4-29-1988

Re Canada Post Corp and CUPW (Whittle)

Innis Christie
Dalhousie University Schulich School of Law

09:0421

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IN THE MATTER OF AN ARBITRATION

BETWEEN: THE CANADIAN UNION OF POSTAL WORKERS (The Union)

AND:

CANADA POST CORPORATION (The Employer)

RE: Robert Whittle - Discharge (The Grievor)

C.U.P.W. Grievance No. 126-85-00514
C.P.C. Arbitration No. 87-13-9912

Before: Innis Christie, Arbitrator

At: St. John's, Newfoundland

Hearing Dates: February 22 and 23, 1988

For the Union:

Kimberley Turner	-	Counsel
Ted Rice	-	C.U.P.W. Officer
Bob Snow	-	Shop Steward

For the Employer:

Terry Roane	-	Counsel
David Jamieson	-	Labour Relations Officer, Atlantic Division, Canada Post Corporation

Date of Decision: April 29, 1988.

Union grievance alleging breach of the Collective Agreement between the parties for the Postal Operations Group (Non-Supervisory): Internal Mail Processing and Complementary Postal Services, which expired September 30, 1986, and remains in force pursuant to the Postal Services Continuation Act, 1987 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 or documents relating to this matter be removed from his personal file.

This matter was the subject of a Preliminary Objection by the Employer which I denied in my decision of January 19, 1988. At the outset of the hearing on the merits of this matter counsel agreed that I am properly seized of it and that I should remain seized, with power to reconvene the hearing should any disagreement arise in the interpretation or implementation of this award. The parties waived any time limits, either pre- or post-hearing, with respect to these proceedings.

A W A R D

The grievor was discharged on June 8, 1987 after he had reported drunk for work on May 29 and for a disciplinary interview on June 1. He is an alcoholic who claims that since his discharge, through medical care and with the

assistance of Alcoholics Anonymous, he has become an abstainer. He asks to be given a last chance by being reinstated in employment on terms and conditions.

The grievor, Robert Whittle, is a full time PO-4. He was first hired by Canada Post as a part-time employee in St. John's on April 21, 1982. Nearly three years later, on April 1, 1985, he transferred to Toronto because the opportunities to become a full time employee were better there. He became full time on April 22 and worked in Toronto until July 23, 1986 when he transferred to Halifax. On October 6 of that same year he transferred from Halifax back to St. John's. The grievor is twenty-five, single and living with his parents. He has two years of science courses at Memorial University of Newfoundland but no vocational training or work experience other than his job at Canada Post.

The grievor is a self-described alcoholic, a characterization about which the evidence leaves no doubt. He started drinking when he was fifteen and now suggests that he crossed the line to alcoholic drinking when he was twenty, by which time he had already begun to work for the Employer.

The incidents leading directly to the grievor's discharge are described in the letter of discharge dated June 8, 1987 and signed by A. W. O'Brien, Plant Manager at the St. John's Post Office:

Dear Mr. Whittle:

On May 29, 1987 you were issued with an emergency suspension from duty as a result of your reporting for work in an intoxicated condition. You were eventually placed under arrest by the Plant Protection Officer and forcefully removed from the premises by the City Police. Later that same day, you were placed on an indefinite suspension and requested to attend a disciplinary interview on June 1, 1987. You again arrived under the influence of alcohol and the interview had to be postponed. At the disciplinary interview of June 4, 1987 you stated that you were experiencing a severe problem with alcohol and that you were prepared to undergo treatment to overcome the problem.

For the past couple of days, we have considered your plea but unfortunately feel that you have been given every opportunity to overcome your problem during the past two/three years. There was no long-lasting cure from previous experiences, therefore we do not anticipate anything different at this time.

Your personal file revealed that you were given a one day waived suspension following an identical incident (reporting for work under the influence of alcohol on February 9, 1987) and a five day waived suspension for abuse of sick leave and failure to report for work.

Having considered your actions of May 29 and June 1, 1987, and your personal file it has been decided to discharge you from Canada Post Corporation effective June 8, 1987.

You are reminded that you have the right to grieve this and any other action taken within the time frame stated in your Collective Agreement.

Mr. O'Brien testified with respect to the postponed disciplinary interview of June 1. Testimony with respect to the incident on May 29 was given by Nick Carew, General Shift

Supervisor, Ronald Flemming, Postal Inspector and Plant Protection Officer in St. John's and Robert Snow, Chief Shop Steward, who witnessed most of the May 29 incident. The grievor also testified. I do not think it necessary to burden this award with the details of the May 29 incident. It suffices to say that the grievor came to work drunk, in a state dangerous to both himself and the Employer's machinery. He was not violent but his behavior was disruptive and he refused to leave until the police were called to drag him out of the plant. Were it not for considerations arising from his illness as an alcoholic, in my opinion his behavior on the night of May 29, considered together with his disciplinary record and the fact that he turned up for his disciplinary interview intoxicated, would have justified his discharge. It may well be that his behavior on the night of May 29, standing alone, would have justified his discharge, but I do not need to decide that.

I heard testimony with respect to the incidents giving rise to both the one-day waived suspension and the five-day waived suspension. The first was somewhat the same as the incident for which he was discharged, except for the bizarre circumstance that,on that occasion,when the grievor arrived drunk the postal plant was virtually deserted because of a severe snowstorm. There was no undue fuss involved in his departure on that occasion. The abuse of sick leave incident involved a drinking bout in the course of which the grievor failed to report for work.

What constitutes a "report" for purposes of Article 10.02(b) of the Collective Agreement? In addition to hearing the oral testimony of Shift Supervisor Nick Carew and Plant Protection Officer Ron Flemming I took into evidence copies of reports to Andy O'Brien, the Plant Manager, from those two witnesses and from R. Whalen, the Forward Supervisor on the midnight shift, who did not testify. This evidence was objected to by counsel for the Union on the ground that copies of the documents had not been sent to the grievor within the ten days required by Article 10.02(b) of the Collective Agreement. The relevant provisions of Article 10.02 are:

> 10.02 Personal File
>
> (a) The Corporation agrees that there shall be only one personal file for each employee and that no report relating to the employee's conduct or performance may be used against him in the grievance procedure nor at arbitration unless such report is part of the said file.
>
> (b) No report may be placed in the file or constitute a part thereof unless a copy of the said report is sent to the employee within ten (10) days after the date of the employee's alleged infraction, or of its coming to the attention of the Corporation, or of the Corporation's alleged source of dissatisfaction with him.

Strictly speaking, it is unnecessary for me to deal with this objection, because I would be quite prepared, on the basis of the oral testimony alone, to make a finding that discharge was justified, however the point was fully argued and I will deal with it.

Mr. Whalen's report is, of course, hearsay and was also objected to on those grounds. My normal practice is to admit hearsay documents, according them reduced weight because the writer is not before me to testify and to be cross-examined. In this case, if Mr. Whalen's report made any real difference to my conclusion, the fact that it is hearsay evidence would lead me to accord it very little weight.

With respect to the letters to Mr. O'Brien from Mr. Carew and Mr. Flemming, in my view even if such a letter is a "report" within the meaning of the term in Article 10.02 either of them could have been used as notes to refresh memory for purposes of otherwise legitimate oral testimony.

On the issue of whether the letters to Mr. O'Brien from Mr. Carew, Mr. Whalen and Mr. Flemming were properly admitted in evidence in light of Article 10.02, counsel for the Union relied on the decision of Arbitrator Outhouse between these parties in Parker (unreported, October 9, 1985) in which the learned arbitrator concluded that evidence of an interview which had taken place more than a year prior to the grievor's disputed discharge was not admissible. At pp. 24-26 he stated:

> An interview with an employee concerning his or her absenteeism is related to that employee's "conduct or performance" within the meaning of Article 10.02(a). Consequently, the interview cannot be used against the employee unless it is made the subject of a report and placed on the employee's personal file. In the present case that was not done. ....

> I am of the opinion, therefore, that the existing authorities are both applicable and persuasive and that, accordingly, evidence of interviews or counselling sessions held more than a year prior to an employee's release for innocent absenteeism are not admissible.

I do not question arbitrator Outhouse's characterization of an interview concerning absenteeism or the conclusion that follows from it. However, the question before him was different from the question of whether, where an incident has been the subject of a "report" properly placed on an employee's file within the ten day limit in Article 10.02(b), the Employer is precluded from introducing any documentary evidence other than that which has been placed on the grievor's personal file, in making its case before an arbitrator. I do not take that to have been what the parties intended, nor is such a result dictated by the words of Article 10.02.

Where the Employer has acted promptly, in accordance with the requirements of Article 10.02(b), in placing a report of an employee's alleged infraction on his or her file the employee will have been given timely notice of his or her situation. Surely, the purpose of Article 10.02 will then have been served. Its purpose does not appear to be to require the Employer, or its counsel, to scrape together, within ten days, every piece of paper relevant to the incident in question, and place it all on the grievor's personal file. Moreover, such an interpretation would lead to the absurdity that oral testimony could be given in support of the Employer's

version of a properly recorded incident but documents properly the subject of such oral testimony could not themselves be introduced in evidence.

This is not by any means a matter of first impression. In ruling that the letters to Mr. O'Brien, which were objected to by counsel for the Union, are admissible I rely on the following extended quotes from an award of arbitrator Bird between these parties in Williams, No. 5 (unreported, August 21, 1987, CUPW Grievance No. W-350-H-590, CP Arbitration No. 86-1-3-4508). First,at pp. 20-23 arbitrator Bird put the positions of the parties:

> Counsel for the Corporation, arguing for admissibility, contended that the statement given by the plant manager to the supervisor was a witness's statement and not a report within the meaning of Article 10.02(a). He referred to a number of authorities including Re Canadian Union of Postal Workers, Whitehorse Local and Canada Post Corporation, Jaster Grievance, October 25th, 1984, Union Grievance No. W-386-GG-138, 140 (Bird) and to Williams and Treasury Board, above. In the last-mentioned decision, "report" was described as "... a document prepared by the employer which relates to a complaint regarding the conduct or performance of an employee". In Re Canadian Union of Postal Workers and Canada Post Corporation, Jeworski grievance, March 19th, 1984, Union Grievance No. W-453-GG-123, C.P.C. Arbitration No. 83-1-3-889, commencing at page 10 arbitrator Norman gave a purposive interpretation;

> What Article 10.01 and .02 combine to ensure is that a grievor has a [11] full and fair opportunity to know the case against him from the moment when disciplinary action is taken by the Employer affecting him. Full disclosure so that a disciplined employee "will not face any surprises regarding such alleged misconduct" is what is required by Articles 10.01 and .02. Nothing less will suffice.

The Corporation complied with this requirement when general supervisor Bird wrote the grievor on February 21st, 1986 and placed a copy on his personal file. That letter is the "report", not the witness's statement, according to Counsel for the Corporation. ...

In Re Canada Post Corporation and Canadian Union of Postal Workers, Marini Grievance, February 10th, 1987, Corporation file 85-1-3-5775; Union File 200-H-549, (Swan), the arbitrator dealt with an argument by the Union which would have used Article 10.02(b) as a very wide barrier to keep out all documents by which the employer sought to prove that the grievor misconducted himself. The foundation for the argument was the proposition that each document was a "report" as described in Article 10.02 and none had been placed on the employee's personal file. On page 37 the arbitrator concluded that the Union confused a report of wrongdoing with evidence of wrong-doing and states, beginning at page 37;

> The correct approach is to ask whether a document constitutes a "report relating to the employee's conduct or performance", or whether it is a document which has an independent existence apart from the disciplinary process. If it is the latter, and if it is relevant to some aspect of the allegations against the grievor which are set out in a properly constituted report,

> I think that the ordinary rules of evidence apply to its admissibility. There is nothing in any of the cases cited by the Union to suggest that the framers of the collective agreement had [38] any other intention, and I am simply unprepared to accept that the Employer must dump literally every document relating to an employee onto the employee's file before it can be a part of the evidentiary case to be made in an arbitration hearing. I therefore find that none of the documents objected to constitute reports as that word is used in Article 10.02, and that there is therefore no requirement to file them before they may be used as evidence, if relevant, at an arbitration hearing.

The statement had an existence independent of the disciplinary process set out in the collective agreement, Counsel for the Corporation contended. According to him, the purpose of Article 10.02(a) is fairness; it would be unfair for an employee to have to attempt to answer and defend himself against changes suddenly brought forward relating to the past when it is too late to gather evidence in his own defence; see Re Canada Post Corporation and Canadian Union of Postal Workers, Henry Grievance, September 10th, 1983, Union No. W-400-GG-20; Corporation No. 82-1-3-58 (Norman) at page 14. ...

In reply, Mr. Loomes contended that the memorandum does not have an existence separate from the disciplinary process and therefore it is a "report" within the meaning of Article 10.02(a) which must be excluded; see Marini, above. The memorandum is a document prepared by the employer which relates to a complaint regarding the conduct or performance of an employee. This fits the definition of a report under Article 10.02 set out at page 33 of Williams and Treasury Board, above, as quoted at page 10 of Jaster. ...

Then, at pp. 24 and 25, he made the following ruling:

> The "report relating to the employee's conduct or performance" is the result of the employer's investigation stated as a conclusion; see Article 10.02(a). In the present case the letter from the general supervisor to the grievor dated February 21st, 1986 sets out, with particularity, the conclusions that the Corporation reached about the grievor's misconduct. That letter is a report (i.e. conclusions stated after investigation) about his conduct. It was filed in Williams' personal file in accordance with Article 10.02(a). The letter, a copy of which was given to the grievor, satisfies the requirements for fairness described in Jeworski, above. Marini, above, speaks of a category of documents as having an independent existence apart from the disciplinary process and says such documents are not "reports" and are admissible provided they comply with the ordinary rules of evidence. I understand that the disciplinary process referred to in Marini is that set out in the collective agreement. I note that there is no explicit provision there for filing written complaints or witnesses' statements. Both purposes were served by the plant manager's statement in the case before me. I give the provision in question, Article 10.02(a), a narrow meaning and justify doing so by saying that as a matter of policy all provisions in a collective agreement which tend to restrict an arbitrator's access to relevant information should be read narrowly. The policy I refer to is to get at the facts and if for reasons the parties find valid they agree on measures which may restrict access to the facts they should do so in express language or otherwise clearly establish that it was their common intention to do so. The word "report" should not ordinarily be understood to include witnesses' statements, written complaints or other documentary evidence but should be given the dictionary meanings set out above.

> The author of the statement, the plant manager, delegated the responsibility for investigating and making a report upon the alleged misconduct of the grievor to the general supervisor. Alternatively, the plant manager might have decided to place the statement on the grievor's file and have a copy of it sent to him so that the original would have been the "report" filed under Article 10.02(a) and by sending a copy there would have been compliance with Article 10.02(b).
>
> A report under Article 10.02(a), (b) and (c) includes but is not limited to findings of misconduct. The expression "any unfavourable report", which is the subject of Article 10.02(c), must include not only reports which find employees guilty of misconduct but reports (formal findings) of non-culpable incompetency and any other written determination by a Corporation official which is adverse to the employee's interest.

The Grievor's history of alcoholism during his employment.

As has already been stated, the grievor became an alcoholic drinker not long after his employment with Canada Post. In the fiscal year, 1983-84 his absenteeism was well above the average. While he was still working in St. John's, before his time in Toronto and Halifax, this led to him accepting treatment at Crosby House in Kentville, Nova Scotia under the Employee Assistance Program. I find that the grievor joined the program offered at Crosby House part way through. He took the program seriously but there was no real follow-up after he returned to St. John's and he soon started drinking again. Counsel for the Employer submitted that this treatment was part of the imposition of "terms and conditions" on

the grievor; a submission relevant to her argument that I should not reinstate the grievor subject to terms and conditions because he had already been twice subject to terms and conditions which he had not observed. The grievor testified that he could not recall any such terms and conditions connected with his treatment under the Employee Assistance Program in 1984.

In rebuttal, counsel for the Employer called Ed Lambert, the Employer's Field Service Manager for Eastern Newfoundland. In November 1984 Mr. Lambert was acting Area Postmaster in St. John's. He identified what purports to be a rough transcript of a disciplinary interview with the grievor in which the grievor is shown as stating he would like to join the Employee Assistance Program to help him with his drinking. In that record of interview Mr. Lambert is shown as referring to "terms and conditions that will have to be drawn up". Also introduced in evidence, over the objection of counsel for the Union, was a document headed "Interview - R. Whittle" which includes the statement "Over the next three (3) months, it will be mandatory for you to maintain the following standard of attendance: ...". This document, which the grievor denies ever having seen, was quite unconvincing on the point of whether the grievor was on "terms and conditions" in 1984. It is undated and Mr. O'Brien, the Plant Manager, through whom it was introduced in evidence, could not say if it had ever been given to the grievor. Mr. Lambert's memory of related

events of November 1984 was understandably hazy. He could not testify that the document had ever actually been given to the grievor.

My conclusion on this evidence is that I am not prepared to treat the grievor's employment as having been then made the subject of terms and conditions, in the sense that while in St. John's, before going to Toronto, he was put on notice that any further alcoholic incidents would result in his discharge. Had I reached the opposite conclusion on this point, I doubt it would have changed the outcome in this case.

After the grievor transferred to Toronto in the spring of 1985 he began to drink again. Some months later this resulted in the grievor being sent home from work for being intoxicated. He was discharged but was reinstated four months later, in settlement of his grievance, on terms and conditions which provided that "he may be subject to discharge" if he was "involved in an act of major misconduct related to his problem". These terms and conditions, which remained in effect for one year, also required the grievor to take prescribed treatment for his dependency.

In the course of that year the grievor became involved in an outpatient program with the Addiction Research Foundation in Toronto. While there was some suggestion in the course of the hearing before me that this program was in some way deficient because it allowed for the possibility that alcoholics might return to social drinking, I see no need to delve into

the details of different theories on alcoholism. Counsel for the Union admitted that Canada Post had done everything it reasonably could for the grievor up to the point of his termination. It suffices, therefore, to say that the grievor met the formal requirements of his terms and conditions both in Toronto and during his 2-1/2 months in Halifax, although he did start to drink again and did miss some days of work.

On October 28, 1986, after the grievor's return to St. John's, Mr. O'Brien wrote reminding him that he had not provided written evidence that he was taking the prescribed treatment, as required, and that his absences had to be certified, clearly stating that the absence was not the result of alcohol or drug use. These certificates were provided. The terms and conditions imposed in Toronto expired November 29, 1986.

The grievor relapsed into heavy drinking, which resulted in the one-day waived suspension for reporting to work intoxicated and the five day waived suspension for abuse of sick leave already referred to.

There is no question that the grievor was drinking while he was under the terms and conditions to which he agreed in Toronto. This did not result in any "act of major misconduct" during the period of those terms and conditions, but it is clear that the grievor did not comply with their spirit and intent. He was seriously afflicted by alcoholism throughout virtually the whole of his employment with Canada Post.

The Grievor's Post-Employment History with respect to alcoholism. The grievor said that prior to his termination in June of 1987 he was well aware that alcohol was causing him serious problems and on several occasions he tried to stop drinking. It was not until after his termination, however, that he actually admitted to himself that he is an alcoholic.

Immediately after he was terminated the grievor sought medical help. Dr. Alan Frecker, a physician experienced with treatment for alcoholism, testified on the grievor's behalf. I will not attempt to summarize Dr. Frecker's testimony here but will, instead, include the following excerpt from a letter which he prepared for the date upon which the hearing in this matter was originally scheduled:

> November 30th, 1987
>
> TO WHOM IT MAY CONCERN:
>
> Re: WHITTLE, Robert
>
> This 25 year old gentleman first came to my attention on June 2nd, 1987 through the Emergency Department at St. Clare's Hospital when he presented in an intoxicated condition. It was evident he was in need of immediate alcoholic rehabilitation and arrangements were made immediately to have him enter in our Alcohol Rehabilitation Program through our Psychiatric Day Hospital of St. Clare's.
>
> It appeared that Bob has had some contact with rehabilitation agencies in the past but it appeared, from reviewing the situation with him when I first contacted him, and later throughout his program with us that these contacts did not provide him with an indepth rehabilitation program.
> ...

> I am pleased to say that since entering the program at St. Clare's, he has been a regular attender, maintained sobriety, takes Antabuse on a regular basis and is an active participant in A.A. Thus I would consider, for the first time, he is now taking an adequate rehabilitation program sufficient to his needs.
>
> A final conference with our staff was held on November 27th, 1987 in relation to Bob's future. It was felt that he was ready for discharge from the full time program but would be continued in outpatient follow up on Mondays and Wednesdays from 2 p.m. to 3.30 p.m. in follow up therapy group. Antabuse will continue to be administered and his contacts with A.A. encouraged.
>
> In summary, I would say since entering our program in June of 1987, Bob has done quite satisfactorily and has followed all modalities of treatment outlined to him. As mentioned above, we have now arranged outpatient follow up for him.

I note that at the date of the hearing in this matter the grievor was still taking Antabuse on a regular basis. He was also very active in Alcoholics Anonymous. Indeed, according to the evidence Alcoholics Anonymous has become the focus of his life.

I heard testimony from one employee and one retired employee of Canada Post who are active in Alcoholic Anonymous and who know the grievor. Both corroborated his testimony with respect to his activities and were optimistic for him, with the restraint common to those familiar with alcoholism. Ken Mahon, the Manager of the St. John's Intergroup Central Office for Alcoholics Anonymous, also testified. He is the grievor's "sponsor". I need not repeat here the useful

details which Mr. Mahon provided with respect to the organization's principles and operation.

It suffices to say that on the basis of this evidence I am satisfied that the grievor has remained completely sober, indeed has not had a drink, since he first put himself into Dr. Frecker's care. I think he has genuinely acknowledged his alcoholism, to himself, and is, without question, deeply involved with Alcoholics Anonymous. Several of the witnesses testified with respect to how difficult it is for one who is unemployed to fight alcoholism. They also referred to the strain under which the grievor had been put by these proceedings, and in particular by the more than two month postponement from the date originally set for the hearing, and the fact that even under that stress he has not turned to drinking. The grievor has continued to live at home. He has radically changed his social life so that it focuses on a young people's group within Alcoholics Anonymous. He has sought employment unsuccessfully and is currently drawing unemployment insurance.

In sum, in the nearly nine months from his termination to the date of this hearing the grievor's behavior with respect to his alcoholism has, on the evidence, been everything he, or anyone, could have hoped.

The Issues:

(1) Counsel for the Union submitted that when the requirements

of progressive discipline are taken into account there was not "just, reasonable and sufficient cause" for the grievor's discharge. In her submission his actions did not warrant progression from one day to five days of suspension and then directly to discharge.

(2) If discharge were otherwise warranted, counsel for the Union submitted that because of his alcoholism the grievor should be reinstated on terms and conditions; given a "last chance". Counsel for the Employer submitted that this was not an appropriate case for reinstatement on terms and conditions, given the grievor's employment history.

(3) If the grievor is to be reinstated on terms and conditions, counsel for the Union submitted that such terms and conditions must relate only to his behavior at work and must not impinge unduly on his private life.

Decision:

(1) Article 10.01 of the Collective Agreement provides:

> 10.01 Just Cause and Burden of Proof
>
> (a) No disciplinary measure in the form of a notice of discipline, suspension or discharge or in any other form shall be imposed on any employee without just, reasonable and sufficient cause and without his receiving beforehand or at the same time a written notice showing the grounds on which a disciplinary measure is imposed.

> (b) In any arbitration relating to a disciplinary measure, the burden of proof shall rest with the Corporation and such proof shall be confined to the grounds mentioned in the notice referred to in paragraph (a) above.

I have already stated, in the course of setting out my findings of fact, my conclusion that the Employer would have had "just, reasonable and sufficient cause" to discharge the grievor, were it not for his alcoholic illness. Progressive discipline does not require that every step up the disciplinary ladder must be taken in order. Misconduct may be sufficiently serious to justify discharge even where there has been no prior discipline at all. I have no doubt that, except for the grievor's illness, his discharge would have been justified.

(2) The grievor's record is certainly deplorable but once it is accepted that his shortcomings were all rooted in his alcoholism the important question becomes whether there is a good chance that he will not suffer a relapse. In a recent award between these same parties, Vincent (unreported, September 16, 1983; CUPW Nos. A-9-GG-343, 353, 407, 419 and 430; CP Nos. 83-1-3-1345, 47-50) arbitrator Outhouse succinctly stated what is at issue here:

> It is a well established practice of arbitrators to order reinstatement of employees who are dismissed by their employers on account of misconduct which is caused by or related to the disease of alcoholism and where it can be demonstrated that the employees have made a serious effort to rehabilitate themselves with reasonable prospects of success.

> See, for example, Re Labatt's Ontario Breweries Ltd. and National Brewery Workers' Union, Local 1 (1978), 20 L.A.C. (2d) 66 (Brunner); Re Cook and the Crown in Right of Ontario (Ministry of Labour) (1979), 22 L.A.C. (2d) 1 Swinton); Re British Columbia Telephone Company and Telecommunication Workers' Union (1978), 19 L.A.C. (2d) 98 (Gall); and Re Jones and The Queen in Right of the Province of New Brunswick (1980), 27 L.A.C. (2d) 184 (Kuttner). This practice has been applied fairly consistently in Post Office arbitrations for the last decade or so as evidenced by the following decisions -- Embury (166-20618), Gagnon (166-2-2576; 166-2-2632), Craffigan (82-1-6-3) and Shier (82-6-C-1). The principle which underlies the practice, of course, is that alcoholism is a disease and that it is unjust to discharge an alcoholic employee for misconduct which is fairly attributable to his or her alcoholism, where the employee has demonstrated a potential for rehabilitation. This is so whether the rehabilitative potential is shown before or, as is frequently the case, after the employee's discharge. Arbitrators naturally recognize, however, that there comes a point where employers are justified in terminating alcoholic employees. Employers cannot be expected to bear indefinitely the burden of carrying employees who cannot or will not rehabilitate themselves. It is for this reason that reinstatement of alcoholics is now almost invariably ordered subject to the condition that any further alcohol-related misconduct within a specified time period will render the employee liable to immediate dismissal. In this sense, the reinstatement can be seen as giving the alcoholic employee one last chance at salvaging the employment relationship.

Arbitrator Outhouse has even more recently reiterated and applied these same principles in a decision between these parties

in Bond (unreported, June 11, 1987: CUPW Nos. 096-85-00461, 503, 529; CP Nos. 87-1-3-811-13, at p. 16 and 17).

Counsel for the Employer submitted that to reinstate the grievor in this case would be to do him no favour. It would be to put him back on the midnight shift in the St. John's Post Office where he would be subject to pressures and temptations from which he has now removed himself. I am unable to accept this submission. Any additional pressure to which the grievor would be submitted by being reinstated would probably be offset by lifting from him the pressure that arises from being unemployed. In any event, I am not prepared to decide this case on that paternalistic basis. If I did not think it likely that the grievor has reached the point in dealing with his alcoholism where he can decide what circumstances are best for him I would not order his reinstatement.

Counsel for the Employer submitted that to reinstate the grievor after all that has happened would be to send the wrong message to employees, and supervisory personnel, at Canada Post. That is, of course, a very serious consideration. However, no one connected with the Employer who is aware of the grievor's situation will have any doubt that his difficulties are the result of alcoholism. They will understand, I trust, that his reinstatement flows from my conclusion that he will probably never drink again. Of course, I put it no higher

than that. I know from the grievor's own testimony, as well as from that of everyone else knowledgeable about alcoholism, that he will always be in grave danger of relapse, but it is hard to know what better evidence of likely success an arbitrator could have. Certainly, a review of similar cases decided by other arbitrators, including Vincent cited above, does not produce any example of a grievor who, by the time of the hearing, had more convincingly set himself on the course of sobriety.

Alcoholism is an illness but, of course, there are elements of self-infliction in it. It is not the Employer's fault. Indeed, as has been mentioned, counsel for the Union conceded that prior to the grievor's termination the Employer had done everything it reasonably could have been expected to do for him. In those circumstances I will order the grievor reinstated without back pay, and without counting for purposes of seniority the period between the time of his discharge and the date of this award. That, I hope, will convey to other employees the message that, while alcoholism is treated with understanding,the grievor has not been allowed to escape all responsibility for his shortcomings as an employee.

Finally, counsel for the Employer submitted that to reinstate the grievor, even under strict terms and conditions, would be to undercut the principle which I enunciated in an award between the Letter Carriers' Union of Canada and this Employer; Stackhouse (unreported, November 10, 1983, L.C.U.C.

No. L-9-83-01; CP No. 83-1-6-4). In that case the employee, while under terms and conditions agreed upon in the settlement of previous grievance against discharge, had continued with a pattern of serious lateness, associated with his drinking. I stated there, at p. 19:

> The conditions it imposed by the agreement of September 15 were not essentially different from those requested by the Union and imposed by arbitrators in the past. To now ask the Employer to go through the same process again is simply unfair to the Employer.
>
> Further, it seems to me that other employees with alcoholism problems are less likely to be helped by "last chance" programs jointly agreed upon by the Employer and the Union if my decision here were to raise the prospect of yet another "last chance" fashioned by the arbitrator. From the employee's point of view the agreement ceases to be seen as truly the last chance and if arbitrators too readily second guess such arrangements employers will be discouraged from thus giving alcoholic employees one last chance in the context of a treatment program.

The difference, of course, is that the grievor in Stackhouse was discharged for breach of current terms and conditions whereas the grievor here successfully completed the period of the terms and conditions imposed while he was in Toronto. In my view that is an important distinction (see in this connection my decision between these same parties in Arsenault (unreported, February 16, 1988; CUPW No. 096-85-00766; CP No. 87-1-3-5750)). If the concept of working under agreed or imposed terms and conditions is to have any meaning, and if the practice is to be

of any use, to the Union and its members in gaining "one last chance", and to the Employer in finally getting rid of non-productive employees, the distinction between employees working under terms and conditions and employees who never were, or are no longer, under terms and conditions must be treated as a real distinction.

The evidence is that the grievor broke the spirit and intent of the previous set of conditions under which he was placed, but that was not the basis of his discharge. Counsel for the Employer submits that it is, nevertheless, a relevant consideration in determining whether reinstatement on terms and conditions is appropriate here. I agree it is relevant but, along with the rest of the grievor's whole sad employment history, it is submerged in the issue of his alcoholism. I have decided, on the balance of probabilities, that the grievor will be able to control his alcoholism in the future. I may be wrong in that, but in so deciding I am concluding that his situation is quite different now than it was when he previously worked under terms and conditions. In other words, unlike the grievor in Stackhouse, the grievor here was not terminated for breach of terms and conditions, and I have not been persuaded by the fact of his breach of the terms and conditions previously in effect that he is unlikely to succeed this time.

(3) Both counsel put forward proposed sets of terms and conditions upon which the grievor should be reinstated, if that

were my decision. I will not set them out here, and will only comment on the submission by counsel for the Union that it would improperly infringe on the grievor's individual rights if I were to impose conditions on his continued employment which related not only to his conduct on the job but also to his private life.

This submission was made in the context of questions which I directed to the grievor in the course of the hearing. I asked him whether he would have any objection to a condition that he would be terminated for any evidence of drinking at all, whether it affected the job or not. I also asked him whether he would have any objection to a requirement that he continue to take Antabuse. He replied that he had no objection to either condition, because he realized that if he drank at all he would be finished, in both personal and employment terms. I realize, of course, that in the context it would be quite unfair to take the grievor's replies as providing justification for undue incursions into his non-working life. The Employer's only legitimate concern, and my concern as an arbitrator, is with his job performance. At this stage in this particular employment relationship, however, it must be recognized that the Employer has a legitimate interest which goes beyond just what the grievor does at work. The Employer legitimately wants some assurance that it will not be subjected without warning to the sort of chaotic behavior that has marked the grievor in the past. In other words, the

Employer here has a stake in the grievor's general sobriety which justifies the extent to which terms and conditions imposed here may impinge on his non-working life.

Conclusion and Order: Were it not for his alcoholism I would uphold the grievor's discharge. Because he is an alcoholic, and because I think there is a good chance that he may not suffer any further relapse if he continues to act as he has for the last ten months, I hereby order that the grievor be reinstated without back pay and without credit for seniority from the period from his termination to the date of this award, but with full credit for all seniority up to the date of his termination. The grievor's reinstatement is subject to the following terms and conditions:

1. Prior to reinstatement, Mr. Whittle shall provide Canada Post with a written statement acknowledging these terms and conditions and that he accepts and agrees with them.

2. At any time within two years from the date of his reinstatement Mr. Whittle may be discharged for breach of these terms and conditions as well as for anything that would otherwise constitute "just, reasonable and sufficient cause" for discharge under the Collective Agreement. Discharge for breach of any of these terms and conditions may be grieved in accordance with the regular procedures of the Collective Agreement.

3. Mr. Whittle will not commit any work-related misconduct or breach of duty caused, directly or indirectly, by the consumption of alcohol.

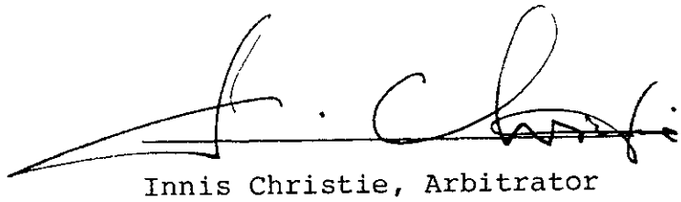
4. Mr. Whittle will provide a medical certificate for every absence for which illness is claimed as a cause. Any such certificate

shall state the nature of the illness or disability and certify that it is unrelated to the consumption of alcohol.

5. Mr. Whittle will attend Alcoholics Anonymous meetings on a regular basis (not less than twice per week) and, when requested, will provide Canada Post with verification of his attendance.

6. Mr. Whittle will continue in the care of Dr. Frecker, seeing him as frequently as Dr. Frecker recommends. If recommended by Dr. Frecker, Mr. Whittle will continue to take Antabuse. Mr. Whittle will ensure that Dr. Frecker provides Canada Post with status reports as requested by Canada Post, confirming Mr. Whittle's attendance, his continuation on Antabuse as recommended and, to the best of Dr. Frecker's knowledge, his continuing sobriety.

I will remain seized of this matter after the issue of this award to deal with any disagreement in its interpretation or application, and will reconvene the hearing at the request of either party. Specifically, I retain jurisdiction to deal with any question relating to the breach of these terms and conditions and the grievor's termination for any alleged breach of them.



Innis Christie, Arbitrator