

APPENDIX B GRIEVANCE AND ARBITRATION

Appendix B provides a scenario in which an employee has been dismissed. Students could be assigned the roles of union stewards, employer representatives, and arbitrators instead of answering the questions that are provided. The role play could include the grievance meetings and the employer's response after each meeting. This scenario will allow students to work with several concepts including the following:

- termination by an employer
- union representation of an employee
- preparation of a grievance
- employer response to grievance
- an arbitration hearing
- arbitral review of the penalty imposed by an employer

1. Assume that you are the HRM professional responsible for this file. Prepare a notice of termination that would be provided to Josh Bradford at the meeting.

The letter of termination would indicate that Bradford was being terminated for just cause. The grounds for the termination or just cause are the theft of organization's tools and the breach of the organization's policy on substance use on the organization's property.

2. Assume that you are the HRM professional, Mohamed Mansour. What steps should been taken in the investigation of the incident involving Bradford and what additional actions should management have taken in preparing for a meeting between company representatives and Josh.

Additional investigation is required with respect to Josh's claim that tool are not often returned to the tool storage area. A determination needs to be made if this is common practice of the employees. There is little evidence of theft in the case.

In preparing for the meeting, the union representative should have been advised of the situation and be present at the meeting. Failing to provide union representation at a discipline meeting can be fatal to the organization's position of discharge with an arbitrator.

3. Assume that you are the Local 317 chief steward, Suresh Patel, who has just received notice that Josh has been terminated. Outline how you would proceed in light of management's disciplinary action against Josh.

A steward would:

- explain the relevant terms of the collective agreement to Josh including the provision allowing the employer to discipline or discharge for just cause;
- review the steps in the grievance procedure;

- briefly explain the nature of an arbitration hearing and explain that the arbitrator has the authority to reinstate Josh, perhaps reducing the discipline to a suspension;
- explain that Josh should begin a search for alternative employment, in case he is not reinstated and to avoid a claim that they have not mitigated their loss; and
- prepare a grievance for Josh to sign, which could be as follows:
Grievance: I grieve that I have been discharged contrary to the terms of the collective agreement.
Remedy sought: Reinstatement to my position with full seniority, compensation, interest, and any other appropriate remedies.

Date:

Signature of grievor _____

3. What arguments would representatives from both the Northern Timber and Timber Workers Union make at the rights arbitration hearing?

The employer would argue that:

- A disciplinary or just cause approach should be applied to this situation;
- Josh has been guilty of theft;
- Josh has been guilty of violating the organization's substance use policy that clearly provided that a violation was cause for immediate dismissal;
- The rule or policy relating to substance use was clearly brought to Josh's attention; and
- The substance use policy is a job related requirement in view of the safety implications of this worksite.

The union would argue that:

- a therapeutic or non-culpable (human rights) approach should be taken in the situation, as elaborated upon below;
- Josh has a moderate length of service;
- Josh has no previous record of misconduct;
- Josh has been candid and cooperative in the investigation process; and
- Josh has taken immediate remedial action to deal with their marijuana use.

With respect to the non-culpable approach the union would argue that Josh suffers from a dependency which is a disability as defined by human rights legislation. The employer cannot impose discipline for non-culpable misconduct. The employer owes a duty to accommodate to the point of undue hardship. The employer has not accommodated to the point of undue hardship, for example, it would be possible to reinstate Josh after allowing them time away for treatment to overcome their dependency on marijuana.

4. Assume that you are the arbitrator in this situation. Outline your decision, providing reasons.

It is unlikely that an arbitrator would find that there has been a theft in this situation as the grievor has provided an alternative plausible explanation.

With respect to the violation of the organization's policy on marijuana, an arbitrator could find that this case requires a hybrid approach as provided in *Kemess Mines Ltd.* 139 L.A.C [4th] 305 and *Fraser Lake Sawmills* 93 LAC [4th] 407. Both of these cases involve a grievor caught smoking marijuana at work. In *Kemess Mines*, the employee was smoking marijuana in a company residence and he was reinstated. In *Fraser Lake Sawmills* the employee was caught smoking marijuana while working and the termination was upheld.

A hybrid approach involves a situation where there is both culpable and non-culpable conduct. In this situation the culpable conduct is a clear violation of the organization's policy. The non-culpable component is the dependence on a drug. It is likely that an arbitrator would fashion an award that provided as follows:

- A lengthy suspension, likely equivalent to the time from the discharge to the time of the arbitration hearing. The result would be that the employer does not owe any compensation to Josh.
- Reinstatement subject to conditions such as: seeking treatment for chemical dependency, refraining from marijuana use, consenting to the employer conducting random searches of Josh's workplace, possible random tests for marijuana usage.