

IN THE MATTER OF AN ARBITRATION AND  
IN THE MATTER OF THE LABOUR RELATIONS CODE  
(BRITISH COLUMBIA), (1992) S.B.C., c.82

BETWEEN

COLLEGE PRINTERS LTD.

(the "EMPLOYER");

AND

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION,  
LOCAL 25

(the "UNION").

(RUSS SAVAGE TERMINATION GRIEVANCE)

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**ARBITRATION AWARD**

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Single Arbitrator:

A. Paul Devine

Michael H. Korbin

Counsel for the Employer:

Counsel for the Union:

E. Casey McCabe

Date and Place of Hearing:

June 28 & 29, August 29, 2000  
Vancouver

## **I. THE GRIEVANCE**

The Grievor was terminated from his employment effective June 25, 1999. The Employer alleged that it had cause for termination because of the Grievor's dishonesty. The Employer alleged that the Grievor falsified a doctor's note to explain his absence from work and then lied to Company employees about the authenticity of the note. The Employer also relied upon the Grievor's discipline record, including a final warning which had been imposed the previous year.

The Grievor acknowledges the doctor's note that he provided to the Employer was falsified and produced to the Employer to cover his absence from work. He argues, however, that the employment relationship is not irrevocably damaged. He seeks reinstatement on the grounds that termination was excessive discipline.

Based on this, the first question in *Wm. Scott & Company Ltd.* [1977] 1 Can. L.R.B.R. is answered in the affirmative. There was cause for discipline. The remaining question is whether the discipline was excessive and, if so, what discipline should be substituted.

This matter was initially set to proceed to arbitration in the Fall of 1999. Due to the Grievor's intervening serious illness, the Hearing was delayed until dates in June 2000 and afterwards.

## **II. BACKGROUND**

The Grievor was employed in September 1992 as a "Flyboy". This is an entry level position, and new employees generally move onto journeyman positions. Employee turnover, however, has been minimal, and so the Grievor has remained in the same job since he began his employment.

The main source of business for the Employer is printing newspapers including the local edition of the *Globe & Mail*. The Flyboy position is essentially a labouring job in support of the newspaper presses. The job entails tasks such as loading rolls onto the press, making slack for the web and working on the Stacker, where printed material is offloaded and bundled.

The Grievor worked steady nights consisting of four eight-hour shifts. His first shift was Sunday night running from 6:00 p.m. to 2:00 a.m., although work on the shift was normally done by midnight. Monday, Tuesday and Thursday shifts run from midnight to 8:00 a.m.

The Grievor has been on a "note system" since 1996. This requires that he provide a medical note for any absences due to illness before he is allowed to return to work.

In 1998, the Grievor was terminated when he left work in defiance of a direct order to stay. In settlement of the subsequent grievance, the Grievor was returned to work and the termination was reduced to a five week disciplinary suspension. As part of the suspension, a "final warning" letter was issued on June 1, 1998. The final warning letter provided:

"Considering your record, we will not tolerate any further breaches of your job responsibilities including but not limited to unwarranted absenteeism, poor work performance or failure to follow instructions. Any further problems will result in your termination."

In a follow-up letter dated June 4, 1998 the Grievor was reminded that he was still on the note system. He had to provide a doctors note to explain any absence and would be required to leave the Company's premises until the note was produced.

The facts leading to the dismissal follow. The Grievor did not report to work on Friday, June 18, 1999 for his graveyard shift. He said he called in at around 10:00 p.m., two hours before the start of his shift, to advise that he would be absent. He either left a message with the Chapel Chair or a voice mail message. He did not go to bed immediately as he was used to staying awake during graveyard shift. He stayed awake until morning then slept until 3:00 p.m. on Friday.

The Grievor testified he now has no independent recollection of telephoning his family doctor for an appointment. He was acutely aware, however, that he would require a note for being absent on the forthcoming Sunday shift. He found an old doctor's note in his wallet on Saturday night and decided to use it to explain his absence when he reported to work on Sunday. He testified that the discovery was coincidental with his need to provide a note for the upcoming shift. The note had been issued for an absence in May 1999. The absence in May was converted into a short-term disability claim which requires the completion of "green" forms by the treating

physician. As a result, the Grievor no longer needed to produce the doctor's note that he was given in anticipation of a shorter absence.

As an aside, there was much debate about the admissibility and relevance of evidence given by the Grievor at an Employment Insurance hearing subsequent to his termination. For the purposes of the instant grievance, it was agreed that the passages which were attributed to him would be admitted and all arguments about them would be confined to the weight that should attach to his statements.

One of the statements the Grievor made to the EI Tribunal related to his reason for requiring a note. He advised the Tribunal that he required the note because he called his doctor's office and was told his doctor was away over the weekend and would not return until the following Tuesday. The Employer learned later the Clinic where the Grievor's doctor works was open on the weekend of June 18th.

The Grievor altered the note in order to use it to excuse his absence on the Sunday shift. He doctored the note by wetting it to obscure the "May" date. He also cut out the piece of the note in the date field.

The Grievor testified that he was concerned about the consequences of failing to provide a note. He understood that he would be sent home until a note could be produced. As a result, he would lose work until he was able to produce a note. His doctor was also reluctant to issue notes for past absences. He said he needed the note as it was the only way he could "get away" with his absence.

The Grievor advised his foreman prior to the shift that he had a note for his earlier absence. He actually produced a note for Gene Topping, the assistant Chapel Chair. Topping recalled the note was in pieces when he received it. The Grievor told him his child ripped it up a bit. Topping said that he put the pieces of the note in an envelope and gave them to Ray Shaw the following day. Shaw is the General Foreman. The Chapel Chair and General Foreman positions are both in the bargaining unit.

Shaw attempted to put together the pieces of the note in his office. He thought that the note seemed old and he noticed the date was missing. He referred the matter to the Human Resources office for further follow-up. He was later asked by Human Resources to confirm that this was the note for the June 18 absence.

Shaw spoke to the Grievor at least twice about the note. He spoke to him once on the shop floor near the Stacker and asked if this was his note for the June 18<sup>th</sup> absence. The Grievor asked "Why?" and then confirmed this was the note for that absence. The Grievor later went into Shaw's office looking for ear plugs. He then asked what was going on, and Shaw asked him again to confirm that this note was for his absence. The Grievor confirmed that it was and apologized for the condition of the note.

Glen Morley is a Supervisor with the Employer. He testified that he was instructed by Human Resources to ask the Grievor if the note he produced was for his June 18 absence. He did so on Monday the 21<sup>st</sup> or Tuesday June 22<sup>nd</sup> at about 6:30 a.m. He thought the discussion took place near the bander but was not certain. He did not have the note with him but simply asked if the note was for the June 18 absence. Morley said the Grievor acknowledged the note was his.

The Grievor disputed this evidence. He said he did not recall a conversation with Morley. Given the Grievor's memory problems, I am not prepared to find that the discussion did not take place. There is no obvious motivation for Morley to invent the conversation. Since the details of the meeting are vague in his mind as well, I conclude the discussion was low key and brief. The Grievor may well have forgotten that it took place.

Shaw co-authored a letter to the Grievor dated June 24, 1999, suspending him pending review. The letter was also signed by Ken Nelson, the General Manager for the Employer. Shaw said he wasn't involved further discipline, because, as a member of the Bargaining Unit, it was not considered appropriate. The letter asked the Grievor to provide a "full written response" for his conduct. Nelson testified that the Employer made a conscious decision not to meet with the Grievor. Instead, he was asked to provide a written response to the Employer.

Nelson said the Employer's investigation included obtaining clarification from the Grievor that the note he produced was for the June 18<sup>th</sup> absence. The Employer also called the Grievor's doctor and learned he had not been seen there since May 1999.

The Grievor provided a letter in which he admitted that he had used an old note. He said he didn't have a chance to get to see his doctor and so decided to use the old note, thinking that it would not be examined closely and it would be just thrown into his file with the rest of his notes. He now realized what a mistake it was, he took the matter seriously and had only himself to blame. The Grievor concluded that he was terribly sorry for trying to deceive the company.

Nelson testified that the Employer reviewed the written explanation proffered by the Grievor to explain his conduct. The Employer accepted the Grievor was apologizing for his conduct. The decision to terminate was taken after reviewing the Grievor's response and considering his past discipline record.

On July 6, 1999, Nelson co-signed a letter with the Employer's President informing the Grievor that his employment was terminated. He said the Employer took the view that the Grievor's dishonest conduct in proffering the note, his subsequent attempts to cover up that conduct, his poor discipline record including the prior termination, and the fact he was on the note system altogether constituted cause for dismissal. Nelson said the Grievor was warned in a letter dated June 4, 1998 (after he returned from a five-week suspension) that he must continue to provide medical notes for all of his absences. The Grievor was absent six times in 1998 and was absent four times to the end of April 1999. Nelson agreed, however, that the note system itself is not disciplinary.

Nelson was present at the Grievor's Employment Insurance appeal heard in September 1999. There was an issue about the admissibility of the tapes of evidence taken by the EI Tribunal. The Employer wanted to introduce the tape recordings of the hearing and a transcript made from those tapes. The Grievor, who was taken seriously ill after the EI hearing, said he had no independent recollection of any of the evidence given to the Tribunal. I ruled that the best evidence was that of Nelson as he was present at the hearing. The transcript and tape were available if the Grievor disputed Nelson's recollection. After further argument, it was agreed that

the Grievor's admissions as recorded in the transcript taken from the tapes of the EI hearing would be accepted subject to argument about the weight which should attach to the Grievor's "admissions".

Nelson testified that the Grievor told the EI Tribunal he couldn't see his doctor until the following Tuesday after the weekend. He felt he needed to produce a note because his "back was against the wall". If he couldn't provide a letter, he would be sent home. He provided the note out of fear that he would not be permitted to work. He also said he showed the note to only one person in management.

The Grievor told the EI Tribunal he did not see his physician on the weekend prior to returning to work for his Sunday shift because he was told his doctor was absent until Tuesday. He said he didn't go to another physician because he didn't feel comfortable seeing other doctors. He also told the EI Tribunal that double-doctoring was a concern.

In cross-examination, the Grievor acknowledged that, following the five-week suspension in 1998, his employment hung on a thread. He agreed that dishonesty is a breach of an employee's job responsibilities, although he did not regard it as a major one. He did not agree that trying to deceive the Employer constituted a breach of job his responsibilities.

### **III. ARGUMENT**

#### **A. Employer**

The Employer provided an exhaustive review of the evidence in support of its argument that the Grievor's dishonesty justified termination of his employment. The Employer submitted that honesty is a crucial element of the employment relationship. In common-law, a dishonesty always provides just cause to dismiss an employee. It is up to the employer to decide to forgive or dismiss. The requirement of honesty from an employee applies whether or not he or she is employed in a position of trust.

The Grievor persisted in his dishonesty by repeating the lie about the note to several supervisory employees and only came clean when discovery was imminent. Moreover, the Grievor demonstrated at the EI hearing he was not repentant about deceiving the Employer.

Moreover, the Grievor was on a "last chance" agreement. Compelling reasons would be required to mitigate the penalty in face of the agreement which had been put in place to substitute for a prior termination.

## **B. Grievor**

The Union acknowledges the Grievor committed an employment offence worthy of discipline. It argues that termination was excessive in all of the circumstances. There were mitigating factors known to the Employer at the time of the dismissal which provide a basis to mitigate against penalty and compel reinstatement.

The Union also submits that the Employer's investigation was flawed. The Employer failed to interview the Grievor or the Union before arriving at a decision to terminate his employment. The Employer also relied on uncorroborated evidence. In particular, the evidence of Glen Morley about his involvement in the incident with the note was disputed.

The Union submits the Employer considered irrelevant factors including the Grievor's absence record. It also failed to recognise that he was remorseful and contrite as a result of his action.

The Union disagreed with some of the Employer's characterization of the evidence. In particular, it disputed the assertion that the Grievor did not regard deceiving one's employer as a breach of job responsibilities. The Union submits the Grievor acknowledged that dishonesty is a breach of the employment relationship. Further, he said in his letter to the Employer that he was sorry for deceiving the Employer. The evidence, submits the Union, establishes that he was contrite, remorseful and recognised the gravity of the offence.

The Union points out that there is no issue regarding the Grievor's illness on Friday. Further, the Grievor did not go to see his doctor prior to returning to work. The note is the issue, not the *bona fides* of his absence.

The Grievor did not obtain a benefit from his misconduct. The Employer pays four sick days to each employee each year. These are paid in advance. The Grievor had already received the money for his sick days and did not receive a benefit for the day off on June 18th.

The Grievor formed the intent to alter the note after he realised he would lose a shift without one. The note had come into his possession as a result of prior illness. The concern, therefore, for the Grievor was he did not have a note to provide. It is also consistent that he had a relationship with his attending physician and therefore did not want to go to the Clinic to see anyone else.

In all, the Grievor conduct as not premeditated. He was not paid for the claim he made in the doctor's note. He had no intent to harm his Employer.

Dealing further with the investigation, the Union submits the process was flawed. A member of management was sent to ask the Grievor if the note was his. The Grievor replied in the affirmative and asked why he was being questioned. The Employer only informed the Grievor that he had been sent to ask about the note. The Union submits that this is a cursory and perfunctory investigation and showed no consideration or review by senior management prior to the decision to terminate.

Likewise, the investigation by Glen Morley was unsatisfactory and should be given no weight. Morley testified that he asked the Grievor if the note was his but did not show it to him. The Grievor denied this conversation took place. Moreover, Morley couldn't recall satisfactorily who gave the Grievor the letter concerning his suspension.

The Grievor's letter is evidence of contrition and remorse. The Grievor provided a full apology for his conduct. He wrote the letter without consulting the Union or anyone else.

As far as prior discipline is concerned, the Grievor was on the "note system". He had provided all of the notes required of him. The failure to provide a note is not in and of itself disciplinary. The penalty he incurred was automatic as he would be sent home from work.

The Union also submits the EI hearing did not provide evidence of prior inconsistent statements or prior improper motivation. It reflected only an appeal for wage loss benefits after the Grievor

was harshly dealt with. The Grievor said during the hearing that he took the offence of providing a false note seriously.

The Union also submits the past discipline was for a different kind of event. It was not for dishonesty. Therefore, it carries less weight.

### **C. Reply By Employer**

The Employer says its investigation was fair, not flawed. The Employer investigated enough to have the Grievor confirm that he had provided the note for his absence on June 18th. He was given an opportunity to present his side of the story and come clean. Instead, he persisted in advancing the note to explain his absence. On his own evidence, he said that the note was provided as the only way he could get away with the absence. Whether or not he received a direct benefit, his conduct was dishonest and the penalty appropriate.

### **D. Analysis and Decision**

#### **1. THE LAW**

The jurisprudence governing arbitrators considering questions about employee discipline is captured in the case of *Re Wm. Scott & Son Company Ltd., supra*. The questions which must be addressed are:

- (a) has the Grievor given just and reasonable cause for some form of discipline by his Employer?
- (b) the answer to question #1 is yes, was the discipline imposed an excessive response under all of the circumstances?
- (c) if the answer to question #2 is yes, what alternative measure should be substituted as just and equitable?

The Union concedes the Grievor's conduct gave some cause for discipline. The question then becomes whether, in answer to question #2, the discipline of termination was excessive in all of the circumstances.