

Recent Arbitration Decisions Involving Discipline and Discharge

Martin L. Levinson

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Commentary

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Notes

RECENT ARBITRATION DECISIONS INVOLVING DISCIPLINE AND DISCHARGE This note discusses several recent discharge and discipline awards, particularly as they relate to the question of jurisdiction. If one can draw any conclusion from such a limited survey, it will be the conclusion that there are indications of a trend towards a narrower conception of an arbitration board's powers. This trend has certain implications for collective bargaining.

Alteration of Penalty without Power in Agreement

The recent decision of the Ontario Court of Appeal in *Regina v. Bigelow, Ex Parte, International Nickel Company*¹ is of considerable significance in discharge and discipline grievances where a collective agreement gives an arbitrator no power to modify a penalty. The case involved a discharged employee who had 29 years of seniority with the company and was five years away from a pension.² The employee had a long record of absenteeism and alcoholism and had received numerous warnings over the years and a number of minor suspensions. Because of his efficiency when at work and his long seniority, the Company had never discharged him. In 1958, the year prior to his discharge, he received only warnings except for three short suspensions of four days or less. The Board refused to uphold the discharge but granted a seven-month suspension.

A few quotes from the arbitration board award will assist in setting forth the problem faced by the Court of Appeal on the application of the Company to quash the award. At page 186 of the award the following paragraphs appear:

Now, in ordinary circumstances, it would seem to be abundantly clear that the grievor's record of service with the company, particularly in the last four years, was by no stretch of the imagination a satisfactory one and that on the basis of his record alone, let alone his last offence, *the company would have been more than justified in discharging such employee.* (Italics are mine).

Yet for previous absences in 1958 because of alcoholism, the grievor remained unpunished and undisciplined except for warnings. On the three previous occasions when he was punished, he was punished by suspensions for one, three and four days respectively. If we assume that those are punishments for his first, second and third offences that the company thought merited punishment, then *it seems to us unreasonable particularly in this case, with its mitigating factors, that for his fourth offence, he should be discharged.* (Italics are mine).

And finally:

For if he is to remain discharged at the age of 55, five years away from the time when he may elect to be pensioned, it means the end of his active and no doubt, his working life. He knows, apparently, how to perform only one job; he likes his job; and when he is performing it,

¹ [1959] O.W.N., p. 245.

² For a full report of the case see Labour Arbitration Cases, Vol. 9, p. 18. Further citation of Labour Arbitration Cases are referred to as L.A.C.

he does so with more than ordinary competence. And it is possible—even probable—that being out of work for over seven months, earning no income all that time, so far as we are aware, and enduring the ordeal of a board of arbitration meeting to discuss whether the utmost possible punishment meted out to him by the company should stand or fall, an experience, no doubt, as solemn to him as it was new, may have the beneficial result that he will no longer offend as he has in the past.

These three paragraphs clearly point up the dilemma faced by the arbitration board. On the one hand, the board was determined that the employee should be penalized for his conduct. On the other hand, it refused to ignore the employee's seniority, his competence when at work, his age, and the degree of penalty imposed in the past. The board, not surprisingly, awarded a lengthy suspension.

The result of the Court of Appeal decision is to make such solution impossible in the absence of a specific power in the agreement. In allowed the motion to quash, the Court said as follows:³

The jurisdiction of the board was to determine the issues between the parties and was expressly confined by the agreement between the company and the union, to that function. The issue simply was whether the employee was discharged for just cause. The board ought to have directed itself to that issue and to that issue only.

The result of the *Bigelow* case appears to be that the arbitration board can, under such circumstances, only give a "yes" or "no" decision. Should it decide the mitigating factors are so weighty that just cause for discharge does not exist, it must allow the grievance without penalty. On the other hand, should it decide the offence justifies the discharge, the grievance must be dismissed without alteration in the penalty.

This often places an arbitrator in an extremely difficult position. The dilemma he is placed in can, and often does, result in inequitable decisions.

This contention is illustrated by an analysis of two cases. The first, *Falconbridge Nickel Mines Limited and Mine, Mill and Smelter Workers Union*,⁴ involved the discharge of an employee for carelessness. The grievor had seniority of five years, only one year of which was spent on the job in which the carelessness took place. The Board, headed by Judge Anderson, held that its function was confined, first, to ascertaining whether or not the employee was careless. Then, having found that he was, the Board went on to say it next had to rule on whether the carelessness was sufficient to enable the company to discharge. The Board came to the conclusion that there was substantial cause for discharge and dismissed the grievance while declaring that it had no power to alter the penalty. The grievor and the union were, I am certain, not greatly consoled by a statement in the report declaring the employee a satisfactory one and expressing the hope that the company would re-hire him in another capacity.

³ [1959] O.W.N., p. 245 at p. 246.

⁴ L.A.C. Vol. 4, p. 239.

The other side of the same coin is exemplified by the recent case of *Re Sudbury and District General Workers Union, Local 902, and Neelon Steel Limited*.⁵ There a grievor had been repeatedly warned for failing to weigh his truck empty before loading and was found to be lying on two occasions with regard to such circumstances. He was warned he would be discharged for the next offence. On the next occasion he lied again and was discharged but the evidence revealed his behaviour resulted from certain extenuating circumstances. In his decision, arbitrator Judge Little said as follows:^{5a}

I have carefully considered all the events leading up to the discharge of the grievor and must come to the conclusion that the penalty imposed was too drastic. In reaching this decision, I must make it clear that I do not condone the grievor's failure to tell the truth. It is to be deplored and, in my view, the company would have been justified in taking some form of disciplinary action such as a severe reprimand or suspension. . . . *I wish it were in my power to impose some penalty in lieu of discharge, but my powers under the agreement are limited.* Under the heading "general" on page 3 of the agreement, he is entitled to be reimbursed for all time lost since the date of discharge. (Italics are mine.)

Undoubtedly many will sympathize with Judge Little's unhappiness about the case.

This is not the place to discuss the merits of the *Bigelow* decision on the question of jurisdiction. Its reasoning gives judicial support to many past arbitration board awards⁶ and one can safely assume that it will be followed by many arbitrators in the future. It should be pointed out, however, that the situation in respect to alteration of penalty in discharge cases differs in the United States. In a recent article, Professor Archibald Cox, perhaps the leading American authority in the field of arbitration, states that most arbitrators in the United States find an implied power to reduce penalties in both discharge and discipline cases.⁷ This fact alone is sufficient to illustrate the controversial nature of the decision.

Presuming that we must live with the *Bigelow* reasoning in Ontario, it is submitted that the mutual interest of labour and management would be served by granting arbitrators the power to dispose of discharge grievances equitably. A "yes" or "no" answer to just cause for discharge often leads to unfair decisions. A gray rather than a black or white award may be infinitely more appropriate in the circumstances.

⁵ L.A.C. Vol. 9, p. 257.

^{5a} *Ibid.*, at p. 260.

⁶ See the following cases as examples:

Retail-Wholesale, Local 440, in Re Borden Company Limited, L.A.C. Vol. 2, p. 681.

United Steelworkers of America in Re The Steel Company of Canada, L.A.C. Vol. 3, p. 1009.

Mine, Mill & Smelter Workers, Local 598, and International Nickel Co. Ltd., L.A.C. Vol. 3, p. 989.

United Steelworkers of America, Local 2900, and John Inglis, L.A.C. Vol. 6, p. 259.

Galt Malleable Iron Company, United Steelworkers Arbitration Series, p. 1-106.

⁷ See *Reflections Upon Labour Arbitration*, 72 Harv. L. Rev. p. 1482.

In the past, management has generally opposed granting powers to arbitrators to alter discharge penalties imposed by it. This is, perhaps, understandable because companies felt such powers could only work to their disadvantage by resulting in reduced penalties. However, the circumstances in the *Neelon* case are such, as to be likely to arise more often in the future. Coupled with the implications of the *Bigelow* decision, the inflexibility imposed on the arbitrator may lead to unfair results to management. Arbitrators, faced with a situation where some lesser penalty than discharge appears desirable may be inclined to find that just cause for discharge did not exist. Employees deserving some penalty will then be let off scot-free.

It is interesting to note that an increasing number of collective agreements in the province give arbitrators the power to make equitable dispositions of discharge grievances. No statistical studies on the number of agreements in which such a provision appears are available. However, on the basis of personal observation, it seems likely that over half of collective agreements in Ontario contain such a provision in the event of discharge.

Implications of the Bigelow Decision on Discipline Grievance

This is certainly not the situation with respect to discipline, where relatively few collective agreements in Ontario grant powers to dispose of grievances equitably. In most contracts the only reference to discipline is contained in the management's rights clause. Management is normally given the right to discipline for just cause.

The *Bigelow* decision raises some interesting and important problems in the field of discipline. These can be illustrated by a brief example. Suppose an employee with ten years seniority has turned out some defective work after being warned to use special care. Let us assume, as fair minded persons, that the offence justifies a two-day suspension. Let us assume, however, that management imposes a six-month suspension, or even a year's suspension.

If, as the *Bigelow* decision suggests, the function of the Board is confined to ascertaining whether the employee was disciplined for just cause, can the arbitration board reduce the penalty to something more reasonable than one year? In our example, we have assumed there was just cause for *some* discipline. It is only the degree of discipline which appears inequitable. Can the board alleviate the penalty in the absence of power in the agreement to equitably dispose of the grievance?

At least one arbitrator has held that he had no power to reduce the harshness of a disciplinary penalty in such circumstances. In the case of *United Packinghouse Workers of America, Local 293, and Quaker Oats Company of Canada*,⁸ Judge R. S. Clark said as follows:

⁸ L.A.C., Vol. 4, p. 1268 at 1271.

The clause relating to discharge cases referred to above, gives a Board of Arbitration a discretionary power to make any other arrangement (short of discharge) which is just and equitable in the opinion of the conferring parties. No such discretion is accorded to it under the clause referring to management rights under Clause 7, and once it is established that discipline has been imposed with reasonable cause, and if arrived at honestly, even though harshly in the opinion of the grievor or the bargaining agency, the Board cannot interfere by revising the employer's decision. . . .

This reasoning can be attacked with considerable force. Men are not hanged for traffic violations and it would seem only right for an arbitration to evaluate the propriety of the penalty according to the seriousness of the offence. Many arbitrators would, I believe, agree that the question of whether just cause existed for the *particular* disciplinary action taken is important. However, the *Bigelow* decision may tend to reinforce the type of thinking outlined above in the *Quaker Oats* case. In the field of discipline, this may raise even more difficult problems than in discharge. In discharge cases, the determination of just cause involves in itself a quantitative determination of the seriousness of the offence. If the offence is not sufficiently serious, the arbitrator can allow the grievance. But in the area of discipline, the arbitrator may be confined to finding whether *some* cause of discipline existed. The quantitative check present in discharge is then lacking if the *Bigelow* reasoning applies and markedly inequitable results could flow from its operation.

If the thinking of the *Bigelow* case becomes more prevalent in future arbitration cases, it appears likely that strenuous efforts will be made by the labour movement to give wider powers to arbitrators in the area of discipline. Presumably these will take the form of attempting to extend the discharge clause which now appears in many collective agreements, so that it covers discipline.

At the root of the question involved in alteration of penalty in both discipline and discharge cases is the differing conception of the nature of an arbitrator's powers under collective agreements. The *Bigelow* decision reinforces those who say the arbitrator's powers are confined strictly to those conferred upon him by the agreement. There are, of course, other points of view held by authorities in both the United States and Canada. The *Bigelow* decision represents one point of view. Professor Archibald Cox puts the other view concisely in a recent article in the *Harvard Law Review*:⁹

Collective agreements, because of the institutional characteristics already mentioned, are less complete and more loosely drawn than many other contracts; therefore, there is much more to be supplied from the context in which they were negotiated. The governing criteria are not judge-made principles of the common law but the practices, assumptions, understandings and aspirations of the going industrial concern; the arbitrator is not bound by the conventional law though he may follow it. If we are to develop a rationale of grievance arbitration, more work should be directed towards identifying the standards which shape arbitral opinions.

⁹ *Reflections Upon Labour Arbitration*, 72 Harv. L. Rev. 1482, at p. 1500.

In view of the divergence of opinion on the major points involved in the *Bigelow* decision, it is to be regretted that the Court of Appeal refused to grant leave to appeal to the Supreme Court of Canada. One can hardly agree with what the writer understands was the reason for refusal, namely, that the issues involved were local and not of sufficient public importance. It is my belief that the decision will have a decided effect in both arbitrator's future decisions in the area of discharge and discipline as well as on future collective bargaining.

Jail Sentences and Leave of Absence

While the recently reported decision of *Re United Steelworkers of America and Algoma Steel Corporation*¹⁰ does not have the general significance of the *Bigelow* award, it again raises some interesting points in regard to the matter of jurisdiction. The grievor, an employee with six years' seniority, was arrested while on his day off and charged with impaired driving. He was convicted and received a 30-day sentence, whereupon he applied for a leave of absence. The Company refused the leave of absence and in accordance with the seniority article, removed the employee from the seniority rolls.

The board reviewed the leave of absence clause and found that the Company had unlimited rights to refuse leave of absence. But it went further and stated:^{10a}

I was not referred to, nor have I found, any provision in the collective agreement which imposes upon the company the obligation of granting a leave of absence to enable the employee to serve a gaol term. In my view if the parties had intended that there should be any such obligation upon the company there would have to be some specific language in the agreement covering the matter.

A substantial number of collective agreements provide that leave of absence is to be granted for reasonable cause. Even had such wording existed in the *Algoma* case, it appears on the above reasoning that the board would have declined jurisdiction.

Aside from the problem of jurisdiction, the question of leave of absence in jail sentences is worthy of comment. Failure of the parties to deal specifically with it often leads to inequitable results. The problem is not a simple one and can be illustrated by an example. Let us assume that an employee with six months of service is jailed for ten years for robbing a bank. Is it reasonable to expect that management should be obliged to rehire him at the end of his sentence? Naturally not. On the other hand, let us assume that an employee with twenty years' seniority is jailed for ten days for impaired driving. It is submitted that he should not lose the substantial interest he has in his job under these circumstances. This might be the case if seniority is automatically lost after a certain number of days of absence without leave.

¹⁰ L.A.C. Vol. 9, p. 276.

^{10a} *Ibid.*, at p. 281.

If future arbitration boards take the *Algoma* approach to the problem and refuse to deal with it unless specifically covered by the agreement, it may be necessary to avoid inequity by adding to the contract. The drafting of a clause to cover leave of absence in the event of jail sentences is a difficult task. It should take into consideration such factors as (i) the type of offense (ii) the length of the jail sentence (iii) the seniority of the employee and (iv) his service record. Management's decision should then be made subject to an arbitrator's review and the same factors would be given weight by him.¹¹

Conclusion

Can one draw any conclusions from this brief review? Only a few recent cases have been mentioned, and they concern only discharge and discipline. However, the *Bigelow*, *Neelon* and *Algoma* awards have all been handed down in the last six months. The Court of Appeal decision in the *Bigelow* case must be accorded considerable weight. When added together with other decisions they seem to indicate an increasing unwillingness on the part of arbitrators to stray from the strict confines of the agreement. The same trend is evident in other areas of contract administration such as contracting out and compensation in the event of improper lay-off.¹² Perhaps the one salient recent example to the contrary is the *Polymer* award.¹³

Whether one agrees with this trend or not, more lengthy and detailed collective agreements are likely in the future. It is difficult to be happy with the situation because it appears to fly in the face of common sense. In this regard one agrees with Professor Laskin when he says in the *Polymer* award:¹⁴

The parties to a collective agreement must be utterly bewildered to know that notwithstanding the successful consummation of an agreement (which by legislation is binding on Company, Union and employees) and notwithstanding the statutory direction for final and binding arbitration of contract disputes, they really have no obligation to carry out the agreement because they should have expressed this obligation twice instead of once. Of course, if the views expounded in the *Deloro* case become pervasive enough the parties to a collective agreement may come to believe that in law you must reinforce your binding promises by an additional covenant that they shall be enforceable.

While one may agree with Professor Laskin, there exists a duty to clients to tell them that Professor Laskin's view is a minority opinion, and that they must protect themselves by reinforcing binding promises by additional covenants. This is certainly true in the matter of alteration of penalty on discharge or discipline or leave of absence for jail sentence and in many other areas of contract admin-

¹¹ For a similar approach to the problem see *United Automobile Workers and Ford Motor Company* L.A.C. Vol. 8, p. 210.

¹² See particularly *Re United Steelworkers of America and Deloro Smelting and Refining Company Ltd.*, L.A.C. Vol. 9, p. 159, for a case of failure to provide for advance notice of lay-off under the seniority article.

¹³ L.A.C. Vol. 10, p. 51.

¹⁴ *Ibid.*, at pp. 62-3.

istration. Failure to give such advice may expose clients to unhappy results and lawyers to considerable criticism from clients.

We in Ontario are moving towards an era of more complicated and legalistic collective bargaining agreements.

Martin L. Levinson*