

THE GRIEVANCE

On January 8, 2008 the Grievor filed a grievance against the employer claiming that:

“ Article 17, the Collective Agreement, my Privacy Rights, including but not limited to any related legislation, my Human Rights, my Rights under the Workers Compensation Act and my Rights under Section 7 of the Canadian Charter of Rights & Freedoms were violated when the Employer unjustly carried out surveillance of me and incorrectly and unjustly terminated my employment based on that surveillance. ”

The relief the Grievor requested was:

“ I be immediately reinstated to my former position with the City and that I suffer no loss of pay, with interest, or benefits to which I would have been entitled, and that I be paid damages, including punitive damages.”

THE COLLECTIVE AGREEMENT

Article 17 of the collective agreement reads as follows:

"ARTICLE 17 -- DISCHARGE CASES

17.01 Dismissal/Suspension

An employee after the completion of the probationary period may be dismissed for just and reasonable cause upon the authority of the Chief Administrative Officer or Acting Chief Administrative Officer. Other persons in authority may suspend an employee but shall immediately report such action to the Chief Administrative Officer. Such employee and the Union shall be advised promptly in writing by the Chief Administrative Officer of the reason for such dismissal.

...

17.03 Reinstatement and Compensation

Should it be found upon investigation that an employee has been unjustly suspended or discharged, such employee shall be immediately reinstated in his/her former position without loss of seniority and shall be compensated for all time lost in an amount equal to his/her normal earnings excluding overtime during the next pay period immediately following reinstatement, or by any other arrangement which in the opinion of the conferring parties or an Arbitration Board or Arbitrator (if the matter is submitted to such Board) is reasonable.

17.04 Payment of Wages

In the event of a dismissal under this clause, payment of wages and holiday pay owing will be in accordance with this Agreement.



17.05 Offences

Appropriate disciplinary action may be taken for the following offences:

- (a) Misconduct during employment
- (b) Incompetence and inefficiency
- (c) Failure to perform assigned duties
- (d) Disobedience of a superior
- (e) Insubordination or insolence to a superior
- (f) Summary conviction
- (g) Failure to observe rules and regulations
- (h) Incompatibility with other employees
- (i) Unauthorized absence from duty

The above list is not to be construed as limiting the rights of management to take disciplinary action for other offences."

THE EMPLOYER'S POSITION

The employer points out that the grievance filed in this matter alleges various rights of the Grievor were violated and that he was terminated based upon those violations. The employer argues that the Charter and admissibility of surveillance evidence are not at issue. It is not a violation of those rights if it is nonintrusive and with no expectation of privacy. All events which occurred here are in the public situation. The rationale for the surveillance was that there was conflicting medical information with respect to the Grievor returning to work. It was conducted in order to ascertain how this could be. The functional assessments say there was a certain level of activity which was possible but this turned out to be not the case practically. Even the most simplistic work could not be performed by the Grievor and it was not improving. The employer could not understand how this was possible. The employer reasoned that either what the Grievor was telling or demonstrating to his doctors was different than he was telling or demonstrating to his therapists or there was something wrong at the job. There seemed to be a glaring incongruence. After the employer viewed the video what was demonstrated on the video was incongruent with what was taking place at work.

The employer acknowledged that the Grievor was attacking the video on the grounds that the Grievor allegedly could not be identified. Friends of the Grievor have come forward with evidence that the private investigator was mistaken in his identification of the Grievor. The



employer argued that the Grievor is prepared to say what he needs to say to improve his personal situation and retain his benefits. The employer alleges that the Grievor's attack is based in his desire to win an appeal to the WHSCC review committee. If it can be established that the Grievor was in fact hunting on December 4 then his appeal has a strong likelihood of failing. It is therefore vital to the Grievor that he be able to establish that it was not him depicted in the video on December 4. The employer pointed out that if the person in the video is in fact the grievor, Dr. Woolfrey has confirmed that the activities being undertaken by that individual are consistent with the abilities which are suggested in the Targeted Functional Assessment.

The employer urged the arbitrator to consider the quality of the evidence presented. The union is requesting the arbitrator to disregard the evidence of the private investigator who spoke with the Grievor on December 4 and positively identified him. This evidence is rebutted only by that of Mr. Murphy who says that the person in the video was not him because he has no hood on his coat. Mr. Murphy had no notes, he had no clear recollection of when he went in the woods other than it was shortly after the four-wheel drive was repaired on the 23rd or 24th of November. If Mr. Murphy's evidence is correct then it probably is not him in the video as he would have been in and out of that area by then. Mr. Murphy however recalls driving a snowmobile to the road which is consistent with the evidence of Mr. Russell. He confirms that they were approximately 12 km back in the woods. The Grievor acknowledged that he did speak with someone in a pickup. The Grievor said that he thought he recognized the private investigator on a snowmobile, however, Mr. Russell did not have one. So, the employer argues bits and pieces of the evidence coming from friends of the Grievor tend to fit within the private investigator's report. The employer alleges that the evidence tendered by the union on behalf of the Grievor just do not fit together well.

Another inference which the union would have the arbitrator make is that the drugs he was taking made him feel better in the morning so he could perform better. The employer pointed out however, that he did not receive these drugs until two weeks after the events depicted in the video. As well, the stories of the Grievor and Mr. White are different. Mr. White says that he did not return until January and went to St. John's in mid-December. The employer alleges that Mr.

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White was living with the Grievor when he asked Mr. Murphy to help him. The evidence is confusing as to whether the purpose of the trip to Logger School Road was for hunting or to close the cabin.

The employer pointed out that the private investigator positively identified the Grievor but he was not cross-examined as to whether it could be someone else during the questioning of him. The evidence of his identification fits together. The person in the video who was seen loading the chainsaw case was, by his own admission, the Grievor. The Grievor, when confronted about loading the cooler into the pickup, said that it only contained light items such as bread and eggs. That vehicle was followed to the Logger School Road by the investigator. The Grievor admitted that he was driving the vehicle on December 3 so who would have driven it on the 4th, the employer asked rhetorically. The employer concludes that the evidence of the Grievor just does not add up, it does not fit. There is no rational way to take the evidence of the Union and say that there is a thread of logic or rationality. In another incident the Grievor testified that Mr. White had just purchased the new snow mobile, however, Mr. White testified that he had had it for years. The employer concludes that the Grievor is simply not believable and will say whatever he needs to avoid losing his compensation.

The evidence of Dr. Woolfrey was that his November 30 assessment was completely inconsistent with what he saw on the video. The behaviour on the video was consistent with the recommendations of the occupational therapist that the Grievor could do modified duties. The employer does not doubt that the Grievor has back problems and at times suffers significant pain but he has a duty to return to safe and productive employment. When he is not being forthright it gives rise to the question of whether or not he can be trusted to give proper information to his doctors. The critical point for the employer is that the patient must be completely honest with his physician and the employer has no belief that the Grievor will do so as long as his benefits depend upon the doctor's opinion. The fact is from the employer's perspective, that the Grievor knew that he was on a snowmobile and he can argue that the person in the video does not look like him and he can say that he wished that he could use a snowmobile but the video demonstrates that he has a range of motion that was not seen in him for many years.

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The issue which is raised by the video evidence and the employer's case is that the Grievor cannot be trusted, is not truthful and is not a credible witness. There is no basis for an employer-employee relationship. The employer quoted various arbitral authorities highlighting the Grievor's duty to speak candidly and truthfully with his physicians and he obviously has not done so. The Grievor is simply not credible and his grievance should be denied.

THE UNION'S POSITION

The union's position is that this case is a textbook example of why video evidence is bad. The union argues that the video and report in this case are not worth the paper or tape they are recorded on. In this case there was the additional obstacle of blowing snow and wipers going to further obstruct the view of the recording. The union's argument is that the arbitrator cannot consider this evidence. Unless you can actually see the Grievor's face, the rest is garbage.

The union argued that there was no basis for the commencement of surveillance on the Grievor; the employer just wanted to check on a few people who were on compensation benefits. The videotape raises privacy concerns as a portion of the video shows the Grievor's wife and child.

The private investigator made various assumptions throughout and in fact he could not see individuals well enough to identify them. The vehicles owned by the Grievor and Mr. White were so similar that these individuals could not even distinguish them on the video. To use license plates is not meaningful as it leads to making assumptions.

The onus in this case is squarely upon the employer to establish what was going on in these videos. That has clearly not been done. People have been called upon to remember things which happened several months before and they could not remember the exact dates and times and could not be expected to. Mr. White and Mr. Murphy stood up well under cross examination when questioned about the sharing of this equipment among them.

The union argues that on December 3, the date when the truck was being loaded you cannot see



the faces. The Grievor was asked if that could be him and he replied that it could be. Mr. White said that it could be him; he could not tell. Mr. White and the Grievor look a lot alike; in fact, if Mr. White had a moustache, which he did at the time, they would be virtually identical. The private investigator said that he talked to the guy sitting in the truck which had not been positively identified as the Grievor. He had to go to Mr. Colbourne for an identification. The evidence of the Grievor was not that he remembered talking to someone but that he spoke to someone with long hair and a goatee. Maybe the investigator spoke with Mr. White or maybe he spoke with hunters. The balance of evidence is in favour of Grievor.

Mr. Russell, the investigator, makes all sorts of assumptions. There are big chunks of time when he did not know where the truck was. He spends his time driving around searching for a truck and not finding it. The December 3 video is unclear. The Grievor is adamant that it is not him on the December 4 video. Mr. White described how he borrowed the truck, trailer and skidoo owned by the Grievor's daughter and went hunting with his wife. Mr. Murphy described how he never wore his pants inside his boots and that he had travelled on Mr. White's Grand Touring snowmobile on his trip with the Grievor. All of this evidence points to it not being the Grievor in the video of December 4. Mr. White and the Grievor have a history of borrowing each other's trucks and snowmobiles. The video therefore is useless. The video of December 4 is the key. That is the basis of the assumption that the Grievor was hunting. He was not hunting. The Grievor was a credible witness and his version of events fits together with that of Mr. White and Mr. Murphy. On December 6, the Grievor says that that could be him and pieces of the video would fit. The employer asks that an assumption be made because there is a hood on a coat and it asks to assume that the Grievor is there with some unknown person.

The union did not suggest that an increase in medications might explain some things that Dr. Woolfrey mentioned in his report. The union merely said that use of medications may make a difference in whether pain is displayed with a certain movement. The Grievor had been encouraged to be as active as possible. The Grievor did not know that he had done anything wrong by being on a snowmobile.

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The employer did not have any professional person look at the video prior to terminating the Grievor's employment. They did hire Karen Butler but included assumptions that he had been out snowmobiling. There is also a built-in assumption that the snowmobiling was rough but there was no evidence to substantiate that that was the case.

The Grievor had tried to return to work but had been removed by the employer. The union argued that Mr. Colbourne did not know the difference between sedentary and light work. That difference is important when evaluating the employer's position. All of the information upon which Mr. Dolter made his decision to terminate the Grievor's employment was based upon information given to him by Mr. Colbourne and Mr. McDonald. They had advised him about the Grievor being hunting. A pattern of failed attempts at return to work is not grounds for discipline. There were reports from the WHSCC that the Grievor had been non-cooperative however, that decision had been overturned by a review panel. This entered into Mr. Dolter's decision to terminate the Grievor's employment when the information was in fact incorrect.

When the incident for which the Grievor was accused first came to light, the employer would not give the union access to all the information available and when it was presented to the Grievor it was based upon a lie that the employer had had an anonymous tip of the Grievor's activities. The Grievor felt that the employer was up to something and he was right. One question which must be answered is whether the Grievor's failure on December 19 to properly disclose is a ground for dismissal. When the Grievor said that he wished he could snowmobile, he was thinking of real snowmobiling and not simply going to his cabin.

The arbitrator was encouraged to take into account the mitigating factors such as:

- The effect of this termination on the Grievor's life
- the personal circumstances of the Grievor
- the prospects for future employment of the Grievor
- if the Grievor were to be reinstated he would simply remain as status quo and would not actually be on the payroll of the City.

The union submitted various arbitral and textual authorities to support its request that the grievance be allowed.

FINDINGS AND CONSIDERATIONS

In a case such as this there are three questions which face an arbitrator:

1. Did the employer have just cause for disciplining the Grievor?
2. If the answer to the first question is yes, was the penalty imposed by the employer a proper one in all these circumstances?
3. If the answer to the second question is no, what is a more fitting penalty?

1. Did the employer have just cause for disciplining the grievor?

A summary of the reasons for the termination of the grievor's employment is provided in the second to last paragraph of the letter of termination entered as exhibit C#2. That paragraph alleges: first, the willingness of the grievor not to be entirely forthright, second, his failure to attempt a return to work in light of his demonstrated abilities depicted in the digital video and surveillance and, third, his untrustworthy conduct, as the main grounds for the termination.

The employer's case against the grievor is intertwined with the video surveillance as undertaken by Mr. Russell, the private investigator. Each of the three reasons contained in the letter of dismissal is grounded in some manner or another by the video. For example, if the video depicts someone other than the Grievor, the Grievor is less likely to be found guilty of being less than forthright with the employer. If the person depicted in the video is not the Grievor then there would be few grounds for saying that the Grievor had abilities to do work beyond what he had been maintaining to be the case with the employer. If the person depicted in the video is not the Grievor then doubt would be cast upon whether his conduct can be seen as untrustworthy. For the reasons discussed below, I am of the opinion that the Grievor is the person substantially depicted in the video and that the assertions made by the employer are justified.

The surveillance, and the video produced as a result, was attacked by the union on several fronts:



- The video is not admissible evidence because the union alleges that the employer had no reasonable and probable grounds to engage in the surveillance;
- The video itself is not clear and distinct and the grievor cannot be clearly identified in much of the video. A large portion of the video is obstructed by snow and wiper blades as well as being too far away to clearly identify the subjects. As the private investigator did not know the grievor at the time nor had he previously seen a photograph of the grievor, his identification of the grievor is suspect;
- Various witnesses were called by the union which contradicted evidence given by the private investigator about the activities and actors depicted on the video.

The admissibility of video evidence is discussed in two cases submitted by the union, namely Prestressed Systems Inc. and L.I.U.N.A Loc. 625, (2005) 137 L.A.C.(4th)193(Lynk) and C.N.R. and C.A.W. (2005) 145 L.A.C.(4th)217 (M.G. Picher) as well as in two cases submitted by the employer, namely A.T.U., Loc. 569 and The City of Edmonton, (2003)123 L.A.C.(4th)306 (Koshman, Neuman & Norrie) and Greater Toronto Airports Authority v. P.S.A.C., (2007)158 L.A.C.(4th)97(Bendel).

In Prestressed Systems Inc., *supra.*, the learned arbitrator was faced with whether to admit into evidence video surveillance of an employee engaged in hockey games in his off hours. A discussion ensued as to which of two competing schools of thought should prevail for the admission of such evidence. On the one hand, there is a school of thought which suggests that the relevance of the particular evidence should determine whether it is admissible in a proceeding. The second school of thought is grounded in whether it is reasonable in light of all the circumstances including the privacy of the individual employee, to admit such evidence. Having considered the arguments, the learned arbitrator concluded, at p.203, that:

“in the absence of a statutory or collective agreement right, a unionized employee in Ontario has a general legal entitlement to privacy respecting the employment relationship.”

He also concluded that this entitlement is not absolute and must always be weighed against the employer's legitimate interests. While adopting the reasonableness test and conceding that it is

not universally accepted by arbitrators he found, at p.208, that the test would require the employer to establish two things: firstly,

” that it was reasonable in the circumstances for the employer to have engaged in video surveillance of the grievor”,

and, secondly,

"that the surveillance itself was conducted in a reasonable fashion. Built into the test is a requirement that the employer had genuinely considered whether some less intrusive steps to protecting its interests and avoiding the intrusion into the employee's privacy interests were reasonably possible before it conducted the video surveillance."

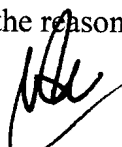
In that case, the arbitrator found that the employer did not establish the reasonableness of its decision to commission the videotape surveillance.

In C.N.R., *supra.*, arbitrator M.G. Picher found video tape evidence inadmissible because the arbitrator was

"satisfied that the Company has not discharged the onus of demonstrating that it had reasonable and probable grounds to engage in the extraordinary step of subjecting its employee to surveillance in his private life."

The arbitrator went on further to conclude that, even if admissible, the surveillance depicted activities for which discipline was not appropriate.

In Greater Toronto Airports Authority v P.S.A.C., *supra.*, the learned arbitrator was dealing with a situation in which an employee was videotaped performing duties at her husband's business premises which were similar to those she alleged she could not perform for her employer. The employer in that case was suspicious of the activities of the grievor and testified that "something didn't smell right". The employer "was concerned that he had received no indication of any improvement in the grievor's condition, or of any new medical initiatives, or of a date for an expected return to work, or of any accommodation, such as modified duties, that might enable her to return to work." The learned arbitrator discussed, and disagreed with, the argument put to him that there had been a consensus among arbitrators "that a balance had to be struck between an employee's right to privacy and the employer's right to protect its business interests". Under this approach he stated that "Arbitrators thus examine the reasonableness of the decision to



conduct surveillance and the reasonableness of the manner in which the surveillance was conducted. Arbitrators have recognized employee's privacy rights in a series of awards over the past 30 years. Privacy was a major public concern."

The arbitrator, in disagreeing with that approach, followed a line of Supreme Court of Canada authorities which found that, in situations to which the Canadian Charter of Rights and Freedoms does not apply, "courts are therefore not concerned with the manner in which evidence is obtained, nor do they have a discretion to reject relevant evidence on the ground that its admission would bring the administration of justice into disrepute." He reasoned, at paragraph 23, that

"arbitrators have no more authority than the courts to exclude relevant evidence. Like the courts, the essence of their job is to receive all the relevant evidence that either party wishes to adduce and decide cases on the basis of that evidence. It is no part of their mandate to concern themselves with the circumstances in which the evidence was obtained."

The arbitrator quotes L'Heureux-Dube, J. in Universite du Quebec a Trois-Rivieres, [1993] 1 S.C.R. 471 (S.C.C.), at paragraph 28, as saying:

"Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence. That is the case here.

In my view, the formalism and inflexibility demonstrated by the arbitrator in this case have no place in the hearing of a grievance..."

Arbitrator Bendel further refers, at paragraph 38, to the approach taken by arbitrator Picher in the Canadian Pacific Ltd. v. B.M.W.E. (1996) 59 L.A.C. (4th) 111 which was followed in the C.N.R. case, *supra* :

"this approach, diligently applied, should protect reasonably against the possible abuse of the right of an employer to resort to surveillance of its employees, in a manner consistent with the obligations which boards of arbitration have to safeguard the integrity of their own procedures, and the credibility of the arbitration process generally."

He then points out the contrary position taken in the decision of Lamer, C.J.C. in Universite du Quebec a Trois-Rivieres, *supra*. wherein he "stated, at p. 488 that 'preserving the credibility of the arbitration process... depends on the parties' believing that they have had a complete



opportunity to be heard.”

Arbitrator Bendel concludes his dealing with this issue by saying, at paragraph 45:

“It is obviously open to the parties to bar the use of surveillance evidence at arbitrations through the inclusion of an appropriate clause in their collective agreement, and arbitrators would respect such a clause. But in the absence of such a clause, it is simply not open to an arbitrator to reject such evidence, whatever view the arbitrator takes on the propriety or the acceptability in our society of the use of such investigative techniques.

[...]To deny the employer the right to present its only evidence in support of its decision to discharge the grievor would be an obvious example of procedural unfairness. I am confident that I would be violating the principle of *audi alteram partem* by rejecting that evidence.”

A.T.U. Local 569 v. City of Edmonton, *supra.*, is a situation not unlike the present one, the employer municipality discharged the grievor for inappropriately obtaining short-term disability benefits. The activities of the grievor outside of work were videotaped and did not coincide with the workers stated inability to perform his duties. The arbitration board found that, unless there was some legal principle that prohibited the arbitrator from admitting relevant evidence, it should be admitted. In reviewing the decision of the arbitrator, Clackson J. of the Alberta Court of Queen’s Bench upheld the decision of the arbitrator and found:

“115 As I have said, the *Charter*, which provides constitutional protection of our rights and freedoms, does not recognize a general right to privacy. Therefore, I find it inconceivable that employees would have such a right when other Canadians do not. I appreciate that employer – employee relations create unique circumstances because of the nature of being employed and because the tools of the job may be the very means by which an intrusion on privacy is affected. That unique relationship is what prompted labour relations legislation and the various dispute resolution processes common to the field. However, it does not compel recognition of the right to privacy.”

The court found that the board of arbitration did not err in admitting the video surveillance evidence.

Based upon this analysis and the binding authority of the Supreme Court of Canada, I am of the view that the videotape surveillance evidence and the evidence of Mr. Russell in support and explanation of this video surveillance is relevant to the allegations made against the grievor by



the employer in the letter of termination and I therefore find that the video surveillance evidence in this matter is admissible.

That finding however, does not dispose of the first question to be answered i.e. are the activities depicted in the video being conducted by the Grievor and, if so, are they sufficient to justify the employer imposing some form of discipline?

First, are the actions depicted those of the Grievor?

That issue must be resolved on a balance of probabilities with the employer carrying the burden of proving it. Has sufficient proof been tendered by the employer?

It is obvious from a review of video evidence that some portions of the activities are difficult to clearly discern. Some of the photography is obscured by falling snow and beating wiper blades. Some of the photography however, is quite clear. It depicts, for example, the Grievor walking from his pickup truck to the bank and post office and exiting from those buildings.

The Grievor himself substantiated to a large degree the identification evidence of the investigator by admitting that he had spoken to the investigator near the Logger School Road. His explanation for having done so was that he thought at the time that the investigator may have been a criminal intending to break into cabins in the area. The investigator said that the Grievor told him that he had been hunting for a period of time and intended to do so for a further period of time. While one can understand the motive for this statement as described by the Grievor in his testimony, it does not definitively prove that the Grievor was hunting as was implied during the hearing. It does, however, prove that the Grievor was in fact on the Logger School Road at the time alleged by the investigator. This makes credible that the activities which were recorded on the video sequence by the investigator were in fact those of the Grievor, i.e. it removes doubt as to whether the person depicted in the video on that day was the Grievor. The conversation places the Grievor at the scene and substantiates the investigator's opinion that the person to whom he spoke was in fact the Grievor. This evidence combined with the identification provided to Mr. Russell by Mr.

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Colbourne of the person in the still photographs provided to him, in the opinion of the undersigned, removes any doubt that the person depicted in at least some of the video sequences was in fact the Grievor.

The union presented two witnesses who testified in support of the Grievor's contention that he was not the person depicted in the video on at least one of the days in question. While these individuals had recollections of being on the Logger School Road with the Grievor, their memories were unclear as to the details of those occasions. They could not specifically identify dates and times at which they were present and, ironically, because of the lack of clarity on the video were unable to definitively say that the persons depicted therein were them. They could not identify themselves positively and were vague about the identity of other persons who appeared in the video. On the whole I find that the evidence of Mr. Russell which was recorded in his notes as well as on video to be more credible than that of Mr. White, Mr. Murphy and the Grievor.

On a balance of probabilities then, the undersigned is satisfied that the Grievor is in fact the person who is the actor in the majority, if not all, of the activities highlighted in the video recording. Even if the activities depicted on the Logger School Road were not all those of the Grievor, I am satisfied that the depiction of the Grievor in his activities going in and out of the bank and post office, which are undisputedly the Grievor, were of sufficient deviation from the depiction of the Grievor's abilities by himself and by his physicians in the reports submitted to the employer to be cause for great concern about the legitimacy of the Grievor's claim to be unable to work a 2 hour shift without suffering debilitating pain. His gait appeared spritely and was unaided by walking canes or any form of support.

Are the actions of the Grievor depicted in the video sufficient to attract some form of discipline from the employer?

It is beyond doubt that the Grievor lied to his employer. He admitted this in his testimony. His rationalization at the time and at the hearing was that he had done it out of fear of losing his job

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which would thereby disqualify him from receipt of benefits from the WHSCC.

There is as well very little doubt, based upon the opinions of both Ms. Butler and Dr. Woolfrey entered in evidence at the hearing, that the Grievor was capable of at least two hours of a return to work program (to give the Grievor the benefit of doubt as to the minimum suggested) at the light to sedentary level with increases in this amount over time. The history of the Grievor's work pattern prior to his termination was that he found even two hours to be intolerable. On the basis of that evidence it would appear that the employer was justified in alleging that the Grievor was not making an honest attempt to return to his job.

In Re Cargill Ltd. and U.F.C.W., Local 1118, 58 C.L.A.S.8, (Tettensor) the arbitrator in substituting a 12 week suspension for a dismissal found, at paragraph 70, that the grievor's misconduct was serious and that he "knowingly bent the rules, but did not believe that his misconduct was serious." In the subject case, the Grievor was aware of Dr. Woolfrey's advice to him to be more active. The Grievor then argued that his snowmobiling activities depicted in the video should be excusable on this basis. This however, does not reconcile with the Grievor being unable or unwilling to genuinely attempt a return to work.

In Re Hussman Store Equipment Ltd. and C.A.W. Local 397, (1990) 16 L. A. C. (4th) 19 (Brown) in allowing reinstatement without compensation for the Grievor, the arbitrator found, at P. 35, as follows:

"Having assessed the grievor as a witness, I am persuaded that he has told the truth about the reason for his reaction at that time. I also find that upon being confronted with all of the facts on which the company had acted, the grievor freely admitted what he had done and that he had lied to Mr. Grigg and apologized to him. Had the grievor maintained his initial position which he knew to be false through to the hearing and had not given the company the correct information, then there would be little, if any, basis for consideration of the mitigation of the penalty in his favour. In these circumstances where there was not a fraudulent claim for benefits but negligence in the exercise of the grievor's responsibility to return to work at the earliest possible time and untruthfulness with his employer, while cause for discipline, the penalty of discharge is, in my opinion too severe and is not consistent with the ratio of the cases referred to above in which fraudulent claims for benefits have been found and terminations of employment have been upheld."



Taking into consideration the fact that the Grievor had lied to his employer and admitted so at the hearing and that he was apparently not willing to attempt to take a graduated approach in a return to work program, I find that the conclusion of the employer that the Grievor was not a trustworthy employee is substantiated by the evidence. The employer suspected that the Grievor had been less than honest with them in his assessment of his ability to work and, based upon the surveillance evidence which had been submitted to them, their suspicions have been confirmed. The cases mentioned above confirm discipline being imposed in similar situations. I find therefore that the employer was justified in imposing some level of discipline upon the grievor.

2. Was the penalty imposed by the employer justified in all the circumstances?

A review of some of the cases submitted by the union on behalf of the grievor and by the employer on this point follows.

In Salvation Army (Sunset Lodge) and HEU, (2004), 76 C.L.A.S. 182, (Jackson) the grievor was terminated for making a fraudulent workers compensation claim. In reinstating the grievor with full back pay, the arbitrator stated, at p. 7 of 7: "none of [the grievor's] activities as portrayed on the videotape was in conflict with what her doctor expected of her in order for her condition to improve... In my opinion there was no evidence that [the grievor] engaged in activities that were inconsistent with her back injury or with the purpose of sick leave." This situation is distinguishable from the one at hand. In the present case, the activities of the Grievor portrayed in the video sequences are such that, in the opinion of Ms. Butler and Dr. Woolfrey, the individual conducting those activities should be capable of light to sedentary duties for at least two hours per day. The conduct of the Grievor during his term of employment was such that he asserted that he was unable to meet this standard.

In Re Cami Automotive Inc. and C. A. W., Local 88, (1998) 52 C.L.A.S. 169 (Snow) the arbitrator, substituting a one-month suspension for a dismissal, found, at p.7 of 12, that the grievor did not participate in a hockey tournament as alleged by the employer, was justified on medical grounds in refusing modified work based upon medical opinion, but, at p. 10 of 12, was acting in a foolhardy or reckless manner in working at alternate employment and acting contrary



to his treatment recommendations. The finding in the instant case, however, is that the Grievor was the person depicted in a great deal of the video recording and was not justified on medical grounds from attempting a return to work. There is very little appearance of discomfort on the Grievor's face and there is no evidence of a walking cane or any other walking support. Both Ms. Butler and Dr. Woolfrey shared the opinion that, other than a small gait abnormality brought on by a leg length discrepancy, the Grievor showed no evidence of injury or a malfunctioning back.

In Richardson v. Davis Wire Industries Ltd. 33 B.C.L.R. (3rd) 224, (BCSC), the learned judge at paragraph 18, quotes McPhillips v. British Columbia Ferry Corp. (1994), 94 B.C.L.R. (2nd) 1 (BCCA) at p. 6:

"Dishonesty is always cause for dismissal because it is a breach of the condition of faithful service. It is the employer's choice whether to dismiss or to forgive."

In Di Vito v. McDonald Dettwiler & Associates Ltd., [1996] B.C.W.L.D. 2036 Justice Drost found at paragraph 34:

"34 Nonetheless, I am not persuaded that the conduct of the plaintiffs, so far as their involvement in the distribution of the e-mail message is concerned, is alone sufficient grounds for their summary dismissal. I am of the view that, standing alone, that conduct warranted a severe reprimand, but nothing more.

35 However, such conduct, when combined with the plaintiffs' subsequent dishonesty during the investigation, does, in my opinion, clearly amounts (sic) to just cause for dismissal.

36 (...) the plaintiffs must have recognized the seriousness of their conduct. Nonetheless, they continued to be evasive and dishonest throughout three meetings with their superior."

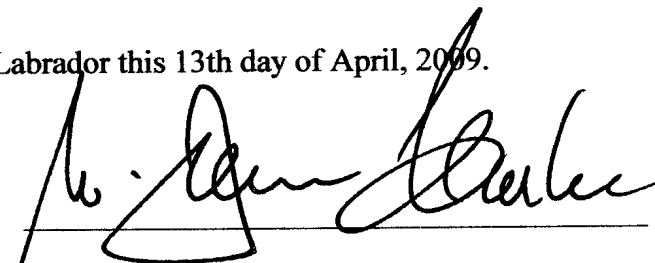
In the instant case, the conduct of the grievor as depicted on the video recording would certainly constitute grounds for discipline in light of the contrary medical and therapy opinions available to the employer. Whether this in itself would have been sufficient for dismissal or simply a long period of suspension is a moot point at this stage. When these activities are combined with the grievor's admitted dishonesty in meeting with his employer during the investigation, it is my view that the grounds for dismissal have been made out by the employer.

A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by several horizontal strokes.

The union has requested that the arbitrator consider the Grievor's situation with respect to his personal circumstances, future employment prospects and the effect on his life. I appreciate that this is a difficult situation for the Grievor and his future prospects look grim but this outcome must have been anticipated by him as he had been through many unsuccessful encounters with the WHSCC. His experience there would surely have shown him the precariousness of his situation, yet little effort was made to re-integrate into the workforce. The Union asserts that reinstatement would simply be maintenance of the status quo and have no effect on the employer's payroll but this is not the case. The employer must pay premiums to insure against the cost of workplace injuries and is rated on its claims experience. It has a right to expect due diligence on an employee's part to attempt to become gainfully employed at whatever he or she can do at the employer's enterprise, just as the employer has an obligation to accommodate injured workers into its work place. Injuries at workplaces are unfortunate and always cause grief for those involved. The employer also has the legitimate expectation of honesty in dealing with its employees. If it does not receive it, it has the option of forgiving it and moving on. The employer here gave an honest effort to accommodate the Grievor and find as meaningful work for the Grievor as the situation would bear. It was entitled to receive the same kind of effort from the Grievor. It did not and reached the end of its forgiveness. I cannot find that it was not justified in doing so.

It follows that the grievance is denied.

DATED at St. John's, Newfoundland and Labrador this 13th day of April, 2009.



W. JOHN CLARKE

SOLE ARBITRATOR