

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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

WINDSOR-ESSEX COUNTY REAL ESTATE BOARD

- The Employer

-and-

SERVICE EMPLOYEES' UNION, LOCAL 210

- The Union

AND IN THE MATTER OF the grievance of Daniela Pittana

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Kimberly Michaelis

- Counsel

Leona MacIntyre

- Executive Officer

On behalf of the Union:

E. R. Durham

- Union Representative

Monica Tuck

- Chief Steward

Daniela Pittana

- Grievor

Hearing held December 7, 1998 in Windsor, Ontario.

AWARD

I. INTRODUCTION

Daniela Pittana (the grievor) works as the bookkeeper for the Employer. On September 11, 1998 she made two bank deposits. For one deposit she entered her own account number and the money was thus credited to her account. She discovered the error on October 1 and promptly had the bank correct the error. She notified her supervisor, the Employer's Executive Officer, early on October 13, the first day they were both in the office.

There was no suggestion of theft or misuse of funds.

The Employer suspended the grievor for three days because of the grievor's initial error and her delay in advising the Employer of it. The grievor contested the three day suspension.

II. THE FACTS

The Employer operates the multiple listing service in Windsor-Essex, provides education, and deals with professional standards and other matters of interest to its member realtors. The members control the operations through elected officers and various committees. In addition, there are twelve employees, eight of whom are in the bargaining unit and four of whom are excluded from the unit. The senior management employee is the Executive Officer. The Executive Officer is responsible for all staff matters and is responsible to the Board of Directors for the financial operations of the Employer.

The grievor is the Employer's only bookkeeper. She began employment here in 1981 and became bookkeeper in 1991. Before this incident the grievor had not been disciplined in her 17 years of employment.

Prior to 1993 the grievor reported to the Assistant to the Executive Officer, but in 1993 the grievor's job description as bookkeeper was revised and she then reported solely to the Executive Officer. When a new Assistant to the Executive Officer was hired in 1994 the Assistant's job description was revised and the Assistant's new job description suggested that the grievor should report in some instances to the Assistant. However these changes in the Assistant's job description were not communicated to the grievor and no changes were made in the grievor's job description.

The grievor has been responsible on a day-to-day basis for the accounting and bookkeeping activities of the Employer, handling the accounts payable and receivable, preparing invoices, and controlling the daily financial operations. Of particular relevance here, she made bank deposits on behalf of the Employer. Although there was no fixed schedule for making bank deposits, the grievor generally made one or two deposits per week to the Employer's primary bank account, a current account at the Bank of Montreal. The Employer did not have deposit slips pre-printed with its name and account number but rather used blank deposit forms. The grievor was required to complete those blank forms with the Employer's name, the bank's branch transit number and the Employer's account number, in addition to the date and the information about the cheques or cash being deposited.

On Friday September 11, 1998 the grievor made two deposits, both intended for the Employer's current account. There was no issue with respect to one deposit - that deposit slip was filled out in the usual manner and the deposit was correctly made. This dispute concerns the second and larger of the two deposits, a deposit of some \$8,200. The grievor properly entered the Employer's name, as the holder of the account, as "Windsor-Essex County Real Estate Board". She also entered the correct bank transit number. The cheques deposited were all cheques payable to the Employer, and the grievor properly stamped all the cheques on the back to indicate that the cheques were for deposit to the credit of

"Windsor-Essex County Real Estate Board". She also stamped all the cheques indicating the Employer's correct account number as the account to which the cheques were to be deposited. However, when the grievor wrote the account number by hand on the deposit form she entered the number of her own personal account at the same branch.

When the grievor made the deposit, the error in the account number on the deposit slip was not noticed. This second deposit was credited to the account number shown on the deposit slip - the grievor's personal account.

For several weeks no one realised an error had been made. However on October 1, 1998 the grievor went to the bank to deposit her pay to her own account and when she updated her account information she realised there was more money in her account than there should have been. She asked the bank to determine the source of the extra money and to advise her. The bank called her at work that afternoon and she then learned that the September 11 deposit intended for the Employer's current account had been made to her own account. The grievor promptly asked the bank to correct the error by transferring the money to the Employer's account. The transfer was made.

October 1 was a Thursday. The Executive Officer was not in the office October 1 or October 2. The grievor was on vacation the following week. Monday October 12 was a holiday. Thus after the grievor learned of her error, the first time both she and the Executive Officer were in the office was October 13. Early on Tuesday October 13, 1998 the grievor informed the Executive Officer of her error and the subsequent correction.

The Executive Officer asked the grievor to provide her with all the records regarding this matter. The Executive Officer then notified the President and contacted the Employer's lawyers and accountants. The Employer asked its accountants to conduct an audit of the

records to ensure that the situation was as the grievor had indicated and to ensure the integrity of the Employer's financial operations. The audit supported the grievor's version of events.

The Employer acknowledged that the grievor cooperated fully in the audit and in the Employer's investigation, including providing her personal banking records. There was no suggestion of theft or misuse of funds.

The grievor acknowledged that it had been her error. She was unable to explain the cause of the error.

The Employer disciplined the grievor with a three day suspension for the error in the deposit and her delay in advising the Employer.

III. PROVISIONS OF THE AGREEMENT

The relevant provisions of the Agreement are as follows:

ARTICLE 3 - MANAGEMENT FUNCTIONS

...

3.01 (b) ... the Union recognizes the right of the Employer to:

...

ii) ... discharge, . . and discipline employees, provided that a claim that a seniority employee has been discharged or disciplined without reasonable cause may be subject of a grievance . . .

ARTICLE 9 - DISCHARGE AND DISCIPLINE

9.01 No employee in this bargaining unit shall be discharged without just cause.

...

IV. POSITION OF THE EMPLOYER

The Employer acknowledged that the grievor was a long service employee and had been bookkeeper since 1991. As such the grievor had made hundreds of deposits. On September 11, 1998 the grievor made out two deposit slips and on one the wrong account number was entered. There was no indication as to how that mistake had occurred, but the money had been deposited to the wrong account. There had been no misuse of the funds and the grievor had cooperated fully in the investigation. However the Employer submitted that the grievor's carelessness and her delay in reporting the error justified discipline.

As for the delay in reporting, the grievor knew of the error on October 1. The Employer submitted the grievor should have reported the error earlier to the Assistant to the Executive Officer. Alternatively the grievor should have reported it to another member of the Management staff or to a member of the Board of Directors, or she should have taken steps to contact the Executive Officer.

The Employer had acted reasonably in its investigation and throughout the investigation the grievor had offered no reason for her error and no valid reason for failing to report the error sooner.

The Employer asked that the discipline be upheld and the grievance dismissed.

The Employer relied upon the following authorities: *The Municipality of Metropolitan Toronto and The Canadian Union of Public Employees, Local 79*, (Woolley grievance) (unreported), June 1, 1992 (Dunn); *Re National Edible Oils, a Unit of Canada Packers Inc. and United Food and Commercial Workers International Union, Local 208* (1986), 23 L.A.C. (3d) 203 (Solomatenko); *Re Outboard Marine Corp. of Canada Ltd. and United*

Steelworkers, Local 5009 (1973), 4 L.A.C. (2d) 82 (Reville); and *Re Volvo Canada Ltd. and Canadian Automobile Workers, Local 720* (1990), 12 L.A.C. (4th) 129 (Outhouse).

V. POSITION OF THE UNION

The Union noted that the grievor was a seventeen year employee with a discipline free record. She had made one mistake in a bank deposit. The mistake had been noticed by her and promptly corrected by her. She then reported her mistake and the correction to the person to whom she felt she should report it and had done so on the first day the two of them were both in the office.

The grievor had demonstrated that she was trustworthy. If she had not notified the Employer, it was possible the error would never have been noticed. She made no attempt to lie or cover up her error; she had been forthright and cooperative throughout.

The Union submitted that, while the error in the deposit justified some measure of discipline, no discipline was appropriate for the delay in reporting the error as there had been no delay. The Union submitted that a verbal warning would have been appropriate and asked that I modify the form of discipline.

The Union relied upon the following cases: *Re Phillips Cables Ltd. and International Union of Electrical, Radio and Machine Workers, Local 510* (1974), 6 L.A.C. (2d) 35 (Adams); *Re Levi Strauss Canada and Amalgamated Clothing and Textile Workers Union* (1980), 26 L.A.C. (2d) 91 (Arthurs); and *Re Prince Rupert Grain Ltd. and Grain Workers Union, Local 333* (1995), 49 L.A.C. (4th) 344 (Munroe).

VI. CONCLUSIONS

In discipline cases I prefer to 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 relied upon two aspects of the grievor's conduct in imposing discipline. First, the Employer submitted that the error in the deposit warranted discipline, and secondly that the delay in reporting the error also warranted discipline. The parties agreed on the first issue but disagreed on the second.

As for the error in the deposit, there was no clear explanation as to how it occurred. It appears to have been a lack of attention to detail or a momentary loss of concentration. At the hearing the grievor could offer no explanation for the error. The Employer relied upon the grievor to handle its money and deposit the money at the bank. The Employer expected the grievor to do so carefully and, for whatever reason, it was clear that, in this instance, the work was not done with sufficient care. I agree with the parties that the grievor's attention to detail in making deposits was important. I also agree that her lack of care in this instance was sufficiently serious as to justify some measure of discipline.

The second matter concerns the delay in reporting the error. The grievor discovered the error and corrected it on October 1, 1998. As bookkeeper she had reported to the Executive Officer since 1993. In 1993 the grievor's job description was changed and all the earlier

references to the bookkeeper reporting to the Assistant to the Executive Officer were removed from the grievor's job description. Although the Employer changed the Assistant's job description in 1994 so as to indicate some responsibility over staff and to suggest that the grievor might report to the Assistant, those changes were never communicated to the grievor. The grievor understood that she reported to the Executive Officer and she had done so during the past five years, particularly in financial matters. While I am prepared to accept that on occasion the grievor dealt with the Assistant to the Executive Officer, the evidence disclosed that in nearly every instance she has reported to and was under the direct supervision of the Executive Officer. At the first instance when both the grievor and the Executive Officer were at the Employer's premises, the grievor reported to the Executive Officer regarding her error and the correction. She made no attempt to contact the Executive Officer prior to that time.

The issue before me is whether the grievor's failure to report the matter to a Board member or to another member of management, or to take extraordinary steps to contact and advise the Executive Officer at a time when either the Executive Officer was away from the office or the grievor was on holiday, was a matter deserving of a disciplinary response.

I appreciate that the Employer believed the grievor should have reported the matter earlier. However, the Employer had the authority to establish the normal reporting lines. It did so most recently when it revised the grievor's job description in 1993. At that time the Employer advised the grievor that she was to report to her supervisor, the Executive Officer. At no time had the Employer advised the grievor that changes had been made in the organization of its management staff, or that it wished her to report to the Assistant on some issues. Nor did the Employer advise the grievor that in the absence of the Executive Officer the grievor should report all, or some, matters to the Assistant to the Executive Officer.

From the grievor's perspective this was a simple error which was corrected as soon as it was discovered and an error which had caused no harm to the Employer.

I accept that the grievor's error was the result of inattention or loss of concentration. When she discovered the error, she corrected it promptly. She reported her error in the normal way as soon as that was possible. I can find nothing so unusual in the circumstances of this error to indicate that the grievor was "required" to report the error to the Executive Officer by other means, or report it to some other person. In other words, I find that the grievor's action in waiting until both she and the Executive Officer were at work before reporting the incident to the Executive Officer was appropriate and not a matter deserving of discipline.

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

I have found that the only conduct deserving of discipline was the grievor's error in making the deposit. The Employer imposed a three day suspension and the question is this: Was that excessive?

As noted earlier the precise reasons for the grievor's error are not known. The grievor did not discover her error for nearly three weeks and she had no specific recollection of the events leading to the error. It is therefore difficult to consider in any detail the nature or cause of her error.

On the other hand the grievor had made hundreds of deposits for the Employer and this was the first error, or at least the first known error. In her seventeen years of employment this was the first instance of discipline.

I would note that while Article 3 uses "reasonable" cause, Article 9 uses "just" cause in

relation to discharge. The parties raised no issue as to any difference between "just" and "reasonable". They treated this as a "just cause" for discipline issue. I view the two terms in this agreement as having the same meaning.

The parties made submissions on the standard of review which I should use in assessing the discipline imposed. In *Re Outboard Marine, supra*, for example, the Board said that an arbitrator should be persuaded by the union or the grievor that the employer acted in an arbitrary, unreasonable or discriminatory manner in imposing discipline before the arbitrator substitutes a different penalty.

That *Outboard Marine* approach was reviewed and largely rejected in *Re Phillips Cables, supra*. In *Re Levi Strauss, supra*, arbitrator Arthurs noted *Phillips Cables* and then set out his view of the proper approach. He expressed the view that an arbitrator must ensure that the discipline is "just", not simply decide whether the Employer acted reasonably. He acknowledged, however, that the notion of what is just has "certain ballpark characteristics".

The Union submitted that I ought to follow the *Levi Strauss* approach; the Employer urged the *Outboard Marine* approach.

As "just cause" is a common issue, I offer a few general comments on the concept before considering the issues in this case in more detail.

The purpose of any discipline (other than discharge) is to correct behaviour, not simply to punish an employee. Thus if discipline is to be for just cause then the discipline should be intended to cause the employee to modify his or her behaviour.

In my view, in order for discipline to be for just cause, the measure of discipline must first

bear a reasonable relationship to the gravity of the employee's wrong. A mild wrong ordinarily merits a mild response, and a serious wrong ordinarily merits a serious form of discipline.

Arbitrators generally adopt the notion of progressive discipline under which the first instance of improper behaviour by an employee merits a moderate form of discipline. More severe forms of discipline are used if the improper behaviour is repeated. The types of discipline commonly used are verbal warnings, then written warnings, then short suspensions, and finally longer suspensions. Particularly serious forms of misconduct may prompt a more serious form of discipline as a first step. If the improper behaviour is not subject to modification by these progressively more serious forms of discipline, then discharge may be used.

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 "better" 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 principles. In particular I believe that the above is the proper approach to adopt when interpreting and applying the provisions in this collective agreement which requires just cause for discipline.

Returning now to the parties' submissions on the standard of review, it is implicit in my above comments that I reject the narrower approach which views the arbitrator's role as one of merely deciding whether the discipline was arbitrary or unreasonable. I view my task as a broader one; my task is to determine whether the penalty was "just". In so doing I

acknowledge that there is often a range of penalties which might be "just". As Arbitrator Arthurs noted in *Re Levi Strauss, supra*, for example, "One cannot say, to a moral certainty, that two days' suspension is just while a one or three-day suspension is not" (p. 93).

Given that:

1. The error was the result of a momentary and isolated lack of attention;
2. The error was one which did not benefit the grievor; and,
3. This was the grievor's only instance of discipline in seventeen years of employment;

I find that a three day suspension was an excessive disciplinary response. In my view it was not within the range of "just" discipline for this grievor's conduct.

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

The remaining issue is what penalty should be substituted. The grievor has had a lengthy and previously unblemished employment record. The reason for this error cannot be determined with certainty. The grievor had no recollection of the event itself. It appears to have resulted from momentary inattentiveness. I have no idea as to what, if any, events caused the grievor's lack of attention to detail. But clearly the grievor has in the past been uniformly careful and attentive in handling matters such as the Employer's bank deposits. A mild form of discipline would have sufficed in this instance to draw the grievor's attention to the importance of paying careful attention to details and would have been sufficient to encourage the grievor to modify her behaviour in this area. I thus substitute a verbal warning for the three day suspension. I direct the Employer to compensate the grievor for her lost income from the three day suspension.

In summary, I conclude that only the grievor's error in the bank deposit merited discipline,

and that a three day suspension was excessive. I substitute a verbal warning.

I retain jurisdiction to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 6th day of January, 1999.

Howard Snow, Arbitrator