11-26-1987

Re Canada Post Corp and CUPW (Gallie)

Innis Christie
Dalhousie University Schulich School of Law

08:0037

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IN THE MATTER OF AN ARBITRATION

BETWEEN: CANADIAN UNION OF POSTAL WORKERS (The Union)

AND:

CANADA POST CORPORATION (The Employer)

Re: Carole Gallie -
Innocent Absenteeism

C.U.P.W. Grievance No. A-59-H-332
C.P.C. Arbitration No. 86-1-3-4606

Before: Innis Christie (Arbitrator)

At: Moncton, New Brunswick

Hearing Date: May 25, 1987 (The final written submission received August 4, 1987)

For the Union:

Ronald A. Pink - Counsel
Wayne Mundle, Regional Education and Organization Officer, CUPW Atlantic Region

For the Employer:

George M. Mitchell - Counsel
Mary Oosterholt-Pilon - Senior Labour Relations Officer, Atlantic Division, Canada Post Corporation

Date of Decision: November 26, 1987

35
11-26

Union grievance alleging breach of the Collective Agreement between the parties in respect of the Postal Operations Group (Non-Supervisory): Internal Mail Processing and Complementary Postal Services, which expired September 30, 1986 and remained in force pursuant to the extention provisions of the Canada Labour Code, and in particular Article 10, in that the Employer released the grievor from employment allegedly without just, reasonable or sufficient cause. The Union requests that the grievor be reinstated and reimbursed for any lost rights, benefits or earnings and that all reports, letters and documents relating to this matter be removed from her personal file.

When this matter was first heard, on January 21 and February 4, 1987, there was a preliminary objection to my jurisdiction. The essence of the objection was that I had not been properly appointed in accordance with paragraph 2(b) and (d) of Appendix "E" to the Collective Agreement, entitled "Arbitration Procedure and Lists of Arbitrators". In an award on the preliminary objection dated March 19, 1987 I denied the objection. Subsequently the parties agreed that this matter would be heard on May 25, 1987. There were no further or other objections to my jurisdiction.

A W A R D

This is a case of innocent absenteeism or "release for incapacity" under Article 10.10 of the Collective Agreement. It is different from many other such cases because a significant

part of the grievor's absences resulted from injuries on duty, for some of which she was granted injury-on-duty-leave with pay under Article 24.01. Also, because of the preliminary objection to my jurisdiction a somewhat longer than usual time lapsed between her notice of termination, on April 29, 1986 and the hearing on the merits, on May 25, 1987. This is significant because, since the award of arbitrator Burkett between these parties in Potosky (1982), 6 L.A.C. (3d) 385, it has been clearly established that the grievor's performance in the period after his or her notional termination is to be taken into account by the arbitrator as evidence "relevant to what is likely to happen in the future", to use arbitrator Swan's words in the matter of Bell (CPC No. 82-1-3-2487; CUPW No. 0-299-GG-446), dated May 4, 1983.

I must also note that what is also, in my experience, a somewhat unusually long time has passed from the date of the hearing to the date of this award. This delay, for which I must apologize, could impact adversely on the Employer because under Article 10.10(b) of this Collective Agreement an employee may not actually be terminated, "released" in the words of the Collective Agreement, until the award has been made. Article 10.10(b) provides:

> 10.10 Release for Incapacity
>
> ...
>
> (b) If a grievance is submitted prior to the end of the thirty (30) day period mentioned hereinabove, the employee shall not be released until the grievance has been settled or disposed of by the arbitrator.

For reasons to which I now turn I have decided that the grievor, Carole Gallie, is to be continued in employment subject to conditions, in this case to be applied from the date of the hearing on the merits rather than from the date of this award. In the result, therefore, the Employer has not been prejudiced by post-hearing delays.

In a previous award between these parties, Arsenault (CUPW Grievance No. A-24-H-119; CPC Arbitration No. 85-1-3-5344, dated April 3, 1986) I set out my understanding of the jurisprudential framework within which grievances like this one arise and are dealt with under the Collective Agreement. I will repeat here the relevant points that I made there. As I have already pointed out this grievance arises under Article 10.10 which, quoted in full, provides:

> 10.10 Release for Incapacity
>
> (a) Where the Corporation intends to release an employee for incapacity, he shall notify the employee in writing at least thirty (30) days in advance and transmit a copy of this notice to the local and regional offices of the Union within the same time limit.
>
> (b) If a grievance is submitted prior to the end of the thirty (30) day period mentioned hereinabove, the employee shall not be released until the grievance has been settled or disposed of by the arbitrator.
>
> (c) The arbitrator seized of a grievance in relation to a release for incapacity may substitute his own opinion to the opinion of the Corporation on any issue raised by the grievance. He may, furthermore, render any decision that he considers just and equitable according to the circumstances.

Articles 10.08 and 10.09 make it clear that even where Article 10.10 applies the provisions dealing with burden of proof and limitations on what may be placed on the grievor's file apply:

> 10.08 Termination of Employment
>
> Article 9 and clause 10.01 shall apply mutatis mutandis to any form of termination of employment decided by the Corporation.
>
> 10.09 Release for Incompetence
>
> For greater certainty, it is understood that a release for incompetence shall be dealt with in the manner provided for disciplinary measures mutatis mutandis.

In an award on a policy grievance between these parties dated September 4, 1984 arbitrator Burkett held, and it is accepted by both parties here, that Article 10.10 applies to cases of "innocent absenteeism" such as this one. I adopt the following statement by arbitrator Swan in Bell (supra) as a succinct statement of the jurisprudence which has been developed in relation to innocent absenteeism and the clauses of the Collective Agreement set out above:

> 1. An employer is justified in releasing for incapacity an employee who is not capable of regular attendance at work and who is therefore unable to perform his or her part of the employment relationship.
>
> 2. The test of inability to attend regularly at work is not only the past record of the employee, but also the reasonable prognosis for regular attendance in the future of the employee.

3. In assessing the evidence relating to that prognosis, an arbitrator is entitled to take into account evidence of what has occurred from the time of the release of the employee until the arbitration hearing, since all of that evidence is relevant to what is likely to happen in the future while it might not be relevant to past performance only.

4. While the initial onus of proof of inability to attend regularly at work both in the past and in the future is on the employer, in the absence of an explanation by the employee of past absences which isn't consistent with a good prognosis for future attendance, or evidence that otherwise establishes such a good prognosis, an arbitrator is entitled to draw an adverse inference from the past record of absenteeism as to the likely prognosis for future attendance. This approach is based upon the fact that most medical evidence is entirely within the knowledge of an individual employee and is not available to an employer, and that once the employer has met the basic obligation to prove its case some obligation falls upon the employee to bring forward evidence to counter the inference that would otherwise flow from the employer's evidence.

Under this Collective Agreement it is accepted, apparently, that an employee in danger of being discharged for innocent absenteeism must be warned. In this respect the Employer's incremental or "progressive" approach to innocent absenteeism closely parallels its progressive discipline system. This may be thought to be mandated by Article 10.09:

> 10.09 Release for Incompetence
>
> For greater certainty, it is understood that a release for incompetence shall be dealt with in the manner provided for disciplinary measures mutatis mutandis.

Clearly, such a system of "warnings" has been adopted as a matter of fairness to employees. To the extent that the notion

of "warning" is inherently incompatible with the notion that the absenteeism in question is "innocent" that incompatibility should not prejudice the Employer. The Employer is required to make its case without reliance on "fault" and at the same time not to take employees by surprise.

Where the record, as established by admissible evidence, is sufficiently bad the onus shifts to the Union to show, through evidence and argument, why the grievor's record is not an adequate basis for predicting that the Employer's legitimate interests can only be protected by upholding the termination. In this context the arbitrator's concern is the likelihood of repetition, not blameworthiness, but causes of absences are clearly relevant to that concern. If the grievor's attendance record itself displays causes of absence that is simply an aspect of the admissible evidence. By the same token, if the record displays a pattern which suggests a particular cause or causes of absences that too is simply a logical implication of the evidence legitimately before the arbitrator.

I hasten to add that evidence <u>tending</u> to prove a pattern may fall far short of doing so on the balance of probabilities. Where the discharge is not a disciplinary one the arbitrator must be careful to focus on the likelihood of continued poor attendance and to exclude implications of blameworthiness in the past record.

The Facts: The grievor is a P.O.#4 in the Moncton Post Office. She is thirty-six years old, married with one child, a six-year old boy who at the date of the hearing was in her sole care. She has been employed at Canada Post for twelve years, working mainly in the Forward Section on the 4 to 12 shift. She would normally work through rotation involving the following jobs:

1. Sorting mail into a sortation case can be sitting or standing maximum weight of items 2 kg. Repetitive hands - arms movements up to 2 hrs.

2. Sorting mail into bags standing maximum weight 25 kg. Repetitive hands, arms and legs movements and bending to pick-up items between waist and knee level up to 2 hrs. duration.

3. Facing up mail on a table (can be seated) maximum weight 5 kg. Repetitive hands and arms movements up to 2 hrs. duration.

4. Cancelling mail - standing. Repetitive hands, arms movements up to 2 hrs.

5. Sorting parcels into bags etc., or other large containers Maximum weight 25 kg. Repetitive hands, arms and legs movements. Some bending to floor level majority of time lifting items at waist level up to 2 hrs. duration.

The grievor testified that at the time of the hearing she was physically capable of performing all of these tasks, as did her doctor. When on light duties the grievor would not perform the functions in paragraphs 2 and 5.

A list of the grievor's absences from March 17, 1975 to April 1, 1987, on a month by month basis, was submitted in evidence. I do not treat as particularly relevant any of the information on the list relating to the period before the end of March 1984, except to note two things. First, up to the

spring of 1982 the grievor's record was far from exemplary but not particularly bad either. Second; for the next year she was absent a great deal. On November 9, 1982 she struck her knee with a lock on a lock-bag and as a result was on injury-on-duty-leave until the 31st of January, 1983. The eligibility for such leave is governed by Article 24.01 of the Collective Agreement, which provides:

> INJURY-ON-DUTY-LEAVE
>
> 24.01 Eligibility for Leave
>
> An employee shall be granted injury-on-duty-leave with pay for the period of time approved by a Provincial Workers' Compensation Board that he is unable to perform his duties because of:
>
> (a) personal injury accidentally received in the performance of his duties and not caused by the employee's willful misconduct,
>
> (b) sickness resulting from the nature of his employment, or
>
> (c) over-exposure to radioactivity or other hazardous conditions in the course of his employment,
>
> if the employee agrees to pay to the Canada Post Corporation any amount received by him for loss of wages in settlement of any claim he may have in respect of such injury, sickness or exposure.

Apparently the grievor's claim for injury-on-duty-leave was disallowed from January 31, 1983 onward. She did not return to work and was in fact struck off strength by the Employer on April 30, 1983. A grievance was filed and settled with the result that she was brought back on strength on March 23, 1984.

It is only the period thereafter that I have treated as relevant to the disposition of this grievance.

Approximately a year and seven months later, on October 24, 1985 the grievor was interviewed by the Superintendent of Mail Processing because of her poor attendance. As a result the following letter was placed on her file:

> 85.10.25
>
> Mrs. C. Gallie
> #3 Shift
> Moncton Post Office
>
> The purpose of this letter is to confirm our discussion of October 24, 1985 regarding your unacceptable attendance and your future employment with Canada Post Corporation.
>
> During our discussion you were made aware of my dissatisfaction with your work performance, more specifically your failure to attend work on a regular and consistent basis.
>
> I reviewed your attendance from your first day of employment but concentrated more specifically since your return to work on March 24, 1984.
>
> I pointed out to you that since April 22, 1984 you had been out sick casual without pay two (2) times for two (2) days, sick certified five (5) times for twenty-seven and one-half (27-1/2)days, sick certified without pay five (5) times for fifty-seven and one-half (57-1/2) days, Injury-on-duty three (3) times for seven (7) days, special with pay one (1) time for one (1) day, special without pay four (4) times for four (4) days and forty-seven (47) minutes, A.W.O.L. one (1) time for one (1) day, early departures three (3) times for five (5) hours and late one (1) time for twenty-one (21) minutes.
>
> During the period April 22, 1984 to October 24, 1985 you were absent on twenty-five (25) occasions for a total of 100 days 6 hours and 8 minutes.

At the meeting you were unable to identify an underlying cause for these absences. As your absences were previously due to illness with many certified by your physician it appears that your problem is medical in nature and in view of this I have advised you that the Corporation would have you see a Doctor of your choice to ascertain your medical condition.

I further asked you to provide me with the name of the Doctor of your choice as well as the date of your medical appointment by Monday, October 28, 1985.

In any event, I want to ensure that you clearly understand that correction of your performance failure is your responsibility. Upon receipt of your Doctor's report I will again discuss this matter with you and at that time I will consider what if any evidence is available to satisfy me that:

1) Evidence that medical or other cause for your absenteeism problem has been identified.

2) Evidence that positive steps are in progress to correct the situation.

3) Evidence that you will be capable of regular attendance in the foreseeable future.

A copy of this letter will be placed on your personal file.

Yours truly,

(Signed) I. Z. Goguen
Supt. Mail Processing

I note that the grievor's major absences during the period covered by the letter were, first, eighteen days of casual sick leave between June 1 and June 29 relating to a lower back injury from lifting a mailbag. Injury-on-duty-leave with pay was not approved by the Provincial Workers' Compensation Board for that

period. Second, for much of the period from October 10 to January 11, 1985, the grievor was on casual sick leave or leave without pay because of a recurrence of difficulties with the knee that she had injured in 1982. Her claim for that period was disallowed by the Provincial Workers' Compensation Board. She returned to work on January 11 on light duties but was, nevertheless, absent for six days between March 29 and April 7 because of a back problem. She did receive injury-on-duty-leave, with the approval of the Provincial Workers' Compensation Board, for that period. Next, she was absent for five days of certified sick leave between September 18 and September 24, apparently due to bronchitis. She was absent again for eight days of certified sick leave from October 3 to the 13th. The Provincial Workers' Compensation Board disallowed her claim for injury-on-duty-leave because, according to her testimony, she thought she could work through a recurrence of her back problem and did not report it in time to qualify.

In accordance with the letter of October 25, the grievor obtained a letter from her family doctor, Dr. William Chesser, a family practitioner, who has been the grievor's doctor through all of the relevant period, as follows:

> November 19, 1985
>
> Canadian Post Corporation
> Supt. Mail Processing
> 1075 Main Street
> Moncton, N. B.
> E1C 1HO
>
> Dear I. Z. Goguen:

Re: Carole Gallie

Carole Gallie was examined November 14, 1985 and found to be in good health. She does suffer from a chronic cough and this is being treated. She also suffers from anxiety, some of which is being caused by pressures at work. Her joint problems seem to have settled down lately and other than a back injury in early October, she has missed very little time at work, during the last several months.

Carole's illnesses in the past have been reported. There is nothing medically to suggest that this lady is likely to miss work in the future. I suspect that if some of the psychologic pressure at work were lessened, her anxiety would also lessen and her performance would improve.

Yours truly,

(Signed) W.G. Chesser, M.D., C.C.F.P.

The grievor was then interviewed on November 27, 1985 by the Acting Superintendent of Mail Processing and, as a result, the following warning letter was put on her personal file:

85.11.28

Dear Ms. Gallie,

This letter will confirm our interview of November 27th, 1985.

At the interview, I read you a letter from Dr. W.G. Chesser (copy attached) in which he states that he examined you and that there was no medical reason that would prevent you from regular attendance either now or for the foreseeable future.

You are aware, through previous discussions of our dissatisfaction of your attendance record. I also pointed out to you that we expect continuous improvement in your attendance that is satisfactory to the Corporation. We will continue to monitor your attendance.

> If your attendance does not improve to the level acceptable to the Corporation, I will have no alternative but to recommend your dismissal from Canada Post to the Divisional General Manager.
>
> A copy of this letter will be placed on your personal file.
>
> Yours truly,
>
> (Signed) G. J. Caissie
> A/Supt. Mail Processing

In December, 1985, the grievor had only one day of casual sick leave, but from January 8 until mid-April she hardly worked at all. This started when, on January 8, the grievor struck her right elbow against a rack and bruised it, with the result that she was on injury-on-duty-leave, approved by the Provincial Workers' Compensation Board, until February 10. On that date the Board ended its approval but she did not return to work. Throughout the whole of the period from February 11 until April 15 she was on sick leave, with certificates from Dr. Chesser which were put in evidence. Those documents reveal virtually nothing other than that she was receiving treatment and would not be returning to work, and in his testimony Dr. Chesser shed no light on this period. There is some suggestion that the grievor's right shoulder bothered her as a result of the bruise on the elbow and that later in the period she suffered from bronchitis.

Letters put in evidence also indicate that the Employer had a great deal of difficulty contacting the grievor during this period.

In any event, on April 24 the grievor, accompanied by the Union representative, was interviewed by Mr. Tanguay, the Plant Manager, and a Mr. Irving. According to the management's notes of the interview the grievor had no idea of the total number of days that she had missed and took the attitude that she could no more predict whether she would be sick or have an accident than anyone else could. She said that she had been receiving physiotherapy for a month and a half following the incident when she had hurt her elbow and from the 6th of March until the 15th of April had been ill with bronchitis, "borderline pneumonia".

On April 29 the grievor was sent the following registered termination letter:

> Ms. Gallie,
>
> This letter is further to your interview report of April 24th, 1986 concerning your poor attendance with Canada Post Corporation since your employment of the 17th of March, 1975.
>
> We have reviewed your past record of attendance which reflects, since the date of your employment, a total loss time of at least 512 days which is deemed excessive.
>
> During your interview of the 24th of April, 1986, no information was provided that would lead the Corporation to believe that this excessive absenteeism record will be corrected in the foreseeable future.
>
> Considering your past record, medical report and future prognosis regarding your attendance, you leave me no alternative but to proceed with termination of your employment for reasons of incapacity.
>
> This letter will serve as the thirty (30) day notice as per article 10.10 of your Collective Agreement. You will remain in the Corporation's employment until the expiration of the thirty (30) day limit of the aforementioned clause.

A copy of this letter will be placed on your personal file and copies forwarded to your local Union and Regional Representatives.

Yours truly,

(Signed) J.C. Tanguay
Plant Manager

The grievance in this matter was filed within the thirty days established by Article 10.10(a) and, as I explained at the outset, did not come on for a hearing on the merits until May 25, 1987. In the intervening thirteen months the grievor was absent on three separate periods, one of them very lengthy.

On May 21 she injured her left shoulder in the course of unhooking a mailbag from the rack. She did not return to work until October 7 and for the whole of that period was on injury-on-duty-leave, approved by the Provincial Workers' Compensation Board. During that period she was referred by Dr. Chesser to a specialist, who did not testify, and attended regular physio-therapy sessions at the Workers' Compensation Board facility in Saint John.

From January 5 to 11, 1987 the grievor was on certified sick leave as a result of surgery on her toe. Dr. Chesser testified that she had a painful lesion in her toe which he saw in October of 1986. He arranged for surgery in December and the surgeon recommended six days off work until the surgery healed. According to Dr. Chesser the surgery was successful and there will be no further complications. Finally, between March 3 and 9 the grievor was absent on injury-on-duty-leave,

approved by the Provincial Workers' Compensation Board, as a result of a re-injury of her left shoulder.

Dr. Chesser testified that he last saw the grievor with respect to a medical condition on April 3, 1987, when she consulted him about a foot problem, which does not appear to be otherwise relevant. He testified that he could not think of any medical reason why the grievor should not henceforth be regular in her attendance at work. He testified to the legitimacy of her reasons for missing work in the past, although, since dismissal here is for innocent absenteeism, the legitimacy of the grievor's health problems is not in issue. Under cross-examination, Dr. Chesser acknowledged that his evidence at the hearing was similar to what he had said in his letter of November 19, 1985, which proved a very poor prognostication. He acknowledged that ligament and muscle sprains or pulls could make a person more prone to subsequent sprains or pulls. He acknowledged that in diagnosing problems with muscles and other soft tissues a doctor is very dependent on what the patient tells him. He suggested that the grievor had suffered somewhat from stress at work and that this could well have been exacerbated by her concerns about attendance. There was, he suggested, no very satisfying way to predict the grievor's future health on the job.

The Issues:

1) The first issue is whether absence on injury-on-duty-leave is to be treated the same, under this Collective Agreement, as other absences due to illness. This is relevant with respect to the grievor's injury-on-duty-leaves both before and after she received her termination letter.

2) In accordance with the statement by arbitrator Swan in the matter of Bell, quoted at the outset of this award, has the Employer here "met the basic obligation to prove its case, such that "some obligation falls upon the employee to bring forward evidence to counter the inference" that the prognosis for future attendance is not good.

3) If the evidentiary onus shifted, has the Union, on behalf of the grievor, brought forward sufficient evidence to counter the inference of a bad prognosis.

4) If the inference of a bad prognosis is countered by the evidence, is the prognosis, nevertheless, sufficiently uncertain that the grievor should be reinstated only on conditions, and if so on what conditions?

Decision:

1) The Union's position is that absences due to injury on duty should not be used to determine an employee's future ability to attend work regularly. This, counsel for the Union submitted, flows from the right of an employee to injury-on-

duty-leave under Article 24.01, which is set out above. This position is supported, in the submission of counsel for the Union, by two "underlying theories":

1. An employee should not be penalized for utilizing leave benefits provided in the collective agreement; and

2. In determining whether an employee will be able to attend work regularly in the future, only past absences which are likely to repeat themselves should be considered. Injuries on duty are isolated events and are not likely to recur in the future.

With respect to the first of these "theories", the Union relied on the decision of arbitrator P. Picher in Williams (CP No. 85-1-3-1278; CUPW No. 298-GG-2336, November 25, 1986) in which she said that in Article 24.01 the parties had modified principles of excessive innocent absenteeism "in respect of employees who are injured on the job and who meet the criteria set out in the article", by clearly stipulating that such an employee shall be granted injury-on-duty-leave.

I am not persuaded by Williams, or the submissions on behalf of the Union, that injuries on duty should be treated differently than other illnesses in the context of "release for incapacity" under this Collective Agreement. The following considerations have led me to that conclusion:

(i) Article 24.01 can only apply where an employee has actually been granted injury-on-duty leave, not where he or she has been on sick leave because of a work related injury for a period not approved by any Provincial Workers' Compensation Board. Williams only concerns itself with absence on leave under Article

24.01(a) which, by definition, must be leave with such approval.

(ii) It may be that even where an employee is released for incapacity while he or she is actually on injury-on-duty-leave Article 24.01 does not protect him or her as arbitrator Picher suggested in Williams. In Zeabin, an unreported award involving these same parties (CP No. 86-1-3-6184; CUPW No. W-460-H-356), arbitrator Norman concluded that the judgment of the Federal Court of Appeal in Nelson v. Attorney General of Canada, [1980] L.A.C. 38, forced him to the conclusion that Article 24.01 did not, in fact, preclude the Employer from releasing an employee on injury-on-duty-leave for incapacity. That may well be the effect of Nelson, where the employee is permanently incapacitated as was the situation in the Nelson case and, it seemed probable, in Zeabin ,but such is not the case here. In Williams the grievor was, apparently, not permanently incapacitated either. In any event, all three of those cases, and Ford (CUPW No. 400-GG-2134; CP No. 85-1-3-2398, November 29, 1985; Thomas Jolliffe, arbitrator), which followed Williams, dealt with the question of whether an employee on injury-on-duty-leave could be released for incapacity while on that leave. The issue before me is a different one.

(iii) Article 24.01 and the award in Williams are concerned only with situations where the employee is released for incapacity while he or she is actually on injury-on-duty-leave. There is nothing in that article, or in the Williams award, that speaks directly to the issue here, which is whether time

spent on such leave must be disregarded when assessing the Employer's justification for release for incapacity under Article 10.10. The language in Article 20.01 granting entitlement to sick leave is less direct than the language of Article 24.01, but no less effective in bestowing a right on an employee to be paid while he or she is incapacitated by illness or non-compensable injury for the period set out in the other parts of that article. Yet it has never been suggested that time on sick leave cannot be taken into account in assessing the Employer's justification for release for incapacity under Article 10.10. Indeed sick leave time is the very essence of innocent absenteeism. For purposes of the issue before me I can see no difference between sick leave and injury-on-duty leave.

The second of the "two underlying theories" put forward by counsel for the Union is, in my opinion, correct insofar as it states that "only past absences which are likely to repeat themselves should be considered". That, it seems to me, is consistent with the jurisprudence which I set out earlier in this award. However, I cannot accept counsel's non-sequitur; "injuries on duty are isolated events and are not likely to recur in the future". In my view, like non-work related illnesses, injuries on duty may or may not be isolated events and may, or may not, be likely to recur in the future. As with illness and any other reason for innocent absenteeism, the arbitrator must try to determine those very questions while assessing the

evidence in the manner set out in the passage quoted from the award of arbitrator Swan in Bell; an approach upon which I have already relied in Arsenault.

(2) At the date of the grievor's "termination" was her attendance record sufficiently bad that the Employer may be said to have discharged the initial onus of proving her inability to attend regularly at work in the past and probably in the future, such that the onus shifted to the grievor to establish a good prognosis? I have reviewed the grievor's attendance record in detail above. I will not repeat the facts for the period preceding April 29, 1986, when she received her termination letter, beyond pointing out that she received a clear warning in November of 1985 and then was absent almost continuously from January 8 to April 15. Even discounting the period from January 8 to February 8 during which she was on injury-on-duty-leave, in the context of all that had gone before, her other absences during that period would, in my opinion, cast the burden of explanation upon the grievor and the Union.

(3) Has the grievor discharged the evidentiary burden of showing that she has a reasonably good prognosis? Normally, in cases of this sort the grievor has two possible ways of establishing that the prognosis is not as bad as the record up to the date of termination appears to suggest; medical testimony and improved performance after the date of "termination".

Here, the medical testimony is positive but not very convincing. The family doctor was not able to testify based on any

general physical examination in the period immediately before the hearing in this matter. He had, however, seen the grievor in his office in the previous month and was able to testify that he could think of no medical reason why she would be unable to be regular in her attendance at work.

The grievor's performance after the notional date of termination is also difficult to assess. As I commented at the outset of this award, the situation here is unusual for the length of time between the grievor's notional termination on April 29, 1986 and the hearing in this matter, on March 25, 1987. For the first part of that thirteen month period the grievor was absent for four and a half months because of the injury to her left shoulder. She was on injury-on-duty-leave for the whole of that period. Out of the remaining seven and a half months she was absent for six days certified sick leave following on her toe operation and for four days, on injury-on-duty-leave, because of another injury to her left shoulder.

I cannot see that the toe operation enters into her prognosis one way or the other. It seems to me that what is in her favour is the fact that during the whole of the thirteen month period she was not incapacitated by a recurrence of any of her earlier problems. Her right knee appears to have been sound, her back problem did not recur and her right elbow and shoulder did not give her any further trouble. Nor did she lose time because of bronchitis or stress.

If the hearing in this matter had been held in the autumn of 1986 I would have been faced with less than compelling medical testimony and a further injury on duty which was not a recurrence of any of her earlier problems, but which might suggest accident proneness. In fact, however, added to that is the very significant fact that the grievor then missed only four days for any relevant cause in the next seven and a half months. That level of absenteeism is perfectly acceptable by the Employer's or, I should think, any standard. It suggests that the grievor may have gotten over her accident proneness, but it is worrying that the four days she did miss were for an injury to her left shoulder, presumably to the same muscles that had kept her on injury-on-duty-leave for ninety eight days through the summer and early fall.

Weighing all of these factors, I have concluded with considerable reluctance that the grievor's prognosis is sufficiently good that she should be maintained in employment, but on conditions.

At the hearing counsel for the Union suggested that the grievor should be reinstated on condition that (1) for any short term or casual illness she should be required to bring medical certificates and (2) her absenteeism not be in excess of the range of the average, excluding injuries on duty. For the reasons that I have given in considering whether her absenteeism for injury on duty or while on injury-on-duty-leave should be treated differently from other absences due to illness, I am not prepared to accept the second of these suggested conditions. Instead, on the basis of my concern for her general accident proneness and recurring injuries, I hereby direct that the grievor be

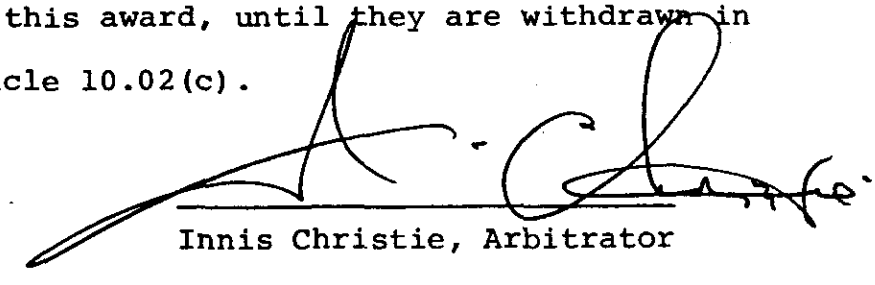
continued in employment, but on the following conditions, all of which will remain in effect for two years from the date of this award:

(1) Every short term or casual illness which causes the grievor to be absent from work must be justified by a medical certificate.

(2) Commencing with the date of the hearing in this matter, if within any period of twelve months the grievor's absences from work for illness and specified injuries on duty exceed the average of absences for those reasons of people doing similar work to hers in the Moncton Post Office she may be released for incapacity. The specified injuries on duty include sprains, strains, pulled muscles and self-inflicted, although unintentional, bruises. Any calculation of her absenteeism or of average absenteeism is to include both periods on injury-on-duty-leave and of absence for injuries of this nature.

Whether the grievor can be dismissed while on injury-on-duty-leave during the period of these conditions is not to be regarded as determined by this order.

In my opinion the appropriate treatment of reports, letters and documents relating to this matter is that they remain on the grievor's personal file, to be read subject to what I have said in this award, until they are withdrawn in accordance with Article 10.02(c).



Innis Christie, Arbitrator