program at Westover and he was also the after-care counsellor in Windsor. Mr. Devos has been employed at the Westover Centre since August 1989 and has training in counselling alcoholics. Mr. Devos is also a recovering alcoholic. He described the profile of those alcoholics who had been clients at the Westover. They usually had a poor self-image, were lethargic, were often depressed, and were people who became dissatisfied but, despite the destruction caused, continued a dependency on chemicals. He indicated that the people around alcoholics frequently recognized the destruction before the alcoholic. He described alcoholism as a "disease of denial." Alcoholics frequently had difficulty seeking help. He described alcoholics as prideful people. He indicated that pleasure before responsibility described most chemically-dependent people. Thus they drank up the money which should have been used for food, shelter, etc. The statistics from the Westover Clinic indicated that approximately 50% of participants remained sober. He indicated that those who remained sober were generally

those who had participated regularly in the after-care program.

Mr. Devos indicated that the grievor had participated fully and done well during the residential program at Westover. Mr. Devos testified that the grievor had acknowledged that he was an alcoholic. Mr. Devos also indicated that the grievor had been participating in the Windsor after-care program.

I heard evidence regarding the importance of bakers attending work regularly or advising the Employer that they would be absent, and of the difficulties caused by bakers' absences. Bakers prepare many products on site. When a baker is absent freshly cooked products which would otherwise be available for sale are not available, leading to customer dissatisfaction. Some bakery products are prepared in stages over two shifts and thus involve the work of two bakers. When a baker is absent, partially prepared products may have to be discarded. In addition other bakery department employees who depend on the baker, such as cake decorators, are under-employed when the baker is absent. The grievor acknowledged the importance of regular attendance.

Finally, I heard evidence about several alcoholic employees who had confronted their alcoholism and remained valuable employees with the Employer.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the parties' Collective Agreement:

Article 7

MANAGEMENT RIGHTS

7.01 The Union agrees that the Employer has the exclusive right and power to manage its business, ... suspend, or discharge for just cause ...

Article 13
NOTICE OF ABSENCE

13.01 Employees are expected to attend work as scheduled. When unable to attend, the employee shall contact his Store Manager, Immediate Supervisor, Department Manager, or the next highest management person within (2) hours before his scheduled starting time where practicable, giving the reason he is unable to report for work. He shall advise the Employer when he expects to return to work and how the Store Manager or other management person as appropriate, noted above, can call or contact him relative to this absence.

IV. POSITION OF THE EMPLOYER

The Employer submitted that it had discharged the grievor following his absence on November 8, 1996 and failure to notify the Employer or provide an acceptable reason for his absence. The Employer submitted that the grievor was a full time baker and occupied a skilled position. The Employer depended on the grievor to come to work as scheduled. It was detrimental to the Employer when full time bakers took unauthorized absences and did not advise the Employer. The Collective Agreement, Article 13, provided an expectation that employees will work when scheduled or advise the Employer of absences.

The Employer had used progressive discipline. The Employer had drawn the grievor's attention to the Employee Assistance Plan at the time the Employer had imposed each of the last three disciplinary penalties. The grievor had not indicated he had a problem. The grievor had been specifically warned in July, 1996 that the next unauthorized absence would result in discharge. The November incident was a culminating incident.

The Employer noted that the grievor provided no indication that his absences were due to alcohol throughout the time he was being disciplined. The grievor now said he was an alcoholic and that the use of alcohol was the reason for his misconduct. However, at the time of the incidents the grievor simply indicated he had overslept or that he had worked too much. The grievor was not candid with the Employer if, in fact, his absences were due to

alcohol. The Employer submitted that the grievor had not been truthful, that he had given different reasons to the Employer as compared to those he provided at the hearing. The Employer referred to various inconsistencies in the grievor's testimony and submitted that, because of those inconsistencies, the grievor was not a truthful witness. The Employer submitted that the grievor's statement that he was an alcoholic was self-serving and that there was no corroboration of his alcoholism.

Rather than indicating that the grievor was an alcoholic, the Employer submitted the evidence indicated that the grievor could be motivated to avoid a penalty. Thus, for example, he had participated in the Brentwood program in 1993 in order to avoid going to jail for his driving offence. In addition, the evidence indicated the grievor was able to control his drinking when he desired. He had controlled his drinking after the Brentwood program. Similarly, on January 1, 1997, he had been able to stop drinking without any assistance. The Employer thus submitted that the grievor was not an alcoholic, that he had a disregard for his job, that he had no motivation to conduct himself appropriately, and that he had no motivation to attend work as scheduled.

The Employer addressed the grievor's prognosis, assuming he was an alcoholic. Mr. Skinner, the grievor's A.A. sponsor, had only known the grievor for about a month and could provide no information about the grievor during his employment or when he was drinking. Everything that Mr. Skinner knew was based on what the grievor had told him. Similarly, Mr. Devos, the grievor's Westover counsellor, had only known the grievor after he had stopped drinking. Mr. Devos knew the grievor only through his period at Westover and the few after-care meetings which had been conducted thereafter. Mr. Devos testified that he was unable to say whether the grievor was an alcoholic, although he did express the opinion that he was an alcoholic. Mr. Devos had indicated that 50% of the participants in the Westover program relapse. The grievor had already been through the Brentwood program

and had relapsed after that program. The grievor's prospects for success in combatting his alcoholism were thus poor.

In summary, the Employer submitted that the grievor wanted a job and needed money, but that he had received four warnings and done nothing in response. The evidence was not conclusive that the grievor was an alcoholic but even if he was, alcoholism provided no excuse for failing to work or failing to notify the Employer. The grievor's actions were in disregard of his obligations to the Employer. He was discharged for not attending work. The Employer submitted that the grievor had not been truthful and that the Employer could not trust the grievor. There was no clear indication that the grievor would continue with the program. He had not done so in the past. If the grievor were reinstated it would undermine the Employer's progressive discipline system and undermine discipline as a matter of deterrence. The Employer submitted there were no mitigating factors to justify altering the penalty and submitted that the discharge should be upheld.

The Employer referred to the following authorities: *Re Miracle Food Mart of Canada and United Food & Commercial Workers International Union, Locals 175 and 633* (1995), 48 L.A.C. (4th) 87 (Newman); *Re Culinar Foods Inc. and American Federation of Grain Millers, Local 242* (1995), 48 L.A.C. (4th) 99 (Brandt); *Re Hudson Bay Mining & Smelting Co. Ltd. and United Steelworkers, Local 7106* (1991), 24 L.A.C. (4th) 14 (Chapman); *Re Public General Hospital Society of Chatham and Service Employees' Union, Local 210* (1991), 23 L.A.C. (4th) 35 (Hinnegan); *Sav-A-Centre, A Division of the Great Atlantic and Pacific Company of Canada, Limited and Retail Wholesale Canada Canadian Service Sector, Division of the United Steelworkers of America, Local 414* (December 13, 1996), unreported (Hinnegan); *Re Stelco Inc. (Stelwire-Parkdale Works) and United Steelworkers, Local 5328* (1990), 9 L.A.C. (4th) 129 (Brent); *Re Alcan Rolled Products Company (Kingston Works) and United Steelworkers of America, Loc. 343* (1996), 56 L.A.C. (4th) 187

(Gray); *Re Canada Post Corp. and Canadian Union of Postal Workers (McSweeney)* (1990), 10 L.A.C. (4th) 412 (Christie); *Canadian Pacific Railway (Mechanical Services) and Canadian Auto Workers, Local 101* (November 15, 1996), unreported (Hope); and *Re Avcorp Industries Inc. and International Association of Machinists & Aerospace Workers, Local 721* (1996), 59 L.A.C. (4th) 79 (Ready).

V. POSITION OF THE UNION

The Union submitted the grievor was a good person with a serious alcohol problem. Since his dismissal he had sought treatment for that problem and had been doing everything in his power to conquer his alcoholism.

The Union acknowledged that the grievor had been disciplined for a series of incidents and that he had not advised the Employer that he was drinking. The Union submitted that it was common for alcoholics to deny their drinking and also common for alcoholics to disregard work and family. The Union indicated that it often required a major event in an alcoholic's life in order for an alcoholic to confront his or her problem. Other alcoholics had successfully overcome their dependency on alcohol and maintained their employment. The question was whether or not the grievor could successfully deal with his alcoholism.

The Union submitted that the grievor had abstained from alcohol since January 1. He had thus made a good start at changing his life.

The Union rejected the Employer's assertion that the grievor was not an alcoholic. The Union noted that the grievor had regularly begun his day with several beers for breakfast, drank everyday, drank more on weekends, and that all of his absences had been due to alcohol. The grievor had lost his driver's license twice due to his drinking. In addition, the

grievor had been diagnosed as suffering from alcoholism when he attended the Windsor Regional Mental Health Clinic. In recent weeks the grievor had attended Alcoholics Anonymous meetings up to five days per week. All the indications were thus that the grievor suffered from excessive dependency on alcohol.

The grievor had now made a sincere and dedicated attempt to overcome his disease. The grievor felt he could attend work regularly. He now knew that he could not drink alcohol, even socially, and he realized that if he were to resume drinking alcohol it would lead to an early death.

Mr. Skinner (the grievor's A.A. sponsor) expressed the opinion that if the grievor continued to work at the A.A. program he should remain sober. In addition, Mr. Devos (the grievor's Westover counsellor) indicated that those who continued to participate in the after-care program had a better chance of remaining sober.

The Union acknowledged that some discipline was appropriate. However, in the circumstances of this case the Union asked that I reinstate the grievor on condition that he abstain from alcohol, that he attend the follow-up program at Westover, that he regularly attend Alcoholics Anonymous meetings, and that if he failed to adhere to these conditions the Employer could terminate his employment. The grievor was willing to provide blood or urine samples on a random basis to demonstrate he was abstaining from alcohol. The Union submitted that it was an appropriate case for this type of "last chance" arrangement.

If the grievor were reinstated on a last chance arrangement there would be no prejudice to the Employer. The Union did not seek compensation for the period since the dismissal. If the grievor was one of those alcoholics who resumed drinking, the Employer would be entitled to terminate the grievor's employment. However, if the grievor maintained sobriety,

the Employer would gain a valuable employee. It was possible, submitted the Union, for me to impose conditions that would protect the Employer and which ought to allay any fears the Employer might have. The Union submitted that to reinstate the grievor on such conditions would not encourage others to be alcoholic nor undermine the Employer's system of progressive discipline.

The Union relied on the following authorities: *Communications, Energy & Paperworkers Union of Canada and Bell Canada* (September 22, 1995) unreported (Devlin); *Re Canada Post Corp. & Canadian Union of Postal Workers (LPP MTC 91-10 & 626-88-3-60468)* (1992), 25 L.A.C. (4th) 326 (Brent); *Re St. Paul's Hospital and Hospital Employees' Union* (1995), 47 L.A.C. (4th) 423 (Bluman); and *Re Canadian Airlines International Ltd. and International Association of Machinists & Aerospace Workers, District Lodge 721* (1990), 17 L.A.C. (4th) 437 (Munroe).

VI. CONCLUSIONS

I begin by recording an evidentiary ruling I made during the hearing which the Union requested be included in this award.

As noted earlier, the grievor testified during the first day of the hearing. Shortly after the first day of hearing, he participated in the Westover program. The grievor continued his testimony on the second day of the hearing at which time the Union sought to put questions to the grievor regarding his Westover experience. The Employer objected to this evidence. The Employer submitted that to admit evidence of events which occurred after the beginning of the hearing was inappropriate. The Employer submitted that one party (in this instance, the Union) may, upon hearing the other party's case (i.e. the Employer's), do something to bolster its own theory of the case (in this instance, have the grievor attend an alcohol

treatment program). The Employer submitted that to admit such evidence would not promote harmonious labour relations.

In response the Union noted it had not closed its case and was not splitting its case. In his first day of testimony the grievor had indicated that he was enrolled in, and intended to attend, the Westover program. The Union submitted that one of the central questions to be determined was whether the grievor would attend work in the future if he were to be reinstated. The Union submitted that evidence about his Westover program was relevant evidence and the fact that it had taken place following the start of the hearing should not make it inadmissible. The Union referred to *Bell Canada, supra*.

I allowed the evidence. There are many cases in which evidence of events which occurred after the filing of the grievance is admitted and relied upon by arbitrators. Post-discharge evidence is a common feature in cases of alcoholism, including many of the cases later cited by the parties in argument, and noted above. (The general issue of the use of post-discharge evidence is dealt with later in this award.) I cannot see any legal reason nor any policy reason in a case such as this to exclude evidence of events which occurred after the start of the hearing simply because the events occurred after the start of the hearing. Such evidence might be very important in assessing the matter of penalty.

However, if after hearing the evidence the Employer had a concern that the grievor's evidence had been manufactured in order to bolster the Union's theory of the case, or had other concerns regarding the weight to be given to that evidence, the Employer was entitled to make submissions to that effect. The time at which the events had occurred (in this case after the start of the hearing) might go to the weight of the evidence, but did not make that evidence inadmissible.

I now turn to the issues before me related to the resolution of the grievance itself. Alcohol has caused employment difficulties for many employees and issues arising in the dismissal of alcoholic employees have caused difficulties for employers as well as arbitrators. Because of the nature of alcoholism, some of the characteristics of which were reviewed above, cases of alcoholism do not fit nicely into the usual approach in dismissal cases.

In many cases regarding the dismissal of alcoholic employees, the employees have long been known to be alcoholic. Those cases often turn on whether the alcoholic employee has made a reasonable effort to control his or her alcoholism and thus whether the employee can be expected to work regularly. Generally in those cases the employer has concluded that the employee cannot be relied upon to attend regularly and the union disputes the point. One of the issues is often a consideration of whether the steps taken by the grievor after, and as a result of, the dismissal demonstrate that the grievor has his or her alcoholism under control.

This case is made more difficult because this Employer reached the conclusion that the grievor could not be relied upon to attend work regularly nor to advise of his absences without the Employer having received any indication from the grievor that the grievor was alcoholic. Although the Employer asked about personal difficulties, the grievor did not indicate that he was an alcoholic until well after the dismissal. The Employer had followed a careful progressive discipline approach and there was no evidence following those earlier incidents of discipline that the grievor would change his employment behaviour. In the absence of the grievor's claim of alcoholism as a basis for his absences, the grievor's dismissal would no doubt have been upheld.

In this case the grievor claimed to be an alcoholic after his dismissal. The Employer accepted neither that the grievor was an alcoholic nor that his absences from work were due to his drinking. The Employer asserted that the evidence of alcoholism was not to be

believed, that it was provided solely in an effort to retain employment. Thus in this case there are evidentiary questions to be addressed first.

1. Is the grievor an alcoholic or, alternatively, does he rely excessively on alcohol? and,
2. Was the grievor's conduct which led to his earlier discipline and his dismissal related to his use of alcohol?

The first issue is whether the grievor is an alcoholic or at least a person who, in the past, has relied excessively on alcohol in the same manner that many alcoholics do. The grievor asserted that he was an alcoholic, and testified that he had been diagnosed as an alcoholic at the Mental Health Clinic. His view was supported in part at least by the evidence of his A.A. sponsor and the evidence of his Westover counsellor. The Employer, however, submitted that this was part of a deliberate attempt by the grievor to secure reinstatement.

Whether the grievor was considered an alcoholic was important to the parties as they disagreed on whether this was a case of innocent or culpable absence. The Union submitted that alcoholism was a disease, that the grievor was thus sick, that he should not be blamed for his illness nor his absences, and that the only issue was whether his future attendance prospects were reasonable. The Union thus characterised the previous absences as innocent, essentially as being beyond the grievor's control, and something for which he should bear no blame. The Employer submitted the grievor was responsible for his actions and, as those actions were contrary to the requirements of the collective agreement and contrary to reasonable employer expectations, his actions should be viewed as deserving of blame, i.e. culpable, in the same way as any other wilful employee misconduct.

I do not find a simple distinction between innocent or culpable absences very helpful in a case like this. Even though alcoholism is a disease, it is by its nature a disease which can only be controlled by the patient, in this case by the grievor. To the extent that the grievor

did not earlier take steps to control his alcoholism he has no one to blame but himself. I appreciate the difficulties he has faced in dealing with his alcoholism but dealing with his alcoholism has been, and will remain, his own responsibility. Thus although his drinking caused him to miss work and to fail to notify the Employer, his absences were his responsibility in the sense that he did not take proper steps to deal with his drinking. I do not view those absences as innocent, such as an absence due to hospitalization following a car accident or because of cancer. However I also do not view the absences as being of the same level of wilfulness or culpability as it would be in the case of an employee who took a day off to go fishing and failed to notify the Employer. The nature of alcoholism is such that it may in some sense diminish the employee's blame or culpability but it does not, in my view, remove it.

Although I do not find the innocent versus culpable distinction useful, I think there is benefit in examining the issue of the nature of the grievor's drinking in further detail. If the grievor is a person who simply enjoys drinking to excess from time to time and thereby misses work, but has always been able to control that drinking, then the evidence of his new approach might ring hollow and be of little value in concluding that he is likely to improve his future work performance. If that were the situation, the grievor would be little different from an employee who likes to take a day off in order to go fishing without providing any notice. Thus an examination of the grievor's drinking may well assist in determining whether the grievor would be likely to continue his earlier pattern of absences or whether he has now taken steps to control his drinking which are likely to lead him to a different work pattern if he were reinstated.

The grievor indicated that he began drinking while in his early teens. He indicated that his consumption of alcohol increased in high school and increased again when he quit high school. The grievor indicated that he also consumed drugs. When he became bored with

what he referred to as “kiddie” drugs, he began to use cocaine. In 1993 the grievor went through a three-month treatment program at Brentwood and indicated that since that experience he has given up drugs. However, he testified that after the Brentwood program he felt he could resume drinking socially. He resumed drinking. He testified that he would begin his day with several bottles of beer. He testified that he drank beer in a way that some people drink a pot of coffee in the morning. In recent years the grievor testified that he would drink much more on the weekends or on days when he was not at work, but testified that he drank every day. Following his dismissal, he indicated that he went on a drinking binge which lasted until January 1.

I acknowledge that it is possible that the grievor invented this evidence. I do not, however, think that he did.

In my approach to this case it does not matter whether the grievor suffers from the disease of alcoholism or is simply, in the colloquial sense, "an alcoholic."

In any event, from the grievor’s testimony, from his earlier attendance at the Brentwood program, from the testimony of his A.A. sponsor and his Westover counsellor, from the fact that the Union knew of the grievor’s excessive drinking at the time it filed the grievance, and from the diagnosis made at the Windsor Regional Mental Health Clinic, I conclude that the grievor is an alcoholic.

I appreciate that alcoholism is a disease. A diagnosis of alcoholism is a medical diagnosis. Thus to the extent that I am not qualified to make a medical diagnosis, and may be wrong on this point, then I would indicate that in my view the grievor has, in the past, relied extensively and excessively on alcohol. His reliance on alcohol was in part the means by which he has attempted to deal with his problems and in so doing he acted in a manner very

similar to that which many alcoholics do. It was not a situation in which he controlled his drinking; rather his drinking controlled him.

The next issue is whether the grievor's conduct was related to his alcoholism. At the time the grievor was discharged, and at the time of his earlier discipline, the grievor did not advise the Employer that his absences had been due to the consumption of alcohol. During the hearing, however, he testified that in each instance his absence and his failure to advise the Employer of that absence had been due to excessive drinking. The Employer asked me to reject this testimony. The Employer submitted that this was part of a deliberate effort by the grievor to secure continued employment.

A resolution of the issue of whether the grievor's absences and his failure to notify the Employer were due to the grievor's alcoholism depends largely on the grievor's credibility. There was no evidence from other witnesses in support of the grievor's assertions, and no direct evidence to the contrary. The grievor acknowledged that he had not told the Employer of his alcohol problem at the time of the earlier absences and discipline. The grievor indicated that he did not then feel that he had an alcohol problem. When Mr. Pflug suggested to the grievor that the Employee Assistance Plan was available and that assistance might be available to him through that Plan, he did not indicate that he was having difficulties with alcohol. Even at the time of discharge Mr. Pflug testified that, while the grievor indicated he had a problem, the grievor had stated that he was not man enough to indicate what his problem was.

The failure to acknowledge alcoholism is common among alcoholics. The grievor's failure to advise the Employer of his alcoholism at the time of the earlier discipline would fit this pattern, and is not determinative of the issue of the grievor's alcoholism. However the grievor had, at some level, acknowledged his alcoholism and dependency on drugs in 1993

when he sought a three-month leave of absence from the Employer in order to attend the Brentwood program. There was considerable evidence that the grievor drank heavily. The grievor's evidence on this point was credible and he was not shaken in cross examination as to the reason for his having missed work. In light of the evidence that the grievor drank heavily, in light of the fact that denial is a common feature of alcoholism and notwithstanding the grievor's failure to advise the Employer of his alcohol problem, I conclude that it is more likely than not that the grievor had been drinking heavily at the times of his earlier discipline and at the time of the incident which led to his discharge. I find that his excessive use of alcohol led both to his failures to attend work and to his failures to properly advise the Employer.

I now turn to those issues which are commonly considered in dismissal cases. I note that there was agreement that:

1. The grievor missed work on November 8 and provided no notice to the Employer; and,
2. This conduct merited a disciplinary response.

As the Union acknowledged the grievor's actions merited some form of discipline, the November 8 incident qualifies as a culminating incident. This permits the review of his entire disciplinary record in assessing the appropriateness of the penalty. That review of the appropriateness of the penalty is the last and most difficult question to be considered.

To repeat, the Union submitted that in the circumstances of this case dismissal was excessive and asked that I exercise my remedial jurisdiction and reinstate the grievor on conditions.

I have read the various awards referred to by the parties and agree with much of the thinking expressed in them. I do not, however, find it necessary to review the facts and decision in

each of those awards. Instead, I will simply set out the conclusions which I reach from those awards and from my consideration of the evidence in this case.

I begin by noting that an Employer may discharge an employee for absences where that absenteeism is excessive and where there is no reasonable basis for concluding that the employee's attendance will improve in the future. (See, for example, *Re Miracle Food Mart*, *Re St. Paul's Hospital*, and *Re Canada Post (LPP MTC 91-10 & 626-88-3-60468)*, *supra*.) In such a situation an employee is unable to meet his or her part of the employment relationship and the Employer is relieved of its obligation. Secondly, where an employee's absence is due to culpable or blameworthy conduct, the employee can be disciplined for cause. At some point culpable absences are sufficient to justify dismissal as the appropriate disciplinary response. (See for example *Re Culinar Foods*, *Re Hudson Bay Mining and Smelting*, *Re Public General Hospital*, and *Sav-A-Centre*, *supra*.) Thirdly, I accept that alcoholism is commonly regarded as a disease and ought to be considered in the same manner as any other disease. On this issue, an Employer will thus be expected to provide employees with an opportunity to confront the disease of alcoholism and to secure appropriate treatment. (See, for example, *Re Stelco Inc*, *Re Alcan*, *Bell Canada*, and *Re St. Paul's Hospital*, *supra*.) Fourth, evidence of events that occurred after the discharge may provide assistance in determining whether or not alcoholism can be controlled and whether the penalty of dismissal of an employee for alcoholism related incidents should be modified. On this point, a point on which arbitrators have been divided, I agree with the approach and the reasoning of Arbitrator Brent in *Re Canada Post (LPP MTC 91-10 & 626-88-3-60468)*, and the similar result in other cases, including *Bell Canada*, *Re St. Paul's Hospital*, *Re Avcorp Industries* and *Re Canadian Airlines*, *supra*. In the *Re Canadian Airlines* award Arbitrator Munroe expressed his conclusion as follows:

In the modern legal environment, arbitrators routinely hear evidence of the grievor's post-dismissal efforts at rehabilitation. For cases of this kind, [alcoholism] it must now be considered settled law that such evidence is admissible. (at p. 445)

Applying these concepts to a situation of alcoholism involves a careful review of the evidence and a balancing of the interests of the Employer and the employee. There is no simple approach to dealing with questions of alcoholism and absences caused by the use of alcohol. It is necessary to assess all of the evidence and reach a conclusion which fairly balances the Employer's right to control the workforce and the individual employee's right under the collective agreement to be discharged only for just cause.

In this situation if there had been no evidence that the grievor was an alcoholic, there would be much less ground to conclude either that discharge was excessive or to substitute another penalty, as there would be little basis to explain the grievor's work difficulties and little basis to conclude that his work performance might improve. The evidence before me, however, indicates that the grievor is an alcoholic and further indicates that in the period following his discharge he has acknowledged his alcoholism and he has made a reasonable effort to deal with his alcoholism. That effort has *so far* been successful. The grievor cannot promise that he will maintain sobriety. The grievor's A.A. sponsor and his Westover counsellor likewise cannot say that the grievor will maintain sobriety. I was, however, impressed by the grievor's acknowledgement of his earlier dependency on alcoholism and his commitment to a new approach to his life. The grievor appears to have overcome his earlier denial of his alcohol problems. Denial of alcohol problems is one of the greatest difficulties facing alcoholics. In addition, the grievor has taken positive steps to deal with his drinking. The grievor now seems to realize that his health and his future depend on him abstaining completely from alcohol.

I thus return to a balancing of the Employer's interests with the grievor's interests. Like his sponsor and his counsellor I cannot say that the grievor will maintain sobriety. However, in the circumstances of this case I think the grievor has a good possibility of maintaining sobriety. So far his progress has been good. If he maintains sobriety I believe he could be

a productive and valued employee. The grievor has been employed for some five years and, other than the problems caused by his alcoholism, appears to have been a productive employee. If the grievor were reinstated and remained sober I see no damage to the Employer's interests. If he were reinstated and resumed drinking the Employer's interests could also be protected by authorizing his dismissal.

In this case I have decided that the dismissal was an excessive penalty. I find that the Union's request that the grievor be given a last chance is a reasonable request and a fair resolution of the conflicting interests involved. Thus I direct the reinstatement of the grievor effective Monday July 7, 1997. Given the date of this award, reinstatement on July 7 allows both the Employer and the grievor time to adjust to his return to work. The grievor is to be reinstated without any back pay but with full seniority. The reinstatement is to be on the following conditions which are to remain in effect for two years, that is until July 6, 1999:

1. The grievor shall abstain from alcohol and drugs. If requested by the Employer, the grievor shall provide urine or blood sample(s) for testing by the Employer as a means of determining whether the grievor has abstained from alcohol and drugs.
2. The grievor shall continue to participate regularly in the after-care program offered by the Westover Clinic.
3. The grievor shall continue to attend meetings of Alcoholics Anonymous on a regular basis.
4. Should the grievor breach any of the conditions 1 through 3 above, the Employer may terminate the grievor's employment as of that date, subject only to the Union's right to dispute whether the condition was breached.

I shall remain seised to deal with any difficulties which may arise in the implementation of this award.

Dated at London, Ontario this 25th day of June, 1997.

Howard Snow, Arbitrator