

**IN THE MATTER OF AN EXPEDITED ARBITRATION**

BETWEEN:

OVERWAITEA FOOD GROUP.

(the "Employer")

AND:

UNITED FOOD AN COMMERCIAL WORKERS UNION, LOCAL 1518

(the "Union")

(Grievance of A. Anderson)

ARBITRATOR:

HEATHER J. LAING

REPRESENTING THE EMPLOYER:

MICHAEL H. KORBIN

REPRESENTING THE UNION:

THEODORE C. ARSENAULT

DATE OF HEARING

April 18, 19, 30, May 1, and 9, 2002

PLACE OF HEARING:

Vancouver, British Columbia

DATE OF AWARD:

June 5, 2002

## AWARD

### INTRODUCTION

I was appointed to arbitrate this dispute by the Director, Collective Agreement Arbitration Bureau, pursuant to Section 104 of the *Labour Relations Code*.

On January 29, 2002, Allan Anderson, the grievor, was discharged for alleged theft of product, a Reese Peanut Butter Cup. The questions I must answer are whether there was just and reasonable cause for some form of discipline by the employer, whether discharge was an excessive response in all the circumstances, and, if so, what alternative measure should be substituted as just and equitable?

### FACTS

The evidence in this case consists of extensive oral testimony from a large number of witnesses, including the grievor, over five days of hearings, together with a variety of statements and other documents as well as two video tapes, including one of the grievor engaged in the activity that ultimately brought about this grievance. I have carefully reviewed and considered all of the evidence in making my determination. In view of the conclusions I have reached, there is no need to reproduce all of the information provided to me or to comment on every particle of the evidence.

At the time of his termination, Mr. Anderson worked at the Langley Save-on-Foods store as a general clerk. His job was to work freight from the warehouse on to the store shelves. He had access to all areas of the store and the warehouse, except behind the pharmacy counter and, at times, the conference room. Approximately two hundred and thirty bargaining unit employees and five excluded managers work at the Langley Save-on-Foods store. The management offices are located upstairs and the only management presence in the warehouse occurs when managers occasionally walk through.

Given the number of employees, the layout of the store, and the scheduled hours managers work, it is not possible for management to directly monitor employees. Employees are largely unsupervised and trusted not to steal from their employer. In the retail food industry, termination is the usual employer response to theft.

Mr. Anderson is thirty nine years old, married and has three children. He has grade twelve education and has worked for Overwaitea Foods, since 1985. He is active in the Langley community, coaching baseball and hockey. Witnesses called to attest to Mr. Anderson's character described his participation in his children's school and the community in positive terms.

In the fall of 2001, because of the Overwaitea Food Group's concern about "shrinkage" or theft, a pro-active Employee Awareness Initiative was commenced. Doug Hartl, Resource Protection Specialist, gave a series of two hour power point presentations to employees at the Langley Save-on-Foods store. The purpose of the presentation was to share with employees the impact of shrinkage on the company and its employees, to encourage any employee who might contemplate stealing product to have a sober second thought, and to ask for employees' help to stop theft by customers and employees. The seminar was a proactive step, directed in particular at what Mr. Hartl identified as the sixty percent of employees who might steal if given the opportunity. Mr. Anderson attended one of these presentations, on November 14, 2002.

The Langley Save-on-Foods store has an employee Resource Protection Committee. At one its meetings, management brought to the committee's attention an area next to an exit door by the public washroom that was prone to losses. Recently, a digital camera, destined for the reward programme and stored in the area, had been reported missing. The committee suggested an overt camera be placed in the area. On January 22, 2002, Doug Hartl installed the camera.

On January 29, 2002, Mr. Anderson was working general merchandise, non-edibles, from 6:30 a.m. until 2:30 p.m. Products arrive, often wrapped in plastic, in large orange plastic "totes" with lids. The totes are placed on carts called "wheelers". Mr.

Anderson's job was to take his wheeler, on which he had approximately four or five totes that day, and work the products to the store shelves.

That day, January 29, 2002, the five managers of the Langley store held their regularly scheduled Core meeting, upstairs in the conference room. A TV monitor in the conference room, showing images from video cameras in the store, is always on, but is not regularly monitored. One of the topics of discussion at this meeting was a recent fine from WCB for having product in front of an electrical panel. During the meeting, Leith Walton, the Store Manager asked the group to look at images from the camera referred to above, because it showed the area in question. Mr. Walton was zeroing in on clutter in front of the electrical panel when one of the managers said, "what is Alan doing?" They saw Mr. Anderson move an orange carton that was on a full skid located to the right of the electrical panel and the exit door, reach into the back of the carton, and put something into the pouch of his apron. It was 9:12 a.m.

Rob Epp, Assistant Store Manager ran downstairs to the warehouse to see what Mr. Anderson had put into his apron. At 9:13.37, as indicated on the video tape in evidence before me, Mr. Epp found that the orange carton was a box of bags of Snack Size Reese Peanut Butter Cups. Each bag contained fifteen individually wrapped chocolate cups. The Reese box was up against others on the skid. Mr. Epp slid it away from the other boxes and found that the perforated side of the Reese box was opened. This opening was up against other boxes on the skid so that the opening could not be seen without moving the Reese box. Mr. Epp saw that one of the bags in the box had been opened. The store sells Reese snack size bags and packages of three cups, both of which are bar coded. Individually wrapped cups are not sold in the store. They are not bar coded and, therefore, cannot be purchased at the store. There was no general merchandise on the skid.

Mr. Epp then went through the door to the store and walked the length of the store, looking up and down the aisles for Mr. Anderson. He did not see the grievor anywhere. Mr. Epp went to aisle number nine where Mr. Anderson's wheeler was parked. He saw a number of orange totes on the wheeler, one of which was opened

and being used as a garbage tote. Employees usually put the plastic wrap used to bind products and other packaging into one tote as they work. Mr. Epp testified that he saw a chocolate peanut butter cup, out of its wrapping, sitting on a piece of cardboard on top of a tote. In the open tote, he saw the black paper tray in which the chocolate cup sits and the orange wrapper, in which both are packaged, sitting among some garbage.

Using the phone he had with him, Mr. Epp left aisle nine and phoned Mr. Walton to tell him what he had found and that he not yet seen the grievor. While continuing to speak on his phone, Mr. Epp walked back to the warehouse. Through the glass in the swing door between the store and the warehouse, Mr. Epp saw Mr. Anderson in the warehouse again in the location of the Reese box. Mr. Epp asked Mr. Walton to look at the TV screen to see what Mr. Anderson was doing. Mr. Walton said that Mr. Anderson was looking around the same boxes. At 9:18.25, as indicated on the video tape, Mr. Anderson moved the blue cardboard on top of the Reese box, and according to the position of his left shoulder it appears that he reached with his left arm behind the Reese box on the side of the opening. So as not to alert the grievor, Mr. Epp returned to aisle nine.

Another employee, Don Baldwin, was also working in aisle nine. Mr. Epp began to speak to him about the Electronic Article Surveillance system. As they were talking the grievor returned. Mr. Epp felt that the grievor thought something was up because he was inquisitive about what Mr. Epp and Mr. Baldwin were discussing and came over to join in the conversation. According to the video tape of aisle nine, this discussion occurred at 9:24. The conversation continued for approximately five minutes. In order not to raise suspicion, Mr. Epp did not look at Mr. Anderson's wheeler during this conversation. The grievor said nothing to Mr. Epp about the peanut butter cup.

After this conversation, Mr. Epp left aisle nine and phoned the Operations Manager to ask if he could get Mr. Anderson away from his wheeler, in order for Mr. Epp to see if the peanut butter cup was still in the same place. Mr. Epp returned to aisle nine. By this time Mr. Baldwin and the grievor had left. Mr. Epp went to the grievor's wheeler, according to video tape at 9:33.27. The peanut butter cup was gone. He looked where

the packaging had been in the tote and he could not see it. He dug into the garbage tote and found the tray and the wrapper rolled up together. He also saw the chocolate wrapped in clear plastic in the same tote.

Mr. Epp left things as he found them. He phoned Mr. Walton to describe what he had found. Mr. Walton put Mr. Epp through to Mr. Hartl. Mr. Hartl told Mr. Epp to take the product, the plastic, and Mr. Anderson to the conference room and said he would join them in ten minutes.

By this time the grievor and his wheeler had moved to another aisle. At approximately 9:55 a.m., Mr. Epp went to where Mr. Anderson, with his wheeler, was stocking stationary. Mr. Epp dug into the garbage tote on the wheeler and pulled out the wrapper, paper tray, and the cup wrapped in plastic. He said to the grievor, "you made a big mistake". The grievor said, "I guess this is it". Mr. Epp described the grievor as deflated, in shock, and looking as if the air had been sucked out of him. Mr. Epp told the grievor that he needed him to come to the conference room. The grievor asked what was going to happen. Mr. Epp responded that he did not know. Mr. Epp told the grievor that he had been in clear view of the camera and that the entire CORE Team had seen him steal. Mr. Anderson said nothing more, put a couple of index cards on the shelf, and followed Mr. Epp.

In the conference room, Mr. Epp placed the product, the wrapping, and the plastic on the table. A few minutes later, he went to get the grievor a glass of water. Shortly thereafter, an employee who was working in the conference room left, leaving the grievor in the room alone.

Because no shop steward was at work, Mr. Epp asked Mr. Baldwin to come to the conference room. Mr. Epp chose Mr. Baldwin because Mr. Epp understood that the employer and union had selected Mr. Baldwin to attend a joint union/management conference, he had a number of years with the company, and he was familiar with what goes on, on the grocery floor. Mr. Epp did not tell Mr. Baldwin what the meeting was about or give him an opportunity to speak to Mr. Anderson before the meeting began.

Eventually, Mr. Hartl, Mr. Walton, Mr. Epp, Mr. Anderson, and Mr. Baldwin were all in the conference room.

Before continuing on with my account of the facts of this dispute, there is an important procedural issue that must be addressed. The union submits that the audiotape of the investigative or security interview should not be admissible in evidence. The union contends that the grievor did not have a witness of his choice present during the security interview as required by Article 21.03 of the collective agreement, thereby requiring me to treat his statements in the meeting as inadmissible evidence.

The evidence before me is that when Mr. Anderson saw Mr. Baldwin he said, "does he have to be here?" Mr. Hartl told him that Mr. Baldwin was there as a witness. Mr. Baldwin agreed during his testimony that, as recalled by Mr. Epp, Mr. Walton, and Mr. Hartl, it is possible that what was said to the grievor was that there is no shop steward available, someone has to be here, and you are entitled to have anyone you want. Mr. Anderson testified that he knew he was entitled to have a witness of his choice. According to Mr. Anderson, he then sat down and said nothing because he felt he was in enough trouble and did not want to cause any more waves. According to other witnesses, Mr. Anderson said "ok, fine". The evidence before me is that on an earlier occasion, Mr. Baldwin had also been a witness at a disciplinary meeting concerning the grievor.

Having carefully considered the position of the union, I have concluded that, in these circumstances, the audiotape is properly before me as evidence and that the grievor's collective bargaining agreement rights were not violated. Article 21.03 does indeed provide that the grievor may have a witness of his choice present at such a meeting as this. The grievor testified that he was aware of his rights. He could have objected or made another choice but because he believed he was in enough trouble he did not do so. I find that he also added the words ok or fine, by which the employer understood he had agreed to have Mr. Baldwin as his witness. On the face of it, Mr. Baldwin was not an unreasonable choice. There is no evidence of bad faith on the part of the

employer. I find that by Mr. Anderson's actions and words, he must be considered to have acquiesced in the selection of Mr. Baldwin. He cannot now say he was denied his choice when he expressly admits he decided not to object because of the situation he was in.

In addition to the audiotape, a transcription of what happened at the security meeting was before me in evidence. The following are relevant portions of Mr. Hartl's (DH) interview with Mr. Anderson (AA).

.....  
DH Okay, you understand, I mean you're a long term employee, you've been here about 18 years 17 years eh. You're aware of all of our Policies and Procedures.

AA Yep

.....  
DH Yeah, tell me why, tell me what happened.

AA I don't know why. I don't know why. I just haven't been thinking straight lately and I don't know why, I know better, that's all I can say.

.....  
DH Where did you get this item from?

AA Out of a box.

DH But where was the box?

AA On the camera.

DH No, the box isn't on the camera, where was the box that you took this item out of?

AA In the warehouse.

DH Okay and was it a sealed box?

AA No, it was already opened.

.....  
DH Okay, how many did you take out of the box?

AA Just one I believe.

DH That's all?

AA I think so.

DH Ok, Why did you take it out of the box?

AA I don't know why. I don't know why.

DH Well you obviously planned on eating it?

AA Well, okay I planned on eating it, yeah.

DH Yeah

AA And I did, but I just, I don't know why I did it.

DH Okay, the only reason why I'm kind of curious, I mean you're aware, your aware, are you aware that we just put a camera in the back?

AA Uh, yes.

.....  
AA Like I say, I was aware it was there, I don't know why I did it, like I say I haven't been thinking clearly lately, so I don't, I don't know why, I have no excuse, I have no reasoning for any of it.

- DH No, and you didn't pay for the item, right? I know this might sound silly, but there's a process we have to do right. You didn't pay for it and you obviously didn't have any intention to pay for it. Your intention was just to take and consume it, but you don't know why, is that what you're telling me?
- AA Pretty much
- .....
- DH So why today?
- AA I don't, like I say I don't know, we went for breakfast this morning, I was hungry, I had breakfast and I was hungry and I don't know why, like I say, I just don't know why, if I knew why it wouldn't have happened.
- .....
- DH Why weren't you thinking straight now?
- AA Just pressure at home, just feel the pressure here at work, just all around.
- .....
- DH Okay, you understand that if you take some product and in this case you ripped it open and you were going to consume it, you understand that without, the simple fact of that that's theft eh? Do you understand that?
- AA I understand that.
- DH Okay, there's no real good reason other than that, that you can tell me other than you made a mistake and you're . .
- AA I don't know why I did it, really I don't other than, possibly to consume it, but I didn't even eat it, so I don't even know what that was about.
- .....
- DH You are aware this was all captured on tape, obviously eh?
- AA I did
- DH Okay, and we'll see how many other ones you took, is there any other ones in your cart or? No, okay, all right, it's the end of the interview and it's 22 minutes after 10:00 and I'll shut off the tape here.

At the end of the interview, Mr. Hartl completed a Corrective Action Report. The grievor objected to that part of the report that said he "wrapped the product in plastic and stashed it". He made no other objection. Having concluded that Mr. Anderson had admitted to theft, no further investigation was conducted and Mr. Walton immediately terminated Mr. Anderson for "theft of product, Reese Peanut Butter Cup".

When the Reese box was inspected after the interview the employer found two bags had been opened. Thirteen of the fifteen cups were missing from one bag. Fifteen cups remained in the other opened bag.

Shortly thereafter, Mr. Anderson left the store, returned home, phoned his wife, and phoned the union. As directed by the union representative, that night Mr. Anderson wrote a statement setting out what happened. That statement provides as follows:

On January 29, 2002 at approximately 10:15 – 10:30 I came back from my coffee break. I grabbed my wheeler in the back and saw an open box of Reeces (sic) Peanut Butter Cups, not thinking I grabbed 1 package. I preceeded (sic) onto the floor where I began to open the package, but I stopped and did not take the product out of the package. We all at times act on impulse or without thought but we catch ourselves realizing that it was not the right thing to do, as I did. I then put the package, contents intact into my tote prepared to pay for it at my next break.

Approximately 5 minutes after putting the product into the tote I observed our Asst. store manager Rob Epp lurking around the aisle I was working in. He was talking on the phone and watching me. I didn't think much of it as they often watch us work. He then came over to my tote, rummaged around inside of it and pulled out the Reeces (sic) Peanut Butter Cup all intact. He then wrapped it in a piece of plastic and asked me to accompany him upstairs to the office.

During my interview I felt that what I was trying to say kept being altered by my interviewer, no matter what I tried to tell him he adjusted my words to say what he wanted to hear, not what I wanted to tell him.

I informed management and everyone present that I did not agree with the information written on the CORRECTIVE ACTION REPORT as I did not wrap the product at all, the assistant manager Rob Epp did, and I did not stash the product, I placed it in my tote to pay for it at my next break.

I did not say I took the product to consume it in the same context as they would have liked me to. I did not eat it, as I knew it was wrong and I knew what I had to lose. They did not want to hear any of it. They just didn't want to give me the benefit of doubt, and just seemed to only wanted to hear that I stole a Reeces (sic) Peanut Butter Cup and didn't care – this is so far from the truth.

In conclusion, I have been an employee with this company for the past 17 years. I have always done my job to the best of my ability. I am a family man and I am a volunteer in the community. I did not eat the Reeces (sic) Peanut Butter Cup as I was not willing to jeopardize my livelihood and my families means of survival. I am sorry for had (sic) having the thought, but it was temporary, and I am glad that unlike many others I did not act on it.

On February 5, 2002, the grievor met with his union representative to discuss what had happened. Together they reviewed the video tape of the incident and the transcript of the security interview. They made the following corrections to the above statement:

the box contained plastic bags with single peanut butter cups for retail as a packaged unit; the box and the bag were open; he put the package into his tote in the "dead space" just before the double doors into the floor rather than after proceeding to the floor; by "intact" the grievor meant the chocolate was still in its package but the package was open; and he did not say during the interview that the package was intact when Mr. Epp found it in the tote.

On February 11, 2002, Mr. Andersen wrote the following statement for Employment Insurance.

On Jan 29 02 I made a very rash decision and without thought I acted on an impulse (which I have never done before) took a reeces (sic) peanut butter cup from an open package in our back room.

I caught myself (before eating the product) realizing that this was not the right thing to do. So I set the product in the tote on my wheeler prepared to pay for it later on my next break.

Before I had the opportunity I was accosted by Management, taken upstairs and after a very intimidating, one sided interview I was terminated.

I have worked for Company for 17 years doing the job to the best of my ability. I stopped myself before eating the product because I knew that this was wrong. I told management what I was thinking at the time, and this is what they based my termination on.

Termination is a very harsh penalty for one's thoughts.

I am currently under an appeal/arbitration claim to be reinstated.

As one can see on the video tape of the relevant area of the warehouse, the Reese box was near the top of a full skid of boxes, which was up against the wall. A couple of cartons sat on the floor directly in front of the skid. There was a blue cardboard display unit on top of the Reese box. The side of the Reese box that was open was tight to the other boxes on the skid.

According to the video, at 9:11, Mr. Anderson went to the area where his wheeler and the orange Reese box were both located and then moved out of view of the camera. He returned at 9:12. He went to the Reese box, shifted it forward, and put his left hand in behind the box. While it is not clear what if anything was in Mr. Anderson's hand, he appears to transfer something from his left hand to his right hand, and then put his right hand into the pouch on his apron. Mr. Anderson looked to his right and then put

his left hand into the back of the box again, and appears to transfer something to his right hand, which he put in the pouch on his apron. Mr. Anderson then put the Reese box back in place, and looking to his left, moved out of view of the camera.

Mr. Epp investigated the skid and the box, between 9:13 and 9:14. At 9:18.01, Mr. Anderson returned. He walked back and forth beside the skid while another employee was also in view of the camera. When that person left, Mr. Anderson looked at a box on top of and at the back of the skid, and looked at the blue display unit on top of the Reese box. He then appears to move his shoulder in such a way that his left hand could have been in the back of the Reese box.

Mr. Anderson's explanation for what happened is as follows. He explained at the hearing before me, that he saw the box of bags of Snack Size Reese Peanut Butter Cups the previous week. As he describes it, the box was turned a different way. He saw that the perforated area of the box was open and there was an open bag inside the box. He did not say anything to anyone about this. Mr. Anderson testified that he did not open either the box or the bag. Mr. Anderson agrees that contrary to the statement he wrote on January 29, the way the Reese box was situated on the skid on January 29, no one could have seen that it was open.

Mr. Anderson's evidence is that after his break on January 29, he went to retrieve his wheeler and seeing the box wondered if it was the same one he had seen the week before. On impulse, he reached into the opening in the back of the Reese box, took out one Reese Peanut Butter Cup from an opened bag, and put it into the pouch on his apron. He agrees that he knew exactly where in the box the open bag was. He agrees that he had no reason to be by the skid of boxes other than to get his wheeler.

Mr. Anderson admits that at that time he intended to eat the product. He moved twelve to fifteen feet away, still inside the warehouse, into the "dead space" by the public washroom, where he took the wrapped cup out of his apron pouch and opened the wrapping. According to Mr. Anderson, he did not feel good because he had not paid, he knew that was wrong, and he "did not want to continue down that road".

Having opened the individual package, Mr. Anderson states that he did not take the chocolate cup out of its package but placed it "intact", the chocolate still in its wrapping, into his tote, behind him on his cart. He then proceeded with his cart through a set of doors to the sales floor. Also in the tote were items yet to be worked to the shelf and some plastic in which items had been wrapped. Shortly after he returned to the floor he saw Mr. Epp in the area "lurking around" the aisle in which he was working. Mr. Epp was talking on the telephone and watching him.

Mr. Anderson denies that he ever removed the chocolate cup from its wrapping. When asked about Mr. Epp's evidence, that he saw the peanut butter cup on top of a tote on a piece of cardboard, Mr. Anderson responded that the lid was open on the tote and it could have been that the cup was on cardboard in the open tote as it could have fallen out of the opened package when he put it in the tote, as he continued working. He disagrees with Mr. Epp's evidence about the chocolate cup being on top of a tote, in the open, separated from its wrapping. Mr. Epp's recollection of what he saw was clear and unequivocal. I accept his version on this matter and find that the grievor's version is not believable.

At the hearing before me, Mr. Anderson agreed that one could not pay for an individually wrapped cup because it did not have a bar code. He testified that because he had taken one cup out of the bag he felt the entire bag was his responsibility and he was going to pay for the whole bag, before he went home, on his break at 11:00 a.m. or 11:30 a.m. He testified that he was prepared to pay, "absolutely," and had the money with him to pay for a cup and for the whole bag.

Mr. Anderson agrees he did not tell Mr. Epp anytime on January 29 that he intended to pay. When asked why he did not offer to pay for the goods at the security interview, he said he believed it came up in a series of questions lumped together, and that if it had been asked separately he would have been able to answer it. Mr. Anderson agrees that he did not say at the interview that he had placed it in his tote to pay for it later, as set out in his statement, but testified those were his thoughts. When it was pointed out that his two statements refer to paying for the product and "it", the grievor responded

that meant the bag of Peanut Butter Cups. Mr. Anderson agreed that the first time he stated his intention was to pay for the entire bag was when he testified at the hearing before me.

Mr. Anderson denies that in the security interview he agreed that he did not intend to pay for the product. Counsel for the employer referred Mr. Anderson to Mr. Hartl's question, "No, and you didn't pay for the item, right? I know this might sound silly, but there is a process we have to do. You didn't pay for it and you obviously didn't have any intention to pay for it. Your intention was just to take it and consume it, but you don't know why, is that what you're telling me?" and Mr. Anderson's answer, "Pretty much". The grievor responded that it was only the last sentence of that exchange to which he was responding.

Mr. Anderson has no explanation for why he did not decide to put the product back in the box having decided, while he was still in the area, that it was wrong to take it. He has no explanation for why, having made that decision, he did not put the product back in the bag and go and seek permission to buy the bag, or why he did not take the bag and pay for it. He maintains that for the next thirty to forty minutes, until Mr. Epp removed the cup from the tote, he continued to have the intention to pay for the bag. When asked if he agreed he could have paid for the bag at any time, the grievor said Mr. Epp was there and he did not feel comfortable going to management but "most likely I would have waited until the next break".

Mr. Anderson agreed that during the time Mr. Epp was speaking to Mr. Baldwin and him about anti-theft measures, Mr. Anderson knew he had in his tote a cup that he had taken without permission from a bag in the box in the warehouse. He knew he had opened it with the intent to eat it and at no time told Mr. Epp or Mr. Baldwin about the peanut butter cup.

Mr. Anderson explained that when Mr. Epp pulled the wrapping, the peanut butter cup and plastic out of his tote and said, "You made a big mistake. I'd like you to come upstairs", he also said that Mr. Hartl would be coming in ten minutes. The grievor

explained that what he meant when he responded, "I guess this is it", was that he would probably be terminated because Mr. Hartl had been contacted. His thought was that if the head of security was coming to the store in ten minutes, it was a matter of a serious nature. Mr. Anderson testified that at that time he felt shocked, scared, and confused and his heart was racing.

Mr. Anderson recalled that as he waited in the conference room he was thinking, "how could I be so stupid, what will I do for a job, how will I tell my wife, what have I done to my family life, and a lot of other emotions." The grievor testified that he felt confused, nervous, and scared. According to Mr. Anderson, he could not explain his actions during the interview because he did not know himself.

Mr. Anderson explained that the family stress to which he had referred in the security interview was a decision, that had involved a confrontation with his wife just before Christmas, to remove himself as coach of his son's hockey team. His evidence was that he was "really torn and emotionally upset about my son" and that "it hurt that kids grow up and do not need dad as much any more". When his counsel asked how that related to what happened on January 29, the grievor responded, "I was just not thinking clearly."

Mr. Anderson testified that he knew if he had eaten the product that would be theft and he would be fired. He believes that, because he did not eat the product or leave the store with it without paying, no theft occurred. He agrees he made a bad judgement, which he says may be contrary to company policy, but does not justify termination. His view is that damaging the product is not theft. Mr. Anderson was asked about his response to Mr. Hartl's question, "you understand that if you take some product and in this case you ripped it open and you were going to consume it, you understand that without, the simple fact of that that's theft eh?". He responded that although he had answered that he understood, he does not agree. When asked if he believed that taking product with the intent to eat it and without the intent to pay, was not theft until he ate it, the grievor responded that it was the action, not the intent, that creates theft. Mr. Anderson was asked if taking the product without the intent to pay and with the intent

to eat it and throwing it away, was theft. He responded, that if he threw it away it was not theft, his obligation was to pay for the whole bag, and if he had taken and thrown out the whole bag that would be theft.

Mr. Anderson's explanation for why he was in the area of the Reese box the third time, at 9:18.25, is that he was looking for Rubbermaid post scrubbers. His evidence is that as he did not know what had happened to them, he looked where his wheeler had been parked before. He did not explain how they might have been on top of the skid where he was looking. He agrees that he went up to the Reese box but he denies he put his arm into the box again. When Mr. Anderson was shown the video again, he had no explanation for why his shoulder was where it was.

Mr. Anderson denies that he took more than one Peanut Butter Cup. When it was suggested that the video showed him twice taking product from the box and putting it into his apron, the grievor responded, that he thought one would see product in his hand if he had taken more than one. When he was shown the video in which he reached into the back of the box a second time, Mr. Anderson at first denied that he had done so. When asked if his position was that he put his left hand in the box for a reason other than to take out candy, the grievor responded, "I believe so". He has no explanation for why he put his right hand in the pouch of his apron a second time and maintains he took only one peanut butter cup. His explanation for why he looked around after taking the candy is that he thought he heard a noise to his left as one faces the fire exit. Being shown the video again, he agrees that he then straightened the box, and returned it to the position it was in when he came. He testified that the fifteen seconds he was in the "dead space" was not enough time to open and eat one of the cups.

Mr. Anderson's evidence is that the security interview was one sided and he felt Mr. Hartl was trying to make him say he had taken the product "and intended to eat it with a clear conscience and it was not with a clear conscience at all". In the statement written on January 29, Mr. Anderson said, "during my interview I felt that what I was trying to say kept being altered by my interviewer, no matter what I tried to tell him he adjusted

my words to say what he wanted to hear, not what I wanted to tell him". Mr. Anderson testified that he felt Mr. Hartl was trying to get him to "admit I took it, ate it, threw the wrapper away, and had no intention of paying for it whatsoever". When the audiotape was played for Mr. Anderson during the proceedings before me, he was unable to identify any point during the interview at which Mr. Hartl had tried to alter his words.

The following exchange, in the transcript was pointed out to Mr. Anderson; "DH. Okay, you understand that if you take some product and in this case you ripped it open and you were going to consume it, you understand that without, the simple fact of that that's theft, eh. Do you understand that? AA. I understand". The grievor responded that he was thinking at that time that he did not agree but admits he said he understood.

The grievor testified that he had no disciplinary record, but added, "there are minor things". The grievor's disciplinary record includes a written warning in 2001 for failing to show up for a shift, a warning in August 1999 for not being ready to start when his shift started, a verbal warning in October 1998 for being four minutes late for on a break, and a written warning in September 1985 for not showing up for a shift because he did not realize he was to work.

Mr. Anderson testified that he has no marketable skills outside the retail food industry. His income is the main income for the family. Since his termination, the grievor has done some refereeing at roller hockey and some landscaping at the local arena. When union counsel asked the grievor how important his job was to him, the grievor responded "it is everything, our livelihood, it allow us to put our kids in things all kids should be part of, lets us take small vacations camping".

Union counsel asked if he were reinstated would this type of thing ever happen again. The grievor said "no never. I have gone through a roller coaster. I would not wish what I have gone through on my worst enemy. It has been very taxing. Yes I admit what I did was wrong, I went to the line, that was wrong. But I did not cross. But I am

guilty for going to the line. I opened the package but did not cross the line by consuming the product.”

Mr. Anderson understood from the employer's power point presentation that the employer considered theft to be a serious problem, they wanted to work with employees to prevent and reduce theft, and they wanted employees to help reduce and prevent theft. He agreed that Mr. Hartl had given the message that they wanted employees to have a sober second thought and reconsider theft if they thought of it. He agrees that honesty and trust are very important in the employment relationship.

#### EMPLOYER'S ARGUMENT

The position of the employer is that Mr. Anderson committed a premeditated theft. It submits that discharge is not an excessive disciplinary response in all the circumstances, especially as the grievor worked in an industry in which employees, including the grievor, know that if they steal from the employer they will be dismissed. The employer contends that the theft occurred in plain view of a camera. It submits that Mr. Anderson admitted that he took a peanut butter cup, planned to eat it without paying for it, and understood what he was doing was theft. The position of the employer is that the grievor's statements made after he was terminated, that he intended to pay for the cup and at this hearing, that he intended to pay for the bag, were excuses that should not be accepted. Further, the employer submits that it should be allowed to argue that the grievor in fact stole more than one peanut butter cup, a conclusion it reached when it reviewed the video tape in preparation for this hearing, and he was dishonest when he maintained he took only one.

The position of the employer is that Mr. Anderson failed to give a credible explanation for his actions, continued to be dishonest throughout the hearing, blamed others for what happened and has not shown remorse for what he had done. It notes that all of this occurred shortly after the employer explained its position to the employees during a two hour power point presentation, asking each to help the employer combat theft

and recommending anyone who might consider stealing have a sober second thought, given the consequences.

The employer argues that in these circumstances, the trust relationship with the grievor has been irrevocably broken. While recognizing that an employer's policy to discharge employees for theft cannot fetter an arbitrator's discretion under the *Labour Relations Code*, the employer submits that regardless of the value of the goods stolen, theft necessarily severely damages the employer-employee relationship. It submits that the grievor has not given a frank and prompt acknowledgement of his wrongdoing and urges that there is nothing in the evidence before me that shows trust may still be merited.

The employer referred to the following authorities: *Overwaitea Food Group and Retail Clerks Union, U.F.C.W., Local 1518*, unreported, April 7, 1987 (Bird, Q.C.); *Re Canada Safeway Ltd. and United Food & Commercial Workers, Local 2000* (1987), 29 L.A.C. (3d) 176 (Hope, Q.C.); *Overwaitea Food Group and United Food & Commercial Workers, Local 2000*, unreported, October 14, 1988 (McColl, Q.C.); *Overwaitea Food Group and United Food & Commercial Workers, Local 2000*, unreported, April 6, 1990 (Getz, Q.C.); *Overwaitea Save-On Foods Limited and United Food & Commercial Workers, Local 1518*, unreported, April 17, 1991 (McPhillips); *Overwaitea Food Group and United Food & Commercial Workers, Local 2000*, unreported, September 25, 1991 (Getz, Q.C.); *Great Atlantic & Pacific Co. of Canada Ltd. and Retail, Wholesale & Department Store Union, Local 414* (1991), 23 L.A.C. (4<sup>th</sup>) 269 (Thorne); *Overwaitea Food Group and United Food & Commercial Workers, Local 1518*, unreported, December 11, 1991 (Ladner, Q.C.); *Canada Safeway Ltd. and United Food & Commercial Workers, Local 401* (1996), 58 L.A.C. (4<sup>th</sup>) 59 (Randall, Q.C.); *Overwaitea Food Group and United Food & Commercial Workers, Local 1518*, unreported, October 1, 1992 (MacIntyre, Q.C.); *Overwaitea Food Group and United Food & Commercial Workers, Local 2000*, unreported, June 27, 1997 (MacIntyre, Q.C.); *Overwaitea Food Group and United Food & Commercial Workers, Local 1518*, [1999] B.C.C.A.A.A. No. 553 (Sigurdson); *Extra Foods #8566 (Squamish) and United Food & Commercial Workers, Local 1518* (2000), 92 L.A.C. (4<sup>th</sup>) 321 (Sanderson, Q.C.); *Canada Safeway Ltd. and United Food & Commercial Workers, Local 1518*, [2001] B.C.C.A.A.A. No. 111 (Sanderson, Q.C.); *Canada Safeway Ltd.*

*and United Food & Commercial Workers, Local 175, [2001] O.L.A.A. No. 70 (Murray); Canada Safeway Ltd. and United Food & Commercial Workers, Local 1518, [2001] B.C.C.A.A.A. No. 417 (Devine); Canada Safeway Ltd. and United Food & Commercial Workers, Local 158, [1997] B.C.C.A.A.A. No. 754 (Devine); University of British Columbia and Canadian Union of Public Employees, Local 116, unreported, August 8, 1983 (Chertkow); Re British Columbia Maritime Employers Association and International Longshoremen's and Warehousemen's Union (1995), 48 L.A.C. (4<sup>th</sup>) 445 (Munroe, Q.C.); Re Heckett, Division of Harsco Corporation and United Steelworkers of America, Local 8782 (1997), 64 L.A.C. (4<sup>th</sup>) 293, (Cocker); University of British Columbia and Canadian Union of Public Employees, Local 116. unreported, September 17, 1998 (Munroe, Q.C.); Re British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258 (2001), 94 L.A.C. (4<sup>th</sup>) 305 (Kinzie); Re Canadian Airlines International Ltd. and Canadian Airline Pilots' Association (1988), 35 L.A.C. (3d) 66 (Munroe, QC); McRae Waste Management and International Union of Operating Engineers, Local 115, [1998] B.C.C.A.A.A. No. 230 (Sanderson, Q.C. ); J.S. Jones Timber Ltd. and Industrial Wood and Allied Workers Union of Canada, Local 1-3567, [1999] B.C.C.A.A.A. No. 564 (Hope, Q.C.); Simon Fraser Lodge and Hospital Employees' Union, [2001] B.C.C.A.A.A. No. 317 (Hope, Q.C.); Coquitlam Library Board and Canadian Union of Public Employees, Local 561, [1997] B.C.C.A.A.A. No. 337 (Hickling); British Columbia and British Columbia Government and Service Employees' Union, [1994] B.C.C.A.A.A. No. 430 (Bluman); Re City of Saint John and Canadian Union of Public Employees, Local 18 (1989), 4 L.A.C. (4<sup>th</sup>) 314 (Collier); Re Wascana Hospital and Saskatchewan Government Employees Union (1983), 13 L.A.C. (3d) 74 (Ish); The Government of the Province of British Columbia (Public Service Employee Relations Commission) (the "Government") and B.C. Government & Services Employees' Union (the "BCGEU") and Business Council of British Columbia, Coalition of B.C. Business and Confederation of Canadian Unions (Intervenors) (1995), B.C.L.R.B. No. B230/95; and Public Service Employee Relations Commission and British Columbia Government and Service Employees Union, [1995] B.C.C.A.A.A. No. 292 (Glass).*

## UNION'S ARGUMENT

The position of the union is that the employer has not proved, by clear, strong and cogent evidence, that a theft occurred. The union submits that mere suspicion and conjecture are not sufficient grounds to find the grievor guilty of theft. It argues that the most that can be said is that Mr. Anderson committed an employment offence by breaching a policy, in that, without authorization, he had product in his possession for which he had not yet paid.

The union contends that the grievor's explanation, that he stopped himself from eating the product, is believable and sufficient to raise a doubt as to any guilt. The union argues that the grievor was in possession of distressed product without authorization and while that may be in violation of a company policy, it is not theft.

The union's view is that the evidence does not support the employer's contention that Mr. Anderson confessed to theft, but merely indicates that there was an inept investigation and an over reaction by the employer to what occurred. The union contends that the manner in which the employer conducted its investigation and terminated the grievor should be taken into account, in favour of the grievor. It argues that there is no evidence that Mr. Anderson consumed, threw out, or removed product from the store without paying for it, nor that he admitted that he intended to do so. It argues that the evidence does not support the employer's contention that the grievor attempted to conceal the product and, but for the intervention of the employer, the grievor would have paid for the product as he claims. Having product that he has not paid for but intends to pay for before he leaves is not theft in the view of the union.

The union submits that the manner in which the employer investigated and terminated Mr. Anderson must be factored into any consideration of this dispute. The union contends that termination was based on an admission of theft when in fact there was no such admission. The union argues that the employer should not be allowed to expand its grounds for termination as it would be unfair to allow the employer to raise new grounds at the hearing that were not previously raised. The employer made its

decision not to investigate further and must be held to the reasons it gave at the time of discharge.

The union challenges the employer's zero tolerance policy with respect to theft. It submits that the employer's decision to discharge the grievor was arbitrary and should not be sustained. The union argues that the employer has given employees at the Langley store a mixed message as to its policy on theft and therefore a zero tolerance policy cannot be supported. The union submits that the employer's policy cannot override an arbitrator's discretion.

The union argues that even if I conclude that the facts prove more than a breach of policy, termination is excessive in all the circumstances. The union contends that Mr. Anderson stopped himself and did not carry out a theft. At most, he may have admitted to attempted theft.

The union argues that this is a situation where the employment relationship can be put back together. The union submits that the grievor has long service with the employer and no prior discipline of any significance. It notes that witnesses have attested to Mr. Anderson's character as a decent family man with deep roots in the community. He has worked for the employer for seventeen years, he supports a wife and three children, the financial consequences of termination are disproportionate to the allegations against him, and he is a decent honest man who made a momentary slip. The union submits that the embarrassment of a termination and the imposition of a subsequent suspension would be more than sufficient penalty for taking a chocolate bar. The position of the union is that the grievor can be rehabilitated and should be reinstated.

The union referred to the following authorities: *Fletcher's Fine Foods Ltd. and United Food & Commercial Workers, Local 472*, unreported, November 24, 1988 (Hope, Q.C.); *Smith v. Smith*, [1952] 2 S.C.R. 312; *Re Macdonalds Consolidated Ltd. and Retail, Wholesale & Department Store Union, Local 580* (1990), 14 L.A.C. (4<sup>th</sup>) 172 (McKee); Brown & Beatty, *Canadian Labour Arbitration*, 3<sup>rd</sup> ed. pages 7-235 to 7-247; *Cominco Ltd. and United*

*Steelworkers of America, Local 480*, [1995] B.C.C.A.A.A. No. 275 (Germaine); *Brown & Beatty, Canadian Labour Arbitration*, 3<sup>rd</sup> ed. pages 7-99 to 7-104; *Brown & Beatty, Canadian Labour Arbitration*, 3<sup>rd</sup> ed. pages 7-251 to 7-254; *Re Labatt Brewing Co. and Brewery, Winery and Distillery Workers, Local 300*, [1996] B.C.C.A.A.A. No. 21 (Blasina); *Re New Dominion Stores and Retail, Wholesale and Department Store Union, Local 414* (1997), 60 L.A.C. (4<sup>th</sup>) 308 (Beck); *The Great Atlantic & Pacific Company of Canada (Dominion Store) and Retail, Wholesale Canada, Service Sector*, unreported, November 16, 1994 (Davie); *Re New Dominion Stores and Retail, Wholesale and Department Store Union, Local 414* (1993), 31 L.A.C. (4<sup>th</sup>) 412 (Stewart); *Re Great Atlantic & Pacific Co. of Canada and United Food & Commercial Workers, Locals 175 and 633* (1983), 10 L.A.C. (3d) 199 (Kruger); *Re National Grocers Co. Ltd. and Teamsters, Local 419* (1983), 11 L.A.C. (3d) 193 (Langille); *Pacific Coach Lines Ltd. and Canadian Brotherhood of Railway, Transport and General Workers, Local 234*, unreported, June 28, 1993 (Greyell); *Re International Minerals and Chemical Corp. Canada Ltd. and Energy & Chemical Workers Union, Local 892* (1990), 12 L.A.C. (4<sup>th</sup>) 244 (Norman); *Re Sasso Disposal Ltd. and Teamsters' Union, Local 880* (1975), 9 L.A.C. 152 (Gorsky); *Government of the Province of British Columbia and B.C.G.E.U.*, (1995), B.C.L.R.B. No. B230/95; *Canada Safeway Ltd. and United Food & Commercial Workers, Local 1518*, unreported, February 13, 2001 (Hall); and *Overwaitea Food Group and United Food & Commercial Workers, Local 1518*, unreported, January 26, 1995 (Albertini); *Re Sasso Disposal Ltd. and Teamsters' Union, Local 880* (1975), 9 L.A.C. (2d) 152 (Gorsky); *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Ltd.* (1965), 16 L.A.C. 73 (Robinson); *Re A.B.F. Freight Systems (B.C.) Ltd. and Teamsters, Local 31* (1987), 28 L.A.C. (3d) 246 (McPhillips); *Re Conestoga College and Ontario Public Service Employees' Union* (1988), 3 L.A.C. (4<sup>th</sup>) 26 (Swan); *Re Dominion Stores Ltd. and Toronto Warehousemen and Retail, Wholesale and Department Store Union, Local 414* (1981), 3 L.A.C. (3d) 91 (McLaren); *Canada Safeway Limited and United Food & Commercial Workers, Local 1518*, unreported, February 20, 1998 (Albertini); *Re Vancouver General Hospital and B.C. Nurses' Union* (1989), 7 L.A.C. (4<sup>th</sup>) 106 (Munroe); *Extra Foods #8566 (Squamish) and United Food & Commercial Workers, Local 1518*, unreported, October 30, 2000 (Sanderson, (Q.C.)); *Mid-Island Consumers' Services Co-op and United Food & Commercial Workers, Local 2000*, unreported, July 27, 1995 (Sanderson, Q.C.); *Re MacMillan Bloedel Ltd. and Communication Energy & Paperworkers Union, Local 1* (1996), 59 L.A.C. (4<sup>th</sup>) 84 (Glass); *Retail Clerk's Union,*

*Local 1518 and Delta Pacific Foods Ltd.*, unreported, October 21, 1985 (Bird, Q.C.); *Canada Safeway Limited and United Food & Commercial Workers, Local 1518*, unreported, July 11, 2000 (Keras); *Bramalea Pritzker Associates and Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40*, unreported, April 26, 1985 (Kelleher); *Re Sour Dough Markets Ltd. and Teamsters, Local 31 (1997)*, 67 L.A.C. (4<sup>th</sup>) 392 (Blasina); *Canada Safeway Limited and United Food & Commercial Worker., Local 1518*, unreported, July 17, 1995 (Glasner, Q.C.); *Canada Safeway Limited and United Food & Commercial Workers, Local 1519*, unreported, November 25, 1986 (Longpre); *Retail Clerks Union, Local 1518 and Canada Safeway Ltd.*, unreported, September 21, 1983 (Dorsey); *Re BC Rail and Canadian Union of Transportation Employees, Local 6 (1966)*, 56 L.A.C. (4<sup>th</sup>) 101 (Hope, Q.C.); and *Re MacMillan Bloedel Ltd. and I.W.A. Canada, Local 1-85 (1993)*, 33 L.A.C. (4<sup>th</sup>) 288 (Hope, Q.C.).

## DECISION

As I have noted, the allegation that brought about the discharge of the grievor, and in due course this arbitration, is that the grievor committed an act of theft.

In argument, the employer placed considerable emphasis on the proposition that the grievor had taken more than one peanut butter cup from the box, all of which was caught on video. Having studied the video a number of times, I find that the grievor's movements are very suspicious, but the video images, partly because of the interval time of two seconds between each frame, are not conclusive. Also extremely suspicious are the grievor's answers when he was asked in the security interview as to how many cups he had taken out of the box. I find Mr. Anderson's response, "just one I believe" and his answer, "I think so" when asked the follow up question, "that's all?", to be very curious. One would expect a person who took one item only to be very certain as to the number taken. However, while the circumstances remain suspicious, I am not prepared to find that a second (or more) cups were taken from the box by the grievor on the basis of this evidence. The test of clear and cogent evidence, converting suspicion to probability, has not been met.

In its turn, the union called evidence to show that some employees believed, based on what they heard at Mr. Hartl's presentation, that someone who made a single mistake, such as pilfering, would be given a second chance and not terminated. While I can understand how some of the phrases used in the presentation might cause someone to reach such a misunderstanding, I find that it was nothing more than that, a misunderstanding. On the evidence, it is apparent that Mr. Hartl made it clear during his presentation that the employer would continue with its policy of terminating employees for theft. When a few employees told the employer of their view, they were corrected. Mr. Anderson testified that he understood he could be fired for stealing from his employer. Thus, I find that the employer's policy of automatic discharge for theft is well known and consistently applied and was not altered by anything said in Mr. Hartl's presentation.

However, an employer's zero tolerance policy for theft is not binding on an arbitrator. Nor did counsel for the employer claim it was. An arbitrator has the authority to "determine that a dismissal . . . is excessive in all circumstances of the case and substitute other measures that appear just and equitable." [See *Labour Relations Code*, R.S.B.C. 1992, c. 82, s. 89 (d)] As set out above, the questions for my determination remain whether there was just and reasonable cause for some form of discipline, whether discharge was an excessive response in all the circumstances, and, if so, what alternative measure should be substituted as just and equitable? [See *Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. 1, [1976] W.L.A.C. 585 (Weiler) at p.5]

The appropriate standard of proof in cases of this sort is on a balance of probabilities. Because of the seriousness of the allegation and the consequences of adverse findings of fact against the grievor, the evidentiary burden has been variously described as "clear and convincing" and "clear and cogent".

I agree with the reasons expressed in the following passage from the decision by arbitrator Sanderson in *Extra Foods #8566 (Squamish) and United Food & Commercial Workers, Local 1518* (2000), (supra) at p.333:

Having carefully reviewed all of these cases, it is evident that the general principles of law to be applied in the circumstances of a case such as this are relatively well settled. However, where allegations of criminal misconduct have been made against a grievor, the problem is not so much to comprehend and appreciate the law but to apply it to the factual circumstances of the particular case. In conducting that analysis, I propose to apply the reasoning developed in the arbitral authorities noted above and particularly the views expressed in the passage from the *Fletchers Fine Foods* award reproduced below. Perhaps the most important of these principles are as follows:

1. The employer, having alleged theft, must prove that a form of criminal misconduct occurred here, at least to a standard of the balance of probabilities.
2. Since the misconduct alleged is, by any definition, a serious crime, the employer must meet a strict proof test. In so doing, the employer must provide evidence that is clear, strong and cogent.
3. If a prima facie case is made out by the employer, the grievor must provide an explanation of the incriminating facts that is believable in all the circumstances.
4. The issue of credibility of witnesses is different from the issue of the burden of proof. Questions of credibility apply at the stage when the arbitrator is making necessary findings of fact. The believability of an explanation put forward by a party against whom an allegation is made is to be weighed against the standard of proof that applies to the employer in making out its case.

As I have said, these principles are discussed by arbitrator Hope in the following passage from *Fletcher's Fine Foods Ltd*, supra, at page 25 as follows:

The onus on an employer according to that decision [Wm. Scott] is to prove conduct deserving of dismissal. That onus remains on the employer throughout the proceedings. We agree that where an employer establishes a prima facie case of misconduct that could justify dismissal, the onus shifts to the union to adduce evidence that meets that case. But the onus goes no further than to require the grievor to provide an explanation that might reasonably be true on the proven facts.

On the evidence before me, there can be no dispute the grievor deliberately removed from an open bag inside an open box, product belonging to the company, at least one packaged peanut butter cup, which he opened, with the admitted intention of eating it and in the knowledge that what he was doing was wrong. In accordance with the authorities referred to above, it is evident that the employer has established a prima

facie case of theft, that is the taking of another's property, without a colour of right, and with the intent of putting it to ones own use. Having opened the individually wrapped package, Mr. Anderson converted the product to his own use and it was no longer possible for the product to be returned to its rightful owner intact. What remains is to consider whether the grievor has provided an explanation for these actions that is believable in all the circumstances.

I begin by noting that the grievor's first attempt at an explanation was to say he had no idea why he had done what he did but that he acted under impulse. That is neither an explanation nor a justification for his actions. At best, it amounts to saying that he can not explain himself.

While he admits he knew he had acted wrongfully, he says he stopped himself from eating the product and he set the cup aside intending to pay for it at his next break period. I have no hesitation in rejecting the grievor's explanation as being unbelievable and unconvincing. It is not possible for an arbitrator to see into the mind of a grievor and the question of what he intended necessarily becomes a question of fact. The explanation of intending to pay for the product was not raised until after he had been discharged, and even then it changed from intending to pay for the single item, as set out in his first statement, to paying for the entire package.

There are no objective facts that support or corroborate the grievor's words. If he really intended to pay for the cup, he had no reason to wait until his break. Having already realized that he had acted wrongfully, he obviously had every incentive to correct his situation. If that was his intention, one would reasonably expect him to have offered that explanation when he realized he had been found out, and certainly, when he was interviewed. Apart from this, his explanation of intending to pay for the cup makes no sense. As someone who had worked in this store for so many years, he must have known it was impossible to pay for a single cup, especially given that its wrapping had been opened, as it had no bar code and hence could not be processed as a sale. As to his later explanation of paying for the entire package, that is equally unsatisfactory, not only because it was raised for the first time at the hearing when the evidence was

clear that one could not pay for a single cup, but had the bag been presented to a cashier in its present form - slit open and with individual packages missing from it - it would have triggered the same concerns from a cashier as the opened single cup, particularly in light of the employee seminar on dealing with the subject of theft in this store.

Based on the evidence before me, I find that Mr. Anderson has not provided an explanation that is believable in the circumstances. Simply put, I am obliged to find that the grievor committed an act of theft from the company with respect to the cup that was found in his possession.

The fact that the cup was not eaten is of no legal significance with respect to the act of theft. It had already been converted by the grievor to his own use by opening the wrapping, and, accepting the evidence of Mr. Epp as I do, by removing the chocolate from its package. The grievor acted consciously, albeit impulsively, and I have no hesitation in finding that his explanation was made up by him in a desperate attempt to extricate himself from an employment disaster he had created for himself.

In this province, the proper arbitral analysis of a discharge grievance is governed by the application of the Wm. Scott tests. The first question, whether there was cause for discipline against the grievor in the circumstances, must be answered in the affirmative. The second question, whether discharge, in all the circumstances, was an excessive disciplinary response, must now be considered.

Again, the notion that theft, even with respect to an item of minor value, is to be treated as an extremely serious employment violation has been widely recognized by arbitrators. Perhaps the clearest expression of this principle is found in the following passage from arbitrator MacIntyre's decision in *Overwaita Food Group and United Food & Commercial Workers*, Local 1518, (supra) at p.2:

There is a very clear policy in the food market industry in this province, to the effect that since food employees work under very little management supervision, and since they have access at all times to merchandise with little

control, an extremely high duty of honesty and integrity is demanded. A very strict policy has become established, under which even a very small theft by an employee results in dismissal, and this policy is well known. To a large extent, this policy has been accepted by arbitrators dealing with cases of theft, but by statute and by custom, arbitrators still retain jurisdiction to require just cause for discipline and dismissal.

This does not mean that the only possible penalty for theft in the retail food industry is discharge. I refer also to the reasoning of arbitrator Hope in *Re MacMillan Bloedel Ltd. and I.W.A. Canada, Local 1-85* (supra) at page 302:

In *MacMillan Bloedel, Harmac Division*, [November 2, 1989, unreported] Mr. Kelleher . . . repeated observations he had made in *Western Pulp* [August 16, 1988] on p.11 as follows:

In the first place, theft is among the most serious of industrial offences. Second, the actual value of the goods stolen is not especially relevant. Third, dismissal is no longer to be considered as the automatic response to a detection of theft. The question is in each case whether the employment relationship can be restored. Fourth, where the grievor is confronted and is untruthful in denying the offence that is an exacerbating factor to be considered. Beyond that, each case must be decided on its own facts: the circumstances of the theft itself, the grievor's demeanor in giving evidence, and so on.

I am of the view that the reasoning of Mr. Kelleher reflects the contemporary standard required in an application of the industrial relations principles articulated and reviewed by the former Labour Relations Board of British Columbia in *Wm. Scott & Co.* In particular, I am of the view that there must be a balancing between the interest of an employer in deterring acts of theft and the entitlement of individual employees to have their conduct assessed on the basis of whether the employment relationship is capable of being restored.

I agree with the conclusions of arbitrator Hope in *Re Canada Safeway Ltd. and United Food & Commercial Workers, Local 2000* (supra) at p.186-87:

However, accepting that each dismissal must be examined on its unique facts, and accepting that reinstatement is available for all acts of misconduct, however grave, it must be acknowledged that an act of theft or other dishonesty in the retail food environment places extreme strain on the relationship. An employee who admits dishonesty or is found to have acted dishonestly in that environment must, as stated, establish mitigating facts consistent with a maintenance or restoration of the essential element of trust.

That approach was adopted in a number of recent decisions between these parties: see . . . . .

Those authorities acknowledge that dishonesty, by its very nature, usually results in an irreparable compromise of the employment relationship. In the retail food industry the opportunity and the temptation for employees to commit dishonest acts is great. Thus the relationship is generally acknowledged as having a fiduciary cast wherein all employees can be taken to understand that theft or other acts of dishonesty will invite dismissal.

The imposition of dismissal for acts of dishonesty in that employment setting responds to two assumptions. The first is that employees can be taken to know that their employment is seriously at risk if they engage in such conduct. Hence, the willingness of an employee to engage in that conduct places the suitability of that employee in extreme doubt. The second factor is the high degree of deterrence that employers in the industry are entitled to extract when offences in breach of the underlying trust relationship are committed. That is, the vulnerability of the employer makes it reasonable to impose relatively exacting standards and to put a heavy price tag on departures from the standards so as to blunt the temptation of other employees who are in a position to commit similar acts of misconduct.

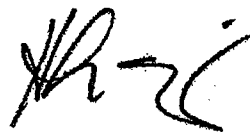
For me to find that discharge is an excessive response in these circumstances, the grievor must demonstrate that there exist mitigating facts "consistent with the maintenance or restoration of the essential element of trust". For example, arbitrators will consider the presence of such mitigating factors as whether the grievor has apologized, shown remorse, or admitted wrongdoing, and whether the grievor has a clean disciplinary record.

What then are the mitigating circumstances that might assist the grievor in this case? I am unable to find any such factors that are of assistance to him. While he is an employee with long service, he does not have a clean disciplinary record. He has not apologized and he has exhibited no remorse except to say he feels sorry for himself and his family. While he may genuinely regret his actions, that is because of the impact it has had on him and his family, rather than having concern for what he done to his relationship with his employer and indirectly, his relationship with his fellow employees. His explanations for his conduct have not been truthful.

I agree with arbitrator Hope that while I have the power to order that a lesser penalty be substituted for the discharge in the exercise of my discretion as an arbitrator, given to me by statute and by law, I should do so only if I have some confidence that the trust relationship with his employer can be maintained and restored. I have considerable sympathy for the personal difficulties the grievor has caused himself and his family. At the same time, the grievor had attended the employer's seminar to deal with the problem of theft in the store just a few months previously. He knew of the installation of the camera in the area. He admits he knew what he was doing was wrong, and yet he went ahead and did it anyway. He then compounded his misconduct by concocting an explanation that is not believable. As I have said, while I have compassion for him as a person and sympathy for the plight of his family, there is nothing in the objective facts of this case that persuades me that he can be trusted in the future. Accordingly and with much regret, I must conclude that the penalty of discharge was not excessive in all the circumstances of this case.

In the result and for the reasons expressed above, I find that the grievance must be denied.

Dated at Vancouver, British Columbia, June 5, 2002.



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Heather J. Laing  
Arbitrator