TERMINATION
ALCOHOL

FINDINGS AND DECISION IN A DISPUTE

BETWEEN:	**MARINE ATLANTIC INC.**
	(hereinafter referred to as "the Employer")
AND:	**USW / ILA COUNCIL OF TRADE UNIONS**
	(hereinafter referred to as "the Union")
RE:	**THE GRIEVANCE OF QUINTON DICKS**
	(hereinafter referred to as the "Grievor")

Appearances:	For the Union:	Boyd Bussey
	For the Employer:	Denis Mahoney
Witnesses:	Called by the Union:	Quinton Dicks
	Called by the Employer:	Rhoda Green
Arbitrator/Mediator:	Dennis Browne, Q.C.	

The Arbitration hearing convened at the Comfort Inn Airport in St. John's, Newfoundland and Labrador, on September 7, 2011. At the commencement of the hearing, the parties agreed as follows:

1. That the sole Arbitrator was acceptable to the parties and had jurisdiction to deal with the dispute.

2. That the Arbitrator would take written notes and in the event of conflict, these notes would prevail.

3. That the grievance procedure had been properly followed.

4. That the Arbitrator would remain seized of the matter for a period of sixty (60) days following the date of the Award in the event that any interpretation of the Award or its effect was necessary.

5. That witnesses would not be excluded from the hearing.

6. That all parties likely to be affected by the outcome of the arbitration had received adequate notice.

7. That Collective Agreement and statutory time limits for making the Award would be waived.

8. That there were no preliminary objections raised with respect to arbitrability.

THE EXHIBITS

The following exhibits were entered by consent:

C1 The Collective Agreement

C2 The Grievance – February 22, 2010

C3 New Employee / Personnel Data Change Form

C4 Correspondence – Gratton/Dicks – June 15, 2004

C5 Job Description: Freight Handler/Stevedore (7451)

C6 Job Description: Traffic Director

C7 Human Resources Handbook / Workplace Standards / Alcohol and Drug Policy

C8 New Employee Orientation Session – May 11, 2004

C9 Alcohol Testing Form

C10 Driver Check / Drug Testing / Results of Alcohol Test

C11 Correspondence – Merrigan/Dicks – October 6, 2009

C12 Woodlawn Medical Clinic – Assessment – Campbell – November 17, 2009

C13 Correspondence – Follett/Dicks – December 10, 2009

C14 Correspondence – June 3, 2011, letter

C15 Correspondence – January 17, 2011, letter

C16 Agreed Statement of Facts

C17 Notification – Court Check

Other Exhibits:

QD1 Correspondence – Merrigan/Dicks – July 17, 2009

The relevant Articles of the Collective Agreement are appended.

NATURE OF THE GRIEVANCE

In a grievance dated February 22, 2010, the Union alleges that the Grievor was wrongfully dismissed from his employment. The Union is seeking the Grievor's reinstatement. The Employer denies any violation of the Collection Agreement in the circumstances.

THE EVIDENCE

AGREED STATEMENT OF FACTS

Introduction

1. This Agreed Statement of Facts is being provided for the purpose of an arbitration scheduled for September 7 and 8, 2011 with respect to the termination of the Grievor, Quinton Dicks ("Dicks"). The parties have reached agreement on the essential facts giving rise to the just cause for discipline of Dicks. The only remaining issue in dispute between the parties for adjudication by the Arbitrator pertains to the penalty of discharge that was issued in this case. Either party may call any witness and give evidence at the hearing provided such evidence does not contradict the information contained in this Agreed Statement of Facts.

Background

2. Marine Atlantic Inc. ("Marine Atlantic") is a federal Crown corporation, formed in 1986 to continue the operation of the constitutionally required ferry service between the Island of Newfoundland and the Province of Nova Scotia, as defined under the Terms of Union between Newfoundland and Canada.

3. At the time of the incident giving rise to the discharge, Marine Atlantic operated a fleet of four vessels: the MV *Caribou*, the MV *Joseph and Clara Smallwood*, the MV *Leif Ericson*, and the MV *Atlantic Vision*. Marine Atlantic provides ferry services on two routes: a year-round 96 nautical mile daily service between Port aux Basques, NL and North Sydney, NS, and a seasonal 280 nautical mile tri-weekly service between Argentia, NL and North Sydney, NS. Passengers, passenger vehicles and freight vehicles are all carried on these vessels.

4. Marine Atlantic's shore-based stevedoring and clerical workers are members of the USW/ILA Council of Trade Unions ("USW/ILA") and work under Agreement D, which is attached as **Tab 1**.

5. On May 12, 2004, Quinton Dicks ("Dicks") commenced employment with Marine Atlantic as a trainee and on June 15, 2004 was offered employment with Marine Atlantic. He worked in accordance with the terms of the Collective Agreement which was year round employment but less than full time hours. A copy of his New Employee Form and Hiring Letter are attached as **Tabs 2 and 3** respectively.

6. Dicks has worked in the positions of Freight Handler/Stevedore and Traffic Director, which both fall within Agreement D. Job descriptions for these positions are attached at **Tabs 4 and 5** respectively.

7. The positions of Stevedore and Traffic Director are both designated as safety sensitive positions pursuant to Clause V (viii) of Marine Atlantic's Alcohol and Drug Policy, which policy is attached at **Tab 6**.

8. At the time Dicks was hired with Marine Atlantic in 2004, he acknowledged having reviewed and received Marine Atlantic's policies, including its Alcohol and Drug Policy, during orientation training, which acknowledgment is attached at **Tab 7**. Dicks was aware of Marine Atlantic's Alcohol and Drug Policy at the time of the events giving rise to his dismissal.

9. Evidence with respect to Dicks' prior record of discipline will be introduced by Marine Atlantic through a witness at the hearing.

Misconduct

10. On August 20, 2009, Dicks was scheduled to work from 6:00 p.m. to 2:00 a.m. in the position of Freight Handler/Stevedore.

11. During that shift, Dicks engaged in the following misconduct:

    a. Dicks carelessly sprayed water into a co-worker's vehicle while using a fire hose owned by the Company, not as part of his assigned duties, and subsequently engaged in an argument with the co-worker;

    b. The incident referred to in sub-paragraph a above required the intervention of the Assistant Terminal Manager, at which time she observed symptoms which caused her to suspect that Dicks was under the influence of alcohol. The Terminal Manager was then also consulted with respect to the incident and Dicks' condition, after which Dicks was asked to and did consent to an alcohol breath test. Two breath alcohol tests were conducted on Dicks that evening at 11:27 and 11:44 p.m. [**Tab 8**]. The results measured confirmed a blood alcohol concentration of 0.037 g % and 0.034 g % respectively [**Tab 9**].

12. A full investigation was conducted by Marine Atlantic during which time statements were taken including a statement from Dicks.

13. Dicks consumed a significant enough amount of alcohol prior to reporting to his shift on August 20, 2009 such that it is likely that Dick's blood alcohol concentration exceeded the "legal limit" under the *Criminal Code* of 80mg/100 ml at the time of reporting to work on August 20, 2009. Marine Atlantic may present further evidence with respect to its consultation with the Toxicologist in this regard through a witness at the hearing.

14. As a result of a statement initially made by Dicks during the investigation indicating that he had a sickness, Dicks was referred by letter from Marine Atlantic dated October 6, 2009 [**Tab 10**] to a Substance Abuse Professional, Dr. Gen Campbell, for

an assessment on October 27, 2009. Dr. Campbell's report, which is attached at **Tab 11** found that Dicks did not meet the criteria for alcohol dependence. Dicks acknowledges and agrees that he does not have an alcohol addiction or dependency.

15. By letter dated December 10, 2009, attached at **Tab 12**, Dicks was terminated from his employment with Marine Atlantic for cause.

16. On February 22, 2010, a grievance was filed on behalf of Dicks with respect to his termination [**Tab 13**] and accepted by Marine Atlantic in its letter dated June 3, 2010, attached at **Tab 14**.

17. On January 19, 2011, a written apology was received from Dicks for the events of August 20, 2009, which is attached at **Tab 15**.

ALL OF THE FORGOING HAVING BEEN AGREED TO BETWEEN THE PARTIES.

Also, there was testimony from the Grievor and the Employer's Vice-President of Human Resources, Rhona Green.

The Grievor confirmed the admissions made in the Agreed Statement of Facts. The Grievor testified that he worked spare/relief with the Employer and was not a fulltime employee in August 2009. The Grievor was 34-years old at the time of termination, is not married and has no children. He has lived his life in Port Aux Basques for the most part and has worked in other jobs, but apparently not for the length of time he has worked for this Employer.

The Grievor acknowledged receiving a letter of discipline for a previous incident, resulting from his failure to interact appropriately and professionally with co-workers and supervisors in an incident dated April 15, 2009. The Grievor had spoken inappropriately to a co-worker and questioned a supervisor, and the discipline was limited to a written warning. The Grievor was advised at that time that any further inappropriate behaviour could lead to disciplinary action up to and including dismissal.

The Grievor admitted that he had drinks before he came to work on August 20, 2009. The Grievor did not deny his responsibility for his misconduct on August 20, 2009. The Grievor also acknowledged that on September 20, 2006, he had been convicted for operating a vehicle while impaired by exceeding 80 mg. He had also been convicted on September 16, 2009, for operation

of a vehicle while impaired. His second conviction required a prison sentence which the Grievor served during weekends, allowing him to keep his job. The Grievor believes that he may have had alcohol dependency but feared admitting that to Dr. Campbell, thinking it would cause him the permanent loss of his job.

In his testimony the Grievor accepted responsibility for his actions. The Grievor wanted his good paying job back, enjoyed the work, and needed to be independent of his parents. The Grievor found it difficult to get a job after he was terminated as no one wanted him.

The Grievor stated that he commenced employment in 2004 on a part-time capacity but if he had remained working he would be on fulltime status today. At the time of the incident on August 20, 2009, the Grievor was working as a stevedore. The Grievor had informed his Employer of his second conviction for impairment. Therefore, the Grievor did not get called in on weekends, which allowed him to serve his sentence on weekends.

The second witness, Rhona Green, the Vice-President of Human Resources, works with the company President, who reports to the Board of Directors. In 2010 the Employer's vessels carried some 400,000 passengers in the transportation service which connects the island of Newfoundland to the mainland.

The Agreed Statement of Facts was acknowledged as accurate. The witness stated that the stevedore's work was physical and safety-sensitive. The responsibilities include off-loading vessels which is viewed as high-risk work.

The Alcohol and Drug Policy is presented to employees upon their hire. The policy was approved by the Board of Directors. The policy was amended in 2002 and 2008.

The witness was not involved personally at the time of the incident but was informed as to what transpired. Because the Grievor said he had an addiction, the Employer referred the Grievor to Dr. Campbell. Dr. Campbell's report was reviewed by the management team. Dr. Campbell's report stated that there was no medical issue pertaining to addiction. The Grievor's short amount of service was considered and the fact that he was five (5) years employed, working approximately three (3) months per year. This was viewed as a very short term of employment. Also, there was a prior letter of discipline due to inappropriate behaviour. The toxicology report was considered and

the fact that the Grievor's consumption of alcohol was higher than 0.37. Given the passage of time when the test was administered, it is likely that the Grievor was over .40 at the start of his shift. All of these facts were considered in the decision to terminate the Grievor. The Grievor's apology came January 30, 2011, but there was nothing in that to persuade the Employer to change the decision. The Employer believed that the apology had more to do with the arbitration than anything else. There was no communication with the Grievor following receipt of the apology. From a company perspective, coming to work under the influence of alcohol and/or drugs in this particular work environment, places other employees and customers at risk.

The Employer considered all of the relevant information in terminating the Grievor. There is nothing in the facts for the Employer to reconsider.

The witness stated that the Employer had a zero tolerance relating to alcohol and work. The witness acknowledged that under the policy an alcohol test in excess of .039 BAC mandated that an employee be removed from their job until considered safe to work. Further, the policy stated that a test result of .04 BAC or higher was considered a violation of the policy. However, in this instance, because the test was conducted later in the evening, it was generally perceived that the Grievor's impairment would have exceeded 0.037 when he first came to work.

The Employer does have an Employee Assistance Program, which employees can access. This program is outside sourced and the Employer was aware that the Grievor took advantage of the policy but had no particulars. The Employer was aware that the Grievor had gone to jail on weekends, pursuant to the 2009 conviction, but was unaware of the 2006 incident.

POSITION OF THE PARTIES

The Union

This grievance pertains to the discharge of the Grievor. There is an Agreed Statement of Facts. The Grievor reported for work after drinking. He had not been assigned to work that day but was called into work at 4:30 in the evening. He made a mistake. He should have stayed home.

The issue is the penalty. It is the Union's position that discharge is too severe. The Grievor has over seven (7) years employment and was born and raised in Port Aux Basques. The Grievor formally

apologized to the Employer. There are similar situations in which arbitrators have decided that the discharge in question was neither just nor reasonable.

The Grievor reported into work under the influence of alcohol. There was an incident. The Grievor was washing another employee's car during a low work time and carelessly sprayed water into the vehicle. There was an altercation in the result. The Grievor apologized and offered to pay for any damage to the car. There is no precedent for an employee to lose his position for this. The Union is requesting a variation of the penalty.

The case is not about whether the Grievor appeared to work under the influence. That is agreed. The Grievor has accepted responsibility for that action. Following the incident the Grievor submitted to an alcohol test. The Employer referred the Grievor to a medical practitioner and the Grievor complied.

The Grievor has not helped himself in that he testified that much of what he told Dr. Campbell was incorrect. The Grievor figured if he convinced the doctor that he did not have a drinking problem he would get his job back. The Grievor had other social, family and personal problems at the time. The Grievor has lost his license three times relating to alcohol because he was driving while under the influence.

If the Grievor had not had the altercation at work as a result of washing a fellow employee's car, the Grievor may have gone through the shift unnoticed. Because the employee's car received water damage through the Grievor's carelessness, there was an investigation and only then was it observed that the Grievor's breath smelled of alcohol. There was carelessness at work, but the incident was limited to what transpired during and after the car wash.

The Grievor has otherwise been a good employee. He has a large family in the community and has chosen to live in a rural part of the province. Losing his job with this employer would be an undue hardship. The Grievor supports an aging mother. The Grievor may not be an alcoholic, however, he certainly needs help and employee assistance is available.

The Employer must also accept some responsibility. The Employer's orientation procedure is only one day. Many issues are complicated. More time is required in orientation to familiarize new employees with all of the policies and practices. The Grievor was subject to previous discipline, with one letter on his record. That was not a complicated situation. There is no sunset clause in the Collective

Agreement in reference to disciplinary issues so the past can be brought forward. The previous incident is far removed from the facts of this case.

The Union presented a number of cases in support of its position, including: Re: British Columbia Hydro and Power Authority and I.B.E.W., Loc. 258 (2001) 94 L.A.C. (4th) 305 (Kinzie); Sour Dough Markets Ltd. and Teamsters Union, Loc. 31 (1997) 49 C.L.A.S. 477 (Blasina); Cominco Ltd. and U.S.W.A., Loc. 480 (1996) 32 L.A.C. (4th) 206 (Williams); and Re: Bricklayers, Masons and Plasters International Union, Local No. 2 N.S. and Sydney Steel Corp. (1968) 19 L.A.C. 398 (Clarke).

It is the Union's position that the penalty of discharge ought to be modified because it was not reasonably imposed.

The Employer

This case is extremely important and significant for the Employer. Safety at the workplace is at the core of the Employer's concern. There is a legislative obligation to ensure workplace safety. Workplace safety has broad, even criminal, responsibility. There is liability for CEOs, who fail in their duty to ensure the health and safety of employees. The Employer has workplace safety first and foremost in training and orientation for employees. The Employer's policies were developed after consultation with the unions. There is no ambiguity in reference to the policy and no grievance has ever been filed. There is zero tolerance for reporting to work under the influence of alcohol. The responsibility to come to work unimpaired is that of the employee.

This is a serious case. There has been a significant infraction and the appropriate penalty is discharge. There are no circumstances in which an arbitrator should intervene in this termination. There are sensitive safety issues. The facts are as presented. There is no evidence that the Grievor suffers from alcohol dependency. At the time of his termination, the Grievance was a young person of less than five (5) years with the company. He was not a fulltime employee. There are no mitigating circumstances. The dismissal should be upheld.

There is serious misconduct here. It is likely that the Grievor attended work having exceeded the legal limit for alcohol under the *Criminal Code*. The Grievor was tested in accordance with company policy. The Grievor had a prior disciplinary warning on his record. Prior discipline should be considered. The Grievor acted inappropriately at work in this instance, as he did in the

previous instance. It is clear that the Grievor violated the Employer's policy. The Union is not disputing that.

This is a clear and compelling case in which the termination should be upheld. The Employer maintains a zero tolerance policy relating to alcohol. If the Grievor were reinstated, the wrong message would be sent to other employees. Reinstatement is not appropriate.

The Grievor has no alcohol dependency and therefore there is no duty to accommodate. The fact is that the Grievor says different things to different people. The Grievor attempts to minimize his poor behaviour. The Grievor has Grade 12, has worked elsewhere in other positions and is employable. There is no evidence that the Grievor attempted to find alternate employment. The Grievor has no dependents and is an only child who lives with a parent. He appears to be receiving financial support from his family. The Grievor is young and would not have a difficult time in securing alternate employment. There would be other work opportunities. Medical reports do not favour of the reinstatement of the Grievor. The Grievor's apology came late and seemed to be a pre-arbitration effort. Therefore its sincerity is questionable. The Arbitrator has no jurisdiction to modify the Collective Agreement, as stipulated under Article 8.6.

The nature of this business requires that employees come into work free from the influence of alcohol. The approach of other arbitrators, as is evident from the cases, should be followed. The Employer referred the Arbitrator to a number of cases, including: Amcan Castings Hamilton Division and U.S.W.A., Loc. 4153 (2006) 86 C.L.A.S. 97 (Tims); Coast Mountain Bus Co. and C.A.W.-Canada, Local 111 (2009), 96 C.L.A.S. 435 (Dorsey); Mount Pearl (City) and C.U.P.E., Local 2099 (2003) 80 C.L.A.S. 133 (Scott); Newfoundland and Labrador (Resource Development Trades Council) and Voisey's Bay Employers Assn. (2005), 80 C.L.A.S. 170 (Buffett); Northumberland Ferries Ltd. and C.A.W., Locals' 4508 and 4508A (2002), 68 C.L.A.S. 216 (MacLean); and National Automobile, Aerospace, Transportation and General Workers (CAW-Canada) Local 4285 and Marine Atlantic Inc. (Unreported) (2005, Archibald).

It is the position of the Employer that the grievance should be denied and the penalty of discharge upheld.

CONSIDERATIONS

Here the parties have provided an Agreed Statement of Facts. The Grievor has admitted his misconduct by commencing his shift to work on August 20, 2009, while under the influence of alcohol. The Grievor works as a freight handler and stevedore. During that shift, the Agreed Statement of Facts states that the Grievor engaged in the following misconduct:

> a. Dicks carelessly sprayed water into a co-worker's vehicle while using a fire hose owned by the Company, not as part of his assigned duties, and subsequently engaged in an argument with the co-worker;
>
> b. The incident referred to in sub-paragraph a above required the intervention of the Assistant Terminal Manager, at which time she observed symptoms which caused her to suspect that Dicks was under the influence of alcohol. The Terminal Manager was then also consulted with respect to the incident and Dicks' condition, after which Dicks was asked to and did consent to an alcohol breath test. Two breath alcohol tests were conducted on Dicks that evening at 11:27 and 11:44 p.m. The results measured confirmed a blood alcohol concentration of 0.037 g % and 0.034 g % respectively.

The Employer conducted a full investigation as required under Article 6.1 of the Collective Agreement prior to disciplining the Grievor. Following that investigation, the Grievor was terminated from his employment. The Grievor does not deny his misconduct. The Union contends that the termination was not a reasonable penalty in the circumstances. That is the issue in dispute here.

The Collective Agreement Articles relevant to this grievance include:

> 8.6 Disputes arising out of proposed changes in rates of pay, rules or working conditions, modifications in or additions to the scope of the Agreement, are specifically excluded from the jurisdiction of the arbitrator, and the arbitrator shall have no power to add to, or subtract from or modify any of the terms of the Agreement.

The Agreed Statement of Facts referenced relevant correspondence.

July 17, 2009, correspondence from Gerard Merrigan, Terminal Manager at Marine Atlantic, to the Grievor referred to a first incident for which the Grievor was disciplined.

> Re: Investigation in Connection With Your Alleged Inappropriate and/or Disrespectful Behaviour in the Workplace on or about 15 April 2009
>
> This letter is to inform you that the above noted investigation is complete. Based on your investigation statement and the statements obtained during the process, this incident appears to have arisen as a result of a misunderstanding of policy in relation to work pass and travel pass holders.
>
> As discussed in my office on 22 June 2009, an employee who is traveling on a work pass should be treated as a reserved passenger and directed to the reserve traffic lanes. As well, a travel pass holder may board the vessel in another passenger's vehicle, as long as the traffic director scans the boarding card. I trust that you now understand the procedure; please contact me if you have further questions.
>
> Please note that this misunderstanding did not warrant the apparent inappropriate manner in which you spoke to a co-worker and questioned your supervisor. However, your discipline will be limited to this written warning, despite your relatively short length of service and a previous warning regarding your performance.
>
> Please be advised that you have a responsibility to interact appropriately and professionally with co-workers and supervisors and any further inappropriate behaviour will lead to disciplinary action up to and including dismissal. This letter has been copied to the Human Resources department for placement on your personnel file for future handling in accordance with the Progressive Discipline Policy. This policy can be viewed on the employee website.

Following a second incident on August 20, 2009, the Grievor received this correspondence dated October 6, 2009, from the Employer:

> Re: Investigation in Regards to Alleged Inappropriate Behaviour in the Workplace on or about 20 August 2009 and/or Alleged Violation of Marine Atlantic Inc.'s Alcohol and Drug Policy (Policy 1-65) on or about 20 August 2009
>
> I have received the documentation in relation to the above noted investigation, including the statement that you provided on 17 September 2009.
>
> In your statement, when questioned about your alleged violation of the Alcohol and Drug Policy, you identified that you have "a sickness." As a result, it is not possible to render a decision for this investigation until you have been assessed by a Substance Abuse Professional.

> An appointment has been scheduled for you with Dr. Gen Campbell, Substance Abuse Professional, in Halifax, Nova Scotia, on 27 October 2009 at 4 p.m. Travel, meals and accommodations will be arranged and paid for by the Company.
>
> For safety reasons, you will be held out of service without pay pending the outcome of this appointment, after which I will render a decision with respect to both allegations in the investigation.
>
> Please feel free to contact me if you have any questions.

Dr. Campbell's report of November 17, 2009, provides the following Diagnostic Summary and Recommendations regarding the Grievor:

> This young gentleman does not meet the diagnostic criteria for alcohol dependence. He also does not meet the diagnostic criteria for alcohol abuse. He does admit that during the time he was in relationship with his previous lady, he did abuse alcohol. Checking with himself and his father this seems to have been the first time this has occurred in his life time. It is worrisome that alcohol was his choice of a coping mechanism. That is certainly not the means of coping that one normally chooses, yet he does not meet the criteria for either of those DSM-IV Diagnoses. Mr. Dicks' behaviour that night therefore does not require medical treatment and the disciplinary response of his employer does not need to be mitigated by concerns of a medical illness.

The Grievor's termination correspondence dated December 10, 2009, from the Employer's President/CEO states:

> Re: Investigation in Regards to Alleged Inappropriate Behaviour in the Workplace on or about 20 August 2009 and/or Alleged Violation of Marine Atlantic Inc.'s Alcohol and Drug Policy (Policy 1-65) on or about 20 August 2009.
>
> This letter is in reference to the investigation of your alleged inappropriate behaviour in the workplace and alleged violation of the Company's Alcohol and Drug Policy on or about 20 August 2009.
>
> Upon review of the investigation documentation, it has been determined that you behaved inappropriately on 20 August 2009 when you carelessly sprayed water into a coworker's vehicle while using a fire hose owned by the Company, not as part of your assigned duties, and subsequently engaged in an argument with the coworker. In statements provided by you on 20 August 2009 and on 17 September 2009, you admit that water went into the coworker's vehicle, and the subsequent argument was witnessed by other employees.

> It has also been determined that you violated the Alcohol and Drug Policy on 20 August 2009. In the statement that you provided on 17 September 2009, you admitted to having consumed alcohol before reporting to work on 20 August 2009, and this is corroborated by the breath alcohol test conducted on that date for reasonable cause.
>
> However, you indicated in your statement that you had "a sickness" and, as a result, the investigation outcome was postponed pending an assessment by a Substance Abuse Professional. An appointment with Dr. Gen Campbell was scheduled for you on 27 October 2009. Following your appointment, Dr. Campbell provided a report which states that you do "not meet the diagnostic criteria for alcohol dependence" and further that your "behaviour that night therefore does not require medical treatment and the disciplinary response of [your] employer does not need to be mitigated by concerns of a medical illness."
>
> Marine Atlantic's Alcohol and Drug Policy states that "Marine Atlantic is committed to the health and safety of employees, contractors and the working environment on behalf of those who use our services, the general public, and the community in which we operate. We recognize that the use of illicit drugs and the inappropriate use of alcohol and medications can adversely affect job performance, the work environment and the well being of employees, and also can place the integrity and safety of the company's operation at risk."
>
> Violation of Marine Atlantic's Alcohol and Drug Policy is contrary to Marine Atlantic's interest in and responsibility for the health and safety of its employees, customers and operations and cannot be tolerated. As a result of your violation of the Alcohol and Drug Policy and inappropriate behaviour on 20 August 2009, and upon review of your personnel file, which indicates a short length of service and a previous letter of warning relating to your behaviour in the workplace, I must advise that your employment with Marine Atlantic Inc. is terminated for cause, effective immediately.

The Employer's Alcohol and Drug Policy as outlined in the Workplace Standards of the Human Resources Handbook states:

> IV. POLICY STANDARDS
>
> To minimize the risk of unsafe and unsatisfactory performance due to the use of alcohol or other drugs, the following standards have been set out. Everyone is expected to report fit for duty, and remain fit throughout their work day, shift, or tour of duty.
>
> ...
>
> ii. Alcohol: The use, possession, distribution, or offering of beverage alcohol is prohibited when on company business or premises, with the exception of the situations outlined below:
>
> - use by vessel crew dead-heading after being relieved of duties at the end of their tour of duty and when not in uniform and when not in any crew areas. This does not apply to deadheading for purposes of transfer to other vessels;
> - use by any employee when on vacation;

- responsible use when on business after the work day e.g. conferences, training sessions, when on travel status, specially approved social events etc.
- possession of <u>factory-sealed containers</u> stored in a personal vehicle parked on company premises;
- <u>factory-sealed containers</u> secured by the vessel Master in his or her office.

Individuals covered by this policy can not:

- report for duty or remain on duty under the influence of alcohol from any source,
- use alcohol after being notified to report for duty,
- use alcohol during the work day (shore) including during meals and breaks,
- use alcohol during a tour of duty (vessels)
- have an alcohol test result of .04 BAC (Blood Alcohol Content) or greater, or
- use alcohol after an accident until tested or advised a test is not required.

iv. <u>Unexpected (Emergency) Call-in</u>: If unexpected circumstances arise where an employee is requested to perform unscheduled services while under the influence of alcohol or medications that could impact safe operations, it is the responsibility of that individual to decline the call. Under the circumstances, the employee will not be disciplined for declining the call, but repeat occurrences for employees who are required under their collective agreements to be available for work may be subject to investigation. Repeat occurrences will be addressed in the same manner as repeat occurrences of declining calls are otherwise dealt with in each work group.

V. KEY DEFINITIONS

viii. <u>Safety-Sensitive Position</u> is a position in which individuals, who may work independently for varying or extended periods of time, have a key and direct role in an operation where performance impacted by alcohol or other drug use could result in:

- a serious accident or incident affecting the health or safety of employees, contractors, customers, the public or the environment, or
- an inadequate response to an emergency or operational situation.

For purposes of this policy, safety-sensitive positions include those who regularly perform or are called on from time to time to perform duties in the following areas:

- all positions assigned to a vessel for the duration of their tour of duty or such other period of time on board the vessel;
- positions assigned to the terminals in the following classifications:
    - Machinists
    - Electricians
    - Plumbers/Pipefitters
    - Carpenter – all classifications
    - Ramp operators
    - Chauffeur porters
    - Tractor Trailer Operators
    - Stevedores
    - Traffic Directors

- Forklift Operator/Doorman
- Forklift Operators
- Drivers Purchasing
- Garbage Truck Driver

IX. CONSEQUENCES OF A POLICY VIOLATION

i. General Expectations: Any violation of the provisions of this policy may be grounds for termination of employment. In all situations, an investigation will be conducted and documented to verify that a policy violation has occurred before disciplinary action is taken.

Therefore, management has the authority and discretion to hold out of service any individual who his believed to be involved in an incident that could lead to termination of employment pending the results of the investigation.

A positive drug test and an alcohol test result of .04 BAC or higher are considered a violation of this policy. Anyone who holds a safety-sensitive or specified management position and has an alcohol test result of .02 to .039 BAC will be removed from their job until considered safe to return. There will be an investigation and consequences appropriate to the situation, and the employee will be required to have a negative alcohol test (<.02 BAC) prior to return to duty. In addition, failure to report directly for a test, refusal to submit to a test, refusal to agree to disclosure of a test result to management, a confirmed attempt to tamper with a test sample, or failure to report an incident which may require testing, are grounds for termination of employment.

ii. Conditions of Continued Employment: Should the company determine that employment will be continued in a specific circumstance, the individual would be required to enter into an agreement governing their continued employment which may require any or all of the following actions, or any other action deemed appropriate to the circumstance:

- temporary removal from their position;
- assessment by an expert to determine the need for a structured treatment program;
- adherence to a recommended treatment and aftercare program;
- maintenance of sobriety and satisfactory performance on return to duty;
- successful completion of a return to duty test;
- ongoing unannounced testing for the duration of their agreement; and
- no further violations of the policy.

Failure to meet the requirements of the agreement during the monitoring period will be grounds for termination of employment.

Brown and Beatty in Canadian Labour Arbitration (4 Ed.) at 7:3560 state the following in relation to “intoxicants”:

> Intoxicants are antithetical to a healthy working environment, and employees who mix the two are liable to be disciplined by their employers. Intoxicants adversely affect the ability of employees to satisfactorily perform their duties, threaten the health and safety of others, and/or undermine the employer's reputation. As a result, being in the possession of or trafficking in alcoholic beverages or illegal drugs in the workplace, actually drinking alcohol or taking drugs on the job, as well as reporting for or being at work under the influence of an intoxicant, have all been determined by arbitrators to merit disciplinary sanctions. Even standing by and watching others consume or deal in drugs can be grounds for discipline. However, where an employee does not become impaired, it has been held that she may not be disciplined for consuming alcohol off company premises during her lunch hour, if that is a period during which she is not paid. The result may be otherwise, however, if the employee performs work, like driving, which is especially sensitive to the consumption of alcohol, or if the meal-break is a period for which she is paid or if the consumption took place on company premises.
>
> In all cases involving an allegation that an employee has misused alcohol or drugs, employers bear the usual burden of proof. To establish that an employee was impaired, for example, arbitrators have required employers to produce evidence of clinical symptoms of impairment or that showed the intoxicant affected the employee's ability to perform his work safely and satisfactorily. On this standard, although proof that the grievor consumed large quantities of liquor may be sufficient to satisfy the onus, the fact of consumption, by itself, might not. If an arbitrator is uncertain about which version of the facts to accept, the indecision will be resolved in the grievor's favour. For example, where, after all the evidence had been adduced, the arbitrator was unable to attribute the cause of impairment to alcohol rather than to an illness or medication, that the discipline was not sustained.
>
> Because there are so many different drug and alcohol offences, the penalties for this kind of behaviour vary enormously. Depending upon a variety of factors, including the employee's history with alcohol and drugs, the nature of the employer's business, and the grievor's job, such behaviour may warrant sanctions ranging from non-disciplinary suspensions to dismissal.
>
> Because of the serious consequences that are at stake, where an employer has reasonable grounds for suspecting an employee of possession or being under the influence of alcohol or some other drug, arbitrators have recognized its right to demand an explanation from and carry out a search of the employee, and to put appropriate testing procedures in place.

The scope of an arbitrator's jurisdiction is as stated in Brown and Beatty at 7:4100:

> Although not all arbitrators were initially in agreement, it now generally accepted that unless the collective agreement or relevant legislation provides otherwise, an arbitrator's remedial powers to assess the appropriateness of whatever disciplinary sanctions were imposed are broad and largely unfettered. The purpose of their review is to determine for themselves that a sanction is just and reasonable in all the circumstances – that the penalty "fits the crime". In the words of one arbitrator, when an arbitrator is inclined to modify a penalty imposed by an employer:

> … he is really saying that the employer has ignored some relevant consideration, proceeded on some misunderstanding, acted from illicit move, or otherwise affronted the arbitrator's sense of what is "just".
>
> In other words, the arbitrator is not only judging the grievor; he is judging the employer as well.

> Sometimes arbitrators may be more deferential. Some arbitrators, for example, have relaxed the standard of their review when, even if the penalty was not the one they would have chosen, it could still be said to fall within a range of reasonable responses to the situation. As well, in some employment settings falling outside the jurisdiction of general labour relations legislation, an arbitrator's jurisdiction to review the fairness of a penalty may be more limited. Occasionally, a collective agreement may expressly require the grievor to demonstrate that the discharge was not for just cause.

At 7:4300, with respect to the reasonableness of a penalty, Brown and Beatty state:

> In many cases in which employees claim to have been unjustly disciplined, they do not dispute that they acted in ways that warranted punishment, but question the reasonableness of the penalty imposed. Although the authority of arbitrators to review an employer's choice of penalties was not always accepted by the courts, it is now expressly recognized in all labour relations statutes. Indeed, it is now understood that testing the reasonableness of a disciplinary sanction involves a wide-ranging review of a broad set of circumstances concerning the employee, the employer and the incident itself.
>
> The nature of the offence is always of critical significance in determining whether a penalty is fair. As described in the preceding sanctions, theft and sabotage are regarded as more culpable than an act of carelessness or one of occasionally being late, for example.
>
> Whether a penalty "fits the crime" can also be affected by how the employer has behaved. The integrity of any penalty will be adversely affected by inconsistent, inattentive and/or inappropriate management.
>
> In addition to the nature of the particular offence, and the way in which the employer has approached the case, there are a myriad of factors pertaining to the personal circumstances, state of mind, etc., of the employee involved that bear directly on the question of whether the punishment received was just. Of these, none figures more importantly in an arbitrator's assessment of what penalty is appropriate than the employment record of the grievor. Long and exemplary employment histories almost always count in favour of lighter penalties, while a record of poor performance invariably has the reverse effect.

At 7:4400 Brown and Beatty reference "mitigating factors":

> An assessment by an arbitrator of the fairness of a disciplinary penalty will of course depend on the facts of the case. Consideration is invariably given to the nature of the misconduct, the personal circumstances of the employee, the way in which the employer has managed the situation, or a combination of all three. The employment context and the employee's occupational and professional status often play important roles as well.
>
> In an effort to give employers and employees a better sense of the analytic framework they employ, arbitrators have provided checklists of the most important factors that typically organize their deliberations. In an early and often-quoted award, one arbitrator summarized in the following terms those factors that, other things being equal, can offset the gravity of the misconduct:
>
> > It has been held, however, that where an arbitration board has the power to mitigate the penalty imposed on a grievor, the board should take into consideration in arriving at its decision the following factors.
> >
> > 1. The previous good record of the grievor.
> > 2. The long service of the grievor.
> > 3. Whether or not the offence was an isolated incident in the employment history of the grievor.
> > 4. Provocation.
> > 5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
> > 6. Whether the penalty imposed has created a special economic hardship for the grievor in light of his particular circumstances.
> > 7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
> > 8. Circumstances negativing intent, *e.g.* likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
> > 9. The seriousness of the offence in terms of company policy and company obligations.
> > 10. Any other circumstances which the board should properly take into consideration, *e.g.*, (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge; this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

On August 20, 2009, the Grievor, acting outside of his assigned duties, sprayed water into a co-worker's vehicle while using a fire hose. Subsequently, an altercation ensued between the Grievor and the co-worker who owned the damaged car. Alcohol was observed on the Grievor's breath. There were two breath alcohol tests conducted which resulted in a blood alcohol concentration of

0.037 g % and 0.034 g %. It is clear therefore that the Grievor had commenced his shift while under the influence of alcohol. This is clearly a violation of the Employer's policy. There is no issue with the fact that the Employer was entitled to discipline the Grievor in these circumstances. The issue here is the reasonableness of the disciplinary penalty.

The Grievor first commenced working with this Employer on May 12, 2004, as a trainee and was offered employment on June 15, 2004. His work was seasonal in nature and amounted to approximately three (3) months a year. He was not working in a fulltime capacity with fulltime hours when the August 20, 2009, incident occurred. There is no lengthy history of employment.

The Grievor's record, at the time of the incident, was already blemished. The Grievor had been cited for disrespectful behaviour in the workplace on or about April 15, 2009, for which the Grievor received a disciplinary letter and was advised that the letter had been copied and placed on his personnel file. That letter stated in part: "However, your discipline will be limited to this written warning, despite your relatively short length of service and a previous warning regarding your performance".

The Employer's policy relating to alcohol ought to have been known by the Grievor as it was included in his orientation at the time of his employment. This is a serious offence and particularly so given the nature of the Employer's enterprise.

Prior to termination, the Employer's due diligence included obtaining medical information regarding the Grievor's health and how alcohol may have impacted his health. Dr. Campbell's report to the Employer stated that the Grievor did not meet the diagnostic criteria for alcohol dependency and his behaviour on the night of August 20, 2009, did not require medical treatment and did not indicate medical illness.

In summary, the Grievor had neither a previous good record of employment nor long service of employment. The event was not an isolated incident because the Grievor had been disciplined previously. There is no evidence of provocation. The Grievor, while at work and under the influence of alcohol, damaged a fellow employee's car and an altercation resulted. The company's policy relating to alcohol and the workplace was violated. The Grievor breached his employment

obligations. Prior to termination, the Employer acted responsibly by referring the Grievor to a physician with experience in drug and alcohol addiction for an assessment. The physician opined that the Grievor did not meet the diagnostic criteria for alcohol dependency.

After reviewing all of the circumstances of this case, and reviewing the applicable mitigating criteria, I am satisfied that the discipline imposed by the Employer was reasonable.

DECISION

In conclusion, having carefully considered the relevant articles of the Collective Agreement, and all of the evidence and arbitral jurisprudence relating to this matter, I find that the grievance is denied.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 7th day of October, 2011.

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Dennis Browne, Q.C.
Arbitrator / Mediator