Case Name:

Aluminum, Brick and Glass Workers International Union v. AFG Industries Ltd. (Walton Grievance)

IN THE MATTER OF an Arbitration
AND IN THE MATTER OF the Grievance of Jason Walton
Between
Aluminum Brick Glass Workers Union (the "union"), and
AFG Industries Limited (the "employer")

[1998] O.L.A.A. No. 766

75 L.A.C. (4th) 336

Ontario
Labour Arbitration

B. Herlich, Arbitrator

Heard: Toronto, Ontario, June 26 and August 11, 1998
Award: September 28, 1998

(35 paras.)

Discipline and Discharge -- Procedural requirements -- A four-month delay between receiving sufficient information to identify the alleged misconduct and actually discharging the grievor was found to be unfair and prejudicial -- The grievor was reinstated

The union claimed that the grievor was wrongfully discharged. As the result of an investigation, the employer terminated the grievor and alleged that he was involved in misconduct which amounted to carelessness and/or theft. There was a delay of roughly four months between the alleged incidents and the grievor's discharge. The union asserted that the period from the date of the alleged improper conduct to the time that the discipline was imposed and the grievor was adequately advised of the allegations against him, constituted an inexcusable delay which was not to be tolerated. The union argued that the prejudicial impact of the company's handling of the grievor's discharge was sufficient to void the discipline. The employer did not deny that there had been a meaningful delay in this case. However, it argued that upon examining the reasons for the delay, the arbitrator could conclude that the delay was reasonable and, that in the absence of evidence of actual prejudice to the grievor, the grievance should have been declined on the basis of the impugned delay.

HELD: The grievance was allowed. Some portion of the delay was justified because the employer was required to review the results of the investigation and hold discharge meetings with union representation. However, in relation to the delay from the imposition of the discharge to the first communication of information sufficient to identify the alleged misconduct, no justification whatsoever had been advanced by the employer. The arbitrator therefore had no hesitation in concluding that, to ask the grievor, over four months after the fact, to recall the two specific incidents of alleged misconduct, was simply unfair and prejudicial. The grievor was reinstated with full compensation.

Statutes, Regulations and Rules Cited:

Appearances:

Victoria Reaume, Glenn Campbell and Jason Walton, for the union.
Michael McFadden, Wayne Anthony and Diane Riley, for the employer.

AWARD

1 The union claims that Jason Walton (the "grievor") was wrongfully discharged. The grievance asserting that view has been referred to me. No issue has been raised regarding my authority to hear and determine this matter.

2 At the first day of hearing, the employer called Mr. Wayne Anthony, the company's director of human resources, to testify. Mr. Anthony made and implemented the decision to discharge the grievor and explained the reasons for and process associated with that decision.

3 Prior to the second scheduled day of hearing, the parties arranged to appear before me to make submissions on the unions motion that the grievance be allowed as a consequence of what it asserted was the employer's undue delay in imposing the discipline in this case. The employer agreed that, although it had further evidence to call in relation to the merits of the grievance, it had none (beyond that which we had heard from Mr. Anthony) which was relevant to the unions motion. The union, for its part, indicated that it could and would, if necessary, call evidence to establish the actual prejudice created by the employees delay in this case, but contended that there was sufficient evidence before me at this stage to warrant granting the motion.

4 The (largely uncontested) facts which are relevant to that motion can be set out as follows. The grievor was discharged on December 8, 1997. In the discharge letter the grievor was told that "[o]n a number of occasions, you were observed deliberately destroying good glass". No further or other particulars of this allegation were provided to the grievor (or the union) before January 8, 1998 when it was disclosed for the first time that the two specific instances upon which the company relied in effecting the discharge were alleged to have taken place on September 1 and 2, 1997, some four months earlier.

5 The employer is a manufacturer of raw glass, operating a large facility in Scarborough (as it once was). The grievor was employed as a "pick-off man". He, along with others, would be responsible for lifting sheets of glass off one of three lines which are each about 8 feet wide and 10-12 feet apart. "Good glass" would be placed on pallets for shipping. "Bad glass" would not be shipped but recycled via the cullet system. There are cases where it is not easy to distinguish good from bad glass. Some bad glass will be readily identifiable by the ink dots placed

on it through the defect marking system. There will, however, be some defective glass not caught or marked by that system. Inspecting and separating out the defective glass is part of the pick-off mans duties. Bad glass may be directed into a bin at the end of each of the lines. There is consequently an abundance of broken glass. It can be found around and in the bin and under the lines at almost any time. Bad glass is required to be broken all the time (sometimes by the pick-off man deliberately and directly); good glass needs to remain intact to remain good.

6 The events giving rise to the grievor's discharge took place in a very specific and particular context. In the spring of 1997 the employer became suspicious that there were significant problems relating to drugs, alcohol and weapons present in the plant. It decided to engage the Baldwin Agency, a security company, to perform what was described as an "operations audit" through "undercover operatives". Essentially, employees of the Baldwin Agency were hired on as company employees and were thus deployed throughout the plant for the purpose of gathering and reporting information. From May until the end of July, 1997 the employer received regular weekly reports from the operatives detailing events of any significance transpiring within the plant. By the end of July, the Baldwin Agency had formed the view that there were drug and drug trafficking activities taking place at the workplace. The police were contacted and, at their suggestion, the regular flow of reports was ceased. On November 10, 1997, police entered the plant and arrested and charged 3 individual employees.

7 Subsequent to those arrests the employer began a process of reviewing the information collected by the operatives. Some 27 discharges resulted, including that of the grievor. The basis for Mr. Anthony's decision is found in a document apparently prepared by one of the operatives in relation to the grievor. It contains the following notations:

> September 02, 1997
>
> Observed Jason (along with Chris, Jeff, Ripper, Ashley & Steve) throwing good glass in the air and letting it smash on the floor. After every smashing sound they yelled.
>
> September 01st, 1997
>
> Observed Jason (with Jeff, Danny & Steve) smashing good glass and yelling.

8 On the basis of those two notations and the assurance provided to him by the Baldwin Agency that it could provide the evidence to support those notations, Mr. Anthony made the decision to discharge the grievor.

9 We were not provided with a complete explanation of the delay between November 10, 1997 (when the company commenced its review of the Baldwin Agency materials) and December 8, 1998 (when the discharge was effected). It would appear that some portions of that delay were attributable to the task of reviewing over three months worth of material. It would also appear that some portion of that delay is attributable to the need to schedule discharge meetings (some 27 of them) and to ensure union representation was available for each one.

10 We were not provided with any explanation for the delay (in the range of a month subsequent to the discharge) in providing the union and the grievor with sufficient particulars of the alleged misconduct (i.e. even identifying the day on which the improper conduct was said to have taken place).

11 While the positions of the parties are fairly straightforward, some of the legal issues (or perhaps the range of legal analysis provided by arbitrators who have dealt with them) are not.

12 The union essentially asserts that the four to four and one half month period from the date of the alleged improper conduct to the time that the discipline was imposed and the grievor was adequately advised of the allegations against him constitutes an inexcusable delay in this case which ought not to be tolerated. While it acknowledges that it has not (yet) called any evidence of actual prejudice, there is sufficient information before me to allow me to infer, to the extent it is necessary, the prejudicial impact of the company's less than expeditious handling of the grievor's discharge.

13 The company does not deny that there has been a meaningful delay in this case. It urges me, however, to examine the reasons for that delay, to conclude that the delay was reasonable in the circumstances and, in the absence of evidence of actual prejudice to the grievor, to decline to allow the grievance on the basis of the impugned delay.

14 Among the cases the parties referred to in support of their positions were the following awards: Re National Grocers Co. Ltd. and Teamsters Union, Local 419 (1983), 11 L.A.C. (3d) 193 (Langille); Re VIA Rail Inc. and CBRT, unreported October 14, 1988 (M.G. Picher); Re Miracle Food Mart, Steinberg Inc. (Ontario) and UFCW Locals 175 & 633 (1988), 2 L.A.C. (4th) 36 (Haefling); Re Ottawa Fibre Inc. and ECWU Local 1541, unreported, December 7, 1992 (Abbott) Re Air Canada and CAW Local 2213 (1993), 34 L.A.C. (4th) 13 (Frumkin); Re Manitoba Pool Elevators Brandon Stockyards and UFCW Local 832 (1993), 35 L.A.C. (4th) 276 (Peltz); Re University of Ottawa and IUOE Local 796-B (1994), 42 L.A.C. (4th) 300 (Bendel); as well as two decisions involving the instant parties: the Peake grievance, [1998] O.L.A.A. No. 577, July 10, 1998 (Weatherill) and the Daze grievance, [1998] O.L.A.A. No. 723, September 11, 1998 (H.D. Brown).

15 The cases cited demonstrate a multiplicity of analytical envelopes for the similar sets of concerns about the need to impose discipline in an expeditious fashion. Theories have included concepts of condonation, acquiescence, procedural fairness as well as notions of some inherent general arbitral principle (see for example the discussion in the University of Ottawa case at page 308 et seq.). While the precise theoretical and analytic may be differently described, there is no doubt that arbitrators have long expressed (and the labour relations community has long understood) concern about the need for the timely imposition of discipline. The failure of an employer to act expeditiously may render the discipline void, or at least voidable. One general description, relying on the recognized labour arbitration texts, was provided in the Miracle Food Mart case at page 46:

> ... there is no doubt in my mind that an arbitrator in an appropriate case ... may be called upon to decide whether a requirement of procedural fairness has been met. In Brown and Beatty (Canadian Labour Arbitration, 2nd ed. (1984)] para. 7:2100, at p. 335, the authors simply enunciate as a matter of general principle the following:
>
> > Regardless of the source of an employer's power to discipline, it is generally recognized that a variety of procedural requirements may circumscribe its legitimate application. Some of these constraints derive from the laws of general application ... Others, such as the requirement that the employer must sanction an individual for behaviour it regards as inappropriate in a reasonable expeditious fashion, are matters of general arbitral principle.
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> Professor Palmer, on the other hand, in a footnote dealing with the question of timeliness in regard to the imposition of discipline [Collective agreement Arbitration in

> Canada, 2nd ed. (1983)], at p. 284, footnote 290, says that, "There are no cases specifically on ... point", and then goes on to state that, "The point is so obvious that none seems necessary."

16 Whether viewed as the product of some "free-floating" general arbitral principle or as a requirement of procedural fairness which can be subsumed under the more general heading of just cause, it is well accepted that employers are under an obligation to act reasonably expeditiously in imposing discipline. Indeed, while disagreeing about the application of that principle to the facts of this case, the parties before me did not dispute its validity.

17 I accept the employer's contention that the application of this principle requires a review of several factors (under three broad general headings) in the context of this case.

18 The starting point is to establish the relevant time frames to determine whether there has been delay sufficient to warrant further consideration. Generally speaking, the relevant period will be that which lies between the alleged improper conduct and the consequent imposition of discipline. However, and certainly to the extent that there is a concern that delay may impact the ability of an employee to answer the case before them, it is imperative that allegations be presented in a fashion which will permit the employee to identify and recollect events which took place at the relevant time. Thus, in a case, such as the present one, where no detailed explanation is provided at the time that discipline is imposed, the relevant period may be extended accordingly.

19 While there is no ready pronouncement regarding the quantum of time which will be sufficient to trigger further arbitral scrutiny, a certain range can be inferred from the cases. Thus, it would appear that while a delay measured in days may not give rise to concern, one that is measured in weeks (see the Air Canada case, supra) and, certainly, months (see, for example, the National Grocers and VIA Rail cases, supra) most definitely will.

20 Once the quantum of delay is sufficient to require further examination, attention will be directed to the reasons for the delay. For example, a frequent and easily understandable reason for delay may arise where the employer is simply, and through no fault of its own, unaware of the facts giving rise to the need for discipline.

21 Finally, will be a consideration of the prejudicial effect of the delay. This may manifest in various different ways but undoubtedly central to this concern is the effect the delay may have on the ability of the grievor to answer the charges levelled against him. Where the allegation relates to a specific event at a specific time and date, prolonged delay will tend to undermine the grievor's ability to recollect his conduct or even whereabouts at the prescribed time. It can effectively deprive him of the ability to defend himself. The nature of the specific allegations may be a factor as well in the grievor's ability to answer the charges. Where (as in the Air Canada case) the allegation relates to the nuances of one of some 60 daily employee-client conversations, delay may have a disproportionately greater deleterious impact than in other situations.

22 Thus, and described more broadly, the factors to be considered include the length of delay, the reasons for delay and its prejudicial effect.

23 The employer argued in this case that since the union failed to call any evidence of actual prejudice their motion should, at a minimum, be dismissed as premature. I do not accept that submission. None of the factors outlined is necessarily determinative and, even in the absence of evidence of actual prejudice, prejudice resulting from the delay can be inferred or presumed as the arbitrator in Via Rail appears to have done:

> It is, in my view, prima facie, inconsistent with the exercise of an employer's authority to impose discipline to delay any communication whatever respecting the incident giving rise to the discipline to the employee concerned for a period of close to three months. From a practical standpoint the employee is put at a severe disadvantage, as he or she may have no recall of an event to which the employee attached no particular significance at the time but for which the Corporation has retained a documented negative report from the outset.

24 Similarly, in a case which involved a more substantial delay, the arbitrator in the Manitoba Pool Elevators case, supra, was not troubled by the lack of evidence of actual prejudice from the grievor and offered the following:

> I accept that reasonably expeditious discipline is a matter of general arbitral principle. In the present case, despite the absence of evidence from the grievor as to actual prejudice, I would, if necessary, be prepared to find prejudice, under the over-all circumstances of this case. Yard receiving workers at the Brandon pool must deal with numerous customers and numerous deliveries on a daily basis. To confront an employee with the specifics of a single, brief encounter with a customer eight and a half months after the fact is inherently unfair and prejudicial.

25 Obviously there is a difference between a case where there is no actual evidence of prejudice and one where it is affirmatively established that no prejudice has resulted from the delay. Thus, in the National Grocers case, supra, the arbitrator was persuaded that given the overwhelming strength of the employees evidence, which included videotape of the conduct in question, no prejudice resulted from the delay. It may be difficult to credibly advance concerns about a grievor's ability to recollect specific though dated events if those events can be replayed on videotape.

26 In summary we must review the length of, the reasons for and the impact of the delay in question to determine whether the discipline ought to be vitiated on the basis of the delay.

27 The relevant delay in our case is significant - it was more than four months after the facts when the employer finally provided the union and the grievor with sufficient information about the allegations to allow them to reasonably begin to prepare to understand and meet the allegations.

28 There are different reasons for different portions of this period of delay. The delay between the events themselves and the employees review of the Baldwin Agency materials in November was in excess of two months. The principal explanation offered for this delay was that the employer did not wish to compromise the effectiveness of the on-going investigation. To its credit, the employer chose not to hide behind either the Baldwin Agency or the police in this regard. It accepted that it had within its ability to direct that Baldwin Agency's reports continue to be filed with the employer during the relevant period. It chose not to. And although it deferred to the recommendations and request of the police in that regard, it acknowledged that, for example, to the extent specific reports or information about the grievor's activities in September did not come to Mr. Anthony's attention prior to November, that was as a result of the employees own choice not to continue to receive such reports. The employer urged me to conclude, however, that decision and the consequent delay were reasonable in the circumstances of this case.

29 I have little difficulty in accepting and acknowledging that there were reasonable grounds for (what was

effectively) the employees decision to delay the imposition of discipline until the completion of the police investigation. It does not necessarily flow from that conclusion, however, that the employer can then proceed with impunity to impose discipline for any and all events which took place during the period. In this regard I agree with and adopt the continents of arbitrator Weatherill in his award involving these some parties, supra at page 4:

> It is argued for the company, however, that it delayed imposing discipline for good reason: it did not wish to compromise the surveillance operation which it had undertaken. As I have indicated, this surveillance operation was a reasonable response to a serious situation It was understandable that the company would want to gather as much information as it could, so that it could act on a proper basis. The decision not to take disciplinary action on the basis of early reports of investigators seems to me to have been an entirely appropriate one. There are severed comments which must be made about this, however. One is that such a decision, necessarily affecting the rights which employees subsequently disciplined would have to a fair hearing, may make it impossible for the company to take disciplinary action with respect to some misconduct alleged to have occurred at an early stage in the period of surveillance, at some much later time. That, I think, is this case. The decision not to act promptly on this case was part of the price to be paid for the continuing surveillance; in this case it would appear to me to have been a reasonable price.

30 Less clarity attaches to the justification for the one month delay between the culmination of the police investigation and the discharge of the grievor. This period of delay is attributable to multiple factors. The text on which the employer ultimately relied to discharge the grievor consists of three lines in an investigators summary. And while it would hardly take a month to review that limited information, as a practical matter, the grievor's case was not the only one being reviewed. Similarly, to the extent that the scheduling of discharge meetings involved the availability of union representatives, it may be unfair to consider the employer as responsible for that aspect of the delay. Thus, it would appear that there is some reasonable justification for a portion of this period of delay.

31 Finally, in relation to the further one month of delay from the imposition of the discharge to the first communication of information sufficient to identify the alleged misconduct, it is clear that no justification whatsoever has been advanced.

32 Turning then to the final general heading - what is the impact of the delay in this case? For various reasons the grievor was advised, in excess of four months after the fact, that on two particular occasions he was observed improperly smashing good glass and yelling (allegations which his counsel advises us are denied). The grievor's job involves separating good glass from bad and placing the former on pallets and insuring that the latter is directed to the cullet system. The grievor spends his entire day "picking off" sheets of glass. Bad glass is regularly required to be broken. Notwithstanding Mr. McFadden's forceful and able argument to the contrary, it appears to me that the nature of the allegations against the grievor are, by analogy and for the purposes of this portion of the inquiry, similar to those in the Air Canada case. Essentially, it is alleged that the grievor has performed an impropriety in relation to the mariner in which he has conducted his duties - it is asserted that one (or in this case two) of a series of similar transactions has been deliberately mishandled by the grievor. I have no hesitation in concluding that to ask the grievor, over four months after the fact, to recall the two specific transactions out of the many in the interim; to ask him, for example, to recall whether the breakage involved bad or, as alleged, good glass is simply unfair and prejudicial.

33 In arriving at this conclusion I have considered the nature of the allegations from a very specific perspective. If we ask someone: "were you hit by the truck four months ago?" or "did you rob the bank four months ago?", we do not anticipate a response such as: I might have, I don't recall - why didn't you ask me sooner?". There are some events when one simply does not forget. Similarly, as in the National Grocers case, even when memory is otherwise faulty or unreliable, technology, such as video, may provide a useful prod, or even proxy, for faded recollection. But where, as here and in the Air Canada case, the stale allegations relate to a variant of a function which an employee regularly performs over and over both daily and from day to day, it should come as no surprise that a prolonged delay in bringing a specific and impugned transaction to the employee's attention will have a growing negative impact on the employee's ability to recollect what transpired at the relevant time.

34 When I evaluate all of these factors, I am left with a meaningful and significant delay in bringing the impugned conduct to the attention of the grievor and some justification for portions of that delay but no justification for other portions of the delay (most notably the last month). On that basis alone, the delay may be sufficiently significant and inadequately explained to warrant allowing the grievance. I need not decide that. For when one factors in the inherent unfairness and prejudice associated with allowing the tardy imposition of discipline in relation to the kind of allegation involved in this case, I am persuaded that to allow this case to proceed would be unjust indeed.

35 Having regard to all of the above, the grievance is hereby allowed. The employer is directed to forthwith reinstate the grievor to his former position with full compensation and without loss of seniority or benefits. I will remain seized in the event the parties encounter any difficulties in the implementation of this award including determining the quantum of damages. In view of this result, the previously scheduled continuation dates in this matter are hereby cancelled.