
David L. Alcock
Sole Arbitrator

In a seasonal operation, a suspension without pay is proportionally more severe than it would be in a year round operation. A lengthy suspension in this case would demonstrate to the grievor and all employees the seriousness of the words chosen in this incident. It would also deter the grievor from future inflammatory responses at work. And it would send a message to others that similar action would lead to financial loss on their part. However, the extent of a suspension, or any disciplinary action for that matter, might not be the same each time. Rather it must always be assessed in light of an employee's employment history, length of service, previous discipline record and the particulars of the incident involved.

The grievor here is an employee who has 13 years of service with this employer and a clean record as far as discipline is concerned. This is sufficient to demonstrate a significant bank of good conduct to draw upon so as to ameliorate the length of suspension that should be imposed. In all the circumstances of this case, I am satisfied that a one (1) month suspension without pay is a just and appropriate penalty for the grievor's offence.

Mr. Wheeler is to be reinstated immediately and reimbursed for all lost pay and benefits, including lost seniority, save and except for his one (1) month suspension. Reimbursement of pay shall be subject to mitigation. The parties are directed to discuss the matter of compensation. I will remain seized of the matter if the parties cannot agree.

Finally, I note that both parties have expressed interest in addressing employee/employer problems such as those raised in the body of this award. I do not have authority to compel a workplace intervention to deal with such issues. However, given that the parties are still getting used to their first bargaining relationship, I would have no hesitation in recommending that the parties jointly pursue some outside expertise to assist them in that regard.

Respectfully submitted as the decision of the arbitrator.

Dated at Mount Pearl, Newfoundland and Labrador, this 29th day of July, 2009.

time when he resented her previous manner and was currently angry with her for telling him again to put his gloves on the rack. The fact that she had to speak to him repeatedly about such matters indicates to me that he did not respect her or listen to her instructions. His statement was made in anger and he was stressed. However, I am convinced that Mr. Wheeler should bear the responsibility for his state of mind. Ms. Deering did not provoke him. In my view, it was his responsibility in the past to speak directly to Ms. Deering about his resentment of her manner. Instead, Mr. Wheeler allowed his resentment to build to the breaking point. In that context, it is perhaps easy to understand that Ms. Deering was frightened when he finally erupted using such inflammatory words. Frankly, I believe he should have addressed the problem on an earlier occasion. Although he regrets his choice of words now knowing how Judy Deering was affected by them, Mr. Wheeler is unable at this point to undo what has been done. I am convinced that he realizes why management could be expected to act to protect its employees' interests in such circumstances.

One must not lose sight of the fact that this incident occurred in a fish plant where knives are a common tool for employees to use. As such, the words "slit your throat" might possibly cause a more physically threatening interpretation by the victim than was intended by the grievor. I believe that is what happened in this case. Although the evidence establishes that no threat was actually made in these circumstances and, therefore, the penalty of discharge is too severe, I am satisfied that Mr. Wheeler's actions were irresponsible and serious enough in this particular fish plant environment to warrant an alternative severe disciplinary response by the Employer. In my view, this is not a minor offence; it is a major offence which justifies a significant disciplinary suspension without pay.

I reject the notion that the Employer should expect the Union to assume liability for the grievor's reinstatement. It is always management's responsibility to deal with employee misconduct and it is always the Union's responsibility to represent the employee's interests.

Gillingham stated that Tom Wheeler confirmed that he told Judy Deering her throat was going to be slit, Mr. Wheeler's solemnly affirmed testimony was that his comment was quite different than Judy Deering reported. Indeed, he explained that he never said either he or anybody else was going to slit her throat.

Two of the four people who were present during the incident have testified that Mr. Wheeler's comment was: "Judy, there's women on this floor who are mad enough to slit your throat." That constitutes valid and acceptable first hand evidence supporting the Union's case. I will ignore Mr. Deering's letter because he was not present to testify to its authenticity or be cross-examined on its contents. Since Mr. Gillingham's evidence was almost all hearsay, I cannot rely on it. It was the Employer's responsibility to ensure that it had every shred of relevant evidence available to present at arbitration. Judy Deering, who possessed the most important evidence the Employer needed to establish its case, was not asked to testify. Without her testimony, the Employer was left with no first hand evidence to support its decision to discharge the grievor.

The Employer contends that it is extremely concerned because there are other employees who fear for their own safety should the grievor be reinstated. In the absence of testimony by such employees, this information is also hearsay, which I am not at liberty to rely on. In my view, Mr. Gillingham is a square shooter who felt compelled to accept Judy Deering's account of the incident, and to be concerned about the Company's liability and other employees' safety. But if such conviction is to be accepted at arbitration, it requires supporting evidence from the people who provided him with information. Bluntly put, at arbitration it is not sufficient for someone to simply say that something is a fact. First hand evidence by witnesses is required.

On balance, I rely upon the first hand evidence provided by the Union's witnesses in this case. I accept Mr. Wheeler's testimony about the words he actually used and I am satisfied that he did not threaten or intend to harm Judy Deering in any way. However, I am also satisfied that the grievor's choice of words "slit your throat" was irresponsible and ill-advised when uttered at a

CONSIDERATIONS AND DECISION

The issue before this arbitration is not a preliminary matter to deal with collective agreement technicalities, or to deal solely with whether the Employer complied with the grievance procedure. The sole issue at arbitration is the one claimed in the grievance, namely, that the Employer discharged the grievor without just cause.

The evidence is that this was a disciplinary discharge. In such cases, the Employer bears the burden of proving that it had just cause to discipline the grievor in the first instance and, if so, that discharge was the appropriate penalty to impose in all the circumstances. Proof in this case would require supporting first hand evidence by the testimony of witnesses who participated in or personally observed the alleged incident. While an arbitrator is free to allow hearsay evidence, he/she is not permitted to rely on such evidence as a basis for his/her decision. To do so would be grounds for the award to be quashed at judicial review.

The Employer argued that it conducted a thorough investigation before discharging the grievor. In my view it did not do so. In building a case to support its decision, for the Employer to justify a claim of thoroughness in its investigation, it should have asked both Judy Deering and Tom Wheeler whether there were any persons present who might have seen and/or heard the incident and conversation between them. The decision to terminate should not have been made without that information. Such information emerged only during the grievance procedure, i.e., after the decision to discharge had already been made and communicated. Mr. Gillingham said he then spoke to Roosevelt Burt who told him he had not heard the conversation. He also said he spoke to Weldon Deering, who confirmed the statement reported to him by Judy Deering. Roosevelt Burt testified that no such meeting occurred between him and Mr. Gillingham – indeed, he testified that nobody asked him about the incident. Mr. Deering did not testify. Although Mr.

of the incident was done before the grievor was fired. And now Mr. Gillingham suggests that Judy Deering won't come back to work if Tom Wheeler is reinstated. That is something Judy Deering would have to testify to and be cross examined on before being accepted at arbitration.

The facts of this case are that the grievor had 13 years of good conduct. Judy Deering was in her first year in Quality Control, and employee complaints about her behaviour at work had already been the subject of a meeting.

The evidence establishes that nobody intended to harm Judy Deering – least of all Tom Wheeler. Two other employees heard what Tom Wheeler said to her and both concur with his testimony, not what Mr. Gillingham says he was told by somebody else. Yet the Employer has made Mr. Wheeler out to be a violent man who would harm another employee at work. That is simply not true. Therefore, the grievor should be reinstated with full compensation.

In support of its position, the Union submitted *Re Metal Technologies Woodstock and C.A.W., Local 636* (October 23, 2005), 83 C.L.A.S. 100, 2005 CLB 10492 (O'Reilly).

Employer Rebuttal

Re Metal Technologies is not on point. Mr. Wheeler's words to Judy Deering were much more serious.

The Union and the employees were accustomed to Ms. Deering in her former capacity as a Union Representative. Now they have seen her in a position that is 360 degrees different.

Mr. Gillingham indicated that he was sorry that Mr. Wheeler made the statement he has been accused of. The Employer's decision was not personal. The main issue is still how to achieve an acceptable resolution. In that regard, the Employer would agree to some sort of intervention.

see Judy's face to determine her reaction. Although he found Judy good to work with on QC matters, Mr. Burt testified that there were others who couldn't get along with her. There was a ratification meeting at the Lion's club in which a fair number of complaints about management were about Judy. Mr. Burt denied that Mr. Gillingham or anybody else called him into the office at any time after the incident to ask what he had heard. In particular, he did not remember talking to Mr. Gillingham about the incident 5 or 6 days later.

ARGUMENT

The Employer

Mr. Gillingham insisted that he investigated the incident thoroughly. Judy Deering had grave concerns that Tom Wheeler was going to harm her; Tom Wheeler admitted he made the statement that she was going to get her throat slit. He indicated that Judy Deering was not brought to this arbitration because this was to be a preliminary hearing on the technicalities of the contract. Had he known beforehand that the arbitrator would have to hear from Judy, he would have brought her along. Now, Mr. Gillingham must be concerned about what the repercussions will be at work for other employees' safety.

Mr. Gillingham indicated that there always was a willingness to bring the grievor back to work, but the problem was how to go about it. More than a couple of day's suspension would be needed in this case. The issue is safety and how to ensure proper employee – Employer relations.

The Union

From the date of the incident until September 2008, nobody from management actively sought to resolve this grievance. Now it is revealed at arbitration that no thorough investigation

When he and Mr. Gillingham were in the QC office on June 13th, he was told that Judy had said that he (Wheeler) said he was going to slit her throat. He denied saying that he or anybody else was going to slit her throat. Then Mr. Gillingham told him to go back on the floor, but he said no and went home. Later that night, Mr. Gillingham called him at home to say that he had been discharged. In a later meeting with the owner and Nichole Mahoney, he was told that that the matter would be settled in a few days. That did not happen. In the result, he lost all work during top production on crab and all work on mackerel in the fall; his estimate was between 500 – 600 lost hours at the rate of \$11.54/hr. He also testified that he had never been disciplined for anything in the past.

In answer to question by the arbitrator, Mr. Wheeler said that he never discussed the issue with the grievor since the incident and didn't know whether any broken fence between them could be mended. The incident on June 13th happened after Judy told him to put his gloves on the rack. Sometimes he hid his gloves as a joke because of the way she behaved on the job, but whenever he carried on that way with her, he always apologized to her afterwards. On June 13th, he was upset and stressed with her, but he insisted that he would never threaten to slit anybody's throat. There had never been any bad blood between them before, and he was very surprised at how she took their conversation.

By way of matters arising, the grievor reiterated that he did use the words "slit your throat" in his conversation with Judy, but not in the way Mr. Gillingham said. He now understands the repercussions of his choice of words. It was something he said on the spur of the moment and he was very sorry for doing so.

Roosevelt Burt testified that he clearly heard Tom Wheeler say to Judy Deering on June 13th: "There are women on the floor who are mad enough to slit your throat." The three of them were all about two feet apart and despite the cooker rumbling at the time, he could hear clearly. He never observed Mr. Wheeler get mad when he made his comment to Judy, and he couldn't

A subsequent meeting in September was held in an attempt to resolve the issue. The Company's position was that it had no option but to stand by its original decision unless the Union was willing to accept legal responsibility for the grievor if he returned to work after some kind of reprimand, which would have to be agreed upon. The Union said no.

Mr. Gillingham testified that, between the time of the incident and the end of the season in 2008, some employees expressed concern that the grievor might be reinstated. In other words, they wondered how the Company would treat incident of that nature where their safety was interfered with. He reiterated that, when he spoke to Tom Wheeler, he said exactly what he had been accused of. Also, Weldon Deering told him that he heard the grievor say "You're going to get your throat slit." Mr. Gillingham was not aware of any incident on the floor in which the employees were upset with Judy Deering. He wondered why the collective agreement was not followed if such issues existed. Any problems that might have occurred, he dealt with them at the time.

Tom Wheeler testified that he was 50 years old, was 6th or 7th on the seniority list, and had worked at Breakwater for 13 seasons. He said that the incident occurred on the production floor at break time. Roosevelt Burt and Weldon Deering were close enough to clearly hear what was said. His comment to Judy Deering was, "there are women on this floor mad enough to slit your throat." He did not say that he was going to slit her throat, or that she was going to get her throat slit. He indicated that he had not been mad at Judy for doing her job, but for the way she was doing it. For example, telling the employees not to chew gum and holding out her hand for them to spit out their gum. In the meantime, managers were never challenged when they chewed gum. Mr. Wheeler heard many complaints about Judy's conduct from employees at negotiating meetings. He also testified that Judy had lost a lot of friends because of the way she was doing her job.

upset with her and made the statement that she was going to get her throat slit if she continued to let her job go to her head. He then asked Tom Wheeler in the Quality Control office whether and why he had made that statement to Judy Deering and did he know how serious this was. The grievor replied that she had been picking on him about those issues and he was mad and under a lot of stress, but “You know me John, I wouldn’t do that.” Mr. Gillingham then told him that his actions were serious, that he (Gillingham) had been put in the position that he had no recourse but to discharge him. He also told him that he would speak to his superiors about whether they considered he had just cause to dismiss him. He also told him that he might face legal implications if Judy made a statement to the police. Mr. Wheeler agreed that he had made a serious blunder.

Although he told the grievor that he would write things up and that he could get Union representation when the dismissal letter as given to him, Mr. Wheeler left the building before that could be done. Instead, the letter was given to the Shop Steward, Nicole Mahoney and an explanation was provided as to what had happened. Another copy was given to the Plant Manager and the matter was discussed with the owner.

The grievance was received on June 14th. Nicole Mahoney then asked Mr. Gillingham to speak to two (2) individuals who were present at the time the incident occurred. He spoke to Weldon Deering, who said that he had heard the grievor say to Judy Deering that she was going to get her throat slit. He agreed that he had heard the comment, but he was not sure how Tom had meant it. Mr. Deering also said that, due to the sensitive nature of the matter, he would appreciate it if his name were not brought into the matter.

Mr. Gillingham then asked Roosevelt Burt if he had heard any part of the conversation. His response was that he was cleaning up the plant at the time and did not hear anything, but he knew they had argued. On the strength of this information, Mr. Gillingham responded to the grievance, denying it.

With repeated objections by the Union noted, the hearing was completed on March 27th, following which a bench decision was delivered by the arbitrator with the essence of the decision to follow in writing at a later date. The arbitrator subsequently developed a medical condition which limited his ability to read or write for extended periods. The parties then agreed with the arbitrator's proposal to write a significantly abbreviated award.

The Evidence

The following contains the essential elements of the information offered by the Employer as well as the first hand evidence of the Union's witnesses.

Judy Deering was an employee who had formerly been active in the Union. At some point, the Employer made her Quality Control Supervisor, a position she pursued diligently and with considerable zeal. Mr. Wheeler and Ms. Deering had known each other as friends for years and had gotten along well at work until she began her new role in Quality Control. In the grievor's view, her demeanor in that job was unacceptable. In essence, he described her as being unreasonably authoritative and demeaning in the manner she told the employees to hang up their aprons and put their gloves away – by all accounts a hygiene matter for which she was responsible. Her manner particularly irked Mr. Wheeler on a couple of occasions, but those incidents passed without incident. It appears that other employees were also upset about the way she was conducting herself; their complaints that her job had “gone to her head” were aired in a subsequent meeting which was attended by Union and Company representatives.

On June 13th, John Gillingham had a call from the Foreman saying that Judy Deering had come to him crying about Tom Wheeler's statement to her after she reminded him again about not following cleanliness rules, i.e., not putting his dirty clothes in storage. Mr. Gillingham investigated the matter by seeing Judy Deering in her office and being told that the grievor got

3. letter dated June 17, 2008 from John Gillingham denying the grievance;
4. "To whom it may concern" letter (undated) signed by Weldon Deering *viz*:

The reason I cannot attend this meeting is because of sickness in my family. I will now give my statement of the conversation I heard between Thomas Wheeler and Judy Deering in June 2008, "Judy there's women in here on the floor that's mad enough to slit your throat."

This is the statement I heard.

5. letter from the Union dated July 16, 2008, referring the grievance to arbitration;
6. Notice of Reprimand dated June 13, 2008 stating:

Employee was dismissed of his job, because of a statement he made to the QC [Quality Control] "Judy Deering" in which he stated that she was going "to get her throat slit" after she had told him about not following proper hygiene rules, regarding the placement of aprons and gloves.

Appearances for the Employer:

Mr. John Gillingham, Production Manager

Appearances for the Union

Mr. Tom Wheeler, grievor

Mr. Roosevelt Barnes, employee

It is my understanding that this arbitration is proceeding under the parties' "first collective agreement" which became effective on the date of signing on June 18, 2008. Since the representative of the Union was experienced in presenting arbitrations and the Production Manager was not, the arbitrator permitted the latter considerable latitude in presenting the Employer's case. Mr. Gillingham's task was made particularly difficult because he was sent to the hearing alone, without witnesses. Since he did not directly participate in or observe the conversation between the grievor and his supervisor, he was unable to provide any first hand evidence of the incident to support his case. The Union objected at the point Mr. Gillingham claimed that his information from other employees were facts. To the extent that he offered information told to him by Ms. Deering, such evidence was hearsay and could not be relied upon at arbitration because the Union would be denied natural justice by its inability to cross examine the author of such information.

IN THE MATTER OF AN ARBITRATION

Between

Breakwater Fisheries Limited
(hereinafter referred to as “the Employer”)

And

Fish, Food, and Allied Workers Union (FFAW/CAW)
(hereinafter referred to as “the Union”)

THE GRIEVANCE

The Employer discharged the grievor, Mr. Tom Wheeler, for a comment he made at work to the Quality Control supervisor alleging that she was going to get her throat slit. The grievance claimed dismissal without just cause. Full redress was requested.

The arbitration hearing was held at St. John’s, Newfoundland and Labrador, on March 27, 2009.

For the Union: Mr. Ben Baker, National Representative, *et al.*
For the Employer: Mr. John Gillingham, Production Manager.
Sole Arbitrator: Mr. David Alcock

The parties were asked whether mediation might be useful. The Union expressed willingness to settle the matter of compensation. The Employer did not agree and wished the matter to be determined by arbitration.

The following items were received by consent:

1. collective agreement;
2. grievance form dated June 13, 2008;