10-2-1995

CPAA v Canada Post Corp

Innis Christie

IN THE MATTER OF AN ARBITRATION

BETWEEN:

95 303 056

CANADIAN POSTMASTERS AND ASSISTANTS ASSOCIATION

(The Union)

and

CANADA POST CORPORATION

(The Employer)

RE: Robert Best (The Grievor)
Suspension
Grievance # 94-G-20

BEFORE: Innis Christie, Arbitrator

AT: Halifax, N.S.

HEARING DATES: April 25 and 26, 1995
DATE OF FINAL WRITTEN SUBMISSION: June 19, 1995

FOR THE UNION: Allan O'Brien, Counsel
Rowena Anderson, National Vice-President

FOR THE EMPLOYER: Phillip M. Dempsey, Counsel
Joseph P. Doucette, Labour Relations Officer

DATE OF AWARD: October 2, 1995

29 P

Employee grievance alleging breach of the Collective Agreement between the parties in respect of the Revenue Postal Operations Group (All Employees) bearing the expiry date 31 December, 1993, which the parties agreed applies here, and in particular of Articles G-6.22 and .24 and G-43, in that the Grievor was suspended for three days without just, reasonable and sufficient cause, allegedly for behaviour for which other employees in the same work situation were not disciplined, and not in compliance with the procedural requirements of the Collective Agreement. The Union requests an order that the Grievor be reimbursed for all lost pay and benefits and that any reference to the incident giving rise to the suspension be removed from his personal file.

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 relating to the arbitration process itself, either pre- or post-hearing, are waived.

AWARD

At the time of the incident in question here, and of the grievance, the Grievor was part-time assistant in the post office at Berwick, Nova Scotia. A fellow part-time assistant complained in writing to the Employer that he had "consistently embarrassed and harassed" her "in front of fellow workers and customers". After investigating this complaint the Area Manager, Nova Scotia Retail Outlets, imposed the three day suspension at issue in this grievance. On behalf of the Grievor, the Union took the position that nothing he had said or done justified the complaint or the three day suspension, or any discipline, in accordance with Article G-6.24 of the Collective Agreement, that the imposition of the discipline was discriminatory contrary to Article

G-43 because the Grievor's behaviour was similar to that which was common in that work place and for which no one else had been disciplined, and that the discipline was not imposed in accordance with notice requirements and time limits in Article G-6.22, 24 and .26.

Those provisions of the Collective Agreement are as follows:

> G-6.22 No disciplinary measure in the form of a notice of discipline, suspension or discharge or any other form shall be imposed on the employee without just, reasonable and sufficient cause and without his receiving beforehand or at the same time a written notice showing the grounds upon which a disciplinary measure is imposed. Evidence shall be limited to the grounds stated in the discharge or disciplinary notice to the employee.
>
> G-6.24 There must be only one personal file for each employee. No disciplinary report or document relating to an employee's conduct or performance shall be placed on that file or constitute a part thereof unless a copy of the said report or document is sent to the employee by registered mail within ten (10) days after the date of the alleged infraction or of its coming to the attention of the Corporation, or of the Corporation's alleged source of dissatisfaction with him. No report or document relating to an employee's conduct or performance may be used against him in the grievance procedure or at arbitration unless such report or document is part of the employee's personal file. The Corporation must not introduce at any hearing any disciplinary report or document relating to an employee's conduct or performance from the file of the employee unless the report or document is properly part of the employee's personal file. Any unfavourable report other than a performance report concerning an employee and any report concerning an infraction shall be withdrawn from the file after a discipline free period of twelve (12) months from the date of the alleged infraction. A verbal reprimand shall not be considered as a disciplinary measure and shall not be reported in the personal file of the employee.

G-43.01 No Discrimination

(a) The Corporation and the Association agree that there shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or stronger disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national origin, political or religious affiliation, sex, sexual orientation, marital status, or membership or activity in the Association.

(b) The Corporation and the Association shall make every effort to ensure that no employee is subjected to sexual harassment. Sexual harassment shall be defined as but not limited to any incident or series of incidents related to sexuality that may be verbal, physical, deliberate, unsolicited or unwelcome.

The Grievor, Robert Best, has worked for the Employer since 1981, in the Berwick post office until January of 1993 and since January 18, 1993 as a 30 hour part-time assistant in the Kingston post office. He moved to the Kingston post office as part of the settlement of a grievance involving him. In the course of the hearing I ruled that I would receive the Minutes of Settlement of that matter into evidence, but that the effect of Article G-6.24 was that anything beyond the fact that the Grievor moved to Kingston as a result of the settlement is irrelevant to this matter.

At the time of the complaint in issue here there was nothing on the Grievor's employment record with respect to discipline for harassment of any kind, but on January 7, 1994, he received a one day suspension for the use of profanity to a customer, which was not grieved.

The Grievor is active in his community, particularly as a hockey referee, and has achieved such recognition in that area that he has worked as a temporary replacement in the N.H.L..

Under date of December 2, 1993, Pauline Ryan, another part-time assistant employed in the Kingston post office, submitted the following document to David Masters, Area Retail Representative:

CONFIDENTIAL

December 2, 1993

SUBJECT: ON JOB HARASSMENT

I feel that I am being harassed in my place of employment by one of my fellow workers, Mr. Robert Best.

On every occasion my hours of work have been assigned to me by the Postmaster or in his absence by the Assistant Postmaster.

Mr. Best has consistently embarrassed and harassed me in front of my fellow workers and customers, for example;

A. On numerous occasions has questioned my hours of employment, suggesting that I am assigned them because of my "Sucking Up" to the Senior Assistant and has called me "Pet" on front of other staff members.

B. He has questioned my judgement while explaining to junior staff how to process and measure mail, on one occasion taking the mail from the Casual employee's hands and throwing it away from her, at the same time cursing and swearing.

C. Mr. Best approached me on one occasion to question as to why I had returned some mail. After telling him why, Mr. Best loudly said I did not like the customer that's why I was returning his mail, causing me

considerable embarrassment as the customer and others were within hearing distance.

D. Mr. Best has continually remarked in front of others "Women are only good for one thing".

E. Mr. Best's continuous cursing, use of profane language and temper tantrums are not the conduct expected of a fellow employee.

In summation, I feel that the preceding paragraphs fully substantiate my position that I am continually subjected to unwarranted job pressures, sexual harassment and verbal assaults by Mr. Best.

[Signed] Pauline D. Ryan
Part-time Assistant
Kingston Post Office

At the hearing in this matter I heard the testimony of Ms. Ryan with respect to these matters. I also heard the testimony of Stan Houghton, Area Manager, Nova Scotia Retail Outlets, with respect to his investigation of Ms. Ryan's complaint and the procedure he followed in imposing the three day suspension on the Grievor, and that of Pauline LeBlanc, who at the time of the complaint was an officer in the Employer's Official Languages and Equality Rights Division, and of the Grievor. I will not detail all of that testimony here. Rather, I will state the facts as I have found them, dealing with the evidence in detail only where it is relevant to the isssues I must decide here, and then only when it is conflicting or nuanced in a way that requires elaboration.

I note that at the outset of the hearing, the parties having failed to agree to the contrary, I made the normal order for the exclusion of witnesses until after they had testified.

Although Labour Relations Officer Joe Doucette was present as an advisor, Mr. Dempsey for the Employer asked that Mr. Houghton be allowed to sit through the testimony of the Union's witnesses because he was also in the advisor's role. After consideration, I ordered Mr. Houghton excluded.

Also, at the outset of Ms. Ryan's testimony, accepting Mr. O'Brien's objection on behalf of the Union, I refused to admit into evidence a document prepared by her expanding on the letter of complaint set out above, which was submitted to Ms. LeBlanc some time after the incidents complained of. Counsel acknowledged that there was a great deal of hearsay material in the document. Ms. Ryan was permitted to use the document to refresh her memory.

Procedural Objections; the Facts. I will deal first with the facts relevant to the Union's position that the Employer did not follow the procedures demanded by Articles G-6.22 and .24. If I conclude, on that basis, that the suspension was not properly imposed it will be unnecessary to consider the merits.

Ms. Ryan' complaint letter is dated December 2, 1993. On or very shortly after that date she gave it to David Masters, the Employer's Retail Representative for the Kingston area, who reports to Stan Houghton. Mr. Masters is a member of management, with disciplinary responsibilities. Through Mr. Houghton, Ms. Ryan's letter was passed to Joe Doucette in the Employer's Labour Relations department and then to Pauline LeBlanc, at that time the Employer's Human Rights Officer for the Atlantic Division. This was in accordance the Employer's *Corporate Policy on*

Human Rights and Employment Equity which has been in effect since at least 1992. Mr. Houghton testified that this document is available through the Corporate manual system, would have been available in all postal outlets and was undoubtedly known to the Union. The relevant parts of this document are:

4.1 Discriminatory Activities

While this policy reflects provisions of the *Canadian Human Rights Act,* the *Employment Equity Act*, and also considers the *Canadian Charter of Rights and Freedoms* and the *Canada Labour Code*, all questions relating to its interpretation and application should be initially directed to the Equality Rights and Official Languages Branch.

The basic elements of the corporate policy include, but are not limited to, a range of activities which could be regarded as discriminatory in nature, such as: ...

- to harass an individual on a prohibited ground of discrimination. Sexual harassment shall be deemed to be harassment on a prohibited ground of discrimination.

4.3 **Complaints**

Any employee who has a complaint arising from alleged violation of the *Human Rights Act* or the *Employment Equity Act*, or the Corporate Policy on Human Rights and Employment Equity, should contact his or her supervisor who will contact the divisional Human Rights Co-ordinator. ... the Human Rights Co-ordinator will investigate the complaint thoroughly and if it is determined that a violation has occurred, will immediately take steps to end the discriminatory behaviour and prevent its recurrence. The Co-ordinator and also inform the complainant of the findings of the investigation and redress taken. ...

Any employee found to be engaging in discriminatory practices may be subject to disciplinary action.

5.1 All CPC employees are responsible for complying with this policy.

In addition to passing the complaint on to the Human Rights Officer, Mr. Doucette signed the following document with the Union. This document is in evidence and there is no dispute that it is binding as between the parties, although there was no evidence with respect to the circumstances of its signing:

MEMORANDUM OF SETTLEMENT

BETWEEN

CANADA POST CORPORATION
(The Corporation)

AND

THE CANADIAN POSTMASTERS AND ASSISTANTS ASSOCIATION
(The Association)

The parties to this Memorandum agree to waive the time limits stated in clause G-6-24 of the Collective Agreement until the Corporation completes an investigation into the sexual harassment complaint filed by an employee working in the Kingston, NS Post Office on December 2, 1993. This agreement is without prejudice or precedent to any position similar or identical taken by either party in future cases.

[Signed] Joseph P. Doucette
J.P. Doucette
for
The Corporation

R. D.[?] Morrison
Rod Morrison
for
The Association

[hand-written] Dec. 9, 1993
Dated

Dec. 9, 1993
Dated

Pauline LeBlanc testified that after receiving Ms. Ryan's complaint in December of 1993 she called first Ms. Ryan and then the Grievor, just prior to Christmas. She spoke with him a several occasions and finally met with him in Kentville on January 20, 1994, together with John Crook, who at that time was the Employer's Manager of Industrial Relations for the Atlantic Division. Notes, which were initialled by the Grievor, and Ms. LeBlanc's summary statement of what was said at that meeting, which was sent to the Grievor, are in evidence.

Under date of May 9, 1994, Mr. Best received his "24 Hour Notice of Interview" in this matter from David Masters. The notice advised him that the interview would be held at 9:30 on May 11 and further stated as follows:

> The purpose of this interview is to discuss the results of our investigation into the sexual-job harassment complaint against you dated Dec. 2, 1993
>
> Your personal file will be involved. You have the right to union representation and may examine your personal file prior to the interview if you so desire.
>
> If you do not attend the interview and fail to explain your inability to attend we shall proceed unilaterally.
>
> A copy of this letter will be placed on your personal file.

Then, under date of May 19, 1994, Mr. Best received from Mr. Masters the following letter of discipline, which is the subject of this grievance:

> This is further to your interview of May 11, 1994 at the Kentville Post Office. In attendance were Stan Houghton, Retail Sales Manager, Vera Carroll C.P.A.A. Representative, yourself and the undersigned.
>
> The purpose of the interview was to discuss the results of our investigation into the sexual-job harassment complaint against you dated December 2, 1993. As discussed these claims were substantiated. In particular your continual degrading of women by using the phrase "women are good for only one thing".
>
> In addition your use of profane language without regard to the sensitivities of others whether they be fellow workers or customers.
>
> You were asked if there was anything further you may wish to add concerning this matter. In response you indicated you couldn't believe she was doing this as she hugged and kissed you when you mentioned you were selected to referee in the N.H.L.
>
> Canada Post cannot and will not tolerate this type of behaviour in the workplace. To impress upon the seriousness of this matter we are imposing a three (3) day suspension without pay to be served from May 25 to May 27, 1994.
>
> Any further incidents of this nature may result in further disciplinary action being taken up to and including discharge.
>
> A copy of this letter will be placed on you personal file.

The Grievor filed this grievance on June 14, 1994. It states simply; "I grieve the unfair and unjust action taken against me by Canada Post Corporation in assessing me a 3 day suspension, served May 25, 26 and 27/94, contravening clauses G 6, G 43 and any other related articles of the Collective Agreement."

Stan Houghton heard the grievance at the first stage and his reply, dated August 2, denies the grievance and states in part: "a review of the facts has determined that the sexual-job harassment complaint brought against you by an employee was founded." The grievance was advanced to the next stage by the Union on August 8, by a document which simply repeated the original statement of the grievance. It was denied on October 31 in the following terms:

> Following a review of the facts surrounding this grievance it has been determined that the interview of May 11, 1994 and the subsequent letter of May 19, 1994 imposing a three-day suspension were warranted and for just cause in view of your degrading comments to women in the workplace and use of profane language, which resulted in a sexual/job harassment complaint being filed against you.

In direct examination Stan Houghton testified that he became aware that the "investigation was completed on April 15" when he received that information from Pauline LeBlanc. He confirmed in cross-examination that he actually received her report no later than April 17. He was out of town for "a couple of days" after the 15th and upon his return discussed the matter with Ms.Leblanc, with Joe Doucette and with Mark MacDonnell, Manager of the Employer's labour relations department for the Atlantic Division. He testified that as a result of his review of the matter he then

contacted David Masters and discussed with him "the results of the human rights investigation". When asked in cross-examination whether there was any further investigation of the matter between April 17 and May 11, Mr. Houghton responded "Yes", there were "several discussions with Pauline LeBlanc and the labour relations group as to where we should go. David Masters was involved". He acknowledged that no new factual information was received. Mr. Masters then sent out the "24 Hour Notice of Interview" set out above.

In cross-examination Mr. Houghton testified that he did not visit the Kingston post office until after the imposition of the discipline. He did not contact the Grievor or Chris Tanner, the Kingston Post Master, after hearing the results of the human rights investigation from Ms. LeBlanc on April 15. He talked to Ms. Ryan in June about the report of the human rights investigation but did not recall speaking to her between December, just after he received her complaint, and June.

Mr. Houghton testified that he attended the disciplinary interview. He testified that it did not last very long. Mr. Masters stated the purpose, reviewed the Grievor's personal file, said that the complaint was well founded and asked if the Grievor had anything to add "over and above what he had said to Ms. LeBlanc". The Grievor's comments were "basically that he couldn't believe that this had happened, because of Ms. Ryan's reaction when he had told her about his chance to referee in the N.H.L." According to Mr. Houghton's testimony, "we said we viewed this as very serious and gave the three day suspension". He said that in his opinion the "Pauline Ryan incident" warranted a three day suspension on its own merits, quite apart from the earlier one day suspension

for use of profane language to a customer that was still on the Grievor's file. In cross-examination Mr. Houghton agreed that the purpose of the interview was to discuss the results of the Employer's investigation, which was by then completed. In re-direct he added that the discipline to be imposed had not been finalized prior to the interview.

Mr. Houghton testified that, except for the signing in December of the waiver document set out above, at no time did the Union make him aware of any "time limits problem". Nothing was said at the disciplinary interview on May 11 to indicate either that the Union was concerned about timeliness or that the time limits in the December document were being extended. Neither then nor at the first level of the grievance procedure did the Union make any reference to when the Employer's investigation had been completed or to time limits.

Procedural Objections: The Issues. The Union's position is that Article G-6.24 provides that no disciplinary report or document can be put on the Grievor's file unless it is "sent to the employee by registered mail within ten (10) days after the date of the alleged infraction or of its coming to the attention of the Corporation, or of the Corporation's alleged source of dissatisfaction with [the Grievor]". Because Article G-6.24 further provides that in imposing discipline the Employer cannot rely on any disciplinary report or document not properly on an employee's file, and because Article G-6.22 limits the evidence that may be offered at arbitration to the grounds stated in a discharge or disciplinary notice, this operates as an important time limit. In many circumstances an "infraction" or "source of dissatisfaction" may be said not to have "com[e] to the attention of the Corporation" until the Employer has completed its

investigation of an alleged infraction by an employee, or of a suggested basis of dissatisfaction with the employee.

Here the parties specifically agreed in the memorandum of December 9, 1993, that the Union would "waive the time limits stated in clause G-6.24 of the Collective Agreement until the Corporation completes an investigation into the sexual harassment complaint". Thus the issue is "were the documents upon which the Employer relied in imposing the three day suspension on the Grievor properly part of his personal file, having been sent to him within ten days of the elapse of the agreed waiver of the time limits in Article G-6.24?" which, in turn, depends on the answer to the question "when did the Employer complete its 'investigation into the sexual harassment complaint'?"

For the Union, Mr. O'Brien asserts that the Employer completed its investigation into the sexual harassment complaint when Pauline LeBlanc reported her results to Stan Houghton on April 15, or, at the latest, April 17. Because the notice of interview and the letter of discipline are dated May 9 and 19 respectively, the Union submits that there they were out of time.

For the Employer, Mr. Dempsey meets the Union's procedural objection in three ways: (i) The Employer's "investigation" was not completed until it met with the Grievor in the disciplinary interview of May 11. Not until then did the Employer' knowledge of the alleged infraction or source of dissatisfaction crystallize. (ii) The Union grieved on the basis that the three day suspension was not justified, not on the basis that it has not been imposed in accordance with the time limits in the Collective Agreement.

(iii) The Union waived its right to advance the timeliness objection by not raising it at the disciplinary interview or at any stage of the grievance procedure prior to cross-examination of Stan Houghton in the course of the arbitration hearing.

Procedural Objections: Decision. I will deal with these three aspects of the Employer's position in the order I have listed them.

(i) The Employer's "investigation" was not completed until it met with the Grievor in the disciplinary interview of May 11. The issue here is, "When did the Union's explicitly agreed waiver of the Article G-6.24 time limits in the December 9, 1993 memo lapse." Clearly it ended when the Employer completed "an investigation into the sexual harassment complaint" filed on December 2. When was that? That was when, on a fair reading of the December 9 document, the parties could be said to have agreed it would lapse.

I do not think that the Union intended by this, or that the Employer could reasonably have taken the Union to intend, that the time limits would not start to run until after the Employer had held the regular disciplinary interview provided for in Article G-6.23(a).

To say in the ordinary course of things, that is in the absence of any waiver agreement like that of December 9, that the ten day time limit "after the date of the alleged infraction or its coming to the attention of the Corporation" would never, or usually not, start to run until after the disciplinary interview would be to rob the time limits in Article G-6.24 of all purpose. If the Employer is allowed to claim that its knowledge

of the alleged infraction or source of dissatisfaction does not crystallize until the disciplinary interview the twenty-four hour notice of disciplinary interview could never be out of time. The notice could be given at the Employer's convenience, on the basis that until the disciplinary interview the Employer would not have completed its investigation.

I do not think that is what Article G-6.24 contemplates, although it is well established that an "alleged infraction" can not be said to have come to the Employer's attention and the ten day time limit does not start to run until after the Employer has completed any genuine investigation it needs to make into the circumstances potentially giving rise to discipline. *Williams and Treasury Board (Post Office Department),* (unreported), PSSRB File No.166-2-5869 (Mitchell), is the definitive statement of how similar language has been interpreted in both the CUPW Collective Agreement and the former LCUC Collective Agreement with the Employer. It is cited in *Allalouf,* a decision of Arbitrator Kates in an arbitration between the Employer and LCUC - unreported, March 15, 1983, and quoted at length in *Gibson*, a decision of Arbitrator Swan in an arbitration between the Employer and CUPW (unreported, Feb. 25, 1987, CUPW No. 322-H-207; CPC No. 86-1-3-3099), both of which were put before me by the Employer here.

Whether or not the Employer interviews an employee thought to be guilty of some infraction as part of its investigation, rather than at its conclusion, is, in my opinion, a matter for the Employer to decide. If it does so it must give the employee the 24 hour notice required by Article G-6.23, which goes on the employee's file, and must do so

within the time limit set out in Article G-6.24. If, as in *Allalouf,* the arbitrator accepts that as of the date of the interview the alleged infraction has not come to the Employer's attention, or the alleged source of its dissatisfaction with the employee has not been established, because the Employer's investigation is ongoing, then an interview which is part of the investigation could not be out of time.

The Collective Agreement language in *Allalouf* was the same as here, and, in general terms, I agree that an investigation may have been ongoing at the time of the interview, but it should not be held to have been so simply because the Employer says it was. It is a matter of fact and the onus, as Arbitrator Kates says in *Allalouf,* and Arbitrator Swan says in *Gibson,* is on the Employer to prove that the interview was a necessary part of the investigation. As counsel for the Employer submitted, at p. 31 Arbitrator Kates speaks in favour of an interview as part of the investigation, but the learned arbitrator adds: "This is not to say that an investigation of the facts may be used to disguise dilatory tactics committed by the employer to justify unnecessary delay in making a decision".

But how this Collective Agreement is to be applied in the regular course of things is not really the issue here, because here the running of the time limit is triggered by the elapse of the waiver agreed upon in the December 9 memo. Nevertheless the appropriate reasoning is similar. For the parties to have agreed that the investigation would not be considered to have ended until the Employer had conducted its disciplinary interview would be for them to have agreed, in effect, to do away with the time limits by putting them entirely in the Employer's control. I do not think that is

what the Union intended, nor, indeed, what the Employer intended, in the December 9 memo. If that was what the parties had intended I assume that is what they would have said very clearly.

What then must the parties be taken to have meant when they used the phrase "until the Employer completes an investigation" in their December 9 agreement? They both knew that the Employer had in place a special process for dealing with complaints arising from alleged violations of the *Human Rights Act,* including complaints of sexual harassment, and it is clear that the December 9 agreement was signed to allow for precisely that kind of investigation to take place before the disciplinary process proceeded. The provisions of the Employer's *Corporate Policy* on *Human Rights and Employment Equity*, I have no doubt, were well known to both parties and very much in their contemplation when they agreed on December 9 to waive the time limits in article G-6.24

In fact, as pointed out by counsel for the Union, the Employer itself, in both the 24 Hour Notice of Interview and the letter of May 19 imposing the discipline, treats Ms. LeBlanc's human rights investigation as *the* investigation here. The 24 Hour Notice states that the purpose of the interview is "to discuss the results of our investigation" and this is repeated in the May 19 letter. Neither suggests that the purpose of the interview was to further the investigation.

Stan Houghton testified that he had Ms. LeBlanc's report on April 15, or at the very latest on the 17th, and that after that the Employer did not receive any new factual

information. All that happened after that was that the Employer's officials discussed the results of the investigation. Mere discussion by management cannot have been intended by the parties to delay the running of the time limit in Article G-24.6 because, if that were so, there would be no real time limit at all. For the same reasons I do not take those who signed the waiver memo of December 9, 1993, to have intended that such discussions were to be part of the "investigation" contemplated there.

For these reasons I reject the submission of the Employer and hold that the waiver of the time limits in Article G-6.24 agreed to by the parties in the memo of December 9, 1993, elapsed on April 17. The next question, then, is whether the Union is precluded from relying on those time limits by the way it proceeded with the grievance.

(ii) The Union grieved on the basis that the three day suspension was not justified, not on the basis that it has not been imposed in accordance with the time limits in the Collective Agreement. In submitting that, on this basis, I should not, indeed cannot, take the Union's time limits objection into account Mr. Dempsey, for the Employer, relied entirely on the award of Arbitrator Bird between the Employer and CUPW in *Klemm*, unreported, February 23, 1989, CUPW No. 730-87-00279, CPC No. 88-1-3-16116.

In *Klemm* the statement of grievance filed with the Employer stated;

> C.U.P.W. hereby grieves a violation of Article 10 and any other pertinent provisions of the Collective Agreement in that a letter of reprimand dated (Approx. 1988-05-27) a letter of suspension dated 1988-06-03 and a one day suspension were imposed upon the grievor without just reasonable and sufficient cause.

Arbitrator Bird stated, on pp. 4 and 5:

> There is no evidence before me which establishes the date upon which the Union became aware that it had a case under Article 10.02(b) [very similar to the second sentence of Article G-6.24 which establishes the 10 day time limit here]. If the Union became aware that it had a case before or during the grievance procedure, the Union has lain in ambush until just before the hearing knowing that the Statement of Grievance was inadequate, having regard to the obligation imposed by Article 9.16... . If the union has lain in ambush when it could have clarified the grievance, it breached a term of the collective agreement and therefore it ought not to be allowed to profit from that breach. If the Union only recently discovered it had a case under Article 10.02(b), which to me seems more likely, then it cannot be heard to say that the Statement of Grievance was written with the breach of the ten day time limit in Article 10.02(b) in mind. ...
>
> I hold that the Union is not entitled to assert non-compliance with Article 10.02(b) because it violated Article 9.16, either by failing to clarify the Statement of Grievance or, in the alternative, by failing to include a reference to the Article 10.02(b) defence to the imposition of discipline in the Statement of Grievance.

For the reasons set out below, I do not think this award is applicable here and, in any event, it was made under a different Collective Agreement and I am not bound by it. Article 9.16 of the CUPW Collective Agreement, upon which Arbitrator Bird relied so heavily, provides:

9.16 Description of the Grievance

> The written description of the nature of the grievance shall be sufficiently clear so as to determine the relationship between the grievance and the provisions of the Collective Agreement. At any level of the grievance procedure, the Union shall, at the request of the Corporation, endeavour to clarify the written description of the grievance. At any level of the grievance procedure, the Union may clarify the written description of the grievance without changing its substance.

This has no equivalent in the Collective Agreement before me here.

On the other hand, like Article 9.17 of the CUPW Collective Agreement, this Collective Agreement does provide in Article G-6.05 that "a grievance shall not be defeated by reason of technical irregularity". This provision in the CUPW Collective Agreement was quoted by Arbitrator Burkett in the course of his award in *Canada Post Corporation and CUPW (Gibson)* (1992), 29 LAC 7, at p. 18, in which, after quoting *Klemm* and two other CUPW awards, *Blakely* (unreported, January 14, 1992) (Brunner) and *Hansen* (unreported [summarized 16 CLAS 20], November 13, 1989) (McKee), the learned arbitrator concluded;

> Having regard to the further stipulation in art. 9.16 that the union may clarify the written description of the grievance without changing its substance, having regard to the stipulation in Article 9.17 ... and having regard to the absence of real prejudice in this matter I prefer the approach of arbitrators Brunner and McKee.

Gibson involved a failure of the Employer to comply with the equivalent of Article G-6.22 in that the Grievor had not been given timely notice of his discipline, not the equivalent G-6.24 which is before me here, but the question of whether the Union was precluded from raising the timeliness issue by its failure to mention it specifically in the grievance document was precisely the same. At p. 18 Arbitrator Burkett quoted the following passage from Arbitrator Brunner's award in *Blakely,* which he expressly "preferred" to *Klemm*:

> While it may be desirable to set out in the grievance all of the provisions of the collective agreement on which reliance is placed, that is not the reality of life or the way the grievance procedure between these parties operates. Nor is it something that in may judgement is required by art. 16. *When an employee files a grievance alleging that he has been unjustly discharged, it puts in issue the validity of the termination, whatever its causes, and it is open to the union to put forward every argument as to why it takes the position that the termination was not for just reasonable and sufficient cause.* [Emphasis in the original]

Thus, even under the CUPW Collective Agreement, *Klemm* is far from being the last word. I too prefer the approach to the wording of grievances that is more generally applied by grievance arbitrators in Canada. It is recognized that a matter not part of a grievance may not be dealt with by a board seized only with that grievance, but it is also understood that very stringent application of this principle would lead to technical concerns with the wording of grievances that would be out of place in the arbitration of grievances under collective agreements between labour and management. Arbitrators are mindful of the fact that grievances are often written by grievors or shop stewards not trained in, or normally much concerned with, precision of language. They, therefore, commonly assert jurisdiction over and dispose of all of the issues in a dispute

between the parties, provided they can fairly be said to have been raised by the grievance. See Brown and Beatty, Canadian Labour Arbitration (3rd ed., looseleaf), at para. 2:3122.

At the fundamental level of the arbitrator's jurisdiction, Brown and Beatty state the arbitral jurisprudence this way, at para: 2:1300 [footnotes omitted];

> Just as the collective agreement defines the general scope of the arbitrator's jurisdiction, the submission to arbitration defines his jurisdiction in the particular case. ... once the submission is made the arbitrator cannot of his own volition extend, amplify, or add to the issues nor substitute other issues for or in lieu of the issues defined by the submission to arbitration. ... In this regard a distinction must be made between a grievance which is merely lacking in particularity and one which fails to define or include a matter and thereby put it in issue in the dispute. If the written grievance is merely too vague, that will not affect the arbitrator's jurisdiction and it may be cured by giving particulars, or by granting an adjournment.

In the matter before me here the grievance was against "the unfair and unjust action taken". I note that Article G-6.22 refers to suspension "without just, reasonable and sufficient cause" so that, if one is to be technical, the reference to "unfair" might be said to be a reference to procedural impropriety. More importantly, and less technically, the grievance here refers to the contravention of Article 6 generally, as well as Article "G-43 and other related articles". Thus, the problem, if there is one, is not that the timeliness issue was not included in the reach of grievance, but that the grievance lacked particularity.

Here, contrary to what Arbitrator Bird says was the situation in *Klemm*, there *is* evidence before me which establishes the date upon which the Union became aware that it had a case under the second sentence of Article G-6.24. Neither the Union nor the Grievor knew when the Employer's investigation was complete, and therefore when the time limit began to run, until Stan Houghton testified in the hearing before me as to when Ms. LeBlanc's human rights investigation had been completed.

I reject Mr. Dempsey's submission that the Union lay in ambush until it heard that testimony. The Union was entitled, but not required, to ask at the grievance hearings whether the Employer's 24 hour notice of disciplinary hearing was out of time. It had no way of knowing when the Employer's investigation had been completed. Only the Employer knew that, and the Union must be allowed to assume that the completion date was such that Employer had not given the 24 hour notice in breach of the Collective Agreement. Surely the Employer cannot be heard to say, in effect, "we gave untimely notice contrary to Article G-6.24 and, because you didn't know that was the case, assumed we were acting in accord the Collective Agreement and didn't check up on us, you can't now raise that irregularity".

As in *Klemm*, the Statement of Grievance here was probably not written with the breach of the ten day time limit in Article G-6.24 in mind, but it does appear to have been written with the intent of not precluding reliance on any grounds of unfairness or injustice that might constitute breaches of the discipline provisions of the Collective Agreement, and for me that is sufficient.

At the commencement of the hearing Mr. O'Brien, for the Union, did not flag the timeliness problem in his opening statement, but neither did he in any way preclude reliance on it. Indeed, he was careful in the way he responded to my routine opening question about whether there was any timeliness objection to my jurisdiction. But once he had heard Mr Houghton's testimony Mr. O'Brien made it clear in cross-examination that the Union would be relying on the fact that the disciplinary documents were, in its submission, out of time. At that point any possible prejudice the Employer might have suffered by being unprepared to argue this issue was avoided by allowing Mr. Dempsey a fresh opportunity to examine Mr. Houghton on the matter of when the Employer's investigation had been completed, followed by cross-examination and re-direct, and by my order that I should receive full written submissions from counsel on this issue.

For all of these reasons I have concluded that the wording of the grievance did not preclude the Union from making the objection that the three day suspension was not imposed in accordance with the time limits in the Collective Agreement.

(iii) The Union waived its right to advance the timeliness objection by not raising it at the disciplinary interview or at any stage of the grievance procedure prior to cross-examination of Stan Houghton in the course of the arbitration hearing. This response to the Union's timeliness objection is different from the preceeding one in that the Employer claims, in the alternative, that even if the grievance could be said to have raised the timeliness issue, the Union waived its right, on behalf of the Grievor, to rely on the Employer's failure to get the disciplinary documents on the Grievor's file within the time allowed by Article G-6.24. It waived that right, the Employer submits,

by not explicitly raising the matter of time limits while continuing to participate in the grievance process.

There is a good statement of the doctrine of waiver in the context of labour arbitration quoted in the award of Arbitrator Kates under the CUPW Collective Agreement in *Lockhart* (Unreported, September 21, 1993) CUPW No. 538-92-00005, at p. 12, an award which was relied upon by the Employer here. Arbitrator Kates quotes with approval from the award of Arbitrator Brunner in *Blakely,* cited above, as follows:

> Waiver is an abandonment or relinquishment of a right which must be intentional or voluntary. It may be express or implied from conduct. Mere acts of indulgence will not amount to waiver nor can a party benefit from a waiver unless he has altered his position in reliance on it. The party in question must have taken steps in the proceeding knowingly and to its prejudice. It must be clear and unequivocal that the person is waiving a procedural safeguard and he must do so with the full knowledge of the rights that the procedure that is provided was intended to protect and the effect that the waiver will have on the process.

In their written submissions both counsel recognized that "arbitrators should be extremely careful in applying the doctrine of 'waiver' to the exercise of substantive rights", quoting Arbitrator Burkett in *Re Hickson-Langs Supply Company and Teamsters Union, Local 419* (1985), 19 LAC (3d) 379. Both also took the position that the Grievor's right to have the disciplinary documents on his personal file within ten days of the completion of the Employer's investigation, that is within ten days of the elapse of the agreed waiver of the running of the time limits in the December 9

memo, was a substantive rather than a procedural right. I do not, therefore, have to address the issue of whether this is, in fact, a substantive rather than a procedural right. I turn to the question of whether the Employer has satisfied me that the elements of waiver are present here.

Much of what there is to be said on waiver is a repetition of what I have just said in respect of the submission that the grievance did not raise the timeliness issue. Certainly neither the Union or the Grievor ever *expressly* waived their right to rely on the Employer's failure to comply with the time limits in Article G-6.24. Did they do so by conduct? The Employer's argument is that by failing to inquire about the completion of the investigation the Union lulled the Employer into thinking there was no timeliness issue. For the reasons spelled out above, I do not agree that the Union or the Grievor had any obligation to ask when the human rights investigation had been completed. With no knowledge to the contrary, they were entitled to assume that in sending its 24 hour notice of interview and letter of discipline the Employer had acted in accordance with the Collective Agreement.

Even if the Employer could be said to have been led by the Union into thinking that there was no timeliness issue, I cannot see that the Employer suffered any prejudice other than the expense and inconvenience of proceeding with the grievance and arbitration process. I need not decide whether that would be sufficient prejudice to bring waiver into play because there are other reasons why I do not think the doctrine of waiver is available to the Employer here.

By no stretch can it be said that, in the words of Arbitrator Brunner quoted above, it was "clear and unequivocal" here that the Union or the Grievor was waiving the time limits, or that either of them did so "with the full knowledge of the rights that the procedure that is provided was intended to protect and the effect that the waiver will have on the process". At a minimum, neither the Union nor the Grievor knew when the Employer had completed the investigation to which the triggering of the time limits was tied by the memo of December 9, so neither could possibly be said to have had "full knowledge of the rights" the Employer claims they waived.

For these reasons I reject the Employer's submission that the Union waived its right to advance the timeliness objection by not raising it at the disciplinary interview or at any stage of the grievance procedure prior to the cross-examination of Stan Houghton in the course of the arbitration hearing.

Conclusion on the Procedural Issue: Article G-6.24 provides that no disciplinary report or document can be put on the Grievor's file unless it is "sent to the employee by registered mail within ten (10) days after the date of the alleged infraction or of its coming to the attention of the Corporation, or of the Corporation's alleged source of dissatisfaction with [the Grievor]". I accept the Union's submission that because Article G-6.24 further provides that in imposing discipline the Employer cannot rely on any disciplinary report or document not properly on an employee's file, and because Article G-6.22 limits the evidence that may be offered at arbitration to the grounds stated in a discharge or disciplinary notice, this operates as a time limit.