



## DAMAGES IN LIEU OF REINSTATEMENT

In most termination cases under a collective agreement, if the arbitrator concludes that dismissal is an excessive penalty, the arbitrator will reinstate the employee and substitute some lesser penalty. That, however, is not always the case. Arbitrators are entitled to consider other remedies that "appear just and equitable" to the arbitrator.

In an arbitration decision earlier this year, a cashier employed by Real Canadian Superstore processed coupons in a manner that the store contended was contrary to its policy. The cashier allowed customers to split their purchases so they could use more coupons. When the cashier was confronted about her conduct, she denied that she had engaged in that conduct in the past. That was untrue. An audit of her transactions revealed that she had split purchases on previous occasions.

The company fired the cashier for dishonesty, both with respect to conferring improper benefits on customers, contrary to store policy, and also for lying to the employer during its investigation. Dishonesty, of course, is one of those disciplinary offences that normally entitles the employer to dismiss the employee without the necessity of following a course of progressive discipline. In this case, however, the arbitrator found that the policy itself was confusing and that the employee was not "dishonest" in her interpretation of the policy. In addition, the arbitrator found that although the employee misled the employer during the investigation, that appeared to be a product of stress rather than dishonesty. He concluded that the employee should be disciplined, but that the discipline would be on the basis that she should have been more forthright in the investigation rather than on the basis that she was dishonest.

Accordingly, the arbitrator found that dismissal was an excessive disciplinary response. The employee only had one warning and two one-day suspensions in her nine years of employment. In most cases, an arbitrator would have reinstated the employee and substituted some lesser discipline.

In this case, the arbitrator reviewed the conduct of the employee during the course of the investigation and the arbitration. The arbitrator said that "she was argumentative, unwilling to acknowledge how she might have done something wrong; confident to the point of fault in the validity of her position, and apparently unwilling to countenance the possibility that she might be mistaken on the application of the conditions of entitlement." The arbitrator concluded that "the relationship between the company and the grievor is shot...". On that basis, the arbitrator declined to

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reinstatement the employee. Instead, he ordered that she be paid damages in lieu of reinstatement. She was awarded compensation from the date of termination to the end of the arbitration hearing.

The award was appealed to the BC Labour Relations Board, which recently issued a decision [*Westfair Foods Ltd.* BCLRB No. B175/2009] confirming that an arbitrator can award damages instead of reinstatement as an appropriate remedy under the *Labour Relations Code*.

*The content of this Newsletter is intended to provide information on Bull, Housser & Tupper LLP, our lawyers and recent developments in the law. The information contained herein is summary in nature, and does not constitute legal advice. For additional details or advice concerning specific situations please contact any member of our Labour & Employment Group.*



If you have any questions, please contact any member of our Labour & Employment Group.

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