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Résumé de l'article

A discharge case involves two areas of proof; a) proof of wrong doing on the part of the grievor, and b) an evaluation of the punishment in relations to the infraction. In this case, there was cause for discipline but not for the extreme penalty of dismissal.

Exerpt from an award in a dispute between Dominion Engineering Works Ltd and Lodge 1660, The International Association of Machinists. H. D. Woods, President; J. R. Cardin, Union nominee; H. McD. Sparks, Company nominee. Revue Légale, octobre 1960, pp. 474-485.

la demanderesse exprime clairement son intention de renoncer à un tel recours. S'il y avait doute, il y aurait lieu d'interpréter en faveur de la demanderesse qui est celle qui a contracté l'obligation.

Dans ces circonstances, la Cour doit admettre qu'en usant de son recours en dommages, la demanderesse n'use pas de représailles dans le sens que les parties ont voulu donner à ce mot et sa présente réclamation doit être maintenue contre le syndicat demandeur.

Quant aux officiers défendeurs, il n'a été prouvé contre eux aucune intervention personnelle autre que les décisions qu'ils ont prises au nom du syndicat dont ils ont engagé la responsabilité.

CONSIDERANT que Raymond Parent était, lors de la grève, le préposé de la défenderesse;

CONSIDERANT que le syndicat défendeur, de concert avec Raymond Parent, a soutenu et dirigé un piquetage illégal qui a violé les droits de propriété du demandeur et par là, lui a causé un dommage considérable;

CONSIDERANT que la preuve n'a pas démontré que les défendeurs, membres de l'exécutif du syndicat, aient personnellement violé les droits de propriété de la demanderesse, et que Raymond Parent n'était pas non plus leur préposé;

CONSIDERANT que les dommages ont été prouvés à la somme de $12,699.39.

LA COUR:

CONDAMNE le défenseur, le Syndicat National des Débardeurs de la Baie des Ha Ha à payer à la demanderesse la somme de $12,699.39 de dommages avec intérêt depuis l'assignation et les dépens; et renvoie l'action avec dépens quant aux autres défendeurs.

AREAS OF PROOF IN A DISCHARGE CASE

> *A discharge case involves two areas of proof; a) proof of wrong doing on the part of the grievor, and b) an evaluation of the punishment in relations to the infraction. In this case, there was cause for discipline but not for the extreme penalty of dismissal.* [1]

The Union claims the dismissal was improper and should be revoked by this Board with full pay compensation. The Company claims it did not violate the agreement, and was fully within its rights, and asks that the grievance be dismissed.

(1) Exerpt from an award in a dispute between Dominion Engineering Works Ltd and Lodge 1660, The International Association of Machinists. H. D. Woods, President; J. R. Cardin, Union nominee; H. McD. Sparks, Company nominee. Revue Légale, octobre 1960, pp. 474-485.

Clause 17. *Discharges.*

The Management of the Company, in case of individual discharge, will notify the Union Committee of the reason for such discharge the same day as the employee receives his notice.

Clause 19. *Arbitration.*

Should the Company and the Committee fail to reach an agreement in regard to any differences concerning the interpretation or violation of the Agreement, the matter may, on the application of either party, be referred to an Arbitration Committee...

JURISDICTION OF THE BOARD

The Company interprets Clause 19 to mean that the Board's jurisdiction is « limited to differences concerning in the interpretation or violation *of the Agreement* » (emphasis added by Company); and since the Union has « failed to establish a violation of any clause in the Agreement, and as the sole jurisdiction of the Board in this case is the violation of the Agreement, we respectfully request that the grievance be dismissed » (submission 11th June, 1959, page 8, para. 9). The employer nominee went further that this in the Board's deliberation meeting and argued as follows:

i) The Board is limited to questions of interpretation or violation of the Agreement.

ii) This means that a specific clause of the Agrement must be named as having been violated;

iii) The only reference to discharge is Clause 17 reproduced above.

This Clause imposes on the Company only the requirement to notify the Union Committee of the reason for such discharge. The Company is therefore under no other contracted restraint on the question of discharge. As long as the Union Committee is given the reasons for discharge, the Company has met all obligations to the Union regardless of the nature of the reasons.

It will be noted that this limited interpretation of the Agreement and the parties would eliminate all consideration of « just cause » in the application of this agreement. The nominee of the Union and the Chairman, representing a majority of the Board, do not agree that the jurisdiction of the Board in this case is limited to determining whether or not the Company informed the Union of its reasons in accordance with the literal wording of Clause 17. Since our position is challenged by the nominee of the Company, we wish to make our position quite clear.

1. Clause 19, which deals with Arbitration, makes no reference to specific clauses but empowers the Arbitration Committee to consider differences of interpretation or violation of the *Agreement* (emphasis added). We are

therefore specifically instructed to consider the action in the context of the entire Agreement. We note that Clause 2 establishes the general purpose of the Agreement « to provide for orderly collective bargaining in connection with the matters contained herein and to further general good employer-employee relations ». We think it not unreasonable to hold that, for example, a flagrantly unfair dismissal would seriously endanger such good relations.

2. In the presentation of its case, the Company representatives (in our opinion, quite properly) placed great emphasis on their belief that the dismissal was quite proper and just, completely aside from any contractual obligation. Almost the entire case of the Company was designed to show that the order given to the employer was reasonable, that it was understood, that he refused to carry it out, that he was warned that dismissal would follow continued refusal, and that he again refused. We believe that the Company was accepting the general principle of just cause.

3. The Agreement itself is simple and uncomplicated. It contains the essential features of union agreements in remarkably concise form. There is little « spellingout ». This provides the virtue of flexibility, and when administered by parties accustomed to give and take, must almost certainly have produced results satisfactory to both parties, and consistent with Clause 2. In view of the fact that there have been practically no previous arbitrations under the Agreement, it would appear that good employer-employee relations have been achieved under this Agreement. It seems unlikely that, under these circumstances, the Company would be attempting, through a narrow interpretation of the Arbitration clause, to remove any accountability for disciplinary action. As pointed out earlier, such an attitude was not displayed in the hearings.

4. Discharge is the extreme industrial penalty since the employee's job and income, and all his rights spelled out in the Agreement, as well as his future prospects, and, perhaps, even his reputation, are at stake. If the employer is relieved of the necessity of showing just cause, as suggested by the Company's nominee, the Agreement would provide no ultimate protection against arbitrary, capricious, unfair or unreasonable discharge.

5. Finally, what seems to us to be a reasonable position is clearly expressed by the well-known American student of Labour Relations, Dr. Neil Chamberlain, in Management Rights and The Arbitration Process, page 143: « It would appear to me that it is closer to the situations we face and know and have lived through to say... that, even when the agreement has been signed and sealed, it does not encompass the whole relationship, and that an arbitrator would be in error so to assume. It sets out the explicit understandings of the parties, but there is usually more existing between them than is made explicit. The relationship as well as the agreement create obligations ».

There are two areas of proof involved in a discharge case like that before us. There are: (i) Proof of wrong doing on the part of the grievor, and (ii) assuming

that wrong doing has been established, an evaluation of the punishment in relation to the infraction.

The Board must answer the following two questions:

1. Did the employer violate plant rules or instructions?

2. Assuming the answer is in the affirmative, was the nature of the infraction considered in the light of the relevant circumstances such as to justify dismissal?

THE QUESTION OF GUILT

We believe that the employer was guilty of violating plant rules, and that some degree of discipline was justified. Let us look at the facts. The employer was requested to give certain information which he refused to supply. Following this, he was ordered to give the information, first by the foreman and, later, by the superintendent, and the latter, at least, and possibly both, warned him that non-compliance would lead to dismissal. There is no doubt about these pertinent facts. There was, therefore, insubordination. Even without any contractual provisor or any published plant rule, this would be recognized as a just cause for discipline. In the present instance, it is clearly spelled out in U-2: « Plant Rules and Regulations », p. 6. It is listed as a major infraction which « will render an employee liable to immediate dismissal ». We must presume that this rule was known to the employer. There can be no doubt of the proof of wrong doing.

Determination of the appropriateness of the penalty imposed requires an examination of the circumstances. This is the only way by which the simple fact of insubordination can be evaluated. There are mitigating circumstances.

The Company is correct in its contention that the case of dismissal under Major Infraction Number 8 is not a parallel case. Error is not falsification. Yet even here the context is important. The employer had every reason to believe that a change-over to incentive was contemplated. He also understood that time study personnel were to come in on December 2nd. We have little evidence on his attitude toward incentive, but he seems to believe that he was asked for exact times. He is correct in the assertion that the employee's income depends partly on the times accepted and that it is in his financial interest to introduce a bias. When the time study men did not appear, and when later he was asked to supply times which were more detailed than those normally requested, it is understandable that he should believe the request was related to time study and incentive.

We therefore come to the conclusion that the employer was guilty of an infraction of rules regarding insubordination. But the circumstances prevailing at the time render it a much less serious violation than what could reasonably call for the most severe penalty available to management. We recognize that an employee, confronted with what he believes to be an improper order should, if pressed to comply, carry out the order under protest, and submit a grievance afterwards. To be strictly correct, this is what the employer should have done.

But we also believe that this failure is the extent of his guilt. It is important to keep in mind that what ultimately became a case of insubordination started out as a complaint that the order was impossible as well as unreasonable. When assessing the seriousness of an offence and the appropriateness of an act of discipline, it is quite proper to take the personal record into account.

This is not a rule invented by arbitrators. It is a principle evolved in practice by management alone and by management and unions mutually.

In the present instance, the employer had been in the employ of the Company for nineteen years without any record of indiscipline. More positively he appears to have been highly rated by supervision, and to have received top merit rates of pay for the past seven years. The Company is correct in stating that the personal record has nothing to do with whether or not there was insubordination on December 3rd., but such an excellent record can hardly be ignored when punishment is considered.

AWARD

The Company has established that there was insubordination, and the right to discipline is upheld. But the penalty of dismissal is seriously out of line with the infraction, especially when the prevailing circumstances, and the record of long, satisfactory service are taken into account. There was cause for discipline, but not for the extreme penalty of dismissal.

The Board considers that a suspension of one month would have been ample punishment in the circumstances. The Company is required to reinstate the employer without loss of any accumulated rights and privileges. The Company is also required to make up the pay the employer would have received had he not been dismissed, less the following:

a) any amounts of income earned, or received in lieu of work since the dismissal, and

b) one month's pay at the rates prevailing at the time of dismissal.

MINORITY REPORT (Mr. H. McD. Spark)

I find that I must disagree completely with the reasoning and the findings of the majority as contained in their report. The report states that the provision of the Arbitration clause makes no reference to specific *clauses*, and indicates that the Arbitration Committee is then empowered to consider the violation of the Agreement. « We are, therefore, instructed to consider the action in the context of the Agreement as a whole ».

The Chairman and the Union nominee then proceed to deal with certain *clauses* only, which in their opinion may have some relation to the present case and have most improperly assumed that the onus is on the Board to endeavour to select which *clause*, if any, has been violated or misinterpreted.

The majority members then went very far afield in an endeavour to find some *clause* (although having previously stated that « we are instructed to consider the Agreement as a whole »), which may remotely be considered applicable — one which was not at any time referred to in the evidence. In an endeavour to justify their position the majority members have selected clause 2 which establishes the general purpose of the Agreement. « To provide for orderly collective bargaining in connection with matters contained herein and to further good employer-employee relations ». This is not a substantive clause, and if Boards are to base their decisions on this type of clause (which is contained in practically all agreements), then the opinion of a Board as to what constitutes or may affect good employer-employee relations may nullify ther clauses in the Agreement.

In disregarding the rights and responsibilities of Management and making the assumption that rights not specifically taken away from an arbitrator may be assumed by him, we are faced with a situation of Management by Arbitration.

The Board states that « we believe that the Company was accepting a general principle of just cause ». There is then no suggestion that the Company acted capriciously or without consideration in a flagrant case of insubordination. The Board recognized that the Agreement is remarkably concise with little « spelling out ». Obviously this form in deliberate and is the result of consideration with respect to those items only which have been negotiated, and an indication that Management has not abrogated its rights except as specified. For example, under clause 16 (b) the Company « will discuss with the Committee any case or instance of alleged hardship or injustice to an employee arising out of lay-off ». While this evidentally is specific to lay-off, no such indication is given under clause 17 « discharge ».

The decision of this Board indicates then that consideration is given to granting rights through the arbitration process which the Union is unsuccessful in obtaining through collective bargaining.

Employers are well aware of the seriousness of the loss of employment; even in case of discharge for theft and other serious causes decisions are not taken lightly and there is a natural sympathy for the culprit. This Board would appear to be of the opinion that retention of an employee, although admitting flagrant insubordination, would foster good relations. The substitution of the Board's opinion or modification of a penalty, the removal of the right to discipline or the lack of application of discipline would create the worst possible situation in the matter of respect and employee relations.

The Board does not question the evidence of the Company but surprisingly little importance is attached to it. On the other hand, great stress is given to the statements of the grievor — made in May regarding that he now says he « believed » in December. For example, « the belief » that Incentive was to be introduced and that he was asked for « exact times » was completely dispelled when he was advised by his supervisor that a time study would not be made and not to split the tables (which the grievor said he believed he was supposed to do if incentive was to be introduced) but to proceed with the work on the basis on which it was

previously done. It also seems very odd that these « beliefs » and the impossibility of giving the times requested disappear after discharges and he undertook to furnish the required data. It was admitted in evidence that all times which he had previously reported were approximate and it was made abundantly clear that this was the request in this instance. The Board does find that there was insubordination and then proceeds to substitute their judgment for that of Management disregarding the fact that they have no such mandate.

There has been no violation or misinterpretation of any clause and there is no authority for this Board to determine or alter any penalty, therefore, the Board has exceeded its jurisdiction.

RECENSIONS - BOOK REVIEWS

Organisations ouvrières au Canada, 48e édition, 1959, publié par la Direction de l'économique et de la recherche, Ministère du Travail, Canada, Ottawa, 96 pp.

C'est le nom sous lequel désormais se présente la publication annuelle que nous connaissions sous le titre « Syndicalisme ouvrier au Canada ».

La raison de ce changement est que le répertoire des groupements ouvriers ne se borne plus aux syndicats rattachés à des centrales, mais comprend pour la première fois les organisations locales indépendantes de plus de cinquante membres, qui ont été certifiées comme agent négociateur en vertu de la loi des relations ouvrières appropriée. Pour éviter des susceptibilités, on prend la peine de noter: « Le fait qu'une organisation paraît dans cette brochure n'implique aucune reconnaissance officielle. Les critères déterminant l'inclusion des organisations dans cette publication n'ont été fixés que dans le but de faciliter l'application de méthodes statistiques cohérentes ».

Comme nos lecteurs connaissent déjà par les éditions antérieures l'utilité de tous les renseignements fournis et l'excellence de cette publication, il nous suffira de remarquer certains changements que nous regrettons. Ainsi, les données statistiques sont moins complètes que par le passé. On ne trouve plus la répartition des unions locales et effectifs par industrie, ni par zône du marché du travail ni par province. De même, dans le répertoire des organisations, ne sont pas indiquées, comme autrefois, les localités où elles possèdent des unités, mais seulement la répartition provinciale. Peut-être, a-t-on des raisons particulières pour n'avoir point fourni ces renseignements, mais c'est dommage. Faut-il aussi souligner que cette édition française nous parvient avec une année de retard?

GÉRARD DION

Management's Right to Manage, by George W. Torrence. A BNA Operations Manual, The Bureau of National Affairs, Inc., Washington 7, D.C., 1959, 109 pp.

Le but de cette étude est d'examiner ce qui est advenu du droit de gérance que possèdent les dirigeants des entreprises. L'auteur s'adresse aux employeurs afin de leur permettre d'évaluer leur position.

L'ouvrage est divisé en six parties: de quel droit il est question; importance du droit de gérance; ce qui est advenu du droit de gérance, en général; ce qui est advenu du droit de gérance dans des cas particuliers; comment se perd le droit de gérance; comment en arriver à préserver le droit de gérance.

Dans son travail, l'auteur laisse délibérément de côté les restrictions au droit de gérance provenant de la loi ou de la règlementation gouvernementale pour se confiner à celles qui arrivent dans la pra-