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# Re Air Nova Inc and CAW-Canada, Local 4236 (Hatt)

Innis Christie

# Re Air Nova Inc. and Canadian Auto Workers, Local 4236

[Indexed as: Air Nova Inc. and C.A.W.-Canada, Loc. 4236 (Hatt) (Re)]

*Canada*
*I. Christie*

*Heard: January 26, July 17, 18, 19 and 20, 2001*
*Decision rendered: March 7, 2002*

EMPLOYEE GRIEVANCE alleging unjust discharge. Grievance allowed in part.

*G. Spencer* and others, for the union.
*B. Johnston, D. MacKenzie* and others, for the employer.

## AWARD

Union grievance on behalf of the Grievor alleging termination contrary to the provisions of the Collective Agreement between the parties, effective January 18, 1999 to January 17, 2002, in that the Grievor's probationary period under Article 8 had expired when he was terminated without just cause, contrary to Article 21. The Grievance also alleges that no information was supplied to the Grievor as to his performance progression throughout the probationary period.

In his opening statement Counsel for the Union stated that he was seeking an order that the Grievor be reinstated as an Avionics Apprentice with full seniority and compensation for all lost pay and benefits, with interest, or, alternatively, that he be reinstated as a Groomer, with full seniority and compensation for all lost pay and benefits, with interest.

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

### INTRODUCTION

The main issues here are whether the Grievor was discharged for just cause, whether he was properly denied continuation in the job of

Avionics Apprentice, and, depending on the answers to those two questions, what the appropriate remedy is.

It is not disputed that the Grievor applied to the Employer for a job as Avionics Apprentice, that is as an Apprentice Aircraft Maintenance Engineer — Category E, sometimes referred to here as "AME — Cat E" ("E" for "electrical"), to replace an employee who was disabled. He was accepted, but the disabled employee returned earlier than expected, so the Employer offered him a position as a "Groomer" while he waited for another Avionics Apprentice position to become available. An Avionics Apprentice position did become available over four months later, he applied and was accepted on the "trial and familiarization period of six (6) months" which according to Article 11-5 of the Collective Agreement applies to employees who have transferred within the Company. It is also not disputed that the Grievor's employment as Groomer was subject to the Employer's standard six-month probationary period and after the end of that original six-month probationary period he became a permanent employee.

More contentious is the fact that after the end of his trial and familiarization period as Avionics Apprentice the Employer "extended" it without consulting the Union, which, however, made no objection after it learned of the extension. After the end of that extension the Grievor's employment was "terminated", although in the course of the Grievance procedure following the filing of this Grievance he was offered an opportunity to return to the Groomer position.

This raises issues of whether the Grievor had to have been told that he had failed to meet the requirements of the trial and familiarization period as Avionics Apprentice while he was still in that period, whether the period was effectively extended because the Union had not been consulted and had not agreed to the extension, but had not objected, and whether, whatever the answer to those questions, he was terminated for just cause. There is also the issue of whether, if the Grievor was dismissed without just cause, he failed to mitigate his losses by not taking the opportunity to return to the job as Groomer.

The facts, from the point of the Grievor's hiring to the Grievance procedure, are complex and in many instances disputed, but I have concluded without difficulty that the Grievor *was discharged without*

*just cause*. I have also concluded that he was *properly* denied continuation in the job of Avionics Apprentice. I have not treated the allegation in the Grievance form that "no information was supplied to the Grievor as to his performance progression throughout the probationary period" as a separate head of grievance, but rather as an aspect of the issue of whether he was properly denied continuation in the job of Avionics Apprentice. In determining the appropriate remedy I have concluded that in not accepting the Employer's offer, in the course of the Grievance procedure, to reinstate him in the job of Aircraft Groomer, the Grievor *did not fail to properly mitigate* his damages. I remain seized of this matter should the parties be unable to agree on the quantum of damages.

THE FACTS

The Grievor's first work experience was in the recording industry. In June 1997, he started a course in Aircraft Electronics Technology at the Career Academy of Technology in St. John's, which he completed in October 1998, receiving a diploma as Aircraft Electronics Technician. In addition, and in accordance with approval given by Transport Canada, the Grievor was credited with eighteen months' experience toward fulfilling the Transport Canada requirements to become a licensed Aircraft Maintenance Engineer. None of his training involved aircraft of the specific type operated by the Employer.

Following his graduation, commencing March 1999 the Grievor worked on a contract basis for one month with Regionair and then with Air Atlantic, both in avionics maintenance positions. Neither position involved aircraft of the specific type operated by the Company. Due to its restructuring the Grievor left Air Atlantic.

On April 5, 1999 the Grievor sent his resume to the Employer in response to a newspaper ad soliciting applications for the Avionics Apprentice position. The Grievor was interviewed and some weeks later was offered this position. When he made the offer Kevin Pike, who was then Manager of Maintenance Production at Air Nova, advised the Grievor of the possibility that another employee who had been on disability leave could displace him by returning to the position if his doctor approved his return to work. Just a few days before the Grievor was to move to Halifax, this turned out to be the case. The situation was very difficult for the Grievor because he had also been offered and accepted an Avionic Apprentice's position at Voyageur Airlines, which he had then to withdraw from.

In this context, Mr. Pike offered the Grievor a position as an Aircraft Groomer, a considerably lesser skilled and lower paid position and suggested that the next Avionics Apprentice vacancy would be his. The Grievor accepted and began his employment on May 25, 1999. The letter offering him the Groomer position made it clear that his employment was subject to a six-month probationary period, as provided for by Article 8 of the Collective Agreement:

> ARTICLE 8 — PROBATION
>
> 8-1 All new employees shall be required to serve a probationary period of six (6) months duration. Such employees shall not acquire permanent status until they have completed the probationary period.
>
> . . . . .
>
> 8-3 The Company has the right to discharge probationary employees during their probationary period who are found to be unsuitable for continued employment. It is understood that the discharge of a probationary employee can be based on a lesser standard of just cause than that for an employee who is outside probation, should generally be at the discretion of the Company and should only be modified where the Company has acted in an arbitrary, discriminatory or bad faith manner.

The other provisions of the Collective Agreement relevant to probation are Articles 21-1 and 9-6, which provide:

> 21-1 Employees shall only be discharged and disciplined for just cause, subject to Article 8-3.
>
> . . . . .
>
> 9-6 All new employees shall be considered as on probation and shall not be placed on the seniority list until completion of the probationary period. Upon completion of the probationary period, an employee shall acquire permanent status and shall thereupon be entitled to a position on the Seniority List with seniority dating back to the date of hire.

It is undisputed that the Grievor performed the Groomer job completely satisfactorily.

On September 10, 1999 a position for an AME — Cat E Apprentice was posted. The Grievor applied and, on September 29, 1999, he was offered the position. The letter of offer stated in part:

> The position, effective Wednesday, October 6, 1999, offers a salary of $23,290.00 per annum and will involve successful completion of a six-month probationary period.

The Grievor accepted the position on September 30, 1999, and began work as an AME — Cat E Apprentice on October 6, 1999, having completed nearly four and one-half months of his probationary period, as a Groomer. It is undisputed that the reference in the

letter of offer to "probationary period" meant and should have read "trial and familiarization period". There was no misunderstanding of that upon which anything turns.

When the Grievor accepted the AME — Cat E position, Article 11-5 of the Collective Agreement was triggered because he was an existing employee of the Employer. Article 11-5 provides:

> 11-5 Successful bidders on postings and/or Company appointees to fill vacancies except for lateral transfer to the same job shall fill that position for a trial and familiarization period of six (6) months. If satisfactory performance is not demonstrated during the trial period the employee may be returned to his/her immediate preceding position.

The certification of Aircraft Maintenance Engineers (AME) is regulated by Transport Canada. Over the years these regulations have changed and, in particular, the minimum apprenticeship period has been increased. At the time of the Grievor's employment a minimum apprenticeship period of four years was required for a person to become eligible for certification as an AME. As mentioned above, as a result of successfully graduating from the Aircraft Electronics Technician Course, the Grievor was credited with eighteen months' experience for the purposes of fulfilling the Transport Canada requirements to become a licensed Aircraft Maintenance Engineer. The remaining required minimum thirty months is comprised of work experience.

In order to be granted an AME licence, an Apprentice is required to pass a series of examinations administered by Transport Canada. As described under Appendix A of the Collective Agreement, to progress from the Apprentice classification to the Engineer Non-Certifying classification, an Apprentice is also required to have completed the Employer's Apprentice progress form. In order to transfer into the Engineer Certifying classification, an employee is further required to pass Transport Canada exams and obtain Transport Canada authority to certify the airworthiness of the particular aircraft type. Thus, apprentices are limited in the work they perform.

There is no maximum apprenticeship period, nor is there a requirement that employees make the progression from Apprentice Engineer to Certified Engineer, although Mr. Pike, the Manager Maintenance Production, testified that the Company's hiring philosophy is to hire at the apprentice level and provide training and

guidance to employees so they can move into the Certified Engineer classification. However, Brian Hughes, Crew Chief of Crew "C", testified that there have been employees who have been apprentices for ten years or more.

As an AME Apprentice the Grievor's work was subject to being supervised and verified by a Certified AME. Mr. Hughes testified in cross-examination that it is the responsibility of the AME in charge of the aircraft to check the work of an Apprentice. He also stated that another Engineer is always assigned to an Apprentice until they "get to a certain level". Mr. Pike agreed in cross-examination that the work of an Apprentice needs to be checked. I do not take this to mean that the AME assigned to an Apprentice is always to be looking over his or her shoulder and ascertaining that every detail is correct.

The Grievor was assigned to Crew "E" which worked a permanent night shift of 4 nights on and 4 nights off. That meant that half of his work time was spent with Maintenance Crew "C" and half with Maintenance Crew "D", which rotated, under the supervision of their respective Supervisors and Crew Chiefs. There was no crew chief specifically for Crew "E".

On November 25, 1999, a performance appraisal for the Grievor's six-month probationary period from May 25, 1999 to November 25, 1999 was conducted. The position for which the Grievor was assessed in this Performance Appraisal is listed as "Groomer/Air Maintenance Engineer Apprentice". Earl Jefferies, Supervisor of Maintenance Control for Crew "D", completed the appraisal. Mr. Jefferies supervised the Grievor for one-half the time he worked as an Apprentice and Terry Langis, Supervisor of Maintenance Control for Crew "C", supervised him for the other half.

Mr. Jefferies is certified as an Aircraft Maintenance Engineer — Category M. The "M" stands for "mechanical". Mr. Jefferies has been employed by Air Nova since 1999 when he was hired as a Supervisor. Prior to that he worked for Air Atlantic for ten years.

Mr. Jefferies' November 25, 1999 Performance Appraisal of the Grievor is attached to a document headed "RECOMMENDATION — PROBATIONARY PERIOD". By tick mark he recommends the Grievor for permanent employment. In his following "COMMENTS" he indicates that the Grievor's performance as an Aircraft Groomer was satisfactory but that "with the short amount of time he has been in

the Avionics Apprentice position it is too early to be able to accurately assess his skills". Mr. Jefferies than states "I recommend extending his probationary period another 3-6 months". Mr. Jefferies admitted in cross-examination that he confused the six-month probation to be served by a new employee, to which this first page or first document is apparently directed, with the "trial and familiarization period of six (6) months" related to the Grievor's move to the Apprentice position. The next two pages, or, I think more properly, the attached document, headed "PERFORMANCE APPRAISAL — PROBATIONARY PERIOD", deals with the Grievor's performance in the Apprentice position.

Mr. Jefferies acknowledged in cross-examination that he did not show the Grievor the first document nor did he advise him of the contents, particularly that he was recommending a 3-6 month extension to the Grievor's "probationary" period. There is no evidence to suggest that anything turned on it but I do wonder what role Mr. Jefferies' recommendation played in the Employer's later decision to extend the Grievor's trial and familiarization period. The recommendation was made, it seems to me, inappropriately and perhaps in confusion with his "probationary period", when the Grievor was just a little over a month and a half into his "trial and familiarization" period.

The comments that Mr. Jefferies made in relation to the Grievor's performance as an Apprentice were:

Under "Strength Assessment";

> Robert has a good grasp of the fundamentals of the avionics trade.

Under "Developmental Areas":

> With more time and coaching, Robert will get to know the aircraft better.

Under "Job Knowledge":

> Robert's knowledge of the aircraft is expanding daily. With more coaching and time in the maintenance manuals his knowledge will improve.

Under "Teamwork":

> Robert works well with others and is willing to help anytime.

Under "Productivity":

> Robert was productive as a Groomer but he needs to be taken and shown the ropes around our particular aircraft types. Robert should focus on learning the aircraft and how to do the tasks correctly.

Under "Quality of Work":

> In the technical side of the avionics apprentice work Robert needs more time to come up to speed on the paperwork end.

Under "Attitude":

> Robert always displays a good attitude and is always on time for work.

Contrary to the submissions on behalf of the Employer, these comments do not appear to be negative with respect to the Grievor's performance in his first month and one-half as an AME — Cat E Apprentice. Indeed, they appear to me to be positive in several respects and, where they are not, they are simply sensible with respect to what could have been expected at that stage.

However, as the Employer stressed, Brian Hughes, the Crew Chief on Crew "C" who testified under subpoena, on redirect examination, answered in response to the question about his reaction to the Electro-Sol incident of December 1, 1999, to which I now turn, that he was ". . . not surprised because Robert had made mistakes before and this was another one". Additionally, Terry Langis, Supervisor of Maintenance Control for Crew "C", testified that the reason he required the Grievor to fill out an "Employee Personnel Report" on the Electro-Sol incident was because his "errors were becoming numerous and it was time to start documenting them".

On December 1, 1999, 12 lampholder assemblies were damaged because the Grievor sprayed them with Electro-Sol, the trade name of a solvent no longer used by the Employer, to clean the contacts in addition to inspecting them, which was all the procedure, W/C D 36, required him to do. As testified to by Mr. Langis, the work card from which the Grievor was working had been generated for the entire Dash 8 fleet. The problem being investigated was the improper installation of the overhead and sidewall lampholders. There is no allegation that the Grievor was responsible in any way for their improper installation and resultant scorching. He was simply carrying out the inspection to ensure that no arcing or scorching had taken place. But as a result of the improper spraying the 12 lampholder assemblies had to be replaced, which required one man-hour of work, half an hour each for the Grievor and Dave Gilland, an AME — Cat E with whom he worked. No danger of fire resulted from what the Grievor did.

Incidents such as this require the filling out of a Report including an "Employee Personnel Report". In his Employee Personnel Report on the Electro-Sol incident the Grievor stated "thought I was doing good and giving that extra little bit". The Grievor testified that the lampholders did not appear dirty nor was there visual evidence of any oxidation but he thought that spraying the contact cleaner onto the contacts would "be an extra step that wouldn't hurt". Contact cleaner is used, amongst other things, to clean or enhance the connection in electrical connections and he had used it many times before on other jobs without this problem occurring. It is also usual for electrical connectors to be encased in plastic, as these lampholders were.

I agree with the Union that, given this purpose, and given the composition of the lampholder, it would not be unusual for someone to believe that its use would not be harmful and would in fact be beneficial on a job where the electrical connection is at issue. On the other hand I accept Mr. Langis' testimony that there was a warning on the Electro-Sol can, which is corroborated by the fact that No-Flash, the product used to replace Electro-Sol, contains a warning to test it on plastics because it could be incompatible. Moreover, the fact is that spraying with Electro-Sol was not part of the procedure the Grievor was to follow. While I think the Employer has over-played the importance of this mistake and while common sense suggests that the Union witnesses must be correct in testifying that work orders do not and cannot detail each and every task that may be involved in a repair or inspection, I am reluctant to second-guess the Employer's judgment that it was serious for a mechanic working on aircraft to fail to follow procedure with this sort of adverse result.

The evidence shows that the Grievor was spoken to about the Electro-Sol incident, although not with the immediacy or in a way that supports the notion that the Employer then treated it with the importance it now purports to. In the employee's part of the "Personnel Report" on the incident the Grievor acknowledged he had failed to follow procedure:

> . . . while the outcome was bad, I thought I was doing good and giving that extra little bit . . . Trust me I am trying to learn from my mistakes and become the best avionics engineer that I can be and be an asset not a liability to Air Nova. Note. Had one hell of a sleepless nite after this incident.

I agree with the Union submission that this is a statement of contrition for the destruction of the Employer's property, not an admission

that the Grievor's actions were unsafe and dangerous to the flying public.

A second specific failure of the Grievor to properly perform his duties as an AME — Cat E Apprentice relied on by the Employer in concluding that he had failed his trial and familiarization period was the "O-ring" incident. On March 2, 2000, the Grievor failed to install an O-ring on a Low Level Fuel Float Switch. Earl Jefferies was the Maintenance Control Supervisor on duty at the time. He testified that a fuel leak occurred at 6:00 a.m. when fuel was being transferred from one wing of an aircraft under maintenance to the other. There is no dispute that the Grievor had been given the job of installing the switch, that a leak occurred because the switch was installed without an O-ring or gasket and that buckets were required to clean up the fuel. I find that as a result of the leak the aircraft under maintenance did not make its scheduled departure time. On the weight of evidence I reject the Grievor's suggestion that the departure may have been delayed because of damage to a heli-coil.

The Grievor testified that he was working on another task when he was informed by the Crew Chief on duty, Mr. Howse, that he was being assigned to change the fuel switch. He then proceeded to the aircraft involved and to the top of the wing at the fuel switch access point where Mr. Ian Kennedy, an AME — Cat E, and another maintenance engineer were waiting for him. Mr. Kennedy or Mr. Howse handed him the replacement switch, which had already been obtained from the Stores Department, showed the Grievor the location of the switch, and instructed him what to do. Mr. Jefferies testified in cross-examination that he was present while Mr. Kennedy explained the job to the Grievor. Mr. Jefferies agreed in cross-examination that Mr. Kennedy did not have the Maintenance Manual with him while he was explaining the job to the Grievor. The Grievor was then left on his own but was "periodically checked by both engineers" while he was performing the task. He was not provided with an O-ring, which comes as a separate part and needs to be ordered separately from the Stores Department. Nor was he given specific instructions regarding the need for an O-ring.

The prescribed procedure, "Fuel Level Switches — Maintenance Practices", clearly shows that O-rings are required in this type of switch. The Grievor simply installed the switch and went to Jeff Butler, the Engineer in charge of the aircraft, to tell him it was in. Mr. Butler started the leak check by initiating the transfer of fuel into

the fuel tank where the switch had been replaced. Given the location of the switch at the top of the tank, the fuel tank has to be filled to perform the check. Once the fuel was transferred, Mr. Butler noted that the low level light was still on. The Grievor then observed fuel "dripping" onto the floor. He then took the man-lift to the top of the wing where he saw fuel coming out where he had installed the new fuel switch. He informed Mr. Butler immediately and Mr. Butler proceeded to transfer the fuel back out of the tank. The Grievor then proceeded to contain and clean up the fuel spill and also informed the supervisor on duty, Mr. Jefferies. The fuel spill was not insignificant but the main concern was the effect on the aircraft's departure.

The Grievor's evidence was that he had never installed this particular switch before and that he had never been exposed to one in school. On cross-examination, the Grievor was asked whether he had been taught about O-rings in his education. His response was that, when he was installing the switch, he was ". . . not thinking about his education".

Earl Jefferies testified that an O-ring is not something that even an apprentice should miss. His evidence was that seals and gaskets are "basic" when you are working with installations involving metal to metal contacts through which fuel moves. Kevin Pike, Manager of Line Maintenance at Air Nova, also testified that installing an O-ring is as ". . . basic as it could get".

Dick Read, a senior AME — Cat E with thirty-three years' experience and a CAW member, was more generous to the Grievor. He testified that the Grievor's failure to install the O-ring did not cause him concern, that he accepted it as resulting probably from an oversight or from the Grievor not knowing it was needed and that experience would now tell him that an O-ring was required. Mr. Read testified in cross-examination that if he were involved in the repair he would not necessarily bother laying out the parts and if he were given the switch and only the switch, he would have installed it as he had received it. He also testified in redirect that "competent people had left O-rings off and don't tighten oil caps".

However, Mr. Read admitted that, having never installed a Low Level Fuel Float Switch before, he would have consulted the maintenance manuals. He also agreed that the installation of an O-ring is basic in these circumstances. Brian Enman, an AME — Cat E Engineer with thirteen years' experience, testified that he was "alarmed" by the fact

that the O-ring had been forgotten. These admissions were made despite Mr. Enman's and Mr. Read's assertions that while forgetting the O-ring was regrettable, they were confident the Grievor would not forget an O-ring again.

An "Employee Personnel Report" was prepared on this incident by William Fitzpatrick, Supervisor, on March 2, 2000. The Grievor, in the "Maintenance Crew Report", attached to Mr. Fitzpatrick's "Employee Personnel Report", noted that the reason for his error was a failure to utilize the "maintenance manuals" and his reliance instead on the "experience of others to guide him through the installation of the switch". The Grievor's report is written in the third person. He explains the missing O-ring as follows:

> The reason why the O-ring was left off was because a new O-ring was supplied to the apprentice and wasn't mentioned when he was instructed how to install the new switch. BUT the apprentice failed in utilizing the maintenance manuals and relied on the experience of others to guide him through the installation of the switch. The apprentice did have the work checked — visually inspected by an engineer in which failing to install an O-ring wasn't detected.

On direct examination, the Grievor testified that he really meant to write that he had *not* been given an O-ring when he was given the switch, which I accept.

The Employer's position is that the O-ring incident represented an unacceptable level of inattention and a poor grasp of the basic principles of aircraft maintenance. This was communicated to the Grievor, as evidenced by his admissions in the "Maintenance Crew Report", attached to Mr. Fitzpatrick's "Employee Personnel Report".

The Union disputes this characterization of the O-ring incident. Its position is that this incident cannot reasonably lead to the conclusion that the Grievor did not, or would not, qualify as an Avionics Apprentice. Nor does it indicate incompetence on his part. In the Union's submission the Grievor reasonably concluded at the time that it was acceptable to simply follow the instructions of a qualified and experienced engineer, which were given in the presence of another engineer and a supervisor, and that it was not necessary to go to another area of the hangar facility and check the instructions that he had been given.

I find that the Grievor cannot evade responsibility for something as basic as failing to insert an O-ring or gasket in a metal to metal fuel switch installation, nor can I accept any suggestion that he could

possibly have thought that a visual inspection after such an installation could detect the failure to install the O-ring.

Four days after March 2, 2000, the date of the "Employee Personnel Report" prepared in response to the O-ring incident, the Grievor discussed his performance with Terry Langis, Supervisor, Maintenance Control for Crew "C". It seems likely that this discussion occurred when the Grievor submitted that Report. Mr. Langis went over his report with him. Mr. Langis testified that in this discussion he used a document entitled "Performance Appraisal — Probationary Period" dated December 6, 1999 as a guide. While I admitted this document into evidence I have decided to give it no weight. It is not clear whether it was filled out on December 6, 1999 or later. In any event, according to Mr. Langis, it was never completed, shown to the Grievor or submitted to the Employer as part of the process of assessing the Grievor. The discussion of March 6, however, is relevant.

It is clear that in the course of the discussion on March 6, 2000 Mr. Langis inquired why the Grievor was making so many errors. The Grievor testified on direct examination that Mr. Langis did not give him much information as to the "specifics" of the problems he was identifying. Mr. Langis testified that he brought up two specifics: the length of time it had taken the Grievor to conduct an emergency lights test (the "inter-valve battery test") after having been shown how to perform it by Mr. Langis and the length of time it had taken him to change a taxi light.

Mr. Langis testified that he used the "emergency lights (inter-valve battery) test" incident, which probably occurred in December, as an example to show the Grievor that his productivity was inadequate. It was Mr. Langis' evidence that he had taken the Grievor out to airplanes 801 and 803 to show him how to conduct a test of the aircrafts' emergency lights system. He had then left the Grievor alone to do it, with the instruction manual. Two to three hours later, Mr. Langis saw Cory Robinson, the Engineer in charge of the airplane walking through the hangar with two battery packs. When he asked who he was helping, Mr. Robinson told him it was the Grievor. Mr. Langis' evidence was that this task should have taken the Grievor fifteen minutes to complete. Mr. Langis testified that, when he used this as an example of the Grievor taking too long to complete a task, the Grievor's response was that, even though it may take him longer, once he learned something, he was proficient at it.

Mr. Robinson did not testify and the Union has suggested that the replacement of battery packs is a separate task, so it is unclear in just what respect the Grievor had his assistance. I am satisfied though, that in Mr. Langis' informed opinion this was an incident in which the Grievor took much too long to perform an assigned task.

Mr. Langis also testified that he had raised with the Grievor the "taxi light incident", which occurred in January or February 2000, as an example of poor productivity. Mr. Langis testified that David Firlotte, a Senior AME — Cat E Engineer with whom the Grievor worked, told Mr. Langis that the Grievor's natural aptitude for the trade was poor and used the example of him taking four hours to install a light into a hole that was far too small for it. Mr. Langis testified that the Grievor denied the incident took place. When Mr. Langis subsequently reported the denial to Mr. Firlotte and asked for clarification Mr. Firlotte confirmed it, stating, "I saw what I saw".

The Grievor's evidence on this issue is that what he denied to Mr. Langis was that it took him four hours to complete the task. He testified that he had obtained the wrong light from "stores" after he obtained the part number from the Parts Catalogue. His evidence was that it took him 45 minutes, rather than four hours to install the light and that it was the smaller light that he was trying to install into a larger hole. I accept his testimony on both points over Mr. Langis' hearsay testimony.

The Grievor's testimony was that after getting the light from Stores he proceeded to the aircraft and immediately determined it was the wrong light. He returned to the Stores Department and obtained the correct one. Having obtained the correct light, he installed it without difficulty. Mr. Dave Gilland also testified about this incident. Mr. Gilland testified that he had no concern whatsoever about it. He did recall hearing another employee express disbelief at how long it took the Grievor to install the light. He reported that his reply was to the effect that "it could happen to them too" if there had been an error in the maintenance manuals.

On the evidence it appears that the Parts Manual was in fact somewhat misleading. At most, this incident appears to demonstrate unwillingness on the Grievor's part to accept, as readily as some mechanically able people might, that the book had misled him, or possibly a failure to read the manual as carefully as he might have.

Mr. Langis also testified about the "elevator servo" incident. This was not discussed with the Grievor in the March 6, 2000 meeting

and the evidence suggests that there may well have been a problem with a testing instrument used in that connection. I have simply disregarded this matter in reaching my conclusion here.

Of the two "incidents" of which I have taken any account, only the first involved Mr. Langis directly. However, Mr. Langis also testified that he had talked to the Grievor's crew chief, Brian Hughes, prior to his discussion with the Grievor on March 6. Mr. Langis further testified that the March 6 meeting lasted two to three hours and that the Grievor was overwhelmed with the information provided. The Grievor agreed in evidence that the meeting was long and "emotional". The Grievor's evidence was that Mr. Langis also accused him of not being eager to "jump on the plane", which the Grievor said he protested as an unfair assessment.

What is clear is that Mr. Langis had ascertained that there were doubts "on the floor" about the Grievor's capacity to do his work, and that he conveyed that to the Grievor.

The Grievor's testimony was that Mr. Langis told him on March 6 that he had one month before the end of his trial and familiarization period and there was a "window" left during which he could demonstrate improvement and that he, Langis, had confidence that the Grievor could do it. Mr. Langis confirmed on cross-examination that he told the Grievor he had a month to make an impression on management and to demonstrate improvement. Mr. Langis also testified that he was "coaching" the Grievor in this session by identifying the problems and telling him what he needed to do in order to meet the Employer's expectations.

On direct examination the Grievor was asked if he made any suggestions to Mr. Langis about what he might need after hearing Mr. Langis' recount that he was taking too long with tasks and committing too many errors. Although witnesses called by the Union, Mr. Read and Mr. Enman, had testified that the Grievor was not receiving enough direction and guidance, the Grievor's response to his counsel's question about whether he told Mr. Langis what he would need to demonstrate improvement was that he had asked for nothing. On cross-examination, Mr. Johnston specifically asked if the Grievor requested more supervision. His answer was no.

The main point I draw from the evidence of this March 6 discussion between the Grievor and Terry Langis, one of his supervisors, is that at that point there was management dissatisfaction with the

Grievor's performance, and he knew it, whether or not he agreed with it, or had reason to.

Up to that point, I do not find there was a lack of information to the Grievor as to his performance throughout the trial and familiarization period. There was testimony from witnesses called by the Union on how busy the Employer's Maintenance operation was during this period, and some contradictory evidence was called by the Employer. I have no doubt that everybody involved was busy through this period, and that each stated his recollections to the best of his ability. However, I do not think it necessary to set this testimony out in detail here.

The end date of the Grievor's trial and familiarization period was April 6, 2000. The Grievor testified on direct examination that this date fell on his "days off" so he went to Mr. Langis when he returned for his next shift and reminded him of the end date. The Grievor testified that Mr. Langis inquired as to whether the forms for his evaluation were in his mailbox. They were not. According to the Grievor, Mr. Langis told him he would have to "check into it" and get back to him.

A week later, the Grievor went back to Mr. Langis for an update and asked for "feedback" and whether or not Mr. Langis had any idea as to which way the decision was going to go. Langis told him that there was a possibility of an extension, which in Mr. Langis' opinion would be fairer to the Employer and to the Grievor because it would give further opportunity to evaluate him. The Grievor asked Langis what would happen if he did not agree with the extension. The Grievor's evidence was that Mr. Langis told him that, if the Grievor chose to push the Employer for a decision one way or the other, it was likely that the Employer would conclude that it would be best to "part ways".

Twelve days after the end of the trial and familiarization period, on April 18, 2000, Mr. Pike met with the Grievor to discuss the extension of the Grievor's trial and familiarization period. Mr. Pike testified that, prior to the meeting, he had had conversations with Mr. Jefferies and Mr. Langis about the Grievor's performance. They had concerns about the Grievor's performance. He reviewed the Grievor's file, including the documents relating to the Electro-Sol and the O-ring incidents. He testified that he viewed these as ". . . considerable safety-related incidents". He testified that he and Mr. Langis

and Mr. Jefferies discussed termination or extension of the "trial and familiarization" period. Based on indications that the Grievor was improving, and his proven ability to get along with others, the decision was made to give him another chance. Mr. Pike testified that this was the only such extension in his experience.

When Mr. Pike met with the Grievor he informed him that, because an improvement in his performance had been noted, the trial and familiarization period would be extended for an additional three months. He discussed the Grievor's progress with him and his status up to that point. The meeting lasted for twenty minutes. The Grievor's testimony was that the only issue Mr. Pike raised was the Grievor's unwillingness to "jump on the plane", but I do not accept that as accurate.

The new expiry date for the Grievor's trial and familiarization period set by Mr. Pike was July 6, 2000. This was confirmed by letter from Mr. Pike to the Grievor on April 18, 2000, which indicates that it was copied to Tim Way, the Union President for Local 4236. Very shortly after April 18 the Grievor told Collin Mullins, the Union Vice-President, about the extension and the letter from Mr. Pike. Mr. Mullins told the Grievor that the Union would have to be informed about the extension, but apparently did nothing else about the matter until he mentioned it to Mr. Way on June 23, about two months later.

Mr. Pike's evidence was that he did not communicate his decision with respect to the Grievor's trial and familiarization period prior to April 6 because Article 11-5 says that the employee's satisfactory performance must be demonstrated "during" the period. Mr. Pike's interpretation of this provision was that management would evaluate the Grievor right up until April 6 and then make its decision what to do after that date.

The Employer made no attempt to discuss the extension of the Grievor's trial and familiarization period with the Union prior to implementing it. Mr. Pike testified that he copied his letter to the Grievor of April 18, 2000 to the Union. This is corroborated by the "cc" notation next to Tim Way's name at the bottom of the letter. I accept Mr. Way's testimony that the letter was not received, but nothing in the evidence explains why it was not. Mr. Way's testimony was that he first learned about the extension on his way to a June 23 meeting he and Mr. Mullins attended with the Employer's

Vice-President of Maintenance and Mr. Pike. At that meeting, according to Mr. Way he said to Mr. Pike that if anything happened as a result of the extension, he would be in "a world of hurt" as a result of Mr. Pike not having obtained the Union's agreement to extend the trial and familiarization period, but he took no other action with respect to the extension. Mr. Pike did not recall that conversation.

It is clear from the Grievor's testimony that he had told Collin Mullins, the Union Vice-President, about the extension and Mr. Pike's letter very shortly after receiving it. The Union must, therefore, be treated as having had knowledge of the extension from shortly after April 18. I am proceeding on the basis that the Union knew of the extension from that point forward, although it certainly had no notice or discussion of the extension prior to that.

From April 18 to July 6, 2000 the Grievor worked the extension of his trial and familiarization period, and continued until July 11, when he was summoned on a day off to meet with Mr. Pike. On July 4, 2000, Earl Jefferies, Supervisor of Maintenance Control for Crew "D", compiled the "Performance Appraisal" that led to the Grievor's "termination" by Mr. Pike on July 11, 2000. This form is usually used at the end of twelve months after the date of hire. The four-page "Performance Appraisal" document filled out by Mr. Jefferies, which is in evidence, has attached to it three two-page "Performance Assessment" forms, one filled out by Mr. Jefferies and the other two by the Maintenance Supervisor for Crew "C", Terry Langis, and the Crew Chief on Crew "C" Brian Hughes, a member of the bargaining unit who reports to Mr. Langis. These documents address the entire period of the Grievor's work as an Avionics Apprentice. Mr. Hughes and Mr. Langis assessed the Grievor as "does not meet requirements" in respect of "job knowledge", "productivity" and "quality of work". Mr. Hughes' summary under the head "General Comments", which, it seems to me captures the collective view of these managers was:

> Although Robert tries hard and is a team player he does not have the technical ability to perform his job as an AME — Cat E apprentice.

Mr. Darcy Hlansy, Crew Chief on Crew "D" from March 6, 2000 on, testified that, while he was ". . . not sure" if he had completed a "Performance Assessment" on the Grievor, he assumed that he would have. Each category of performance to be assessed in the "Performance Assessment" document calls for a tick mark opposite

"Does not meet requirements", "Meets requirements" or "Exceeds requirements", and provides a space for comments headed "Substantiation". Mr. Hlansy testified that he never provides comments in the "Substantiation" portions for each category and that he always fills them out as "meets requirements" unless something "drastic" has happened. He testified he would have filled the Grievor's assessment out as "meets requirements" throughout, with no other comment.

Mr. Pike testified that he never received a copy of Mr. Hlansy's "Performance Assessment". He acknowledged that his conversations with Mr. Hlansy during the Grievor's three-month extension were to the effect that the Grievor was "on the curve". However, he said that because Mr. Hlansy was new as crew chief for Crew "D" and had not previously worked with the Grievor as a Category E Engineer he did not have him fill out an assessment. Mr. Jefferies probably should have sought an assessment from Mr. Hlansy because he had been Crew Chief on Crew "D" since March, for the whole of the period of the Grievor's extension, but I do not find that his failure to do so was improperly motivated or that he reached his conclusions without awareness of Mr. Hlansey's more favourable opinion of the Grievor's performance. It is clear, however, that Mr. Jefferies' assessment was based on those of Brian Hughes and Terry Langis, and discussions with them.

It was Mr. Hughes' evidence that he had to specifically assign an engineer to "keep an eye on what was going on" and that he made sure the Grievor was never assigned alone. Mr. Hughes testified that this level of supervision is usual during the first two months, but unusual thereafter because the practice with apprentices has been to "wean them off" this level of scrutiny. Mr. Hughes' evidence about how he dealt with the Grievor was that he could not ". . . assign him work without someone with him". On cross-examination, Mr. Hughes testified that he observed the Grievor taking too long with tasks on a nightly basis. He therefore had to keep the Grievor in the back of his mind and had to compensate in terms of manpower because of his poor performance.

Mr. Hughes also testified that he came to know about the Grievor's deficiencies, not only through observation, but also from the Grievor's peer group. Mr. Hughes also testified that there were comments from other apprentices and that, overall, the Grievor's

slow rate of productivity was a problem with other employees. In Mr. Hughes' opinion the Grievor simply did not possess the mechanical aptitude to do the job. His assessment was based on the entire period of the Grievor's apprenticeship.

Terry Langis also completed an assessment contained in the July 4, 2000 "Performance Appraisal" package compiled by Mr. Jefferies. He is an AME — Cat E Engineer and has been employed by Air Nova for more than 13 years. Like Mr. Hughes, he noted problems with the Grievor's mechanical ability. He noted at p. 9 that the Grievor's ". . . learning curve is below average at Air Nova. His knowledge level is not where it should be for a 9 mts apprentice. Takes extent. period of time when tackling new tasks or systems." He also notes on p. 10 that the trust of his co-workers had not yet been achieved by the Grievor.

Mr. Jefferies testified that he compiled his Performance Appraisal by collecting the information from Mr. Hughes and Mr. Langis. At pp. 1-5 of his Performance Appraisal package he identifies problems with the Grievor's work similar to those identified by Mr. Hughes. At p. 2 he notes that "his job knowledge is not building as fast as it should be", that he was "below average" and that he took an "extended period of time when tackling new tasks or systems". He also notes at p. 3 that the Grievor's "productivity suffers because of his knowledge level and his mechanical aptitude". He concludes at p. 4 that the Grievor, although he was a "team player", did not have the "technical ability to perform the job . . .". He also notes that the Grievor has been unable to gain the trust and confidence of his co-workers.

On July 11, 2000, Mr. Pike and the Grievor met to discuss the Grievor's performance. Mr. Pike had the July 4, 2000 "Performance Appraisal" package compiled by Mr. Jefferies in front of him. Mr. Pike informed the Grievor verbally that he had not passed the trial and familiarization period, that he was not accepted for continuation in the Avionics Apprentice position and that he was "terminated". He also explained that Mr. Jefferies had compiled the "Performance Appraisal" package. The Grievor's evidence was that, in the meeting, Mr. Pike was reading from a document that the Grievor never saw. He also testified that Mr. Pike pointed to no specific examples of problems with his work.

There is no dispute that, at the Grievor's initiative, he and Mr. Pike discussed the possibility of the Grievor returning to a Groomer

position. Mr. Pike said there was no obligation in that respect, but that he would look into it and get back to the Grievor.

On July 13, 2000, the Grievor filed the Grievance before me here, alleging violation of Article 21-8 of the Collective Agreement. Mr. Pike signed the Grievance form noting its receipt on July 18. The Grievor also alleges that his "probationary period had expired" and that no information was supplied as to his "performance progression throughout the probationary period".

Tony Head, the Grievance Chairperson, testified that the Grievance should have read "No information was provided during the extension of the period". Having considered the position of the Union in its submissions, I have decided that nothing turns on this.

As I said at the outset of the this Award, I have not treated the allegation in the Grievance form that "no information was supplied to the Grievor as to his performance progression throughout the probationary period" as a separate head of grievance, but rather as an aspect of the issue of whether he was properly denied continuation in the job of Avionics Apprentice.

On July 21, 2000, after communicating with the Grievor and Tony Head of the Union, Mr. Pike affirmed the position that the Grievor would not be returned to the Avionics Apprentice position. The Employer's position was that the Grievor could, however, return to his position as a Groomer if he abandoned the grievance. The Grievor through Mr. Head, declined to accept this arrangement, and subsequently received the following letter from Mr. Pike dated July 21, 2000:

> Dear Robert:
>
> Following our meeting on July 11, 2000 and further verbal communications from Tony Head today, July 21st, indicating your refusal to settle your grievance and return to your previous Groomer position, this letter confirms our decision to terminate your employment in accordance with Article 11-5 of the Collective Agreement and my letter dated April 18, 2000 . . .

On July 26, 2000, Mr. Pike formally responded to the Grievance by reiterating that the Grievor's "termination" had been for "Just Cause" and repeating his refusal to reinstate the Grievor as an AME Apprentice. In this document the Employer offered that the Grievor could return to his position as a Groomer with a 14-month credit on the Groomer pay scale and full credits for time spent satisfying the

probationary period as a Groomer, still provided that he dropped his Grievance. The text of the "Response" was:

> After reviewing the grievance reasons, the Company remains firm on its position that termination was for "Just Cause". Given that the grievance does not indicate a violation of any article of the Collective Agreement, this reply is based on the wording of Article 11-5.

I note that in the space on the Grievance form headed "Contract violation; section" the Union had in fact written "21-8". Article 21 is headed "DISCIPLINE/DISCHARGE". Paragraph 21-1, which I have already set out above, provides:

> 21-1 Employees shall only be disciplined or discharged for just cause, subject to Article 8-3.

Paragraph 21-8 then provides:

> 21-8 An employee who has been disciplined or discharged and who is not in agreement with the Company's decision, may file a grievance in accordance with the provisions of Article 19 — Grievance Procedure. Such grievances will commence at the Step II stage.

The Employer's July 26 Response to the Grievance then continued:

> Following the completion of Robert's six (6)-month trial and familiarization period as an apprentice, a review of his performance was carried out. At that time, following a meeting with Robert, a letter was provided and copied to the Union outlining the decision to extend Robert's trial and familiarization period for an additional three months. This decision was based on communication with a Supervisor noting an improvement in Robert's performance during the preceding four to six weeks. This decision was acceptable to both Robert and the Union. Following the completion of the additional three-month period a review of Robert's performance during the extended trial and familiarization period was carried out. Based on this review the decision was made to discontinue Robert's services as an Avionics Apprentice.
>
> Article 11-5 also states that if satisfactory performance is not demonstrated during a trial and familiarization period, the employee may be returned to his/her immediate preceding position. We are offering the option for Robert to return to a Groomer's position with a total of fourteen (14) months credit on the Groomer's pay scale and also accepting previous time in the Groomer's position to satisfy the required probation period. Returning to a previous position is not automatic under this article, however, with agreement to close the grievance at this stage we will return Robert to his previous grooming position under the above noted terms.
>
> Please reply in writing.

On August 3, 2000, Tony Head, the Grievance Chairperson, on behalf of the Grievor, refused this offer and appealed in writing to step three of the Grievance Procedure. In respect of the basis of the

Grievance I must also note that the Union's "Appeal of Step Two" signed by Mr. Head, states:

> In K. Pike's response he stated "that the grievance does not indicate a violation of any article in the collective agreement", this response and appeal is based on the wording of Article 8-1.
>
> The union agrees that Robert's probation was extended for three months, to expire on July 6, 2000. The date of his review and termination was July 11, 2000, clearly beyond the end of his probation.
>
> Based on this, we feel this was indeed an unjustified termination.
>
> Also, as per article 19-8, no hearing was held as called for in this article.
>
> Please reply in writing.

I note however, that the Grievance form itself, as quoted above, indicated that Article 21 was, at least in part the basis of the Grievance and counsel for the Union made it clear in both his opening statement and his written argument that the Union was grieving the unjust discharge of the Grievor as well as his removal from the Avionics Apprentice position.

On August 16, 2000, clearly as part of the Grievance procedure, Mr. Pike reiterated that the Employer would not allow the Grievor to work as an AME Apprentice. He also offered for the first time that, even if the Grievor maintained the Grievance, he would be permitted to return to his position as a Groomer. In effect, as counsel for the Employer put it in his submission, at that point the Employer "untied" its offer of the Groomer position from the condition that the Grievor abandon the Grievance before me here. He stated in writing:

> Following our meeting August 11, 2000, reference Step III of the grievance procedure, this is our response to the grievance filed on behalf of Robert Hatt.
>
> Our position with respect to terminating Robert's trial and familiarization period as Avionics Apprentice in accordance with article 11-5 remains unchanged.
>
> However, we will permit Robert to return to his previous position as a groomer. The effective date of his return will be the date on which the union provides notice to the company of Robert's accepting this offer.
>
> We await your written reply.

Mr. Head testified on direct that when he received the August 16, 2000 letter from Mr. Pike he knew the requirement to abandon the grievance in order to return to the Groomer position had been dropped and the terms on which Air Nova was agreeing that the Grievor would be returned to the Groomer position. He testified that he communicated this to the Grievor in a telephone conversation that

lasted one-half hour. He testified that the Grievor was not interested in the position. The Grievor confirmed in his direct testimony that in August 2000 he knew that the requirement to settle the Grievance was severed from the opportunity to return to a Groomer position.

Mr. Pike also continued to take the position that the Employer was under no obligation whatsoever to offer the Groomer job to the Grievor.

These discussions from July 13, 2000 on were clearly part of the Grievance Procedure under the Collective Agreement. Most importantly this is so of Mr. Pike's August 16 communication "untying" the Employer's offer to the Grievor that he could return to the Groomer position without dropping his Grievance, and all subsequent communications. Normally, negotiations toward settlement in a grievance procedure are privileged. I admitted the evidence of these communications over the objection of counsel for the Union on the basis of the Employer's counsel's submission that, by putting in evidence the July 21 letter from Mr. Pike to the Grievor quoted above, counsel for the Union had opened the subject of settlement negotiations and had thereby, on behalf of the Grievor, waived privilege.

I return to this evidence below in the context of considering the remedy available to the Grievor. It suffices to say at this point that to admit evidence of settlement negotiations in the course of the grievance procedure is one thing; to give it weight in determining the Grievor's remedy is another.

On September 29, 2000, the Union advised the Employer that it was proceeding to arbitration.

THE ISSUES

The submissions by counsel for the Employer were organized under the following "issues":

(1) Does the Collective Agreement require that Air Nova communicate the termination within the trial and familiarization period?

(2) If Air Nova was required to communicate the termination within the trial and familiarization period, is the Union estopped from enforcing any strict timelines associated with such communication?

(3) Was Air Nova under a duty to communicate to The Grievor, within the trial and familiarization period (October 6, 1999 to July 6, 2000 and from April 6, 2000 to July 6, 2000) that his performance as an AME Apprentice was unsatisfactory?

(4) If there was an obligation to warn, did Air Nova adequately communicate to The Grievor that he was performing poorly during the trial and familiarization period?

(5) What standard was Air Nova required to apply in removing The Grievor from the AME — Cat E Apprentice position?

(6) Was The Grievor under a duty to mitigate by accepting the position as a Groomer?

The Union's submissions were organized under the following heads:

(a) Any decision and action taken by the Company pursuant to Article 11-5 must be taken during the trial and familiarization period.

(b) There is no ability for the Company to unilaterally, and without the Union's agreement in advance, extend the trial and familiarization period under Article 11-5. Nor, in the circumstances of this case, is the Company entitled to do so under a claim of estoppel.

(c) Article 11-5 does not entitle the Company to terminate an employee without just cause.

(d) The circumstances of this case did not give the Company just cause to terminate Mr. Hatt's employment or for his removal from the Avionics Apprentice position.

In the circumstances of this case, the Company's offer of the Groomer's position should not affect Mr. Hatt's entitlement to damages.

I have organized my consideration of the issues somewhat differently:

1) Did the Employer have just cause to terminate the Grievor?

2) If not, was the Grievor improperly denied continuation in the job of Avionics Apprentice,

   a) because on April 6, 2000 six months had elapsed from October 6, 1999, the start of the Grievor's six-month trial and familiarization period, and he was not told that it had not been satisfactory until April 18, or

   b) because the Employer had no right to extend his trial and familiarization period without the agreement of the Union? What is the effect in this context of the Union's failure to act on the Grievor's advice to Collin Mullins, the Union Vice-President, of the extension, or

   c) because on July 6, three months had elapsed from April 6, 2000, the start of the three-month extension of the Grievor's trial and familiarization period, and he was not told that it had not been satisfactory until July 11, or

   d) because the Employer's decision that the Grievor had not performed satisfactorily during his trial and familiarization period, including the three-month extension, was not correct?

3) If the Grievor was not properly denied continuation in the job of Avionics Apprentice, what is the appropriate remedy?
4) If the Grievor was properly denied continuation in the job of Avionics Apprentice, but was terminated without just cause, what is the appropriate remedy, apart from the Grievor's obligation to mitigate his losses?
5) What is the effect on the Grievor's remedy of his obligation to mitigate his losses?

DECISION

*1) Did the Employer have just cause to terminate the Grievor?*

It is clear beyond any doubt that on July 11, 2000 the Employer had no right to terminate the Grievor's employment without just cause, and none has been proven. He had completed his probation on November 25, 1999 and was a permanent employee. Article 21-1, therefore, made it perfectly clear that he could only be discharged for "just cause". No evidence of or argument for disciplinary discharge was put before me by counsel for the Employer.

The only possible argument that the Employer had any right to terminate the Grievor if he was not successful during this trial and familiarization period arises from the second sentence of Article 11-5, which, it will be recalled, provides:

> If satisfactory performance is not demonstrated during the trial period the employee *may* be returned to his/her immediate preceding position. [Emphasis added.]

It would, however, be a very strained and peculiar interpretation of this provision to hold that the Employer has discretion to terminate employees who attempt to transfer internally and "don't make it". No such interpretation can be held to override the clear words of Article 21, "Employees shall only be . . . discharged for just cause". The much more natural interpretation, and the one I take to have been intended by the parties, is simply that, rather than leaving them in the new position, the Employer can return employees who do not demonstrate satisfactory performance during the trial period to their former positions.

Counsel for the Union submitted that this was not an appropriate case for disciplinary demotion. I do not find it necessary to deal with those submissions here because I do not understand the Employer to have attempted to justify the denial to the Grievor of the Avionics

Apprentice position on the basis that it was a justified demotion, disciplinary or otherwise. Had I reached a different conclusion on Issue 2), to which I now turn, it might have been necessary to consider whether the Grievor was properly "demoted", but such is not the case.

*2) (a) Was the Grievor improperly denied continuation in the job of Avionics Apprentice . . . because on April 6, 2000 six months had elapsed from October 6, 1999, the start of the Grievor's six-month trial and familiarization period, and he was not told that it had not been satisfactory until April 18?*

The Union's position is that any decision and action taken by the Employer pursuant to Article 11-5 must be taken *during* the trial and familiarization period. The Employer's position is that Article 11-5 does not require it to remove an employee who is subject to a trial and familiarization period from the position he or she is "trying" during or within the six-month period. This, in the Employer's submission, is based on a plain wording of the Article and the arbitral jurisprudence surrounding trial and familiarization periods. For ease of reference, once again, Article 11-5 provides:

> 11-5 Successful bidders on postings and/or Company appointees to fill vacancies except for lateral transfer to the same job shall fill that position for a trial and familiarization period of six (6) months. If satisfactory performance is not demonstrated during the trial period the employee may be returned to his/her immediate preceding position.

The Employer's submission is that there is no reference to the necessity of making or communicating the decision to return an employee to his former position *within* the trial period. The article apparently gives the employee the *entire* 6 months to prove his suitability for the position. This, says the Employer, is evidenced by the use of the word "during".

The working of Article 11-5 can be contrasted in this respect with Article 8-3 which sets out the employer's right to discharge probationary employees.

> 8-3 The Company has the right *to discharge probationary employees during their probationary period who are found to be unsuitable for continued employment.* It is understood that the discharge of a probationary employee can be based on a lesser standard of just cause than that for an employee who is outside probation, should generally be at the discretion of the Company and should only be modified where the Company has acted in an arbitrary, discriminatory or bad faith manner. [Emphasis added.]

Contrasted with Article 11-5, Article 8-3 states that "discharge" can be effected "during" the probationary period. Article 11-5 says that it is "satisfactory performance" that must occur "during" the trial and familiarization period, not the termination, but it does appear that where the parties intend that the determination of whether an employee has performed satisfactorily within a period is to be made within that period they have made that clear.

In *Re Lac Minerals Ltd. (Macassa Division) and U.S.W.* (1987), 26 L.A.C. (3d) 210 (Kilgour), the issue was whether a posting had been properly filled. The relevant provision provided that the successful employee had to be able to ". . . fulfill the normal requirements of the job . . .". Section 8.08(k), as set out at p. 211 of the decision, defined this term as follows:

> "(k) Fulfill the normal requirements of the job means the ability to perform the requirements of the job following an appropriate familiarization period. In the event the employee is unable or cannot satisfactorily perform the job, he shall be returned to his former position and any other employee who has been promoted or transferred because of the rearrangement of the positions, shall also be returned to his former position."

This provision is similar to Article 11-5, although it does use the word "following". At page 219, Arbitrator Kilgour interpreted this provision as follows:

> In my view, the wording of this subsection — specifically, "fulfill the normal requirements of the job means the ability to perform the requirements of the job following an appropriate familiarization period" — means that the *final* evaluation of an employee's ability to perform the requirements of the job cannot be made until the familiarization period has been completed. In short, the person selected for the "2nd Class Mechanic" job in the instant case is entitled to an "appropriate familiarization period" on the job before a final assessment is made as to whether he stays on that job or returns to his former job.

In *Re McGraw-Edison of Canada Ltd. and International Union of Electrical, Radio & Machine Workers, Loc. 595* (1977), 16 L.A.C. (2d) 337 (H.D. Brown), the Board of Arbitration also held that the employee's qualifications were to be assessed after a trial period had been completed. The relevant provisions, as set out at p. 338 of that decision, provided:

> "15.02 Any vacancies shall be filled in accordance with Article 14.06 from the applicants, providing the applicants can become able to perform the work in a trial period commensurate with the requirements of the job, but in no event, in excess of 22 working days.
>
> . . . . .

> "15.05 If within the designated trial period, the applicant is unable to perform the function, the person will be given the option of returning to his former job with the loss of his bidding rights for one (1) year, or returning to any vacant position at the option of the Company, after discussion with the employee, with bidding rights restored."

The Board was required to decide whether the vacancy had been properly filled given the relative qualifications of two employees. The Board concluded that the proper time for assessment was after the trial period had been completed by the Grievor. At p. 344, the Board wrote:

> The decision of whether he can perform the work after that period is the responsibility of management in the first instance, and it is only after that decision is made that any further challenge, if necessary, could be dealt with.

The Union disputed the relevance of this award on the basis that the parties there had agreed on the length of the trial period, but in my view the same can be said of Article 11-5. In neither Collective Agreement were the parties explicit about when the "trying employee" was to be told that he had succeeded or failed.

Apart from distinguishing this and other awards cited by the Employer, the only award relied on by Union counsel on this issue was *Re Brantford (City) and C.U.P.E., Loc. 181* (1999), 17 L.A.C. (4th) 149 (Burkett), which had also been cited in the Employer's submission. The Arbitration Board there was dealing with a grievance involving an employee who had been returned to her previous position after having been found by the employer to be unable to perform the duties of the position she had been promoted to. That collective agreement provided [at p. 149]:

> "8.02(b) An employee who has been promoted shall be allowed a period of thirty (30) working days to prove his ability for the position. If the Employer or the employee finds he is unable to perform the duties of the position during such period, the employee shall revert to his former classification and position."

In that case the employee was in fact reverted to her former position *during* the thirty day period, as the Union claims should have been the case here, but that was not an issue in the grievance. The decision to uphold the grievance was based on the finding, on p. 157 of the award, that:

> Having regard to all of the foregoing we have not been satisfied that Ms. MacKay demonstrated an inability to perform the Accounting Clerk II position during the 30-day assessment.

Indeed, the Board stated at p. 155:

> Under art. 8.02(b) she was entitled to a "period of thirty . . . working days to prove [her] ability for the position", with the right to revert to the former position if she considered herself unable to do the job or to be reverted should the employer consider her unable to perform the job. It is trite to observe that if an employee is to be reverted under art. 8.02(b) by the employer the employee must be given an adequate opportunity to perform in the position and to be assessed fairly and objectively against the normal requirements of the job.

If anything, this suggests that the Employer might have been subject to a Grievance if it had made the decision to revert the Grievor within the six months of the trial and familiarization period.

I have concluded that by not telling the Grievor before the April 6 end of his trial and familiarization period as Avionics Apprentice that his performance had been unsatisfactory the Employer did not, in effect, confirm him in the position. Therefore, the Employer did not on that basis improperly deny him continuation in the job.

What this leaves open, and what I do not have to decide here, is how long the Employer here had after the end of the trial and familiarization period within which to advise the Grievor that, in the Employer's opinion, he had or had not satisfied its requirements. Obviously, even in the absence of any explicit requirement in the Collective Agreement, there would come a point at which it would have to be concluded that, by not telling him differently and by continuing to have him do the work, the Employer had conveyed to an apprentice that he had performed satisfactorily.

On the evidence here, Mr. Pike told the Grievor on April 18 that his performance during the six-month trial and familiarization period that ended on April 6 was unsatisfactory. That was not a delay that could have given rise to any misunderstanding or reliance by the Grievor. This particularly so in light of the evidence of Terry Langis' equivocation when the Grievor approached him on his first shift after April 6 and again a week later.

*2) (b) Was the Grievor improperly denied continuation in the job of Avionics Apprentice . . . because the Employer had no right to extend his trial and familiarization period without the agreement of the Union? What is the effect in this context of the Union's failure to act on the Grievor's advice to Collin Mullins, the Union Vice-President, of the extension?*

The Union's position is that the Collective Agreement does not entitle the Employer to unilaterally, and without the Union's agreement in advance, extend the trial and familiarization period under

Article 11-5. Nor, in the Union's submission, in the circumstances of this case, can the Company to be treated as having been entitled to do so on the basis of estoppel.

The Employer submitted that there is no requirement in Article 11-5 that the Union be consulted before management makes its decision to terminate a trial and familiarization period and suggests that this is what the Union is arguing. This misconceives the Union's point, which is that there is nothing in the Collective Agreement that provides for "extensions" of the six-month trial and familiarization period in Article 11-5. I agree with the Union on this. Quite clearly, the Employer has six months on the basis of which to make its judgment and there is no basis upon which it can unilaterally extend that period.

I agree with the Employer that the only mechanism by which the Union is involved in assessing an employee's performance during the period is to react with a grievance if it does not believe the decision/evaluation is appropriate, but the point here is not about "assessing an employee's performance during the period". It is about extending the period, for which the Collective Agreement makes no provision.

I accept that fairness to the employee may be what prompts the Employer to want more time to make up its mind about a transferring employee's performance. Probably here the extension was granted fairly, to give the Grievor another chance. However, the Union has a legitimate interest on behalf of its members in ensuring that transferring employees are not left in a state of perpetual uncertainty by arbitrary extensions. If the Employer wants to change such a provision of the Collective Agreement it must have the agreement of the Union, which is the other party to the Collective Agreement, not of the employee involved. It is not sufficient to give notice to the Union. The Union must agree to the extension.

The problem for the Union and the Grievor here, though, is that the Union did not question the extension in time. Through Collin Mullins, the Union Vice-President, the Union is fixed with knowledge of the extension very shortly after April 18, but it did nothing whatever about it until the argument of this matter before me. Even when the President, Mr. Hay, was told about the extension, on his own testimony on June 23 he only told Mr. Pike that if anything

happened as a result of the extension, he could be in "a world of hurt" as a result of Mr. Pike not having obtained the Union's agreement. He did not take any steps to have the extension rescinded or even ended at that point. It may well be, of course, that in this he was acting in the Grievor's best interests, but that is not the point here. In those circumstances the Union must be taken to have waived, or to be estopped from asserting, its right to veto the extension.

In my award in *Re Canada Post Corp. and C.U.P.W.* (Christie — unreported February 3, 1995), quoted by the Employer I set out my understanding of when the doctrine of promissory or equitable estoppel applies:

> *Estoppel.* It is trite law that to establish a promissory or equitable estoppel . . . a party to a collective agreement must show four things: (1) the other party has, by words or deeds, in effect promised to forego a right under the collective agreement, (2) this was done with intent, or at least knowledge, that those words or deeds would by relied on by the party now alleging estoppel, (3) they were relied on by the party now alleging estoppel, to its detriment, meaning that if the foregone right is reasserted by the party now alleging estoppel will be worse off than if the right had not been foregone in the first place, and (4) the other party knew (or can be taken to have known) that the party now alleging the estoppel did rely to its detriment on the express or implied promise that the right in question would not be asserted.

When the Union, in the person first of Mr. Mullins and then of Mr. Way, knew that the Grievor's trial and familiarization period had been extended they did nothing about it, and by that, in effect, promised not to insist on their right that there be no extension. This sort of lack of response or acquiescence has been held in many arbitration awards to meet the requirements of estoppel. See *Re Taggart Service Ltd. and U.F.C.W., Loc. P818* (1989), 6 L.A.C. (4th) 279 (M.G. Picher), and the awards cited there. The Union must be taken to have known, if not to have intended, that the Employer was going ahead with the extension in reliance on the absence of any objection on the Union's part. The Employer heard no objection and so assumed that the Union did not object. To now hold that, because the extension was not explicitly agreed to by the Union, the Employer gave up its power to assess the Grievor's capacity to be an Avionics Engineer would be to put the Employer in a worse position than it would have been if the Union had not waived it right to insist that there be no extension. I take the Union to have known that the Employer was relying on the fact that there was no objection. If not, it should have.

*2) (c) Was the Grievor improperly denied continuation in the job of Avionics Apprentice . . . because on July 6, three months had elapsed from April 6, 2000, the start of the three-month extension of the Grievor's trial and familiarization period, and he was not told that it had not been satisfactory until July 11?*

The same reasons that led to my conclusion with respect to Issue 2(b) apply here. Under the wording of the Collective Agreement the Employer did not have to make its decision and advise the Grievor of the results of his trial and familiarization period within that period. Having concluded that the Union waived or is estopped from making objection to the extension of that period, the Employer similarly did not have to make its decision and advise the Grievor of the results of his extended trial and familiarization period within that period.

*2) (d) Was the Grievor improperly denied continuation in the job of Avionics Apprentice . . . because the Employer's decision that the Grievor had not performed satisfactorily during his trial and familiarization period, including the three-month extension, was not correct?*

The Employer's position is that, based on the arbitral jurisprudence, it had to be "reasonable, fair and objective" in its assessment of whether the Grievor had performed satisfactorily during his trial and familiarization period, including the three-month extension.

The Union's position is that the circumstances of this case did not give the Employer cause for the Grievor's removal from the Avionics Apprentice position. While the Union is clearly correct in its assertion that for the Employer to show that it was "fair reasonable and objective" does not prove just cause for termination, it is equally clear that under Article 11-5 the Employer does not have to meet a standard of disciplinary just cause to properly conclude that "satisfactory performance is not demonstrated during the trial period". Indeed, the Union has not taken that position that such is the standard.

However, the Union submitted that the Employer has not met the standard for disciplinary demotion which I discussed in my award in *Re Pictou District School Board and N.S.T.U.* (1997) 63 L.A.C. (4th) 14 (Christie), starting at p. 31. I agree, but this is a red herring because there is no issue of demotion, disciplinary or otherwise, here. The issue is whether the Grievor satisfactorily completed the

trial and familiarization period required for him to be confirmed as an Avionics Apprentice.

The precise question is whether, in accordance with Article 11-5, "satisfactory performance" was *not* demonstrated during the trial period. Having itself concluded that "satisfactory performance" was *not* demonstrated during the trial period the Employer has the onus of proving that to have been the case, because, were it not, the Grievor would still be in the Avionics Apprentice position. In other words, the Employer has to prove that its decision was correct, *i.e.* that "satisfactory performance [was] not demonstrated". However, as arbitrator I must pay considerable deference to the Employer's judgment.

Clearly, the parties to the Collective Agreement contemplated that the Employer would make the decision on whether the performance was not satisfactory, subject to review in the Grievance procedure and arbitration if its decision was grieved, as it has been here. Depending, of course, on the precise wording of the Collective Agreement, my views on this are essentially similar to those I expressed some years ago in the context of a job posting grievance in *Re Lady Galt Towels Ltd. and Textile Workers Union* (1969), 20 L.A.C. 382 at p. 383. "Even where the right to determine qualifications is not expressly given to the company, in my opinion the right to decide what qualifications a job requires flows from a standard management rights clause." Not only is it the Employer that must determine initially, in good faith, what constitutes satisfactory performance based on the needs of the operation and the apprenticeship requirements, it is the Employer, through its supervisors, that must initially, and presumptively can best, determine whether "satisfactory performance [was] not demonstrated".

The Board of Arbitration in *Re Maple Leaf Mills Ltd. and U.F.C.W., Loc. 530P* (1993), 31 L.A.C. (4th) 384 (Springate, Chair) commented on the proper test to be applied in assessing performance in a trial period, at p. 399:

> In assessing whether an employee is able to perform the requirements of a job arbitrators have generally given great weight to management's determination of the issue. This is because as long as they are acting in good faith and in a non-arbitrary manner, management staff are generally in the best position to assess an employee's capability.

There is no evidence here that the Employer's management acted other than in good faith, based on the needs of the operation and the

apprenticeship requirements, in determining what constituted satisfactory performance. While their opinions differed from those expressed by the Union witnesses, there is no suggestion of ulterior motives on the part of Messrs. Jefferies, Hughes or Langis for wanting the Grievor removed from the position. There was no suggestion that the trial period was extended for any reason other than to give him another chance. The assessments which they completed on July 4, 2000, and which Mr. Pike relied on in making the decision that the Grievor had not met the requirements of the extended trial and familiarization period, were made honestly and in good faith. Their credentials were not called into question. I agree with the submission by counsel for the Employer, that the decision that "satisfactory performance [was] not demonstrated" by the Grievor during his trial period as Avionics Apprentice was made "after a reasoned, thoughtful and complete analysis of his work and abilities". I cannot conclude that the Employer was wrong in this decision.



As I said at the outset of this award, I have not treated the allegation in the Grievance form that "no information was supplied to the Grievor as to his performance progression throughout the probationary period" as a separate head of grievance, but rather as an aspect of the issue of whether the Grievor was properly denied continuation in the job of Avionics Apprentice. The Collective Agreement places no specific or explicit obligation on the Employer with respect to the content or structure of the training, or any feedback during the trial and familiarization period under Article 11-5. However, the Board of Arbitration in *Re Maple Leaf Mills Ltd.*, quoted above, went on to say at p. 399, with respect to the proper test to be applied in assessing performance in a trial period:

> In fairness to the employee, however, arbitrators have generally required that management advise the employee of the standards he is expected to meet, provide him or her with a reasonable opportunity to meet those standards and also advise the employee that a failure to meet the standards will result in the employee being removed from the position: see, for example, *Re La Compagnie des Papiers Satures du Quebec Ltée and Syndicat des Salaries du Papier Sature du Quebec* (1983), 13 L.A.C. (3d) 166 (Frumkin).

See also *Re Brantford (City) and C.U.P.E., Loc. 181* (1999), 17 L.A.C. (4th) 149 at p. 155, quoted in the Employer's written submission.

Here the Union's suggestion that the Grievor was not fairly put on notice has been met by the number of occasions upon which he was

told that his performance was deficient. On November 25, 1999 he signed the "Air Nova Recommendation (Probationary Period)" form completed by Earl Jefferies. As I stated above, I do not consider this document to be critical of the Grievor's progress at that stage, but Mr. Jefferies stated that the Grievor needed more time to "come up to speed on the paperwork" and that he needed "coaching and time in the . . . manuals" in respect of his work as an AME — Cat E Apprentice. Mr. Jefferies also noted there that the Grievor "should focus on learning the aircraft and how to do the tasks correctly".

There were also Employee Personnel Reports required of the Grievor in connection with the Electro-Sol incident in December, 1999 and the O-ring incident in March, 2000. On March 6, 2000, in a meeting that lasted at least two hours, Supervisor Terry Langis was quite explicit with the Grievor about perceived shortcomings. The fact that the Grievor did not think the comments fair, or that he had been doing, and subsequently did, his best to meet requirements does not overcome the fact that he was put on notice that the Employer perceived him as having difficulty meeting the requirements of the trial period.

After April 6 Mr. Langis told the Grievor that if he pushed the Employer to make a decision rather than allow an extension the likely result would be that he would be removed from the position. On April 18 the Grievor knew his trial and familiarization period had not been satisfactory and had been extended. Obviously, he knew he was in jeopardy and knew from discussions with Mr. Langis and Mr. Pike, in a general way at least, the standards he had to meet. I note Brian Hughes' testimony that, because he was a Category "M" Engineer rather than a Category "E", he left it to Terry Langis to speak to or coach the Grievor rather than doing so himself.

I am satisfied that the Grievor knew that he took more time than other apprentices at the same stage to complete tasks. Mr. Enman testified that the Grievor read and worked through breaks in order to "compensate" for this. I think the quotation in the Employer's submission from the award in *Re Dexter-Lawson Manufacturing Inc. and U.S.W.A., Loc. 2890 (McFayden)* (1997), 68 L.A.C. (4th) 379 (Marcotte) at p. 404 is apt, particularly with respect to his meeting with Mr. Pike on April 18:

> It seems to me that, given repeated assistance on jobs that he had been trained to perform to the point where he had been unable to progress . . . the Grievor

> ought reasonably have been able to deduce that he was having problems during his training period, yet he made no reference to them during meetings designed for the very purpose of discussing his training progress.

I recognize that there was no specific incident after April 18 upon which the Employer relied to demonstrate that the Grievor had not satisfied the requirements of the trial and familiarization period, and that there was no documented warning to him in that period. However, that does not prove unfairness to the Grievor. I repeat that, on the evidence, the decision that "satisfactory performance [was] not demonstrated" by the Grievor during his trial period was made "after a reasoned, thoughtful and complete analysis of his work and abilities" and I have no basis upon which to conclude that it was wrong.

4) *If the Grievor was properly denied continuation in the job of Avionics Apprentice, but was terminated without just cause, what is the appropriate remedy, apart from the Grievor's obligation to mitigate his losses?*

This issue was not addressed by the parties as specifically as it might have been. As I said at the beginning of this Award, Counsel for the Union stated at the outset of the hearing that he was seeking an order that the Grievor be reinstated as an Avionics Apprentice with full seniority and compensation for all lost pay and benefits, with interest, or, alternatively, that he be reinstated as a Groomer, with full seniority and compensation for all lost pay and benefits, with interest. I have made it clear that I will not order that the Grievor be reinstated as an Avionics Apprentice, but, apart from the Employer's submission on the Grievor's obligation to mitigate his losses, there is no reason why I should not order him reinstated as a Groomer, with full seniority and compensation for all lost pay and benefits, with interest. As Brown and Beatty state in *Canadian Labour Arbitration* (3rd ed., current CD-ROM) at para. 2:1410:

> . . . generally, in assessing damages arbitrators have followed and utilized the same common law principles that are applied in breach of contract cases. Thus, the basic purpose of an award of damages is to put the aggrieved party in the same position he would have been in had there been no breach of the collective agreement. [Footnotes omitted.]

5) *What is the effect on the Grievor's remedy of his obligation to mitigate his losses?*

In relation to the remedy appropriate here, the Employer submits that the Grievor's refusal to accept the Groomer position is a failure

to mitigate damages. The Union's position is that in the circumstances of this case, the Company's offer of the Groomer position should not affect the Grievor's entitlement to damages.

When he was told by Mr. Pike on July 11 that he was "terminated" (terminology repeated in Mr. Pike's July 21 letter) the Grievor raised the question of whether he could revert to the Groomer job. There is no dispute that Mr. Pike said there was no obligation in that respect, but that he would look into it and get back to the Grievor. This Grievance was filed two days later, on July 13. Article 19 of the Collective Agreement provides in part:

> ARTICLE 19 — GRIEVANCE PROCEDURE
>
> .....
>
> 19-6 Prior to the filing of a grievance, an employee with a complaint should first attempt to obtain a satisfactory settlement with his/her immediate Supervisor. The employee may be accompanied by the Union Representative for such purpose.
>
> 19-7 Where no satisfactory settlement is obtained through the discussion with a Supervisor, a grievance may be initiated by the Union in writing at Step 1 and subsequently appealed through the next steps if no satisfactory settlement is obtained. The grievance steps are as follows:
>
> Step I Supervisor
>
> Step II Manager or designate
>
> Step III Vice President, Maintenance or designate

After July 13, in the course of what must be considered part of the Grievance Procedure, Tony Head, the Union Grievance Chairperson acting for the Grievor, was advised that the Employer would return the Grievor to the Groomer job *if he abandoned the Grievance*. On July 21, 2000, the Grievor, through Mr. Head, declined to accept this arrangement. He then received Mr. Pike's July 21 letter making the same offer, quoted in full above.

On July 26, 2000, Mr. Pike again responded to the Grievance by repeating his refusal to reinstate the Grievor as an AME Apprentice, but this time he offered that the Grievor could return to his position as a Groomer with a 14-month credit on the Groomer pay scale with full credits for time spent satisfying the probationary period as a Groomer, still provided that he dropped his Grievance. On August 3, 2000, on the Grievor's behalf, Tony Head, the Grievance Chairperson, refused this offer.

On August 16, 2000 Mr. Pike reiterated that the Employer would not allow the Grievor to work as an AME Apprentice. However he

then offered to permit the Grievor to return to the Groomer job even if he did not drop his Grievance. In effect, as counsel for the Employer put it in his submission, at that point the Employer "untied" its offer of the Groomer position from the condition that the Grievor abandon the Grievance. On the evidence there is no doubt that the Grievor knew at that point that the requirement to settle the Grievance was severed from the opportunity to return to a Groomer position.

It is clear beyond question that this was part of the Grievance procedure. Indeed, the Employer's focus in this negotiation appears to have been on whether the Grievance had to be abandoned in exchange for returning the Grievor to the Groomer job.

The Employer's stated position is that the Grievor's failure to return to the Groomer position represents a failure to mitigate. It submitted that "effectively, he quit". For purposes of completeness I will simply say that the Grievor did not "quit", effectively or otherwise. He was terminated, and as I have already held, without just cause.

There is no doubt that the doctrine of mitigation, which applies generally to breaches of contract, applies to unjust discharge grievances under collective agreements. In *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, Chief Justice Laskin, as he then was, stated [at pp. 330-1]:

> The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that a defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a duty to mitigate should be understood in this sense.
>
> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.

There are two problems with applying this doctrine here. First, the general doctrine does not necessarily obligate a wrongfully discharged employee to accept a different job with the employer by whom he or she was wrongfully discharged. Second, the Employer's offer to take the Grievor back in the Groomer job was made in the context of the Grievance procedure.

With respect to the first of these problems, counsel for the Employer submitted that this is "unlike a situation where an

employee is terminated and offered another, unrelated position with the employer. In this case, Article 11-5 specifically contemplates that there would be a return to the preceding position." I agree with that submission. The difficulty for the Employer, however, is that the Employer did not do, or offer to do, what Article 11-5 contemplates, until after the Grievance was filed. Had the Grievor simply been told by Mr. Pike on July 11, or at any time before he was terminated, that he was being reverted to the Groomer position I would have denied this Grievance.

Counsel for the Employer also cited arbitral authority for the position that, quite apart from the "reversion" context here, it may be held to be reasonable under the doctrine of mitigation for a wrongfully discharged employee to accept a different position, for which he or she is qualified, with the former employer, citing *Re Canadian Johns Manville Co. and International Chemical Workers, Loc. 346* (1976), 12 L.A.C. (2d) 195 (G.S.P. Ferguson), and *Re Ottawa West End Villa Ltd. and O.N.A.* (1977), 15 L.A.C. (2d) 417 (D. Fraser). I agree that there may be such cases. Indeed in wrongful dismissal actions in the non-unionized context the courts appear to be moving in that direction as well, where the position offered is not "demeaning" and where personal relations between the employee and his or her superiors are not "acrimonious" and thus threatening to the employee. See England, Christie and Christie, *Employment Law in Canada* (3rd ed., looseleaf), at paras. 16.74-79.

But I do not think this is one of those cases, in light of the Employer's unwillingness to simply revert the Grievor to the Groomer job and deal directly with the issue of whether he had been properly discontinued as an Avionics Apprentice.

What I have identified as the second problem with treating the Grievor's failure to accept the Employer's August 16 "untied" offer to return the Grievor to the Groomer job as a failure to take reasonable steps to mitigate his loss is that it was made in the context of the Grievance procedure. Quite apart from the first problem, which I have addressed in the preceding paragraphs, on this basis alone I should not treat the Grievor's failure to accept the Employer's August 16 "untied" offer as a failure to take reasonable steps to mitigate his loss.

As I explained above, negotiations toward settlement in the grievance procedure are treated by arbitrators as privileged. Here I

admitted the evidence of the communications in question over the objection of counsel for the Union. I did so on the basis of the Employer's counsel's submission that, by putting in evidence the July 21 letter from Mr. Pike to the Grievor quoted above, counsel for the Union had opened the subject of settlement negotiations and had thereby, on behalf of the Grievor, waived privilege. However, as is the case with the ready admission of hearsay and other relaxations of the rules of evidence in the arbitration context, the admission of evidence is one thing, the weight or effect to be given to it is another.

Brown and Beatty state in *Canadian Labour Arbitration* (3rd ed., current CD-ROM) at para. 3:4342:

> . . . because the primary purpose of grievance procedure meetings has been seen as a means of facilitating the settlement of disputes, arbitrators have generally treated all discussions, whether they relate to settlements or something else, as privileged regardless of whether there is express agreement that such discussions are "without prejudice". [Footnotes omitted.]

That "primary purpose" is served, of course, not only by refusing to admit evidence of settlement discussions but also by refusing to act on such evidence. In my view it would be damaging to the grievance process, between these parties and generally, to base the determination of damages for breach of the Collective Agreement on negotiations toward settlement. Therefore, I am not prepared to treat the Grievor's unwillingness to go back to the Groomer job after August 16, 2000 as a failure to take reasonable steps to mitigate the loss he suffered by being discharged without just cause contrary to Article 21 of the Collective Agreement. I decline to pass judgment on, or hold the parties bound by, what they said in the Grievance Procedure.

CONCLUSION AND ORDER

For all of these reasons the Grievance is allowed in part. The Grievor was properly assessed by the Employer as not having demonstrated satisfactory performance in his extended trial and familiarization period in the job of Avionics Apprentice in accordance with Article 11-5 of the Collective Agreement, but he was discharged without just cause contrary to Article 21-1.

The Grievor is to be reinstated by the Employer as a Groomer with full seniority, and he is to be compensated for all lost pay and benefits, with interest, from July 11, 2000 to the date of this Order, at the rate he would have earned as a Groomer, subject to any amounts which, in the application of the doctrine of mitigation are

properly deducted. Deduction in accordance with the doctrine of mitigation will not include any amount he would have earned as a Groomer had he returned to work for the Employer prior to this order. If, after the date of this Order, the Grievor chooses not to return to work as a Groomer for the Employer, he will, of course, not be entitled to compensation under this Order for any period after its date.

As agreed by the parties at the first day of hearings, I remain seized of this matter. If the parties are unable to agree on the precise amount of compensation to be paid to the Grievor by the Employer I will reconvene at the request of either of them to determine that amount.