

ARBITRATION AWARD

BETWEEN:

COMMUNICATIONS, ENERGY AND PAPERWORKERS
UNION OF CANADA, LOCAL 441-G
(hereinafter called the "Union")

AND:

TRANSCONTINENTAL, ST. JOHN'S, NL
(A DIVISION OF OPTIPRESS GP)
(hereinafter called the "Employer")

GRIEVOR: Ray Connolly

COUNSEL: For the Union

Charles Shewfelt

For the Employer

Harold M. Smith, Q.C.

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on April 9 and 14, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter in the event there is a question of interpretation arising from the Award, with any question to be referred to the Arbitrator within sixty (60) days following publication of the Award.
5. Any applicable time limits for the filing of the Award were waived.
6. Witnesses were excluded from the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Transcontinental, St. John's, NL (a Division of Optipress GP) ("Transcontinental") and Communications, Energy and Paperworkers Union of Canada, Local 441-G, effective January 1, 2006 to December 31, 2009
- Consent 2 - Letter dated September 29, 2008 from John Over, General Manager, Transcontinental to Ray Connolly
- Consent 3 - Grievance form filed October 1, 2008, File 441G-001-2008
- Consent 4 - Code of Ethics of Transcontinental
- Consent 5 - Appendix "A" - Declaration and Undertaking by Employee, Appendix "B" - Declaration of a Real or Potential Conflict of Interest, and Appendix "C" - Protection of Confidentiality and Transfer of Intellectual Property Rights, signed by Ray Connolly dated February 22, 2006
- DC - 1 Letter of Offer dated August 29, 2008 from British Group of Companies to Ray Connolly
- JO - 1 Letter dated December 18, 2006 from John Over, General Manager, Transcontinental to Ray Connolly

- JO - 2 Letter dated January 16, 2007 from John Over, General Manager, Transcontinental to Ray Connolly
- JO - 3 Letter dated January 16, 2007 from John Over, General Manager, Transcontinental to Ray Connolly
- JO - 4 Physician's Report dated December 4, 2007, Workplace Health, Safety and Compensation Commission
- JO - 5 Medical notes for Ray Connolly dated December 18, 2007, January 11, 2008, February 3, 2008, March 25, 2008
- JO - 6 Air quality report - Robinson Blackmore Building, October, 2008, BAE-Newplan Group Limited
- JO - 7 Industrial hygiene assessment, February, 2008, Rogers Enterprises Ltd.
- JO - 8 Medical note dated September 25, 2008 and Physician's Report dated September 25, 2008, Workplace Health, Safety and Compensation Commission
- JO - 9 Letter dated November 4, 2008 from Marsha Waddleton, Intake Adjudicator to Ray Connolly
- JO - 10 Inspection/Officers Report dated June 11, 2008 and order form dated May 8, 2008, Occupational Health and Safety Inspections Branch, Government of Newfoundland and Labrador
- RC - 1 Immediate Hazard Identification Report, dated September 13, 2007, reported by Ray Connolly
- RC - 2 Workers Report of Injury dated November 15, 2007, signed by Ray Connolly
- RC - 3 Email dated September 6, 2008 from Ray Connolly re OHS report
- RC - 4 Resume of Ray Connolly
- RC - 5 Medical note dated September 30, 2008

Nature of the Grievance

The Grievor was dismissed from employment on September 28, 2008. He was off work for medical reasons at the time. The reasons for dismissal stated by the Employer were that the Grievor was employed by a competitor and was in a conflict of interest situation, and that either the Grievor was fit for work and had abandoned his employment, or he was falsely claiming to be unfit for work. The Union grieves that the Employer did not have just cause to dismiss the Grievor from his employment.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 4 Management Rights

...

4.05 The right of the Employer to discipline, suspend or discharge employees is hereby confirmed. Any employee, who feels himself/herself unjustly treated in this regard, shall have the right to proceed under the grievance procedure. The dismissal of a probationary employee at any time during the probationary period shall not be subject to the provisions of the grievance and arbitration procedures.

...

Article 12 Miscellaneous

12.01 The Employer agrees to provide and maintain at all times, properly lighted, ventilated and heated conditions in his/her shop, also sufficient sanitary arrangements for both male and female employees to comply with such health regulations which are now or may come into effect in the near future.

...

12.05 Employees shall not enter into competition with the Employer or engage in any activities which do or are likely to result in any conflict of interest with respect to the employees' connection with the Employer.

Evidence

The witnesses called by the Employer were David Connolly, President, British Group of Companies and John Over, General Manager, Transcontinental. The witness called by the Union was Ray Connolly, the Grievor.

Transcontinental operates a commercial printing business. At the relevant time it operated five presses, one press for printing community newspapers and magazines, and four sheet feed presses, printing annual reports, brochures and covers for magazines. The presses included two multicolour presses, a Hiedelberg SM 74 and SM 52, both located in Press Room No. 1. The Grievor, Ray Connolly commenced employment at the Transcontinental business in 1995. The business was operated by Robinson Blackmore until it was purchased by Transcontinental in 2004. The General Manager, John Over, stated that the Code of Ethics of Transcontinental came into effect following the purchase. The Grievor signed the appendices attached to the Code of Ethics on February 22, 2006. Mr. Over did not know whether or not there was any document signed by the Union stating it agreed with the Code of Ethics.

The Grievor was off work for medical reasons commencing on November 15, 2007. The Employer received information in September, 2008 that the Grievor was working for another printing operation, British Confectionary Company Limited (“British”). Mr. Over testified that he consulted with his human resources advisor and concluded there was just cause to terminate the Grievor’s employment. He did not believe it was necessary to interview the Grievor prior to the termination. The Grievor’s employment was terminated at a meeting with Mr. Over on September 29, 2008. He was given a letter at the meeting which stated as follows:

Re: Termination of your employment

Mr. Connolly:

It has come to our attention from multiple reliable sources that you are currently working at another printing firm.

Article 12, Section 12.05 of our collective agreement with your bargaining unit of the Communications, Energy and Paper workers Union of Canada Local 441-G reads as follows:

“Employees shall not enter into competition with the Employer or engage in any activities which do or are likely to result in any conflict of interest with respect to the employees’ connection with the Employer.”

We consider that your employment by one of our competitors puts you in a conflict of interest situation as well as in competition with Transcontinental St-John’s.

Further more, the fact that you have been off work for medical reasons since November, 2007 forces us to conclude that either:

- 1- You are now fit to work, but have not advised us of such and decided to abandon your employment with us to work for the competition; or
- 2 - That you have been falsely claiming to be medically unable to perform your job duties, while being fit to work for the competition.

Both these conclusions as well as the violation of the non-compete clause of your collective agreement are considered as major faults. After a careful review of your file, and given the seriousness of the situation, we have made the decision to terminate your employment for cause, effective immediately.

Please be advised that your medical benefit through Transcontinental have also ended immediately. You will be receiving through regular mail in the next weeks all the documentation related to your employment termination.

The Grievor filed a claim for benefits with the Workplace Health, Safety and Compensation Commission (“WHSCC”) on November 15, 2007. He submitted a Workers’ Report of Injury form that described his injury as “chest pains left side, blood pressure elevation, skin burning, face and ears tightness and may have other symptoms of over exposure to isopropyl alcohol for years and no ventilation”. His claim was accepted initially for medical benefits. The WHSCC arranged for medical consultations and reviewed the claim. By letter to the Grievor dated November 4, 2008, his claim for benefits was denied by the WHSCC adjudicator. The letter stated, in part, as follows:

Mr. Connolly, I have reviewed and weighed all of the evidence on your file. The weight of medical evidence present on your file does not support that you are suffering from an occupational disease. It is noted that you do have two medical conditions, hypertension and vasomotor rhinitis. Neither one of these were caused by a workplace exposure nor would they limit you from returning to work. There has been no cause identified for your other complaints as all of the investigations

completed to date have been normal. When addressing the condition of vasomotor rhinitis, I have considered Dr. Lee's opinion that it is difficult to impossible to confirm what has caused your vasomotor rhinitis as it could be caused by non-occupational factors as well. I have also considered the OH&S reports and the Industrial Hygiene assessment that were completed at Transcontinental Printing. My review of these documents does not indicate that there was any significant levels of exposure to isopropyl alcohol that could possibly result in the symptoms you are reporting. The air sampling that was completed for the purposes of the Industrial Hygiene investigation in February 2008 confirm that the exposure level of isopropyl alcohol for an eight workday was 26.9 ppm, which is well below the threshold level value of 400 ppm. It is also noted that the sampling was conducted in the morning and the afternoon for quality purposes. Therefore, I am unable to conclude that your exposure to isopropyl alcohol has resulted in any of the symptoms you are reporting. As a result, I conclude that the evidence weighs more against than in favour of your claim.

The Grievor testified that he has applied for a review of the WHSCC adjudicator's decision and the review is pending. During his absence from work from November, 2007 to September, 2008, the Grievor provided medical notes from his family doctor stating that he was off work due to medical reasons. The Grievor received Employment Insurance medical benefits for 16 weeks. He also applied for benefits under the Company's short term disability benefit plan. His application for disability benefits is now pending.

John Over testified that he understood the Grievor's claim for Workers Compensation benefits was based on air quality at the Transcontinental plant. Mr. Over referred to Government Occupational Health and Safety ("OHS") inspection reports and consultants' reports related to air quality. He said there was no finding of any air quality problem in the building. He said that Government OHS Inspectors visited the building prior to November, 2007 in response to an anonymous complaint. This was the first time Mr. Over was informed about any ventilation concern. As a result of the Government OHS Inspectors' visit, Transcontinental hired a consultant to determine the level of isopropyl alcohol ("IPA") in the air. The consultant, Rogers Enterprises, issued an Industrial Hygiene Assessment, dated February, 2008, stating that the Time Weighted Average exposure level of IPA for an eight hour work day was 26.9 ppm, well below the threshold value of 400 ppm. The report included several recommendations to minimize potential risk of exposure during daily work activities and/or in the event of an accident. The report was given to the Employer's Occupational Health and Safety Committee and the Government OHS Inspectors.

Government OHS Inspectors visited the plant on May 6, 2008 and as a result, issued an Order that Transcontinental conduct an assessment of the existing ventilation system to determine the number of air changes per hour, the amount of fresh outdoor air supplied to the system and the volumetric air flows. The Inspectors also issued Orders to Transcontinental to reduce the concentrations of VOCs (volatile organic compounds) entering ambient air from trash cans containing soiled rags, and to reduce the concentration of VOCs being emitted from the fountain solution tank. Mr. Over testified about the Employer's response to the Orders. An air quality report dated October, 2008 was obtained from BAE-Newplan Group Limited. The report concluded, based on measurements taken by the consultants, that there were acceptable ventilation rates in press room #1, press room #2, web press room and web and sheet stockroom, and there were not acceptable ventilation rates in the bindery room and the digital printing room. The Grievor's work area was in press room #1. Mr. Over testified that, following the BAE-Newplan Report, Transcontinental replaced compressors and coils in the rooftop air handling systems over press room #2 and the bindery room, installed an air exchanger in the digital printing room, and vented the fountain solution tank to the outside. Mr. Over said that Transcontinental had known since 2006 that repairs were needed to the air handling system, and was in the process of having the repairs done. Approval had been obtained for the capital expense, and parts were ordered. Also, following the May, 2008 order from the OHS Inspectors, the trash cans containing soiled rags were sealed. Transcontinental also made changes in the chemical storage room so that the fan would continuously vent the room to the outside. Mr. Over said that the Grievor had not expressed concern directly to the Employer about the workplace environment and had not said anything about working for another employer. Mr. Over said that the option of operating the presses without alcohol had been considered, but it was difficult to convert an existing press from an alcohol to a nonalcohol process. Mr. Over said it was not proven that air quality at the plant had anything to do with the Grievor's medical condition.

The Grievor, Ray Connolly testified with respect to his health problems and his concerns about air ventilation. He said that he worked mostly on the SM 52 press since 2000 and also assisted other press operators as needed. He said that he first experienced health problems in about the year 2000, when he had complaints of painful itching, and developed welts on his skin. He also developed back problems as a result of being required to load paper into the press from his knees. He filed for Workers' Compensation benefits in 2001 or 2002 in relation to his back problems. He was offered medication and was given advice about lifting. The Grievor said that he developed chest pains that he described as feeling like a heart attack. He said he was eventually diagnosed with chondritis in February, 2009. In January, 2006, he was off work for medical reasons for about six weeks with

chest pains and high blood pressure. Before he came back to work he asked his supervisor, Kathy Hudson, to install an exhaust fan over the printing press. He believed that there was no air in the building and that he would have health problems if the ventilation system was not corrected. He said that the fountain solution tank was pointed towards his work area and he turned the tank away from his work area. Someone else turned the tank back towards him, and eventually the tank was bolted to the floor in that position. He complained to the Occupational Health and Safety Committee about air ventilation. He phoned the Government OHS Inspectors. As a result, there was a visit by an OHS Inspector in May, 2007. The Grievor understood from the Inspector that the air conditioning system was scheduled to be repaired. On September 17, 2007 he submitted a form called "Immediate Hazard Identification Report", in which he said there was no fresh air in his work area. He said the form was not completed by the Employer. The Grievor testified that he made a hole in the wall near his work area which he believed would improve air ventilation in the area. The Grievor testified that in November, 2007, someone covered the hole he had made in the wall.

The Grievor testified that he left work on November 14, 2007 and proceeded to the emergency department at the hospital. He said he was given medication to slow his heart rate. He completed a WHSCC Workers' Report of Injury Form on November 15, 2007 in which he reported chest pains and other symptoms from overexposure to IPA and no ventilation. He has applied for a review of the decision dated November 8, 2008 in which the Workers' Compensation Adjudicator found insufficient evidence of IPA and denied his claim. He said that evidence of VOCs should also have been considered. The Grievor testified that he was unable to challenge the finding in the Rogers report that the IPA concentration levels did not exceed the allowable limits. He believed there was no ventilation in the old part of the building, but he accepted that there was ventilation in the new part of the building where his work area was located. He agreed that fresh air was coming into the building from the air handling unit.

The Grievor testified that in August, 2008, a former worker at Transcontinental, who was at that time employed as a press operator by British, told him about a possible job there. The Grievor was interested in applying for the job and he met with Blair Connolly of British (no relation to the Grievor). He visited the plant, viewed the exhaust vents, felt air movement and believed the building was well ventilated. British did not use alcohol in its operations. The Grievor received an offer of employment from Blair Connolly by letter dated August 29, 2008, which he accepted. The letter stated as follows:

Letter of Offer

Further to our discussion on Aug 29, 2008, we are delighted to offer you the following employment package with the British Group of Companies / Atlantic Gaming Inc, starting September 15th, 2008. We feel that your skills and background will be an invaluable asset to our team as we move forward.

Per our discussion, the position is Press Operator and Feeder (XL 105), and, when required, operating some of the smaller presses (AB Dick, GTO and we expect to have a 2 Color Multi during the next Quarter). Your employment package constitutes the following:

- \$20.00 / Hour
- Comprehensive Health Benefit Package as per the Handbook provided
- 3 Weeks Vacation, taken any time during the calendar year, approved by immediate supervisor (no more than 2 consecutive weeks)
- Participation in the Corporate Wellness Program powered by Definitions Inc.

Ray, on a personal note, the potential of the new business is enormous and we sincerely hope that you are on board for the journey. With the infrastructure currently in place, the additional equipment en route and most importantly, the corporate vision to the future, I am confident that the journey will be highly successful, and tremendously rewarding; both financially and from an enjoyment standpoint.

Before the Grievor started to work at British, he sent an email dated September 6, 2008 to a number of individuals in various positions with WHSCC, injured worker representatives, and Government representatives. The email stated, in part, as follows:

I am starting another job with another printing company (THAT IS PROPERLY VENTILATED FROM NEW PRINTING PRESS TO BUILDING ASK ME I TOURED THE BUILDING) This has been discussed with Mrs. Waddleton I am not quitting Transcontinental!! I have been forced out of my job and keep out by Transcontinental and WHSCC. I am taking a \$1.84 pay cut, losing two weeks holidays, I will no longer have a pension that I was paying top rate for twelve years that the company was matching. I also paid top medical coverage. And twelve years worth of severance that I would be intitled to. I am not dropping out of my Union Local 441-G who is now filing a grievance under our own union contract (ventilation) by Mr. Charles Shewfelt National Representative who has also offered assistance with my WHSCC claim as well. He will also be receiving a copy of OHS report Monday. Mr. Shewfelt also has complete copy of my Doctor's notes that was dropped off Tuesday Sept 2 2008.

I have informed this new company of most of the situation and that everything is documented by myself and WHSCC and if anything happens that Transcontinental and WHSCC will be responsible not their company and liability will fall to them My symptoms are not gone they are conditions with no cures now and can be aggravated by environment. Printing companies cannot eliminate all the chemicals from shop this new company has followed OHS regulations and done their best to protect their employees I just hope it will be enough for me know that Transcontinental has made me sensitive to environment. The question now is how sensitive am I My biggest concerns will be the chest pains the blood pressure (left side of my heart being swollen) which are still there and can be aggravated even when not at work for 10 months, along with sinus and skin. So I will be working with this conditions but WHSCC knows this already and would have let me go back into Transcontinental with no ventilation at all. But I will take the lose for now and go to the properly ventilated company.

The email was not sent to any representative of Transcontinental or British. The Grievor testified that he had no intention to work at both Transcontinental and British at the same time. He said he did not quit Transcontinental, and he would return to work there if the air quality problems were fixed. He did not tell British that he might quit his job there and go back to work at Transcontinental. He worked at British for 14 working days. He started a few days before the scheduled starting date of September 15, 2008. He said he was doing training for two weeks. He was printing lottery tickets. The Grievor testified that he quit the job at British because his symptoms were returning. He experienced chest pains and sinus and skin problems. While he was working at British someone from Transcontinental phoned his house asking for him. His mother told the caller that he had found work. He later spoke to Mr. Over and met him on September 29, 2008. Mr. Over gave the Grievor the letter of dismissal.

The Grievor obtained a medical note from his doctor on September 25, 2008 stating "Ray should not return to a workplace unless recommended ventilation systems are in place". The doctor signed a report to the WHSCC on the same date, stating that the Grievor had no functional limitations, except that he should work in a well ventilated building. The Grievor obtained a medical note from his doctor dated September 30, 2008 that stated "Raymond had recurrence of symptoms of chemical sensitivity in his new work place and can no longer work in this environment".

David Connolly (no relation to the Grievor), President of British, testified with respect to his company's printing business and the employment of the Grievor. David Connolly testified that

British is in the commercial printing business. Its primary business is printing lottery tickets, but it also prints calendars and brochures. Mr. Connolly said the printing business is competitive. Transcontinental is one of the competitors of British. He said British bids on tenders called by Government and large corporations, and pursues other business interests. British relocated its business in June, 2006 following a fire at its former premises. A new air ventilation system was installed in the new premises. The printing presses at British use an alcohol substitute in place of alcohol in the printing process. Alcohol is used to clean the rollers. David Connolly had never met the Grievor prior to the arbitration hearing. His son, Blair Connolly, hired the Grievor. The Grievor was employed for three weeks in September, 2008 as a press operator and feeder. The Grievor quit. His personal file did not indicate any reason for quitting.

Mr. Over testified that British is one of three major commercial printers competing with Transcontinental in the same market. Transcontinental does not print lottery tickets, but is a competitor of British for other work. Mr. Over testified that the Grievor has knowledge of Transcontinental's business because he observed all the products being printed. There was potential harm to Transcontinental if British used the Grievor's knowledge of Transcontinental's printing operations.

Mr. Over believed that the Grievor had breached his duty of loyalty. Mr. Over did not believe the Grievor was trustworthy. The Grievor had a doctor's note saying he was unable to work and yet he was working for a competitor. The doctor's note of September 25, 2008 said the Grievor should not return to work unless the recommended ventilation system was installed. However, the Transcontinental building was well ventilated according to the independent reports.

Mr. Over referred to the Grievor's discipline record. The Grievor was suspended on December 18, 2006 for one day without pay for pushing another employee in a heated dispute. The suspension was not grieved. The Grievor was issued a letter of reprimand on January 16, 2007 for failing to report to work on December 22, 2006 as scheduled, without informing his supervisor. The reprimand was not grieved. The Grievor was issued a letter of reprimand on January 16, 2007 for being away from his press on several occasions while the press was running. The Grievor signed the letter, but wrote on the letter that he did not agree with it. The reprimand was not grieved. Mr. Over testified that he took into consideration the Grievor's disciplinary record when deciding to terminate his employment.

Employer Submission

The Employer submitted that the Grievor acted in breach of his duty of fidelity to his Employer, and that he engaged in activities that resulted in a conflict of interest in violation of Article 12.05 of the Collective Agreement. There was just cause for dismissal. The Grievor's breach of duty occurred upon signing the offer of employment from British. The offer of employment referred to the long term potential for the business and indicated the permanent nature of the employment. British was a competitor of Transcontinental. They were in the same printing business, produced the same material, and bid on the same work. The Grievor operated the printing press of the competitor and acted in a manner that advanced the interest of the competitor thereby breaching the duty of fidelity. The Grievor performed the same duties and worked the same hours for British as he did for Transcontinental. As a press operator, the Grievor gained knowledge of the Employer's organization, processes and type of work. The Employer could not accept any risk that the Grievor's knowledge could be shared with the competitor. The effect of Article 12.05 of the Collective Agreement was that the parties agreed to prohibit conflict of interest. The Grievor did not admit any breach of Article 12.05 prior to the arbitration hearing. The Grievor did not have any justification for accepting work at British and not returning to work at Transcontinental. There was no foundation for the Grievor's concern about air ventilation at Transcontinental. The study done in February, 2008 indicated that isopropyl alcohol levels were well within allowable limits. The Employer complied with all requests made by the OHS Inspectors, for example, it vented the chemical storage reservoir, placed lids on the soiled rag bin, and completed repairs to air exchangers. The ventilation study indicated that ventilation was adequate in the Grievor's work area. There was no medical evidence to prove that air quality was the cause of the Grievor's medical problems. The Workplace Health, Safety and Compensation Commission did extensive investigations and found there was no basis for the claim. The Grievor's symptoms returned even though the British premises had new ventilation systems and did not use alcohol in the printing process. Therefore the Grievor's medical condition was not caused by the workplace. The Grievor appeared to develop symptoms while working at British, after Mr. Over called his house looking for him. The doctor's notes obtained by the Grievor on September 25 and September 30, 2008 were questionable. The doctor's note of September 25, 2008 stated that the Grievor was required to remain off work until the ventilation system was fixed, but the doctor did not have any knowledge of the workplace other than what she was told by the Grievor. The Grievor did not inform Transcontinental that he was going to work for British. It appeared that the Grievor knew that he had done something wrong and then went to the medical doctor to obtain a note to justify his actions. Both parts of the letter of dismissal

were proven. The Employer referred to arbitral authorities in *CJCH 920/C100 FM v. N.A.B.E.T.* (1990) 17 L.A.C. (4th) 1 (Outhouse), and *Schneider Foods v. UFCW, Local 709-3* (2004) 128 L.A.C. (4th) 381 (Levinson). The Employer submitted that it did not have to give the Grievor the opportunity to resign from the competitor before dismissing him. When the Grievor resigned from British, it was for medical reasons. The Employer did not have to prove actual loss. The Union's case authorities were distinguishable. The situation in this case was more serious because the Grievor had told the Employer that he was unable to work. The Grievor knowingly breached the Collective Agreement. There were no mitigating factors. The penalty should not be reduced. Alternatively, if substitution of another penalty was considered by the Arbitrator, then a suspension was an available penalty. The Employer could no longer trust the Grievor. The Employer requested that the grievance be denied.

Union Submission

The Union agreed that British was a competitor of Transcontinental in the printing business, and that the Grievor's activities amounted to a breach of Article 12.05. The Union objected to the penalty of dismissal. When the Grievor discovered that there was a conflict of interest, he quit his job at British. The Grievor likely knew that he would have to quit at that time in any event, for the reason that his symptoms had returned. The Union questioned the actions by the Employer. The Employer failed to conduct any investigation or have any discussion with the Grievor prior to dismissing him. The Employer simply asked the Grievor to attend a meeting and gave him the letter of dismissal. The Grievor had serious medical problems. He left the workplace in November, 2007 and sought medical treatment. He received Employment Insurance sickness benefits, and filed for Workers' Compensation benefits and disability benefits. He regularly provided doctor's notes to the Employer. The Employer never questioned the doctor's notes and never asked for any other medical reports. The Employer did not take any action to have the Grievor return to work. The Employer did not have any evidence to support dismissing the Grievor for making a fraudulent sickness claim. The second reason stated in the letter of dismissal was not proven. The Grievor did not abandon his job at Transcontinental. He said in an email prior to accepting the job at British that he was not quitting his job at Transcontinental. The Employer could have asked the Grievor to choose between working at Transcontinental or British, but in any event, the Grievor quit his job at British. The Grievor needed income after his Employment Insurance benefits expired. He was not convinced that the ventilation problems at Transcontinental were resolved. He was told about a possible job at British, investigated the workplace, concluded it was a safe place for him to work, and accepted the

position. The Union referred to the case authorities of *Woodward Stores Ltd. and UFCW, Local 2000* (1987) 28 L.A.C. (3d) 59 (Fraser) (“*Woodward Stores*”) and *Food Group Inc. and RWDSU, Local 1065* (1987) 30 L.A.C. (3d) 250 (Stanley) (“*Food Group*”). In those cases, there was a conflict of interest, but the employees were allowed to continue in their employment upon quitting the job for the competitor or divesting their competing business interest. An appropriate disciplinary response would have been a letter to the Grievor advising him that he was in breach of the Collective Agreement and he had to resign his job with the competitor if he wanted to keep his job. A suspension was not an available penalty in circumstances where the Grievor was absent for medical reasons. The Employer did not have just cause for dismissal. The Union requested that the grievance be allowed.

Considerations

The Arbitrator will consider whether or not the Employer had just cause to discipline the Grievor, and if it did, whether or not the penalty of dismissal was just and appropriate in the circumstances. The Grievor was dismissed from his position as press operator on the grounds that he breached Article 12.05 of the Collective Agreement by entering into competition with the Employer and engaging in activities resulting in a conflict of interest. The Grievor was also dismissed for the reason that he was off work for medical reasons and he was either fit for work, but did not advise the Employer and decided to abandon his employment, or that he was falsely claiming to be medically unable to perform his job duties while being fit for work. The letter of dismissal stated that both reasons were major faults and either reason justified dismissal.

The factual background is that the Grievor was off work without pay for medical reasons, commencing on November 15, 2007. During his period of absence from work, and until his dismissal from employment on September 29, 2008, the Grievor provided doctor’s notes from his family physician to the Employer stating that he was off work due to medical reasons. The Employer did not question the doctor’s notes provided by the Grievor and did not ask the Grievor to provide any additional medical information. The Grievor was eligible to participate in the Employer’s medical benefit plan while he was off work, until his employment was terminated. The Grievor was assessed by various medical doctors for the purpose of his claim for Workers’ Compensation benefits. His claim for benefits was denied by the WHSCC in November, 2008. The Grievor claimed, in his application for benefits, that his medical problems were due to his exposure to isopropyl alcohol (“IPA”) and lack of ventilation when he worked at Transcontinental. The WHSCC

adjudicator found, based on the medical evidence, that the Grievor was not suffering from an occupational disease. The Transcontinental premises were inspected by Government OHS Inspectors. An independent study was conducted of the isopropyl alcohol levels in February, 2008, and the levels were found to be within acceptable limits. The Grievor maintained that the level of IPA and lack of proper air ventilation at Transcontinental aggravated his medical symptoms and that he could not return to work for medical reasons.

When the Grievor was off work for medical reasons, he accepted an offer of employment as a press operator from British, another printing business. He commenced work a few days earlier than his scheduled starting date of September 15, 2008. His duties at British were similar to his duties at Transcontinental, namely, to operate a multicolour press. He was mostly printing lottery tickets, one of the main products printed by British, and a product not printed by Transcontinental. However, it was agreed by the parties that British and Transcontinental were competitors. Both companies bid on the same tenders and compete for the same work, such as printing brochures and other materials. British and Transcontinental are two of the four companies who are competitors in the same market. As an employee of Transcontinental since 1995, the Grievor acquired knowledge of Transcontinental's clients, products and work processes. While working at British, the Grievor was using his skills as a press operator to advance the interests of a competitor of Transcontinental. He was in a position where he could potentially disclose information about the business of Transcontinental to British. There was no evidence that the Grievor actually disclosed any information about Transcontinental to British, or that Transcontinental suffered any financial loss as a result of the Grievor's employment by the competitor.

The Grievor informed WHSCC representatives and others by email that he was going to start a job with another printing company, but he did not inform Transcontinental. He maintained in his email that he was not quitting Transcontinental and that he would be maintaining his medical benefits and his right to severance pay, while at the same time working for another company. The Grievor believed that the British plant was properly ventilated. The printing process at British did not use isopropyl alcohol. The Grievor believed that he could work at British, but he could not return to work at Transcontinental. The first medical note produced by the Grievor that refers specifically to ventilation in the workplace, was a doctor's note dated September 25, 2008, after the Grievor started to work at British. The note stated that the Grievor should work only in a well ventilated workplace. The Grievor believed that British was well ventilated and Transcontinental was not well ventilated.

However, the objective evidence does not support the Grievor's belief about the Transcontinental workplace.

The letter of dismissal refers to two grounds for dismissal, but states, in effect, that either ground justifies dismissal. The wording of the letter of dismissal contemplates that the Employer is not required to prove both grounds to justify the penalty imposed. The first ground for dismissal refers to the conflict of interest, and this ground will be discussed later in the Award. The second ground for dismissal refers to the Grievor being off work for medical reasons, and sets out two points. The first point was that the Grievor was fit for work and abandoned his employment. With respect to the first point, the Grievor worked at British as a press operator, appeared to be fit to work and did not advise Transcontinental that he had another job. However, having regard to all the evidence, including the Grievor's stated intent, the Employer has not proven that the Grievor abandoned his employment. The second point was that the Grievor was falsely claiming to be unfit for work. With respect to the second point, the Grievor provided medical reports, the reports were not questioned by the Employer, and the reports were not proven to be false. Therefore, the second ground for dismissal is not proven. However, as stated, it is unnecessary that both grounds in the letter of dismissal be proven. The Employer may rely on the first ground of breach of conflict of interest. Also, the circumstances surrounding the Grievor's absence from work, and failure to inform the Employer that he was fit to work for the competitor, may be taken into consideration when reviewing the penalty of dismissal.

The parties have agreed in Article 12.05 that employees have a duty to avoid a conflict of interest. The avoidance of a conflict of interest is also part of an employee's duty of fidelity. An employer may discipline for breach of the duty of fidelity, whether or not there is a specific rule or collective agreement article prohibiting conflict of interest. The meaning of the duty of fidelity is discussed in *Re Felec Services Inc. and I.B.E.W., Local 1541* (1989) 8 L.A.C. (4th) 321 (Hamilton), at page 337 as follows:

All of these cases dealt with situations where employees had been discharged by their employers for conflict of interest. In the context of these discharge cases, a number of general principles emerge. First, there is no need for there to be a published rule against untrustworthiness and conflict of interest for the duty of fidelity is a basic foundation of the employment relationship. Secondly, in order for there to be a conflict of interest, the employee must be in direct or relevant competition with his employer and here consideration must be given to "similarity of product and market". Further, the employer need only adduce evidence showing "likelihood of" loss rather

than actual loss. If the impugned activity could be detrimental to or is capable of operating in competition with the employer, then that is enough.

The duty of fidelity is also discussed in *Schneider Foods v. U.F.C.W., Local 709-3* (2004) 128 L.A.C. (4th) 381 (Levinson) commencing at paragraph 8 as follows:

The first issue is whether the Company established that the grievor engaged in culpable misconduct by virtue of his activities as a full-time employee at MLF while also working as a full-time employee for the Company. At common law, an employee is expected to be both honest and faithful to his employer. An employment contract has been construed to imply a duty of fidelity. A similar duty exists for employees in a collective bargaining context. For example, see *Wosk's Ltd. v. I.B.T., Local 351* (1983), 13 L.A.C. (3d) 64 (B.C. Arb. Bd.) (Dorsey) at pages 70-72 and cases cited therein and *Northern Breweries Ltd. v. Brewery, General & Professional Workers Union* (2000), 90 L.A.C. (4th) 343 (Ont. Arb. Bd.) (Carrier) at page 354. To prove a conflict of interest, a promulgated rule against such conduct is not always required. See *Wosk's Ltd. v. I.B.T., Local 351* (*supra*) at page 73. See also *Woodward Stores Ltd. v. U.F.C.W., Local 2000* (1987), 28 L.A.C. (3d) 59 (B.C. Arb. Bd.) (Fraser) at page 66. The expressed rationale for the foregoing is that like honesty, fidelity is assumed to form part of the foundation of an employment relationship. Additionally, a finding of a conflict of interest does not necessarily require an employer to prove actual loss. In that regard, a likelihood of loss is sufficient. See *Woodward Stores Ltd. v. U.F.C.W., Local 2000* (*supra*) at page 65 and cases cited therein.

Whether or not a breach of the duty of fidelity will justify the penalty of discharge, is discussed in Mitchnick and Etherington, *Labour Arbitration in Canada*, 2006, at page 201 as follows:

In a number of cases in which the conflict of interest was found sufficiently serious to justify a disciplinary response, the arbitrator has gone on to consider whether, in place of discharge, the employee should have been given an opportunity to resign the other position, or to discontinue the competing business, as a condition of retaining his or her job with the original employer. Where the arbitrator has determined that the latter option would have been appropriate rather than discharge, the employee has generally been reinstated, subject to meeting the prescribed conditions. In *Schneider Foods and U.F.C.W., Local 709-3* (2004), 128 L.A.C. (4th) 381, Arbitrator Randy Levinson reviewed the jurisprudence and concluded that conditional reinstatement has been ordered in those cases where it was possible to restore a viable employment relationship. This, he found, depended on an evaluation of the employee's trustworthiness, which in turn depended on the nature of the conflict of interest, and in particular on whether the employee had a *bona fide* (though mistaken) belief that

the competing employment or business did not harm the employer's interests. In contrast, an employee who has been less than forthright about his or her outside activities, or has attempted to mislead the employer, will not normally be provided with the option of reinstatement with conditions.

The Arbitrator finds that the Employer had just cause to discipline the Grievor upon finding a breach of Article 12.05 of the Collective Agreement. The breach of Article 12.05 was also a breach of the implied duty of fidelity.

Did the Employer have just cause to impose the penalty of dismissal? With respect to the appropriate disciplinary penalty, it is necessary to consider the Collective Agreement, the circumstances of the case and any mitigating factors. The Grievor engaged in a conflict of interest which is specifically prohibited by agreement of the parties in Article 12.05 of the Collective Agreement. The breach of conflict of interest is made more serious by the fact that the Grievor provided doctors' notes indicating that he was unable to work, while at the same time he proceeded to work for a competitor doing the same job without informing the Employer. The Grievor did not inform the Employer about his belief that he was medically able to work for the competitor and not medically able to work for his Employer. The Grievor was not forthright with his Employer about his activities. The Grievor has not admitted any wrongdoing. The Grievor believed it was acceptable to have Transcontinental maintain a job for him, and maintain his employment benefits, while at the same time performing the same work for a competitor. He testified that the reason he quit working for the competitor was because his medical symptoms had returned. There was a serious breach of Article 12.05 and the implied duty of fidelity. The Grievor's employment record is not a mitigating factor. The Employer properly took into account the Grievor's discipline record, which included a suspension and two letters of reprimand for various recent workplace incidents.

I have considered arbitral authorities submitted by the Union, where reinstatement was permitted on condition the employee resign from the competitor ("*Food Group*") or the employees divest their interest in a competing business ("*Woodward Stores*"). The *Food Group* case may be distinguished on the basis that there was no collective agreement prohibition against working for a competitor, the employee was not absent for medical reasons, and the employer was willing to allow the grievor to choose between jobs. The *Woodward Stores* case may be distinguished on the basis that there was no rule or collective agreement prohibition against working for a competitor, the employees were

not absent for medical reasons, and the employer had offered both grievors the opportunity to divest their interest in the competing business. In both cases, restoration of the employment relationship was considered viable.

Having regard to all the circumstances of this case, it was reasonable for the Employer to conclude that the employment relationship was no longer viable and could not be restored. The Employer had just cause to dismiss the Grievor from his employment. The penalty of dismissal was just and appropriate.

Decision

The grievance is denied. The Employer had just cause to dismiss the Grievor.

DATED this 8th day of June, 2009.

James C. Oakley
Arbitrator