7-6-1993

Re Canada Post Corp and CUPW (MacKinnon)

Innis Christie
Dalhousie University Schulich School of Law

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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: D. MacKinnnon (The Grievor)
Discharge

C.U.P.W. Grievance No. 096-92-00014
C.P.C. Arbitration No.

BEFORE: Innis Christie, Arbitrator

AT: Halifax, N.S.

HEARING DATE: April 23, 1993

FOR THE UNION: Wayne Mundle, CUPW National Director

FOR THE EMPLOYER: George Mitchell, Counsel
Mike Lewis, Labour Relations Officer

DATE OF AWARD: July 6, 1993

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Union grievance alleging breach of the Collective Agreement between the parties dated July 31, 1992, and in particular of 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 granted full redress.

At the outset of the hearing in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, and that all time limits, either pre- or post-hearing, are waived.

AWARD

By letter of August 25, 1992, the Grievor was terminated for incapacity pursuant to Article 10.10 of the Collective Agreement, which, together with the related relevant paragraphs of Article 10, provides;

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

decision that he/she considers just and equitable according to the circumstances.

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.

10.01 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/her 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.

In compliance with Article 10.10(a) the Grievor's discharge was to be effective October 5, 1992. The discharge was grieved and in accordance with that provision the Grievor continued in employment.

The first hearing in this matter was held on December 14, 1992. In the context explained in my Interim award in this matter, dated December 17, 1992, the parties agreed that the hearing should be adjourned to a later date, subsequently set as April 23, when this matter finally came before me.

On February 14, 1993 the Grievor broke his shoulder and was still off work on the date of the hearing, although he had returned for one hour and 15 minutes on April 21 to try working. This followed discussions between the Grievor's doctor and the medical consultant

employed by the Employer. It had been anticipated that he would return for two hours at a time initially, but, apparently, that experiment was unsuccessful.

In 1990 the Grievor was discharged as a result of alcohol related problems, but was re-instated on terms and conditions. In the spring of 1991 he was discharged for alleged breach of those terms and conditions; specifically for failing to provide a medical certificate within the time required upon return from an absence due to illness. That discharge was grieved and came before me as arbitrator. I found that the term or condition in question had not been breached and re-instated the Grievor by an award dated December 7, 1991. He was on long term sick leave at the time and actually returned to work on January 15, 1992. At that time the Grievor was still on the terms and conditions that had been at issue in the arbitration. From January 15 until the terms and conditions ended on March 7, 1992 he met the special requirements for attendance that they imposed upon him.

From April 28, 1992 to August 18, the date of his last absence preceding his termination, the Grievor was absent 9 and 1/2 days on short term absences spread over five occasions. For four of those days he was on certified sick leave. The other 5 and 1/2 were casual sick days. He was also absent on certified sick leave for 8 days, from June 2 to June 10, a period which included one rotation day off. In other words the Grievor was absent for 17 and 1/2 days in slightly over 3 and 1/2 months.

The 8 day sick leave was, according to the parties' conventional usage, "long term", but there was no evidence that it was caused by illness or accident of a nature different from the Grievor's other absences. Indeed, the evidence is that in the course of an interview with respect to his attendance on June 15, when asked if he had any information of which he would like the Employer to be aware with respect to this and his other two absences since his previous interview on May 13, the Grievor replied, "I am just sick".

The only evidence of medical fitness to work before me was an Occupational Health Services/Fitness Assessment Form, undated but according to the evidence submitted by the Grievor on June 10, 1992 and signed by his doctor on June 10. There was no evidence with respect to it other than the Employer's evidence with respect to its submission. The form only indicates, with a tick mark, that the Grievor was then "Fit for regular job immediately".

The Grievor was interviewed by supervisor Wayne Kelly on May 13, June 15 and June 23, with respect to his attendance, as well as on August 24 by Superintendent Peter Cahill prior to the decision to terminate him. The interview of May 13 is not relevant here because it resulted in a disciplinary letter. The next two resulted in letters quite standard in the Employer's Attendance Management Program. The fact that they were more or less standard does not, however, negate their significance here. Each clearly brought to the Grievor's attention the importance to the Employer of regular attendance. Neither carried any warning in a disciplinary sense, but a warning of that sort would not have been appropriate in the context of absences that were being treated by the Employer as "innocent" and which here form part of the record of what are assumed to be faultless absences.

The letter following up on the interview of June 26, 1992 concludes,

> Your attendance will be monitored and any further absences will be dealt with according to Canada Post Corporation's "Attendance Management Program".

Supervisor Wayne Kelly testified that in his experience virtually all employees know that the Attendance Management Program leads, in the end, if there is no improvement, to discharge for innocent absenteeism, so when the he advised the Grievor in the interview that he would be dealt with according to the Program he was not surprised that the Grievor did not ask to see the Program in written form. Had he been asked, Mr. Kelly testified, he would have given it to the Grievor, as is his practice.

Under date of August 24, 1992, Peter Cahill, Superintendent of the Halifax Mail Processing Plant, wrote advising the Grievor of his termination as follows:

> This letter will confirm our interview of August 24, 1992 regarding your attendance. Present were supervisor, Tom Lundy; Shop Steward, Roger Lewis; yourself and the undersigned.
>
> You were advised that I had reviewed both your attendance record and your personal file and found an excessive absenteeism record. A record that continues despite attempts made through the attendance management program to correct the problem.
>
> As a result I have no alternative but to advise you that you will be released from the employ of Canada Post Corporation. In keeping with Article 10.10 of the CUPW Collective Agreement, your release will take effect on October 05, 1992.
>
> A copy of this letter will be placed on your personal file.

By agreement the parties put before me the Grievor's record of absences after October 5, 1992, the effective date of his "termination" pursuant to Article 10.10. The Employer's compilation shows 21 days of casual sick time from then to February, 14, 1993, when he broke his shoulder. The Employer's compilation for purposes of the hearing before me states that these 21 days are spread over 14 occasions. However, for purposes of this award I am prepared to accept Mr. Mundle's submission that where the Grievor did not actually return to work between casual sick days, because he was on rotation days off, holidays or annual vacation, those sick days should be treated as part of the same "occasion".

On this basis the Grievor's TAC cards show that his 21 casual sick days after October 5, 1992 were spread over 10 not 14 occasions. This includes treating as one occasion the period from December 7, 1992 to December 20; a period which included, first, 2 certified sick days, a rotation day off, a casual sick day, another rotation day off, another casual sick day and then 7 certified sick days, with two rotation days off just prior to the last of those 7 days.

In cross-examination by Mr. Mundle, Mr. Cahill did not deny that there might be other employees in the Halifax Mail Processing Plant with worse records of absenteeism over the period primarily in issue here, that is May, June, July and August, 1992, who were not terminated, but he insisted that each case had to be assessed on the basis of all relevant considerations and in its own "historical context".

When Mr. Mundle commenced to put to Mr.Cahill a series of individual cases in which the numbers of days lost were high, I ruled that the bare facts that particular employees had been absent certain numbers of days were irrelevant and inadmissible if Mr. Mundle was not prepared to do more than merely raise these other cases in cross-examination. In my opinion the probative value of such facts was greatly outweighed by the time it would take in the hearing for the Employer to then put before me all the relevant circumstances of each individual case. Without knowledge of those circumstances such evidence would be more misleading than helpful.

I did, however, allow into evidence, over Mr. Mitchell's objection, a letter from Mr. Cahill to another employee, who was not terminated, with respect to her absences, because it set out statistics on average absences in the Plant. As is usual in matters of this sort, other evidence of that nature was also introduced.

Under cross-examination Mr. Cahill and Supervisor Wayne Kelly, who conducted Attendance Management interviews with the Grievor on June 15 and 23, acknowledged that, once his terms and conditions ended, the Employer had not outlined in writing for the Grievor what its expectation for attendance were in terms of numbers, such as average attendance statistics. Mr. Cahill also acknowledged that

he was not privy to any medical information to the effect that, apart from his shoulder injury, the Grievor was not fit to return to work.

For the Employer, Mr. Mitchell sought to introduce specific evidence of the Grievor's attendance record for 1990 and 1991, through testimony by Supervisor Wayne Kelly. This material was, apparently, not part of the Grievor's personal file, and I therefore ruled that by virtue of Article 10.02(a) it could not be introduced. Article 10.02(a) provides:

> 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/her in the grievance procedure nor at arbitration unless such report is part of the said file.

I note that as a general rule the Employer is allowed in cases such as this to make use of the employee's entire attendance record. The problem here appears to have been that that record was not part of the Grievor's personal file, or at least that the testimony was to the effect that it was not.

The final witness in this matter was Irvine Carvery, the Employer's Attendance Management Coordinator for the Atlantic Region. Mr. Carvery testified with respect to absenteeism statistics which were put in evidence. The most relevant were those that demonstrated an average absenteeism due to illness of 13.6 days for the CUPW internal group at the Halifax Mail Processing Plant for the period April 1992 to March 1993. The Grievor, it will be recalled, was absent due to illness for 17 and 1/2 days from April 28 to August 24, 1992. That is about four times the annual rate.

It is difficult to compare the Grievor's absences over the whole year preceding the decision to terminate him because for much of

that time he was not at work because of a previous termination (which was overturned at arbitration) and due to long term illness.

It was undisputed that the Grievor had no sick leave credits available. Indeed, they are "in substantial negative quantities".

The Issue: The issue is whether the Grievor was properly terminated in accordance with Article 10.08, 10.01 and 10.10 of the Collective Agreement, which are set out at the beginning of this Award.

Decision: Without in any way diminishing the tragedy involved for the Grievor, Counsel for the Employer described this as a "bread and butter Article 10.10 case." Many, many such cases have been decided by the application of the principles articulated by Arbitrator Swan in his unreported award between these parties in Bell, 1983, CPC Arb. No. 82-1-3-2487; CUPW Gr. No. 0-299-GG-446;

> 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 [are not] 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 on the fact that most medical evidence is entirely within the knowledge of an individual employee and is not available to the employer, and that since 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.

Applying these principles to the facts before me here leads irresistibly to the conclusion that the grievance must be denied. I have reached this conclusion after also taking fully into account the principles enunciated in the more recent unreported awards between these parties cited to me by Mr. Mundle for the Union; specifically the award of Arbitrator Alan Beattie in Oparyk (July 5, 1990, CUPW Gr. No. 730-88-60013; CP Arb. No. 319443F) and the award of Arbitrator Outhouse in Blackburn (Nov. 19, 1990, CUPW Gr. No. 096-88-00751).

Clearly, the Employer has shown that the Grievor was unable to attend work regularly in the past. The point of reference for this conclusion is August 25, 1992, when he was advised by Superintendent Cahill that he was terminated. At that time, commencing with his first absence after coming off the terms and conditions under which he had previously been returned to work, the Grievor had been absent at nearly four times the average rate for his work group.

If the Grievor's eight day "long term" absence is excluded, as Oparyk and Blackburn suggest, his rate of absence was still more than double that of his work group. In Oparyk Arbitrator Beattie suggests, at p. 30;

> It seems clear from the cases that anything in excess of double the average may be considered "excessive" or "unduly excessive", depending on the circumstances.

I do note that all but one of the cases Arbitrator Beattie then cites involve rates considerably more than double, but "the circumstances" here do not favour the Grievor.

I am not satisfied that the long term absence during the period primarily in question here should necessarily be excluded from consideration, because there is no evidence that it had a discrete cause and was unrelated to the Grievor's general poor attendance record, as were the long term absences in Oparyk and Blackburn. Because the Grievor's attendance was sufficiently poor over the period in question to justify the termination even without counting that absence I do not have to make any final decision on whether it should be counted.

In very general terms, it is clear that the Grievor's overall record previous to March 7, 1992, when he came off the terms and conditions which had been agreed to by the parties, was poor, although he had complied with those terms and conditions.

Against this background, the Grievor's poor attendance record through the Spring of 1992 provided the Employer, and provides me, with ample basis upon which to draw the inference that on August 25, 1992, the prognosis for the Grievor's future attendance was anything but good.

The onus then shifts to the Grievor to prove that the prognosis was in fact good. The Union introduced no medical or other evidence whatever to that effect. Indeed, on the facts before me it appears strange to even suggest that it might have. The special feature of Article 10.10 is, of course, that the Grievor stays on the job after his or her nominal "termination" until the arbitrator's award is issued; so that an apparently poor prognosis as of the date of

termination can be disproved by the Grievor's subsequent actual good attendance record. This was the situation in the unreported award of Arbitrator Thistle between these parties in Gannon, (Jan. 3, 1991, CUPW Gr. No. 096-88-00580).

Under Article 10.10 a poor prognosis arising by inference from a grievor's pre-termination attendance record may, of course, not only be rebutted, it may also be borne out by his or her post-termination attendance, but it is not necessary for the Employer to make that case. It is for the Union to rebut the inference, and only if it attempts to do so must the Employer rely on the post-termination record. Here the Union called no evidence, medical or otherwise, to suggest that as of the date of the hearing the prognosis for the Grievor was good. On the face of it, the Union would have been hard pressed to find such evidence. For this reason I have not focused here on the Grievor's post-termination attendance or attempted to assess the impact of his broken shoulder, which, according to Oparyk and Blackburn, would appear to be irrelevant.

For the Union, Mr. Mundle submitted that the Grievor had not been warned that his job was in jeopardy. I find, however, that the Grievor had every reason to know that such was the case. He must have been familiar with the Employer's Attendance Management Program, at least to the extent of realizing that the interviews in which he participated were a prelude to the Employer concluding that his attendance was so poor that it could not support a continued employment relationship. Indeed, I find that Supervisor Kelly said as much to him, even if the warning was not fully explicit.

As I have already suggested, the Employer is faced by the paradox in this connection. It is entitled to terminate for innocent absenteeism, that is for absences over which, theoretically, the employee has no control, but it has been told by arbitrators that in fairness it must put employees on notice that their failures to attend are unacceptable and that, ultimately, their jobs are in jeopardy. In doing so, however, it cannot treat an absence as a disciplinable matter. If it does so it moves into a different realm, where the employee is assumed to be directly responsible and accountable for his or her absences. To avoid this, "notice" or

"advice" is more appropriate than "warning". Bearing these considerations in mind, I find that the Grievor here was given fair notice.

Mr. Mundle also submitted that no standards were set for the Grievor. I find that the Employer was not required to set a specific number of absences which the Grievor could not exceed. To do so would be to license absences in a way that the Collective Agreement does not contemplate. The parties may choose, in the settlement of grievances, set such limits by specific agreement for individual cases, and arbitrators may do so as part of the terms and conditions under which a grievor is returned to work, but there is nothing in Article 10.10 or elsewhere in the Collective agreement requiring the introduction of any such rigidity.

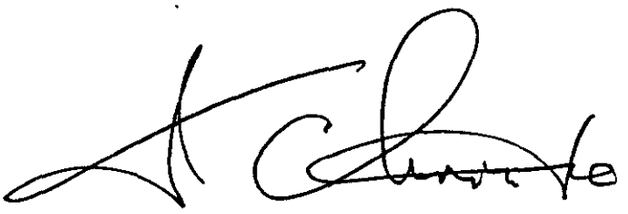
Mr. Mundle submitted that there was no fair comparison of the Grievor with his fellow workers, because there were no statistics for people on the evening shift in his classification. I am satisfied that the statistics put in evidence amply demonstrate that the Grievor's absenteeism rate was quite excessive. Whether it would have appeared slightly less excessive when measured against that group, rather than inside workers in the CUPW unit at the Halifax Plant in general does not seem to me to be determinative.

The Union also took the position that Superintendent Cahill had singled out the Grievor for special attention and discriminated against him because of his history of alcoholism. The evidence simply does not support any such conclusion. Clearly, the Grievor's history was known, but the Employer has made out its case on the Grievor's record of poor attendance, and appears on the evidence to have treated him throughout in accordance with its general policies.

The issue of the Grievor's entitlement to sick leave as a standard against which to judge his absenteeism does not, in my opinion, arise for serious consideration here, because the Grievor had no sick leave time coming to him. This issue is canvassed by Arbitrator Beattie in Oparyk, at pp. 31-34. Indeed the Grievor here is "in debt" to the sick leave plan. The Collective Agreement (now Article 20.11(a)) provides that a full time employee may

borrow up to twenty days of sick leave, but I do not think the parties can be taken to have thereby agreed to alter the Employer's right to release for incapacity or innocent absenteeism to the extent that there can be no termination until that "fund" is exhausted.

Conclusion and Order: The Grievor's record of innocent absences immediately preceding his notice of termination on August 25, 1992, in the context of his general past attendance, justified that action by the Employer. There was no evidence of a favourable prognosis at the time of the hearing and the Grievor's attendance in the interim provided no basis for a favourable prognosis. There having been no failings on the part of the Employer that would justify any other conclusion, the grievance is hereby dismissed.



Innis Christie
Arbitrator