1-10-2007

Re Canada Post Corp and CUPW

Innis Christie

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IN THE MATTER OF A FORMAL ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

07 016 057

RE: *XX*

CUPW No. 096-03-00712

BEFORE: Innis Christie, Arbitrator

HEARING DATES: December 11 and 13, 2006

AT: Halifax, N.S.

FOR THE UNION: David Roberts, Counsel
Doug Smith, Union Representative

FOR THE EMPLOYER: Thomas Groves, Counsel
Katrine Giroux, Articled Clerk
Laurie Stewart, Labour Relations Officer
Tony O'Keefe, Director of Finance
Leta Nelson, Delivery Service Officer
Wayne Paul, Delivery Service Officer

DATE OF AWARD: January 10, 2007

Union grievance, submitted on May 10, 2005, on behalf of XX alleging breach of the Collective Agreement between the parties bearing the expiry date January 31, 2007, in that the Employer violated Article 10 and all other related provisions by discharging the Mr. XX without just, reasonable or sufficient cause. The Union requests an order that the Grievor be fully reinstated and be compensated for all lost earnings and benefits and that all letters, reports and documents relating to the basis upon which he was discharged be removed from his personal file.

This Award follows a Preliminary Award in this matter dated August 18, 2006. At the outset of the hearing that resulted in the Preliminary Award the Parties agreed that I am properly seized of this matter and that I should remain seized after the issue of any Award in this matter to deal with any issues arising directly from its application.

AWARD

The Grievor was discharged by a letter dated April 18, 2005, which is set out below, for indecently exposing himself to a customer and for refusing to attend an Independent Medical Examination scheduled by the Employer for April 20, 2005. Because of the nature of the complaint counsel jointly requested that the names of the Grievor and the complainant not be included in this award. On the basis of the evidence before me I have concluded, on a balance of probabilities, that the Grievor did expose himself as alleged by the Employer. I have, however, concluded that, in all the circumstances, that behaviour did not justify his discharge and have substituted lesser discipline of six months suspension. I have also concluded that, although the Grievor did refuse to attend the Independent Medical Examination

scheduled by the Employer, considered in context, his refusal to do so did not merit any discipline.

At the hearing that resulted in the Preliminary Award in this matter the Union's primary position was that the letter of discharge of April 18, 2005, set out below, read in context, gives as the only reason for the discharge of the Grievor that he refused to attend the Independent Medical Examination scheduled by the Employer, and that, by virtue of Article 10.01(b) of the Collective Agreement, the Employer was not entitled to put before me evidence of any other reason for his discharge. The Employer's position was that, read in that same context, the letter of April 18 also gives as a reason for the discharge of the Grievor that he had, on October 22, 2004, indecently exposed himself to a customer, and that evidence of that incident was admissible. My conclusion in the Preliminary Award was that evidence relating to the alleged incident of indecent exposure on October 22, 2004, which was the subject of a customer complaint, was not inadmissible by virtue of Article 10.01(b) because that incident was one of "the grounds mentioned" in the letter of discharge of April 18, 2004.

The Union's alternative position at the hearing that resulted in the Preliminary Award was that, even if evidence of the alleged incident of indecent exposure was admissible under Article 10.01(b), it was not a proper basis for discipline because an unreasonable amount of time had elapsed from October 22, 2004, the date of the alleged incident of exposure, to April 18, 2005, the date of the discharge letter. In the Preliminary Award I dealt with the Union counsel's several arguments on this point and concluded that, in light of the correspondence in evidence before me, the six month delay from the complaint of indecent exposure to the discharge of the

Grievor was not such that the alleged incident of exposure could not be relied on as a basis for discipline.

The Facts. The Grievor was discharged for indecently exposing himself to a customer on October 22, 2004 and for subsequently, while that incident was being investigated, refusing to attend an Independent Medical Examination scheduled by the Employer for April 20, 2005. Prior to that, the Grievor had been employed by the Employer for fifteen years. He had worked as a postal clerk, mail handler, dispatcher, mail service courier and letter carrier; most recently as a motorized mail carrier. He had a clean discipline record. He was active in the Union, including as an member of the executive of the Local, although he was not a Union officer at the time of his discharge, having ceased to be a member of the executive in 2002.

The evidence for and against the Employer's allegation that the Grievor indecently exposed himself on October 22, 2004 is what matters most here. The Employer, of course, bears the burden of proof, which is the civil, not the criminal burden. Counsel agreed that on November 24, 2005, six months after his discharge and more than a year after the incident, the Grievor was acquitted in provincial court of criminal charges based on the incident of indecent exposure with which I am concerned here. Because a criminal offence must be proved beyond a reasonable doubt and in an arbitration the arbitrator must be satisfied on the balance of probabilities, there was no dispute the Grievor's acquittal does not determine the factual issue here, although, had he been convicted, the reverse would not have been true. See *Toronto v. CUPE, Local 79*, [2003] 3 SCR 77.

Counsel for the Employer called as his main witness Ms. YY, who was working at the reception desk of the Mother House at Mount St. Vincent on the morning of October 22, 2004. Ms. YY has been working at the Mount Saint Vincent Mother House for nearly seventeen years.

Ms. YY testified that between 10 and 10:30 on the morning of October 22, 2004, from the reception office to the left of the main doors, she saw the Grievor, whom she recognized as the regular deliverer of the mail although she did not know his name, come up the stairs and enter the lobby of the Mother House. She was clear in her identification of him at the hearing, which was not contested, but said that on the morning in question he had looked "different" in the sense that he was dressed more casually and appeared somewhat disheveled. In cross-examination Ms. YY testified that previously she had always found the Grievor courteous and efficient.

Ms. YY testified that on the morning in question the Grievor had paused outside the door to the reception office, facing away from her, and placed an incoming mail parcel on a small table there, rather than simply bringing it in to her office has he always had previously. She said "Can I help you?" He then entered the office, placed the parcel on the end of her desk nearest the door and passed her the electronic signature pad.

Ms. YY testified that as she leaned left to check the information on the parcel she could see "out of the corner of [her] eye" that the Grievor unbuttoned his pants, unzipped them, hooked his thumbs into the waistband of his underpants, pulled them down "and made a display of himself". He then pulled his underpants back up and closed his pants. She testified that the signing pad was not at the right screen

and she said, as she handed it back to the Grievor, "This is not the right screen". He took it back, and then, she testified, speaking for the first time, he said, "Who is going to pay?". Ms. YY said that she then stood, leaned to the left to see the COD information on the package and, as she stood there, he repeated the exposure of his "male reproductive organs". This time, she testified, she looked at him "so that he would know I'd seen his little display".

Ms. YY then sat down and paged the person in the Mother House's postal office and also the addressee of the parcel, who had to bring the cash to pay the COD charge. The Grievor, she said, "stood there", presumably having pulled up his underwear and closed his pants. Nothing more was said in the minute or two until the person from the postal office arrived. The recipient of the COD parcel also arrived and stood outside the reception office. Ms. YY then told the Grievor that the person to receive the COD parcel had arrived, asked the person from the postal office to take her place at the switch board, and left the office to go to the Mother House administrator's office. Ms. YY told the administrator what had happened and the administrator called the police. When she returned to the reception office the Grievor had left. She stated that the incident had disgusted her.

At the letter carrier depot in the Halifax Postal Plant Supervisor Sherri Briand took the call of complaint about the incident at Mount Saint Vincent. The Grievor's route was under Wayne Paul's supervision but at the time of the call only Supervisor Leta Nelson was in the office they share. Mr. Paul was in the parking lot when he was told of the complaint. Ms. Nelson notified Tony O'Keefe, the Manager of Letter Mail of the complaint and discussed it with a Labour Relations Officer. Mr. Paul testified that as he and Ms. Nelson left the Halifax Postal Plant

to talk to the complainant the Grievor came in. Mr. Paul said it was the Grievor's regular time to be coming in. Mr. Paul testified that the Grievor "was a little red in the face", but it became clear on cross-examination that no significance can be attached to this.

The Grievor was paged to Ms. Briand's office with Shop Steward Tony Rogers. Ms. Briand asked the Grievor what kind of a day he had had, to which he replied that it had been alright, "nothing different." Ms. Briand then told the Grievor and Mr. Rogers that there had been a serious complaint, involving indecent exposure, whereupon Mr. Rogers terminated the meeting because there had not been appropriate notice. Mr. Paul told the Grievor he had to do an investigation and not to leave the building until he got back. However, the Grievor went to the Union office on Kempt Road, where he consulted John Buckland, the President of the Local. Mr. Buckland testified that the Grievor appeared so upset that he told him he should not work any more that day, because it might have been dangerous for him to drive. Mr. Buckland then followed the Grievor back to the Postal Plant.

Mr. Paul and Ms. Nelson went Mount Saint Vincent, where they questioned Ms. YY and the Administrator at the Mother House. Mr. Paul testified that Ms. YY "appeared upset". They took a signed statement from Ms. YY.

After Mr. Paul and Ms. Nelson returned from Mount Saint Vincent Mr. Paul met John Buckland, who informed him that the Grievor "would not be showing up for a while because he was seeking medical attention". Mr. Paul testified in cross-examination that the Grievor had asked for and received permission to leave the

workplace. Mr. Paul and Ms. Nelson then again discussed the matter with the Labour Relations Officer.

On Monday, October 25, the Grievor came in to work. Mr. Paul called Mr. Buckland, who said he would come right in. The upshot was that the Grievor left the workplace.

Ms. Nelson testified that the supervisors had decided the Grievor should be suspended until the Employer had medical information that it was safe to allow the Grievor to return to the workplace and contact with customers, as set out in the following letter to the Grievor, dated October 25th, written by Ms. Nelson:

> On October 22, 2004 Friday, we received a complaint from a customer at the Mount Saint Vincent Mother House regarding your behaviour while you were delivering mail there at approximately 10:30 a.m. The complaint involved your exposing your genitals to the customer twice while you were in the process of delivering mail.
>
> When you returned here at lunch time, Supervisors W. Paul and S. Briand requested that your Shop Steward Tony Rogers and you meet with them. When questioned about your delivery of mail to the Mother House and what happened there, you did not offer any information. You subsequently asked to go to Nova Local.
>
> Following that, at about 1:10 the President of Nova Local accompanied you to meet with Supervisor Paul and stated that you would not be doing the rest of your walk since you were on your way to the doctor. Supervisor Paul requested that you advise him of the outcome of that visit.
>
> An investigation has been undertaken. Part of the investigation will be to meet with you. As well, a medical assessment of your fitness to work safely with your co-workers and customers will be requested immediately. Until this can be determined you will not be allowed in non-public areas of the Post Office.
>
> You are suspended indefinitely until the medical certification is presented and can be reviewed by our Medical Consultant, as well as until an interview can be

> completed with you. Once all of the results of the investigation are in, you and your Union President will be advised of the outcome.
>
> In the meantime, please feel free to contact EAP if you wish.

The Grievor testified in cross-examination that the reason he was going to see his doctor on the 22nd was to get medical certification for his absence that afternoon. No such certification is in evidence.

Ms. Nelson testified that the supervisors involved had understood that the Grievor was going to see his doctor on the 22nd and would provide them with a medical assessment. When none was received, she wrote the Grievor a second letter, dated October 29, 2004, with a copy of the October 25 letter attached, advising him that an interview would be held on November 1, that his personal file would be referred to and that he could be accompanied by a union representative. The President of Nova Local was copied. This was the twenty-four hour notice of interview called for by Article 10.04(a) of the Collective Agreement. Article 10 sets out the process for "Discipline, Suspension and Discharge".

The Grievor testified that he tried to see his family doctor but she was not there, so he saw the other doctor in her office twice before he could see his own doctor, Dr. Sue Goomar. He said he was not able to see Dr. Goomar until December 20, 2004, the date on the first note from her to the Employer. I find this testimony unconvincing, but the fact remains that the Grievo r had no medical certificate by November 1.

Ms. Nelson attended the interview of November 1 along with Tony O'Keefe, the Manager of Letter Mail, and took notes, which are in evidence. Her notes include

her handwritten notation to the effect that prior to the incident in issue here there had been no customer complaints and that when the Grievor first took the route the Mount Saint Vincent Mother House had called to say they were "happy with service" and that it was "good to have regular l/c on route".

At the meeting the Grievor, who was accompanied by John Buckland, the President of Nova Local, stated that he could not remember anything out of the ordinary happening on October 22. He maintained that same position after he and Mr. Buckland were provided with Ms. YY's signed statement.

Subsequently, under date of November 1, 2004, the Grievor received a letter from Ms. Nelson summarizing what occurred at the interview. It is undisputed that this was a report placed on the Grievor's personal file in accordance with Article 10.02 of the Collective Agreement. The President of Nova Local was copied. I note particularly what occurred with respect to the Request and Consent for Release of Medical Information tendered by Mr. O'Keefe. The sixth, seventh and eighth paragraphs of the November 1 letter are as follows:

> [Manager of Lettermail] Tony [O'Keefe] mentioned that we were still investigating, and advised you of our Employee Assistance Program that is available to you, if you decide to use it.
>
> Tony showed you the Request and Consent for Release of Medical Information for the purpose of determining your fitness and safety, and your ability to work appropriately with your co-workers and the public. [President] John [Buckland of the Union] responded that no way would he allow any of his members to sign such a consent. John requested an AMI [Additional Medical Information] to start the process. CPC responded that the process usually starts from the employee's doctor.
>
> You stated that you were going to your doctor today, and that you would have something for CPC from this appointment. It was suggested that you take a copy of

> the Customer Complaint to your doctor, you agreed to do this. Please provide this as soon as possible, so your medical condition can be assessed.

Mr. O'Keefe testified that in the course of the interview on November 1 he pressed for an Independent Medical Examination, but Mr. Buckland insisted that the proper process under Article 33.10 be followed, which requires that the Grievor go first to his own doctor, and the Employer agreed. Mr. Buckland testified that he had insisted that Article 33.10(a) be complied with. Mr. O'Keefe testified that in his understanding the Employer was receive a report from the Grievor's doctor, which the Employer would send to Dr. Matthew Burnstein of Medisys, the Employer's contracted medical advisor, who would then start the process for a further medical examination. The Grievor acknowledged in cross-examination that he had agreed to take a copy of the customer complaint to his doctor. He agreed to this, he testified, because he was trying to be cooperative and save his job.

The Grievor testified that nothing unusual had occurred on October 22 at the Mother House of Mount Saint Vincent. He was there, he said, for about two minutes. He was "shocked and devastated" by the accusation. He has maintained that position throughout. There was no evidence of what the Grievor did between the time he left Mount Saint Vincent and returned to the Letter Carrier Depot, other than his testimony that nothing unusual had occurred.

Ms. Nelson testified with respect to the correspondence that followed, which is set out below, but she added little of significance to what appears in the letters. I note that this correspondence is set out in my Preliminary Award in this matter, but I repeat it here, with some passages edited out there put back in, because it sets the context in which the Grievor's refusal to attend the Independent Medical

Examination scheduled by the Employer for April 20, 2005 must be considered. The Employer relied on that refusal as an additional or alternate reason for discharging the Grievor. It was undisputed that these letters were placed on the Grievor's file as appropriate. Apparently, only those advising of medical appointments were not.

Under date of November 17, 2004 Ms. Nelson again wrote to the Grievor, with a copy to the Union Local President, "further to a complaint we received on October 22", and continued:

> At approximately 1:10 on October 22, 2004, the president of Nova Local advised your Supervisor that you were on your way to the doctor. Supervisor Paul requested that you advise him of the outcome of that visit. You did not provide any documentation from that visit.
>
> At the interview I held with you on November 1, 2004, you were requested to attend an IME [Independent Medical Examination] to determine your fitness and safety, and your ability to work appropriately with your co-workers and the public. You stated that you were going to your doctor that day, and that you would have something for CPC from this appointment. You agreed to also take a copy of the Customer Complaint to your doctor. So far, you have failed to provide any documentation from that visit.
>
> Your failure to cooperate in the medical process is delaying the investigation, and ultimately the outcome of your situation.
>
> Please provide your doctor's information in the next 5 days. As soon as the report is reviewed, you will be advised on any next step required in this process. Failure to provide the required medical information may mean you will be disciplined.
>
> Meanwhile this matter is still under investigation, and your suspension is still in effect. Your cooperation in the medical process is essential prior to any change in the outcome of this situation.

The Grievor testified that he was charged criminally on November 22, 2004. He then consulted a criminal lawyer, who advised him "not to speak about the matter whatsoever and to do nothing about the case".

The next letter, dated December 7, is from Ms. Nelson to Lori Stacey, First Vice President of Nova Local, with a copy to the Grievor, and is said to be "further to my letter of November 15, 2004 to XX". Counsel agreed that this and other references to November 15 should have been to November 17, and that nothing turns on this typo. The letter continues:

> ... In that letter I discussed the many times since October 22 that efforts were made to secure the appropriate medical documentation for Mr. XX. Finally on October 22, he was given 5 days to provide the required medical information.

Ms. Nelson agreed in cross-examination that the second reference to "October 22" should have been to "November 17".

The December 7 letter from Ms. Nelson to Lori Stacey of the Union continues:

> Following that letter, you called me to intervene on Mr. XX's behalf and to explain that he had made an appointment with an appropriate medical specialist for December 16, 2004.
>
> This letter is to reiterate that from October 22 to December 16 is much too long for Mr. XX to take to produce the appropriate medical, which CPC in entitled to under our Collective Agreement.

Ms. Nelson testified on re-direct that this reference to "October 22" should have been to "November 1".

The December 7 letter concludes:

> We expect the specialist's report of the December 16 medical to be sent to Dr. Matthew Burnstein at the above address within a week of the appointment.

> Hopefully, Dr. Burnstein can determine from that information, Mr. XX's fitness and safety, and his ability to work appropriately with co-workers and the public. If he cannot make that determination, then further medical information will be required on a much more timely basis under Article 33.10. You agreed that you understood that.
>
> Until the appropriate medical information is received, Mr. XX's fitness to work with his co-workers, and the public, cannot be determined: therefore continuing his suspension.

By letter under date of January 6, 2005 from Lori Morrison, Nurse Case Manager with Medisys, which acts for the Employer in these matters, the Grievor was advised that an appointment had been booked for him with Dr. P. Scott Theriault, a doctor at HealthServ Atlantic Inc., for an Independent Medical Examination on Wednesday, January 12. The January 6 letter does not state Dr. Theriault's specialty, but Dr. Burnstein testified that he is a forensic psychiatrist.

In response, in a letter dated January 10, John Buckland, President of Nova Local, wrote Ms. Morrison to the effect that under Article 33.10 of the Collective Agreement the first IME had to be with a doctor chosen by the employee, not the Employer, and that he had advised the Grievor not to attend the appointment at HealthServ. and giving the Union's reasons why he did not have to as follows:

> ... clauses 33.10(a)(b)(c) of the CPC/CUPW Collective Agreement outline the conditions under which the employer may require and employee to undergo a medical examination.
>
> In particular the collective agreement states that examinations are undertaken... "*by a designated qualified practitioner, chosen by the employee, ...*"
>
> This letter is to inform you that neither Mr. XX nor his union representatives have waived any provisions of the collective agreement. Your letter to Mr. XX is constructed in such a way as to bypass the employer's obligations in respect of clause 33.10(a) ...

> So as to be clear,,. you are advised that the union is opposed to the application of clause 33.10(c) prior to having applied the provision at clause 33.10(a). to do otherwise is to render the language under 33.10(a) inoperable. ...

This was followed by a letter of January 11 from Mr. Buckland to Mr. O'Keefe, the Manager of Lettermail, stating that the Grievor had decided not to attend the appointment, and referring to the reasons given in the letter to Ms. Morrison. Mr. Buckland testified that this letter was a follow-up to a conversation with Mr. O'Keefe.

On February 4 Mr. O'Keefe wrote to the Grievor referencing Ms. Stacey's letter of November 17, in which, as he detailed, she had outlined the instances of what the Employer saw as his failures to provide medical information, and the letter to Lori Stacey of December 7, also outlining its content. He continued in the third paragraph:

> As a follow-up to that letter, you did not have your specialist provide a report of the December 16 medical to Dr. Burnstein as promised. As a result Dr. Burstein could not make the appropriate determination regarding your health and safety to return to work with your fellow workers and our customers.
>
> Therefore an appointment with a forensic psychiatrist was made for you on January 12, 2005. You refused to attend this appointment. Once again you are in non-compliance to provide the required medical information. A cost of upwards to $1,000 was incurred on your behalf, as you did not attend this appointment.
>
> The President of Nova Local, John Buckland, has stated on your behalf that you will have questions from Dr. Burnstein responded to in an AMI process. Further if Dr. Burnstein made a determination from the response on the doctor's report, then the next step is agreed to by J. Buckland, to be 33.10(c).
>
> The response to the questions must be received by February 28, 2005. I expect you to do everything you can to expedite this information. Your record of non-compliance is now from October 2004 to February 2005. I now expect you to

> comply immediately, in accordance with the promise from your Local President, John Buckland.
>
> Failure to comply as quickly as possible may result in your dismissal from Canada Post. I will not tolerate any further delays.

In furtherance of this process, on February 18 Ms. Nelson wrote to the Grievor enclosing "a confidential letter" for him to take to his family physician. Dr. Burnstein testified that he prepared this letter on February 8, 2005.

The letter is addressed "Dear Doctor", because, Dr. Burnstein testified, he prepared it for either Dr. Goomar or a specialist to answer. It states that Dr. Burnstein is writing in his capacity as medical consultant to the Employer, in the matter of the Grievor, who is alleged to have exposed his genitals to a customer, which he denies, and continues:

> ... However, I am advised that Canada Post believes the statement provided by the customer is accurate. I am advised that the police have been contacted in relation to this event.
>
> Mr. XX has been indefinitely suspended from his position at Canada Post Corporation pending a further review including a medical assessment to determine his fitness to return to work safely with co-workers and the public.
>
> On December 20, 2004, Mr. XX provided a note from his family physician, Dr. Goomar, that stated "*He is suffering from acute anxiety and stress relating to his job. He is on medication to relieve his symptoms and is also being seen by psychologist Dr. Sodhi, and is being referred to a psychiatrist, Dr. Hansen*".
>
> In order that I may be in a position to advise Canada Post as to Mr. XX's ability to safely return to his position, I require further medical information. To this end would you please provide answers to the following questions?

The questions, and answers provided over the signature of the Grievor's family physician, Dr. Sue Goomar, which are in evidence, are:

1) Does Mr. XX have a medical condition to account for his alleged behaviour? If yes, what is the nature of his condition and what treatment has been provided to date. Y/N

The "Y" is circled and the following hand written words inserted "Acute anxiety - depression stress, job related".

2) To date, what has been the response to treatment?

The handwritten response is, "Some relief with above symptoms after his session with the psychologist"

3) Are there any further treatments, consultations or interventions planned? Y/N

The "Y" is circled and the handwritten response is, "Further treatment plan with Dr. Sodhi, psychologist – referral has been sent to Dr. Hansen and arranging appointment with him". I return below to this reference to Dr. Sodhi, who was called as a witness by the Union.

4) Mr. XX is a letter carrier who works unsupervised on the street. How would you categorize his risk of re-offending? (Low, Medium, High)
Please explain how you have reached this determination.

The handwritten response is "I am not in a position to answer this unless assessed by psychiatrist."

5) What is the risk of "re-offending" should Mr. XX be placed in a plant situation with co-workers, where he would not be supervised for most of the eight hour shift? (Low, Medium. High)

Please explain how you reached this determination.

The handwritten response is "patient feels he did not make an offence therefore he does not like to be questioned about re-offending."

Dr. Burnstein testified that he considered this response to be in conflict with the response to question 1.

I return below to Dr. Burnstein's testimony, which I consider significant because it demonstrates the inappropriateness of the questions in this document when addressed to an employee who is being asked, in the course of a disciplinary investigation, to get his doctor's answers to questions that may well incriminate him. Dr. Burnstein appeared unaware that this might raise issues different from those involved where the issue was whether the Grievor could return to work, or be entitled to benefits, although he agreed in cross-examination that question 1 assumed that the Grievor had in fact committed the act alleged. Indeed, in this case the Grievor was also under criminal investigation, a fact of which Dr. Burnstein testified he was aware when he drafted the questionnaire. Dr. Burnstein testified that he had never been made aware that the Grievor has retained criminal counsel, who had advised him not to provide any information relevant to the alleged indecent exposure.

Dr. Burnstein also testified that he had advised the Employer's Labour Relations Officer that this document did not provide a basis upon which he could advise whether it was safe to have the Grievor return to work, and had decided to proceed again to set up an Independent Medical Examination with Dr. Theriault, the forensic psychiatrist. Dr. Burnstein testified that a forensic psychiatrist had seemed to him to

be the appropriate specialist because of what the Employer was seeking to have determined. His testimony suggested to me that he thought one of the questions to be determined was why the Grievor had done the act alleged, as well as whether he was likely to repeat. He assumed that the Grievor had in fact indecently exposed himself. That I.M.E. was set for April 20, 2005, and, as explained below, the Grievor was advised of it by letter of March 29.

Continuing with the questions in Dr. Burnstein's letter:

> 6) Any further thoughts or comments that might assist me in my understanding of Mr. XX' medical condition (if any) and its impact on his work activities would be greatly appreciated.

The handwritten response is "It will be appropriate to obtain an assessment [from] Dr. Hansen to obtain more accurate understanding of his situation. App. [with] Dr. Hansen (29/3/05) at 2 p.m.". Dr. Burnstein testified that he never received anything from Dr. Hansen, nor, he admitted in cross-examination, had he sought anything.

In her brief covering letter to the Grievor with the questionnaire, Ms. Nelson stated "The response must be received by February 28, 2005" and concluded with the sentence: "Failure to comply may result in your dismissal from Canada Post". In cross-examination Mr. O'Keefe testified that prior to February 18 he was aware that information had come back from the Grievor's family doctor to Medisys, but said that he understood that Dr. Burnstein had considered it inadequate. No one from the Employer had written to the Grievor pointing out the alleged inadequacies. As I point out below, this was an important failure.

Dr. Burnstein testified that, in addition to the completed questionnaire and Doctor Goomar's note of December 20, which he quotes in his letter prior to the questionnaire, there was in the Medisys file, dated stamped March 4, 2005, but signed "10/1/05" the following note from Dr. Goomar:

> This patient has been off work since Oct. 25/2004 due to stress and anxiety. He is being seen by a psychologist & he is also on medication. He has not returned to work as yet due to the above symptoms not being resolved.

Next, on March 7 Mr. O'Keefe wrote to the Grievor, with a copy to the President of Nova Local, referencing his letter of February 4, quoted above, and stating:

> To date, the information has not been provided.
>
> I will give you one final opportunity to provide the necessary information by March 18, 2005.
>
> If the information is not made available by that date, I will have no alternative but to discharge you from Canada Post.
>
> This is a very serious matter. I hope you will give it every consideration.

On March 9 Mr. O'Keefe e-mailed a case manager at Medisys, with a copy to Dr. Burnstein in which he stated:

> .... XX ... has been off work since November and we are awaiting medical information from his doctor. He indicates that the medical information was competed on Feb. 24 and should have been forwarded to Dr. Burnstein. Please let me know if it has arrived. We are dealing with a Labour issue and plan on releasing him from employment should documentation not be provided.

Dr. Burnstein responded on March 29, apologizing for the delay and explaining that he had been away for two weeks. The e-mail then states:

> As you know, on Feb 8th a letter was sent to Mr XX to take to his physician. This letter asked several specific questions in relation to Mr. XX behaviour while in the employ of CPC. It was requested that a reply be provided by Feb 28th '05.
> On March 14th '05, a brief note, dated 10/**01**/05 was received at OHS&E, from Mr. XX's family physician. The note simply states that Mr. XX has been off work since Oct 25th '04 due to a specific medical condition and that treatment is being provided.
> Obviously, as this note pre dates my letter, the doctor did not address my specific questions.
> Unfortunately, without further medical information, I am unable to advise CPC as to the existence of a medical condition which would account for Mr XX's behaviour or provide a prognosis for recurrence of this behaviour.
> If I can be of further assistance, please do not hesitate to contact me.

In cross-examination Dr. Burnstein admitted that he was mistaken in this e-mail in not referring to the fact that the letter and questionnaire he had prepared on February 8 had, in fact, been returned to him by Dr. Goomar. He had erroneously consulted only the Grievor's regular medical file. He also said that he had sent a "field report" on March 9 which did refer to this fact. A memo "dictated but not read", which appears on the letterhead of "Occupational Health Services, Halifax Mail Processing Plant", to Joanne Harrington, Labour Relations Officer, from Dr. Burnstein reads:

> I have received a response to my letter of February 8, 2005. The physician indicates that he [sic] is treating Mr. XX for a specific medical condition. However, the physician states that Mr. XX denies any of the alleged behaviour (exposing himself), therefore the relationship of the described medical condition to the alleged behaviour is uncertain. As Mr. XX denied exposing himself, the physician is unable to comment on the likelihood of re-offending.

Finally on the matter of medical appointments, by letter of March 29 on Medisys letterhead but apparently signed for Joanne Harrington of the Employer's Labour Relations Department, the Grievor was advised of the new appointment for an IME at Healthserv.

The Grievor responded to this in a handwritten letter dated April 8, as follows:

> By way of this letter I respectfully decline the Medical Examination that CPC/Medisys had arranged for April 20th/05. As you may or may not be aware I have three doctors that I have been seeing.
>
> In the past I have provided medical information on three separate occasions, with regards to this current illness, including a questionnaire. I will continue to co-operate should the corporation/Medisys require additional information. Please outline your questions in writing and I will forward them to my doctor.
>
> The timeliness of this letter should provide due time for cancellation without financial charge. I trust you will find the above satisfactory.

The Grievor testified that he refused to go for the April 20 I.M.E. because he was already seeing three doctors and considered the request unreasonable and in breach of the Collective Agreement. He testified that he did not seek the Union's advice before writing this letter.

The culmination was the letter of discharge, dated April 18, 2005, to the Grievor from Mr. O'Keefe, who testified that he does not have access to Medisys files and had seen no medical information, other than "a couple of medical notes from the g.p., which did not address the incident". He acknowledged that by then not only had the two notes from Dr. Goomar been received by the Employer, or its agent Medisys, but so too had Dr. Goomar's response to Dr. Burnstein's

letter/questionnaire of February 8, and that no instructions had been given to inform the Grievor or Dr. Goomar why these were inadequate.

The letter of discharge stated:

> I have reviewed your letter of April 8, 2005, received April 11, 2005 by Medisys, advising that you are refusing to attend the Independent Medical Examination arranged for you for April 20, 2005.
>
> On Friday, October 22, 2004, Canada Post received a complaint from a customer at the Mount Saint Vincent Mother House stating that you exposed your genitals to the customer twice while you were in the process of delivering the mail. When the President of Nova Local met with you at approximately 1:10 that day, he stated you were on your way to the doctor. Canada Post requested information on the outcome of that visit. No information was provided. In the letter to you of October 25, 2004 you were advised that part of the investigation would consist of an immediate medical assessment of your fitness to work safely with your co-workers and customers. This was not provided.
>
> I was subsequently advised that you had attended your doctor on Monday October 25, 2004, and that you would provide me with documentation about this visit. You again failed to provide anything.
>
> An interview was held with you on November 1, 2005 as part of the investigation. During the interview, you were evasive about your activity at the Mount Saint Vincent Mother House on October 24 [sic "22"], 2004, stating that you could not remember anything out of the ordinary occurring that day. You were again advised that you were required to provide the medical information as requested, so that Canada post could ensure you could safely work with co-workers and customers. You advised us that you were going to your doctor that day and that you would take a copy of the Customer Complaint to your doctor as well. Once again you failed to provide any documentation related to this visit.
>
> In a letter dated November 15 [sic "17"], 2004, you were requested to provide information from your doctor within the next 5 days. You failed to provide that information. Instead Lori Stacey, First Vice President of Nova Local, called stating you had an appointment with a medical specialist on December 16, 2004 and that information would be provided to Dr. M. Burnstein, Medical Consultant with Canada Post, and if any further information was required, it would be provided under Article 33.10 on a much more timely basis. You failed to provide information from any medical specialist. Instead you had your family doctor send a

letter dated December 20, 2004, which did not address the issue of whether you could safely work with co-workers and customers.

In January 2005, you were charged for your actions of October 24 [sic "22"] under Section 173.(1) (Indecent Acts) of the Criminal Code. Your first appearance in court was January 20, 2005; the charges are still outstanding.

An Independent Medical Examination was scheduled for you for January 12, 2005 at 1:30 pm. You failed to attend. The President of the Nova Local requested you be given another opportunity to be examined by a doctor chosen by you. Even though you had been given more than ample opportunity to provide the information requested, I agreed to give you one further chance, and the IME questions were provided to you and your doctor of choice. The response was due by February 28, 2005. You failed to provide the medical information by this date.

You were given a final opportunity to provide the information by March 18, 2005. On March 14, 2005, a brief note dated January 10, 2005, was received from your family doctor. Since the note pre-dated the AMI questions it did not answer the questions we required in order to determine your ability to work with co-workers and customers.

The IME was again arranged under Article 33.10(c) of the Collective Agreement for April 20, 2005. On April 11, 2005, Canada Post received your letter of April 8, 2005, in which you declined to attend this medical.

You have been completely uncooperative with the investigation into your medical condition, to determine if you can safely work with your co-workers and customers. Your failure to provide the required medical information is a violation of the CPC/CUPW Collective Agreement.

Canada Post's letter carriers are expected to perform their work largely unsupervised on the street, working with the public and the Corporation's customers. Canada Post must be assured that the behaviour of its employees towards customers will be exemplary. Behaviour such as exposing your genitals is completely unacceptable and will not be tolerated. Furthermore, in the absence of medical evidence to the contrary, Canada Post cannot trust you to work with your fellow co-workers in the plant environment.

I believe you have been given every opportunity to provide the required information. I can only find that you are in breach of the trust required as an employee of Canada Post to carry out your job. You have been indefinitely suspended from your position since October 22, 2004. You are now discharged from Canada Post. Please return all of your Canada Post property, including keys, to Security immediately.

Mr. O'Keefe does not mention, nor did he know of or take into account, Dr. Goomar's response to Dr. Burnstein's February 8 letter/questionnaire.

In setting out Dr. Burnstein's letter and questionnaire of February 8, 2005, and Dr. Goomar's responses, I noted that her handwritten responses included, "Some relief with above symptoms after his session with the psychologist" and "Further treatment plan with Dr. Sodhi, psychologist – referral has been sent to Dr. Hansen and arranging appointment with him". Dr. Sid S. Sodhi and the Grievor both testified that prior to October 22, 2004, the date of the alleged indecent exposure, as well as in the aftermath, the Grievor was being treated by Dr. Sodhi, who is a well qualified clinical psychologist, a faculty member at Dalhousie University from 1970 to 1995 and now a private practitioner in Halifax.

The Grievor testified that in 2003, after he left the Union executive, he had been threatened on the work floor, and at other times thought he had been, and felt he was not getting any support from the Employer. For that reason, because he was not getting proper sleep worrying about it, he had sought treatment from Dr. Sodhi. John Buckland testified that he was aware that in that period the Grievor was being "given a hard time" in the workplace because of some of the positions he'd taken previously, while he was a member of the Union executive.

Dr. Sodhi testified that he had had two clinical sessions with the Grievor in June of 2003 and four between December of 2004 and November 23, 2005. Dr. Sodhi testified that in the earlier sessions he had treated the Grievor for "exhaustion" and "adjustment disorder" and that when he saw him in November the Grievor "had suffered a relapse". He testified that the Grievor did not tell him then that he had

been accused of indecently exposing himself in October. The Grievor first testified in cross-examination that he "could not recall" whether he had discussed what he alleged were false allegations against him of indecent exposure when he saw Dr. Sodhi in December of 2004. It was obviously highly unlikely that he could not recall whether or not he had discussed the allegations. Indeed, later in his cross-examination the Grievor stated that he did not discuss the allegations with Dr. Sodhi because he had been told not to. When pressed, he effectively admitted that the allegations were the reason he had gone to Dr. Sodhi, but maintained the position that their conversation had been about ways to cope with stress, not the allegations specifically. The Grievor testified that after he was acquitted on November 25, 2005 he talked to Dr. Sodhi about the allegations.

On July 25, 2006 Dr. Sodhi wrote a report to counsel for the Union based on twelve sessions with the Grievor between March 10, 2006 and July 21, 2006, which had been arranged by the Union. In the report and in his oral testimony Dr. Sodhi stated that, based on widely accepted testing methods, and his behaviour "in the last six months", the Grievor does not suffer from "Exhibitionism disorder", which Dr. Sodhi testified is defined in *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) as:

> Over a period of at least six months, recurrent intense sexually arousing fantasies, sexual urges, or behaviours involving the exposure of ones genitals to an unsuspecting stranger.

Dr. Sodhi agreed that the Grievor might have exposed his genitals as alleged even though he did not suffer from "exhibitionism disorder".

It was Dr. Sodhi's professional opinion that the Grievor "suffer[ed] from 'burn-out' manifesting in Adjustment Disorder and Post Traumatic Stress Disorder (PTSD)", and that he suffered from PTSD "during his Union work". When tested on March 10, 2006 the Grievor had "moderate impairment in social and occupational functioning" but "due to our intense psychotherapy sessions" as of July 25, 2006 he "project[ed] good functioning in all areas".

Dr. Sodhi introduced into evidence two brief reports from Dr. Eric Hansen, M.D., the psychiatrist referred to by Dr. Goomar in her response to Dr. Burstein's letter/questionnaire of February 8, 2005. The first, addressed to Dr. Goomar, dated May 4, 2005, is based on visits of March 29 and April 7, 2005. Dr. Hansen's "Diagnostic assessment" is that the Grievor was suffering from "Adult Adjustment Disorder related to an unexpected and severe external stressor". The second, addressed to a Medical Adjudicator for the Canada Pension Plan, dated February 28. 2006, is based on the same two visits and states "Diagnosis: Adult Adjustment Disorder".

The Issues. I have separated the issues as follows. In this, perhaps over-formalized, structure the two important questions are whether the Employer met the required standard of proof of the incident of indecent exposure and whether the Employer properly required the Grievor to attend the IME of April 20:

1. What is the Standard of Proof Where the Employer Alleges a Criminal Act?
2. Has the Employer Met the Standard of Proof ?
3. If So, Was Discharge Appropriate?
4. If Not, What Discipline Is To Be Substituted?

5. Was the Grievor's Refusal to Attend the Independent Medical Examination a Breach of His Obligations to the Employer?
6. If So, Was Discharge Appropriate?
7. If Not, What Discipline Is To Be Substituted?

Decision.

1. What is the Standard of Proof Where the Employer Alleges a Criminal Act?

I need not dwell on this issue. Clearly, the Grievor did not have to prove that he did not expose himself to Ms. YY. The Employer had to prove that he did, but the Union did not suggest that the Employer had to do more than satisfy me "on the balance of probabilities" that the Grievor had intentionally exposed his genitals as alleged. The Employer did not have to prove its case "beyond a reasonable doubt', as the Crown would have had to do at the Grievor's criminal trial on the same allegation. Counsel for the Union did not suggest the standard of proof was higher than "on clear, cogent and convincing evidence" and I have reached my conclusion on the allegation that the Grievor exposed his genitals on that basis.

In *Nova Scotia Teacher's Union v. Nova Scotia Teacher's Community College*, [2006] N.S.J. No.64, NSCA 22 (Judgment: February 22, 2006) the Nova Scotia Court of Appeal squarely addressed this issue in reversing the trial judge and restoring the award of Arbitrator Bruce Archibald. That case involved inappropriate sexual touching and, as here, was, in the words of the trial judge on judicial review, based on a " 'he says/she says' " allegation". Arbitrator Archibald stated (quoted at para 21 of the Court of Appeal judgment):

> To be blunt and brief, I have concluded that the Complainant's version of events is to be believed over that of the Grievor. ... I find that there is clear, cogent and

> convincing evidence that the Grievor engaged in unwanted sexual touching of the Complainant ...

Writing for the Court (Bateman and Cromwell JJ.A.), Fichaud J.A. stated, at para. 28:

> ... In labour arbitration the standard is not beyond a reasonable doubt. Rather the Employer must, on the balance of probabilities, discharge the onus to show cause for discipline. When there are very serious allegations such as sexual misconduct, arbitrators accept that the balance of probabilities is to be established by "clear, cogent and convincing evidence. See Brown and Beatty, Canadian Labour Arbitration (3rd ed. looseleaf) para. 7.2300 and 7. 3432 and the authorities there cited. ...

At para. 29 Fichaud J.A. stated, "The arbitrator applied these arbitral principles in his award" and then quoted with approval two paragraphs of Arbitrator Archibald's Award, including the following:

> 11. While it is accepted that there is no "third standard of proof" between the civil and criminal standards, that is between proof on a balance of probabilities and proof beyond a reasonable doubt, it is nonetheless acknowledged that where the allegations and their consequences are very serious, the civil standard may require "clear, cogent and convincing" evidence: ...

My only doubts in determining the standard of proof to be applied on the facts before me here are whether, in the context of that determination, "the allegations and their consequences are very serious". The allegations and their consequences are undoubtedly serious from the Grievor's point of view, in that they involved a criminal offence and considerable social stigma, but I do not want to be taken as holding that every disciplinable breach of an employee's obligations that could also result in a minor criminal charge must be proven by clear, cogent and convincing evidence. As I have already said, I have reached my conclusion on the allegation

against the Grievor on that basis, so I need not decide whether I would have reached the same conclusion on evidence less clear, cogent and convincing.

2. Has the Employer Met the Standard of Proof ? Based on clear, cogent and convincing evidence, I find, on the balance of probabilities, that the Grievor exposed his genitals to Ms. YY at the Mount Saint Vincent Mother House on October 22, 2004, as alleged by the Employer. I believe Ms. YY and not the Grievor.

There is no reason not to believe Ms. YY. Her testimony before me was straightforward and credible. There is no evidence before me that suggests any reason for her to fabricate her story, nor is there a shred of evidence to suggest that on October 22, 2004, or when she testified before me, she was irrational.

Counsel for the Union suggested that it was hard to believe that after the Grievor exposed himself Ms. YY would have waited "a minute or two" before paging others, that she would have remained so calm in dealing with the Grievor after he exposed himself and that she would have simply left for the administrator's office without saying anything to her newly-arrived colleagues about what had happened. In the circumstances, I put no great store in Ms. YY's judgment of the elapsed time. She testified that she was disgusted, not scared, and I can believe that she remained controlled in the circumstances. Consistent with that, I can also believe that she simply left for the administrator's office without saying anything that would cause an uproar, knowing that neither of her colleagues was alone with the Grievor.

Ms. YY's testimony about the Grievor's disheveled appearance is not consistent with that of the other witnesses who saw him an hour or so later, but there is no evidence of what he may have done about that in the mean time.

The Grievor also appeared credible, but, of course, he had very good reason to deny the allegation against him. I found minor gaps in his testimony, and that of other witnesses called by the Union on his behalf, which left me unsure about his truthfulness.

I am not satisfied that when the Grievor left work on October 22nd "to see his doctor" it was simply to get certification that he was too upset to work that afternoon. At that point he may very well have not yet decided that his best course was to deny the incident rather than seek a medical explanation for it.

I do not accept the Grievor's explanation of his long delay in actually presenting to Dr. Goomar, and I found that he contradicted himself on why, as he claims, when he saw Dr. Sodhi in November 2004 he did not tell him that he had been suspended for allegedly exposing himself.

The Grievor's own evidence, and that of the other witnesses called by the Union, about his state of mind in the early Autumn of 2004 is more consistent with the probability that he acted irrationally than with the probability that Ms. YY acted irrationally. Clearly one of them did. Of course, in the absence of convincing psychiatric or other relevant evidence, the fact that the Grievor acted irrationally does not mean that he is other than fully responsible for his behaviour.

All of the Grievor's behaviour subsequent to the morning of October 22, 2004 is perfectly consistent with his having exposed himself to Ms. YY. Dr. Sodhi's evidence that when he tested the Grievor in 2006 he did not display symptoms of exhibitionism is of little assistance, both because of the timing and the indeterminacy of the test, based as heavily as it is on the Grievor's own account of his activities and feelings.

In reaching this factual conclusion I have borne in mind the oft quoted words of O'Halloran, J.A., speaking for the majority of the Court in *Farnya v. Chorny*, [1952] 2 D.L.R. 354, at p. 357 (B.C.C.A.); a passage described by Fichaud J.A. in para. 33 of *Nova Scotia Teacher's Union v. Nova Scotia Teacher's Community College*, (2006) (supra) as "a familiar guidepost to assess credibility in arbitration proceedings"; words quoted by both Arbitrator Archibald in the Award under review there; and words quoted in turn, with approval, by his Lordship in restoring the Award:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauges solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on a consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of the probabilities in the case, and

> if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all of the elements by which it can be tested in the particular case.

3. If So, Was Discharge Appropriate? I have concluded that the Grievor's behaviour in exposing his genitals at the Mount Saint Vincent Mother House on October 22, 2004 justified the Employer in imposing significant discipline, but that discharge was not appropriate.

As a guide to deciding whether discharge was appropriate, and to determining what discipline should be substituted, Counsel for the Union put before me a well-aged Award of mine between these parties in which he was counsel (*Woodworth*, (unreported) CUPW Grievance No. 054-88-00162, October 17, 1991). At pp.10ff of that Award I stated that in answering both questions mitigating circumstances must be considered and continued:

> A succinct and clear statement of the mitigating circumstances that have been considered by arbitrators under this and other collective agreements is found in the ... decision of arbitrator Thistle between these parties in the grievance of *Gagnon* (1989) 8 LAC(4th) 97 at pp. 113-4:
>
> > These have been extensively reviewed in numerous awards, the most often-quoted is *Re U.S.A.W., Loc. 3257 and Steel Equipment Co. Ltd.* (1964), 14 LAC 356 (Reville) at pp. 356-8. The factors include the previous good record and long service of the grievor, whether or not the offence was an isolated incident in the employment history of the grievor, whether the offence was a momentary aberration or premeditated, whether the penalty imposed has created a special economic hardship for the grievor in the light of her particular circumstances, whether the company policies have been uniformly enforced, thus constituting a form of discrimination, whether there are circumstances negativing intent, and how serious the offence is in terms of company policy and company obligations.

The Grievor had a clean disciplinary record. Indeed, there is evidence that until the incident of October 22, 2004 the Complainant and the other people who dealt with the mail at the Mount Saint Vincent Mother House were perfectly satisfied with the service the Grievor provided. The incident of indecent exposure was a totally isolated event in his employment history. I can only conclude that it was a momentary aberration; something the Grievor did for reasons that I do not pretend to understand and which he himself probably does not understand. The exposure was repeated and in that sense not completely unpremeditated.

As I said above, the fact that what the Grievor did can only be considered totally irrational does not weigh at all in his favour, unless there is convincing psychiatric or other relevant evidence that he did not know what he was doing, had temporarily lost understanding that it was wrong, or suffered from some irresistible compulsion. The onus was clearly on him, or the Union, to produce such evidence to the Employer or at least introduce it in evidence before me. Dr. Sodhi's testimony that the Grievor was suffering from "Adjustment Disorder", and, through him, the documentary evidence of Dr. Hansen's diagnoses of "Adult Adjustment Disorder" in entirely different contexts, without more, does not come close to satisfying this requirement.

However, there is no evidence that the Grievor has ever done anything similar, before or since. There is also the testimony of Dr. Sodhi that, at the time he was tested in 2006, the Grievor did not suffer from "Exhibitionism disorder", although that may amount, for the most part, to saying that, as far as Dr. Sodhi knew, this was an isolated incident.

The Grievor does not have a family to support, so, although he testified that he has lost his most prized possessions as a result the discharge, the hardship he suffered cannot be taken to be greater or less than discharge must necessarily always be for an employee of his age and seniority.

There is no evidence of the discipline imposed by the Employer in similar circumstances, so there is no basis whatever for suggesting that the Employer discriminated against the Grievor.

Indecent exposure is perceived as relatively serious in our society. Certainly the Employer does not need to have an articulated policy against such behaviour, and the potential for damage to its relations with its customers and the public in general is obvious, although there is no evidence that the incident received any publicity. On the other hand, there was no damage to the Employer's physical property and no one was injured. The complainant was disgusted but not traumatized, as she might have been by an act or threat of violence.

The Grievor has never displayed any contrition. If he had, that would have weighed in his favour, but the fact that he did not cannot properly be held against him where he has put the Employer to the proof, as he is entitled to do. Particularly because he was also charged criminally, it cannot be counted against him that he did not confess.

Mainly because the Grievor was a fifteen year employee with a clean record, I do not think discharge was the appropriate sanction for his serious misconduct at the Mount Saint Vincent Mother House on October 22, 2004.

4. If Not, What Discipline Is To Be Substituted? Having considered the factors set out under the preceding heading, I order that a six calendar month suspension be substituted for discharge. In other words, in my judgment, based on the conclusion that the Employer has proved on a balance of probabilities that the Grievor exposed his genitals to a customer on October 22, 2004 the Employer could have, properly, imposed upon him a disciplinary suspension until April 22, 2005.

My Award between these parties in *Al-Molky* (April 11, 1991, CUPW No. 096-88-00745, unreported), which counsel put before me here, concerned discharge for failing to provide medical documentation for time off work as required by the Collective Agreement. Having concluded that discharge was inappropriate, at p. 31 of that award I discussed whether I should substitute a "time served" suspension for discharge. In that case I did substitute a "time served" suspension because the Grievor, acting at the direction of the Union, had never provided the Employer with the information it needed to properly exercise its power to order an Independent Medical Examination in accordance with Article 33.10(c) of the Collective Agreement, and had thereby caused himself to be without pay for most of the period in issue.

The facts here are different in that the central issue is discipline for misconduct. As I elaborate under the next head, the Employer did not address itself, as it should have, to determining either whether the Grievor had committed the alleged act and, if he

had, what the appropriate sanction would be. Instead, it concerned itself, or at least purported to concern itself, only with whether, on a medical basis it was "safe" to return the Grievor to work with its customers and employees. The long delay that ensued was very much of the Employer's making. In that context a "time served" suspension is not appropriate.

5. Was the Grievor's Refusal to Attend the Independent Medical Examination a Breach of His Obligations to the Employer? Counsel for the Employer made it clear in his submissions at the hearing that the only "... failure to provide the required medical information [in] violation of the CPC/CUPW Collective Agreement" upon which the Employer was relying to justify disciplining the Grievor here was his refusal in advance to attend the Independent Medical Examination scheduled for April 20, 2005. However, in the unusual circumstances with which it was faced, the Employer made serious missteps prior to scheduling that IME, and the Union was correct in pointing them out, although the Union did not act entirely properly here either.

Article 33.13 of the Collective Agreement provides:

> **33.10 Medical Examinations**
>
> **(a)** Where the Corporation requires an employee to undergo a medical examination by a designated qualified practitioner, chosen by the employee, the examination will be conducted at no expense to the employee. Insofar as possible, an appointment for an examination will be scheduled during the working hours of the employee, but where an appointment for an examination is scheduled during an employee's non-working hours, he or she shall be excused from duty for a period of three (3) hours on either the shift immediately prior to or the shift immediately following the examination, at the option of the employee concerned.

(b) An employee will suffer no loss in regular pay to attend the examination and the Corporation shall assume the cost of any travel expenses in accordance with existing travel regulations.

(c) Notwithstanding paragraph 33.10(a) should it be advisable in the opinion of the Corporation, that a further medical examination be necessary, the Corporation may require such an examination by a qualified practitioner selected by the Corporation and at the expense of the Corporation.

Mr. Buckland's position, on behalf of the Grievor and the Union, throughout the investigation of the incident of indecent exposure was that the Employer could only require a "further" Independent Medical Examination, as provided for in Article 33.10(c), after the Grievor had undergone "a medical examination by a designated qualified practitioner, chosen by the employee" as provided for by Article 33.10(a). He was absolutely correct in this. If the Collective Agreement provision is not sufficiently clear on its face, the decisions of arbitrators on it leave no doubt.

In his Award between these parties in *Brown*, CUPW No. 126-85-00210, (Feb. 8, 1989, unreported) Arbitrator Thistle stated, at p. 17:

> The application of Article 33.10 was considered in the Debra Bakker award (CUPW Nos. W-460-Grievor-419 and 619; CPC nos. 83-1-3-1154 7 1155) where Arbitrator Norman at page 8 suggested that the Employer was duty bound to first send an employee to his/her own physician before resorting to one selected by the Employer. He said: "There can be no other purpose behind the presence of the word 'further' in subsection (c)". At p. 10 he summarized under what circumstances and employer can require a further medical examination:
>
> > "It follows from this analysis that the Employer must act reasonably and fairly in exercising its option under subsection (c), in the aftermath of an examination by the employee's own physician under subsection (a). Mr. Blasina submitted that this entailed the proposition that if the Employer is not satisfied with the report it receives under subsection (a), the affected employee is entitled to know why. He argued that in balancing the

> employee's right to privacy against the employer's concern for the medical fitness of the employee, the former should be predominant to the extent that it ought to lie with the employer to clearly state it objections to the report received under subsection (a) and to give the employee and his/her physician an opportunity to meet these concerns before resorting to subsection (c).
>
> I entirely agree with this line of analysis. To say otherwise, to my mind, is to shelve subsection (a) and, along with it, employee rights to privacy."

...

In a subsequent award between the parties (Gail Church, CUPW No. W-460-Grievor-746; CPC No. 83-1-3-5079) Arbitrator Norman had to review his finding in the Bakker case. In fact, he fully reconsidered Article 33.10, since the opinion he had earlier offered was viewed by him only as an "aside". The Church case was the first to directly raise the interrelationship between the subsections of Article 33.10. At page 11, he stated:

> "At a minimum, it is necessary to read subsection (c) as having something to do with subsection (a) ... It only makes sense to recognize that resort to subsection (c), on the Employer's part, is proper in light of dissatisfaction with an earlier utilization of subsection (a) ... What is conferred on the Employer by subsection (c) is the extraordinary right to seek a second opinion, by means of a further medical examination, by a physician selected by the Employer. ...
>
> This means that in order for subsection (c) to be resorted to, the Employer must engage in an exercise of subjective discretion. In order to formulate an opinion that a further medical examination take place, management must address itself to the question: 'Do we have full confidence in the report supplied to us by the employee's own physician?' As was made clear by the testimony of Mrs. Anderson and Mr. Harnet, no such question was considered by them in this affair. On this basis alone the grievance is sustainable.

Arbitrator Norman concluded his interpretation of Article 33.10(c) with the comment that in order to keep to a minimum the encroachment on privacy rights entailed in subsection (c), management must direct their collective minds to the matter of whether they have confidence in the medical report received from the personal physician. If, with good reason, they answer this question in the negative, then subsection (c) gives them the right to a second opinion. He did not suggest that there is any ironclad formula to be scrupulously followed as a precondition to the implementation of subsection (c).

I agree with the approach Arbitrator Norman has taken in respect of Article

> 33.10(c), since, in balancing the employee's right to privacy against an employers right to be satisfied as to the medical condition of an employee, limitations are placed on the right to insist on a "further" medical examination. The Employer cannot arbitrarily impose such a requirement.

In my Award in *Al-Molky* (*supra*) I cited all of these awards, and stated at p. 23:

> Arbitrators under this Collective Agreement have held that the Employer cannot require "an examination by a qualified practitioner selected by the Corporation" under Article 33.10(c) unless it can "clearly state it objections to the report received under subsection (a)" and give the employee and his/her physician an opportunity to meet these concerns before resorting to subsection (c). ... It has also been held that the Employer is precluded from communicating directly, without the employee's permission, with his or her doctor. See *Gail Nelson*, CUPW No. W-350-H-216 and 376; CPC No. 86-1-3-6 (McKee, arbitrator)
>
> In this context, it appears to me that the arrangement and forms used by the Employer here achieve the required balance very nicely. It is surely better for the Employer to be able to satisfy itself, either through a discussion by its consultant with the employee's doctor or on the basis of the consultant's examination of the reports and records held by the employee's doctor, that a second examination is not necessary, than for the Employer to have face more "unspeaking" certificates before concluding that it simply must exercise its power under section 33.10(c). To do the latter subjects the employee to the inconvenience and invasion of privacy of being examined by a physician not of his or her choice.

Article 33.10 is not limited to medical examinations in any particular contexts. However, it would take much more explicit language to persuade me that the parties intended it to authorize the Employer to use a medical examination as means of ascertaining whether an employee had in fact committed an act of misconduct which he or she denied having done. In the more common contexts of return to work, accommodation, benefit entitlements and the like the parties have become very sophisticated in balancing the legitimate interests of the Employer with the privacy interest of the employees. While I do think there was any ill-will

here, this same sophistication was not displayed in the context of a disciplinary investigation, with pending criminal charges.

The Employer's letter of October 25, 2004 to the Grievor effectuated the suspension of the Grievor. This was within the Employer's rights, provided it could be justified on a disciplinary basis, but that assumed that the Grievor had indecently exposed himself as alleged by the Complainant. If it turned out he had not, the suspension would have been without just cause (unless, perhaps, it could be justified on an emergency basis, as is the case under some collective agreements). That had yet to be determined by the investigation referred to the letter and the rest of the disciplinary process. It could also have been justified on a safety basis, if it turned out that the Grievor had, in fact, indecently exposed himself and that his having done so was a proper basis for assuming that he would do it again. The Employer purported to be acting only on the basis of customer and employee safety in seeking a medical assessment but it was well aware that discipline was involved, and it was following the disciplinary process. The initial letter to the Grievor, of October 25 stated:

> An investigation has been undertaken. Part of the investigation will be to meet with you. As well, a medical assessment of your fitness to work safely with your co-workers and customers will be requested immediately. Until this can be determined you will not be allowed in non-public areas of the Post Office.
>
> You are suspended indefinitely until the medical certification is presented and can be reviewed by our Medical Consultant, as well as until an interview can be completed with you. Once all of the results of the investigation are in you and your Union President will be advised of the outcome.

On the face of it, this constituted a request to the Grievor for a medical certificate from his own doctor, but it was not accompanied by a letter or AMI form advising

the doctor of what was needed.

Mr. O'Keefe muddied the waters at the meeting of November 1, 2004 by requesting that the Grievor sign a general Request and Consent for Release of Medical Information, to which Mr. Buckland properly objected, but the parties "cleared things up" by agreeing that the Grievor would take a copy of the customer complaint to his doctor. I note that there is no evidence that Mr. Buckland for the Union did not accede to this. Ms. Nelson's letter about the November 21 meeting states:

> Tony showed you the Request and Consent for Release of Medical Information for the purpose of determining your fitness and safety, and your ability to work appropriately with your co-workers and the public. [President] John [Buckland of the Union] responded that no way would he allow any of his members to sign such a consent. John requested an AMI [Additional Medical Information] to start the process. CPC responded that the process usually starts from the employee's doctor.
>
> You stated that you were going to your doctor today, and that you would have something for CPC from this appointment. It was suggested that you take a copy of the Customer Complaint to your doctor, you agreed to do this. Please provide this as soon as possible, so your medical condition can be assessed.

This, of course, put the Grievor and his doctor in the position that to satisfy the medical requirement he would have to admit his misconduct, which he had already denied in the November meeting. Understandably, he delayed, and then, on November 22, 2004, he was charged criminally.

In this era of accommodation for medical problems the Employer was in something of a "Catch 22". I can only be sympathetic, with Ms. Nelson initially and Mr. O'Keefe at the November 1 meeting, for thinking from the start that the Grievor

must have had a medical problem. Why else would the Grievor have done what was alleged? Although it appears that Mr. Buckland did nothing to directly disabuse management of the idea that there was a medical problem, neither the Grievor nor the Union ever admitted that he had, in fact, been guilty of any misconduct. Therefore the Employer's initial concern had to be disciplinary.

In other words, the Employer had first to determine whether the Grievor did what was alleged and, if so, what was the appropriate discipline? It was for the Grievor, or the Union on his behalf, to raise a medical defense or excuse, not for the Employer to force the Grievor into a medical inquisition. To raise a medical excuse, the Grievor would have had to admit that he had done what the Employer alleged, and he never did admit it. Had he done so, following Article 33.10(a) would have been the appropriate first step.

Once the Employer had determined to its own satisfaction that the Grievor had in fact exposed himself to Ms. YY, and had decided that the appropriate discipline was not discharge, it could have appropriately concerned itself with the safety of its customers and employees before allowing the Grievor to return to his duties. In that context as well, following Article 33.10(a) would have been the appropriate first step.

After the Grievor was charged criminally the mingling of the medical excuse/safety assurance processes with the disciplinary investigation became even more inappropriate, as the Grievor guarded his right not to incriminate himself, and to have the case against him proven not only by the Employer in the discipline process but by the Crown in the criminal process.

Acceding to Mr. Buckland's insistence that Article 33.10 be complied with, on February 18, over Ms. Nelson's signature, the Employer wrote to the Grievor enclosing Dr. Burnstein's "confidential letter" of February 8, 2005 for him to take to his family physician. This letter even more hopelessly, and improperly, mingled the safety assurance process with the disciplinary investigation, because it was written with no regard for its implications for either discipline or the pending criminal charges. Dr. Burnstein's concerns were purely medical, based on the assumption that the Grievor had committed the act of misconduct. The fact that I have now found, on the balance of probabilities, that he was correct, does not mean that it was appropriate for the Employer, acting through him, to have proceeded on that basis in the disciplinary process.

Dr. Burnstein's attitude to Dr. Goomar's responses to the February 8 letter/questionnaire demonstrates the inappropriateness of the questions in this document when addressed to an employee who is being asked, in the course of a disciplinary investigation, to take to his doctor questions the answers to which may well incriminate him. Indeed, the questions were of the "have you stopped beating your wife sort", so that any responsive answer would have incriminated the Grievor.

The fact that the Grievor was subsequently acquitted on the criminal charge, because it was not proven beyond a reasonable doubt, drives home the point that the process was inappropriate, but it was inappropriate apart from that, because the disciplinary process was on-going.

The arbitration awards on Article 33.10(a) and (c) quoted above suggest that rather than scheduling the Grievor to be examined by a forensic psychiatrist Dr. Burnstein

should have addressed his concerns with the answers to his February 8 letter/questionnaire to Dr. Goomar. Had he done so she might have enlightened him, and the Employer's Labour Relations Officer, on just how untenable was the position in which the Employer was placing her, and the Grievor.

As I have already suggested, difficult as it may have been, from the outset the Employer should have separated the disciplinary and safety assurance aspects of the Grievor's situation. An immediate suspension pending investigation was probably appropriate for either or both reasons, but the first question to be answered through investigation should have been whether the Employer was satisfied that the Grievor had done what the complainant alleged. If, following the disciplinary process, the Employer was satisfied of that, he should have been disciplined appropriately, or suspended pending further investigation. In that context one reason for further investigation might, for example, be that in the disciplinary process the misconduct was admitted but Grievor or the Union had raised medical issues that could diminish the Grievor's responsibility and therefore affect the determination of appropriate discipline. Article 33.10 would then be engaged, and proceeded with in the normal way. The Employer might well have raised such issues on its own, but it surely could not have proceeded under Article 33.10 for this reason unless the misconduct was admitted.

Once the Employer had determined to its own satisfaction that the Grievor had in fact exposed himself to Ms. YY, if it had decided that the appropriate discipline was anything short of discharge it could then have invoked customer and employee safety as a basis for demanding a medical certificate under Article 33.10(a) and a psychiatric examination under Article 33.10(c), to determine whether the Grievor could return to the workplace. If the Grievor had then refused to follow Article

33.10(c) the Employer would be justified in at least holding him out of the workplace and probably in imposing discipline.

There was no such separation of the discipline and safety issues here. The Grievor's refusal, on April 8, 2005, to attend the Medisys appointment with Dr. Theriault, the forensic psychiatrist, came while he was still facing criminal charges. The assurance, in a letter on Medisys letterhead but signed by one of the Employer's Labour Relations Officers, that any medical information received would be "guarded as 'medical/confidential' by the Occupational Health /Services Unit" and would "not be released to either the employee or the employer (*except as required by law* [emphasis added])" must have been cold comfort.

In that context the Grievor's reply was:

> By way of this letter I respectfully decline the Medical Examination that CPC/Medisys had arranged for April 20th/05. As you may or may not be aware I have three doctors that I have been seeing.
>
> In the past I have provided medical information on three separate occasions, with regards to this current illness, including a questionnaire. I will continue to co-operate should the corporation/Medisys require additional information. Please outline your questions in writing and I will forward them to my doctor.

In the circumstances, and given its terms and tenor, I have decided that this refusal by the Grievor to attend the April 20 Independent Medical Examination was not a disciplinable breach of his obligations to the Employer.

This is not to say that a refusal to attend an IME, in the context of a medical excuse raised by an employee or the Union, or in the context of a return to work, and after

a proper exchange between the Employer and an employee and his or her doctor, would not be disciplinable. But those were not the circumstances here.

6. If So, Was Discharge Appropriate? Because there was no disciplinable misconduct this issue obviously does not arise.

7. If Not, What Discipline Is To Be Substituted? Because there was no disciplinable misconduct this issue obviously does not arise either. I note, however, that according to counsel there is virtually no arbitration case law to provide any guidance here as to the appropriate discipline, because, typically, where an employee refuses to attend a scheduled medical examination which is within the employer's right to require the employer simply denies the benefits in issue or does not allow the employee back into work force. In other words, withholding of the benefit in issue or indefinite suspension leading to termination is the usual means of ensuring that an employee attends a scheduled IME.

Here the Grievor has never undergone the IME the Employer sought, purportedly to assure itself that the safety of its customers and employees would not be jeopardized. Based on the evidence before me, including that of Dr. Sid Sodhi, clinical psychologist, I am prepared to simply order the Grievor reinstated. On the evidence before me I see no reasonable basis now for requiring the Grievor to undergo a medical examination, but after he is reinstated the Employer will have whatever rights it has in the case of any employee to require the Grievor to undergo a medical examination in accordance with Article 33.10. He will, of course, also have the same rights as any other employee to object and to file a grievance.

Conclusion and Order. I have found, on the balance of probabilities based on clear, cogent and convincing evidence, that the Grievor exposed his genitals to Ms. YY at the Mount Saint Vincent Mother House on October 22, 2004, as alleged by the Employer. That was a serious breach of his obligations and damaging to the Employer. However, particularly because the Grievor was a fifteen year employee with a clean record, I have found that discharge was not the appropriate sanction for this misconduct. I have also found the refusal by the Grievor to attend the April 20 Independent Medical Examination scheduled by the Employer was not a disciplinable breach of his obligations.

Having considered the length of the Grievor's employment, his discipline free record and the other relevant factors, I order that a six calendar month suspension be substituted for discharge, and that the Grievor be fully compensated for all lost pay, benefits and seniority from April 2005 onward. I retain jurisdiction over this matter and, should the parties be unable to agree on the details of the implementation of this Award, I will reconvene the hearing at the request of either of them.

Innis Christie
Arbitrator

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