

IN THE MATTER OF AN EXPEDITED ARBITRATION
PURSUANT TO SECTION 104 OF
THE LABOUR RELATIONS CODE OF
BRITISH COLUMBIA

BETWEEN

Overwaita Foods / Save-on-Foods British Columbia
(The Employer)

AND

United Food & Commercial Workers Union, Local 1518
(The Union)

Collective Agreement Arbitration Bureau Case Number 61463/10R
Ashlea Hunt Discharge Grievance (#10-656)

Arbitrator:	Ronald S. Keras
Counsel for the Employer:	Mr. Michael Korbin
Counsel for the Union:	Mr. Chris Buchanan Ms. Emily Luther
Hearing:	January 5 & 21, 2011
Published:	February 11, 2011

I

The parties agreed that this arbitration board was properly constituted by appointment from the Director of the Collective Agreement Arbitration Bureau pursuant to Section 104 of the *Labour Relations Code* with the jurisdiction to hear and decide the matter in dispute.

Overwaitea / Save-on-Foods operate sixty-eight stores in British Columbia with 7,000 employees represented by Local 1518 of the United Food & Commercial Workers Union. The Grievor worked as a part-time bakery clerk at the South Point Store in Surrey, BC. She began her employment on September 18, 2009 and was terminated on August 12, 2010.

The Corrective Action Report terminating the Grievor read in part:

Current infraction:

Breach of trust (time theft) during a disciplinary interview on Aug 10/10. Ashlea misrepresented her actions on shift for Aug8/10.

Summary of circumstances surrounding the infraction:

During a disciplinary interview on Aug 10/10, Ashlea stated that she had only been on 2 x 30 min breaks during her shift. After investigation it was found that she had also taken a 15 min break at 2:05p – 2:22 pm prior to her first 30 min break.

Additional Comments:

Ashlea has misrepresented her actions to the management of this store + the employment relationship has been irreparably damaged.

In its opening statement the Employer argued that this Board should uphold termination as the Grievor had destroyed the trust by her dishonesty in her attempt to deceive.

The Union's opening included an argument that while Ms. Hunt's actions warrant some discipline, she admitted her long break and therefore termination was excessive and this Board should substitute the termination with a written warning.

II

Employer witness and one of the Operations Managers of South Point Store (Store 903) at the time of the Grievor's termination, Mr. Jacky Ho, testified to the events of Sunday, August 8, 2010 and to the subsequent meetings and discussions. Mr. Ho advised that there were five excluded personnel and about 180 bargaining unit employees at the South Point store. He advised that on August 8, 2010, Ms. Hunt was on an 8 hour shift, which meant she was allowed a half hour unpaid lunch break and two fifteen minute paid coffee breaks which employees sometimes combined into a half hour paid break.

Mr. Ho testified that during a walk around of the store at about 7 p.m. he had asked at the bakery shop where the other two clerks were and was advised

that Ashlea and Melina were on break. Mr. Ho said the bakery was in rough shape, the cake and bread centres were running low, and the centre islands needed a tidy.

When Mr. Ho saw Melina and Ashlea returning to the store at about 7:30 p.m. he asked them to the office for a meeting. Mr. Ho testified that he asked them what was going on and that they both said they must have been late coming back and they were sorry. Mr. Ho was being called away and advised that they would finish the conversation another day. Mr. Ho made notes of the meeting the next day which read:

Talk with Melina/Ashley

- Had a conversation with Melina and Ashley regarding taking extra time on their breaks as they were coming back from their break late.
- They didn't realize what time was and say ok and sorry.
- I had asked them what shift they were working because I remember seeing them starting earlier in the day and it seemed late to be on a lunch break.
- Told them we would continue next shift they were in as I was called away and I needed to get some more info.

Jacky Ho

On Monday, August 9, 2010 Mr. Ho told fellow Operations Manager, Ms. Kerr, about the Melina / Ashlea situation and Ms. Kerr went over the store video and the raw punch information and found that Ms. Hunt had taken a 15 minute break, a lunch break and then around 7 p.m. took another 30 minute break. Mr. Ho testified that he and Ms. Kerr went over the video and

spoke to a People Specialist, Mr. Gord Johnston, and reached a conclusion that, in the next discussion, if Ms. Hunt was honest she would get a warning and if not, she would be terminated. Mr. Ho said she was dishonest, it was time theft and he can't trust her.

On August 10 Mr. Ho held a meeting which included Ms. Kerr and a Shop Steward. Mr. Ho asked Ashlea to tell him the sequence of the day (August 8). Mr. Ho said she asked what he meant. Mr. Ho testified that he explained, what time did you start, your duties, when did you go to break and when did you leave work. She said she started at 11:30 in the cake centre, she took lunch break, clocked in and back, then helped in production / packaging and then she said she took her two 15 minute breaks and went for a half hour. Mr. Ho said Ashlea said she clocked out at 8 p.m. Mr. Ho testified that "she did not tell me that she took a 2:05 coffee break". Mr. Ho concluded that she was being dishonest with him. Mr. Ho suspended Ms. Hunt until further notice. Mr. Ho's notes of the meeting read:

Coming back from 2x15 min break.
Said she left @ 6:58 Back @ 7:30.

Started @ 11:30 am.

- Start work
- Took meal break at around @ 4:15 30 min
- Clocked out and clocked in on phone
- Came back from meal break
- Worked in cake center and then jumped over to production side to help with packaging with Carrie and Jeff
- 6:58 pm. Took 2x15 mins break
- Came back
- Clocked out @ 8pm.

After Mr. Ho suspended Ms. Hunt he spoke to Mr. Gord Johnston and told him about the outcome and that discussion resulted in the decision to terminate Ms. Hunt. Mr. Ho testified that Melina got written up and that she did not take an additional coffee break.

In cross-examination Mr. Ho advised that at 7 p.m. there are about 30 to 40 employees on shift. Mr. Ho said there were about 15 to 20 video cameras in the store, including cameras in the staff room and leading up the stairs to the staff room. Mr. Ho also described the punch clock system. Mr. Ho testified that occasionally employees are late returning from break, that it is often inadvertent and therefore he would speak to the employee. He said the first step was verbal, the second step written.

Mr. Ho advised that the August 8 meeting was just a conversation, that there was no Shop Steward offered and no advance notice. Mr. Ho said that Melina and Ashlea apologized for taking a long break. Mr. Ho testified that at the August 10 meeting he did not put to Ms. Hunt that there was a 15 minute break followed by the lunch break and the half hour break. Mr. Ho said she described her day and omitted the early break. Mr. Ho said if she was going to be truthful "I would have just given her a written warning". Mr. Ho said he didn't ask her if she took a break around 2 p.m.

Summoned Employer witness Ms. Carri Alcos was working in the bakery on August 8 and testified that after the meeting with Mr. Ho, Melina was concerned and Ashlea said: "Don't worry about it, they can't prove it or do anything about it anyway". Ms. Alcos testified that later Ashlea said "if they do anything her dad would know what to do". In cross-examination Ms.

Alcos testified that Ms. Hunt was senior to her and that she (Ms. Alcos) wrote down the comments for the lawyer in December 2010.

Employer witness and Assistant Operations Manager, Mr. Ryan Gautschi, testified that he was asked to attend the August 10 meeting as a witness; that Ashlea said she combined two breaks and said she had a half hour lunch break. Mr. Gautschi testified that Jacky didn't say anything about reviewing the video and that Ashlea didn't say anything about the break at 2:05.

Employer witness and Operations Manager, Ms. Colette Kerr, took the Board through the video evidence, which in part shows Ms. Hunt taking a break from 2:05 to 2:22 p.m. on August 8. She advised of her discussions with Gord Johnston and Jacky Ho and the decision to terminate. Ms. Kerr testified that at the August 12 meeting Ms. Hunt said she had taken two half hour breaks and that when Ms. Hunt was asked if she took any other breaks, she said "no". Ms. Kerr testified that we explained we had video of an additional break and Ms. Hunt said, 'Oh, did I take another break? I can't remember.' Ms. Kerr testified that she had the corrective action report (essentially the termination notice) at the meeting. Ms. Kerr said on other occasions she had ripped up such reports based on employee information at the meeting. Ms. Kerr testified that they did not know they were going to fire the Grievor before the August 12 meeting.

Employer witness Mr. Chris Abraham, Assistant Manager of the store, testified to the August 12 meeting. In attendance were Mr. Abraham, Ms. Kerr, Ms. Hunt and Ms. Lillie, the Shop Steward. Mr. Abraham said he asked Ms. Hunt what breaks were taken on August 8 and Ms. Hunt said two

thirty minute breaks. Mr. Abraham testified that he asked Ms. Hunt about an additional break and she said no but that further along she said she was not quite sure and asked, 'did I take an additional break'. Ms. Kerr then read out the report (termination). In cross-examination Mr. Abraham said Ms. Hunt was very quiet through most of the meeting and that she did not dispute the early break. The following is Mr. Abraham's typed notes produced August 13 taken from his hand written "scribble" taken at the August 12 meeting. The hand written notes were not retained.

Interview with Ashlea Hunt on Time theft

Date: August, 2010

In Attendance: Collette Kerr, Elaine Lillie, Chris Abraham, Ashlea Hunt

We reviewed the breaks taken that day. We had the raw punch times. She agreed she took those breaks. We then reviewed the circumstances of the additional break taken that was observed by Jacky Ho. She acted surprised and made a comment of "oh did I take another break, I can't remember". I gave her the opportunity to come clean on the Time theft issue. She didn't admit to the additional break so we told her that we had times leaving and re entering the store from the onsite cameras. I told Ashlea that when there is a breach of trust between the employer and team member on an issue regarding time theft, that this is grounds for dismissal. She understood what was being said. We gave her two opportunities to admit to the wrong doing but she did not admit whole heartily to the time theft. I told Ashlea that this is a part of the job that is unfortunate but we must proceed with the discipline meeting.

At this point I asked Colette to proceed with the Corrective Action for Breach of Trust – Time theft. Colette reviewed the circumstances and we terminated Ashlea's employment at this point. I advised Ashlea that this meeting is totally confidential and that all circumstances would not be broadcast through out

the store by any party present today. She understood. We told her I would give her some time with Elaine (shop steward) to discuss this further or if she felt we handled this incorrectly she could talk to a business agent about our conduct. We gave her a copy of the CAR and gave a copy to Elaine to fax to the union office.

Chris Abraham
Assistant Manager
903 South Point

Union witness and Grievor, Ms. Ashlea Hunt, advised that she was 18 years old, lived at home with her parents in Surrey, BC and that she was a middle child of six children. Ms. Hunt had graduated high school and had worked at KFC before being employed at the South Point Store. Ms. Hunt advised that her parents were Shop Stewards.

Ms. Hunt testified that on August 8 she went to Starbucks with Melina Benson at 6:50 or 7 p.m. Ms. Hunt knew Melina was on a 30 minute break (two 15's). Ms. Hunt testified that she didn't plan to take more than 15 minutes. When they returned to the store they were met by Mr. Ho and went to the office. Ms. Hunt testified that in the office Melina said we were on 2 – 15's and that they said they were sorry. Ms. Hunt testified that she did not correct Melina and that she was scared, knew she was in trouble and didn't know what to say.

With regard to Ms. Alcos' testimony, Ms. Hunt testified that she never said 'don't worry about it, they can't prove it'. The Grievor testified that Melina said we were scared and Ms. Hunt said she would probably ask her dad what to do.

Ms. Hunt described the August 10 meeting. Ms. Hunt testified that she didn't mention the first 15 minute break; that she panicked; that Jacky said she had already gone on 2 – 15's with Melina.

Ms. Hunt testified that at the August 12 meeting Collette read what happened at the August 10 meeting and advised that due to a breach of trust she was terminated. Ms. Hunt said Mr. Abraham said it was unfortunate that it had to end the way it did and that they don't like to let employees go. Ms. Hunt said Collette handed her a copy of the termination and asked if she had any questions. Ms. Hunt said she was sorry and didn't mean to do anything wrong.

In cross-examination Ms. Hunt said she never lied intentionally. With regard to the August 10 meeting Ms. Hunt said she concealed the first 15 minute break, that she told him that she combined two 15's and that was a lie. Ms. Hunt said that she knew she should have only taken a 15 minute break and that she should have returned before Melina. Ms. Hunt said that on August 10, "I lied".

III

The Employer described the case as being about a very short term employee who committed time theft and then lied to the Employer about her own misconduct and then continued her dishonesty through arbitration. Mr. Korbin described Ms. Hunt's conduct as a fundamental and irreparable breach of the trust in the employment relationship. The Employer described

the Grievor's dishonesty with the Employer at all three meetings and argued that the dishonesty continued through her testimony at the arbitration hearing.

The Employer summarized its argument as follows: This is a case where there was initial misconduct, and then a scheme of dishonesty to try to cover up her own misconduct. This is not a case where the arbitrator can say that the employee acknowledged her wrongdoing and accepted responsibility for her actions from the outset. Consider her initial response to Carri. She said she thought the Company couldn't prove it and she would get away with it. This reflected her contemptuous attitude – 'they can't catch me and even if they can, my dad will bail me out'. She was acting with supreme confidence that she would be able to take an extra paid break and not be caught because this was a Sunday evening with no supervision in the Bakery. Her dishonesty to management was in furtherance of this supreme confidence that she would get away with it because she thought the Company couldn't prove her time theft. It is this dishonesty, particularly with such a short service employee, that has destroyed the employment relationship.

This is also not a case where the arbitrator can say that while there was an initial lie to cover up the initial theft of time, the Grievor soon thereafter rectified her misconduct with a full and frank acknowledgement of her wrongdoing. She repeated her dishonesty in the second meeting with management, even when she was told about the irrefutable video evidence. Further, her lack of contrition, lack of remorse, and lack of true accountability continued throughout her apology letter. Her dishonesty has

continued through to this arbitration, where she continued to be dishonest in giving her evidence under oath to this Arbitration Board.

Mr. Korbin submitted that one cannot conclude that she really learned her lesson and that she is a good candidate for reinstatement. With regard to the question of whether the employment relationship is capable of being restored, the Employer's submission is that all of the evidence shows that it is not.

Finally, this is not a case where the Grievor is able to rely on a long record of good service as a mitigating factor that is to be weighed against the seriousness of her misconduct. This is a short service employee who committed a fundamental breach of trust through her dishonest conduct. Accordingly, the employment relationship has been irrevocably destroyed. Honesty is the touchstone for the employment relationship, and she fundamentally violated that. The Employers submission included reference to the following case law:

Re McRae Waste Management Limited and International Union of Operating Engineers, Local 115 [2000] B.C.L.R.B.D. No. 34/2000 (L. Parkinson, Vice-Chair, Ron McEachern and Raj Chouhan, Members), January 26, 2000;

Re Canada Safeway Limited and United Food and Commercial Workers' Union, Local 1518, (Kanouse Grievance) [1997] B.C.C.A.A.A. No. 754, (A. P. Divine), November 7, 1997;

Re *PTPC Corrugated Company and Communications, Energy and Paperworkers Union of Canada, Local 433, (Nelles Grievances)* [2006] B.C.C.A.A.A. No. 153, 86 C.L.A.S. 312 (W. Moore), February 28, 2006;

Re *Coast Mountain Buslink Company Ltd. and Independent Canadian Transit Union, Local 2, (Croteau Grievance)* [1999] B.C.C.A.A.A. No, 318, (D. C. McPhillips), June 16, 1999;

Re *British Columbia Transit (Victoria) and National Automobile, Aerospace, Transportation and General Workers Union (CAW-Canada), Local 333, (Fleming Grievance)* [1999] B.C.C.A.A.A. No. 310, (R. K. McDonald) August 9, 1999;

Re *Cominco Metals, A Division of Cominco Ltd. and United Steelworkers of America, Local 9705* [1988] B.C.C.A.A.A. No, 21, 9 C.L.A.S. 41 (Stephen Kelleher), January 15, 1988;

Re *Royal Columbian Hospital (as represented by Health Employers' Association of British Columbia) and Hospital Employees' Union, (Saligumba Grievance)* [2001] B.C.C.A.A.A. No, 39, (J. M. Gordon), February 5, 2001;

Re *Versacold Canada Corp. and United Food & Commercial Workers International Union, Local 2000 (Gerrard Grievance)*, [1996] B.C.C.A.A.A. No. 213, (C. Bruce) April 17, 1996; and

Re *Cominco Ltd. and United Steelworkers of America, Local 480*, [1997] B.C.C.A.A.A. No, 305 (R. Germaine) May 13, 1997.

Mr. Buchanan, on behalf of the Union, argued that the Employer had failed in its burden to demonstrate that the employment relationship was irreparably harmed. While conceding that there was just and reasonable cause for some discipline the Union reviewed the nature of the offence in an

argument that the term “time theft” for the misuse of company time was fundamentally misguided.

The Union’s argument continued as follows: Some arbitrators will assess an employee’s conduct against mythical perfect employees as opposed to a realistic view of humans. Under such judgment, an employee’s conduct is necessarily found to be wanting. Employees are not a separate species from humans. It is a natural failing of all individuals to minimize their conduct, through half-truths or minor alterations of details. That does not mean that such individuals are not trustworthy employees or that they have no rehabilitative potential. Rather it means that they are human.

Arbitrators have accepted that even when a grievor lies before an arbitration board, this does not mean reinstatement is not possible. More importantly, arbitrators understand that an employee, when initially confronted, may provide a less than forthright answer and then be stuck with that version, unable or unwilling to be fully forthright with the employer. That is, once an employee gives an inaccurate account it becomes very difficult for the employee to provide a different account because that would necessarily mean that their earlier version is inaccurate.

Arbitrators have held that not admitting wrong-doing when confronted, either during investigation or at arbitration, does not change the character of the underlying offence. Rather it is a loss of opportunity at mitigation.

In many cases the arbitrator should look at the rehabilitative potential of the employee with a view to whether the employment relationship can be

sustained. The onus is on the employer to show that discharge is the only possible penalty.

This job is important to Ms. Hunt. She loves working at Save-On and her work in the bakery was a stepping stone to her career of being a pastry chef. She still has this goal – to keep working in the bakery, improve her skills and become a pastry chef. You can be confident that she would not do anything to jeopardize this goal if given another chance.

Ms. Hunt clearly has learned a valuable lesson and she knows now how serious her actions were. She knows that she needs to educate herself on all employer policies and follow them religiously. She knows she needs to be scrupulously honest in all her interactions with the employer.

There is good reason to believe that Ms. Hunt has the potential to be a great employee if she is given another chance.

The Unions submission included reference to the following case law:

Re Grand & Toy Ltd. v. United Steelworkers of America, Local 9197 (Natal Grievance), [2001] O.L.A.A. No. 242, (P. Craven), April 17, 2001;

Re Cominco Ltd. v Steelworkers of America, Local 480 (Roussy Grievance), [2000] B.C.C.A.A.A. No. 464, (D. L. Larson), December 8, 2000;

Re Canada Bread and United Food and Commercial Workers Union, Local 1518, [2001] B.C.C.A.A.A. No. 288, 100 L.A.C. (4th) 244, (J. M. MacIntyre, Q.C.), July 13, 2001;

Re Canada Safeway Ltd. v United Food and Commercial Workers, Local 401 (Champagne Grievance), [2007] A.G.A.A. No. 27, (R. I. Hornung, Q.C.), May 4, 2007;

Re Kemess Mines Ltd. and International Union of Operating Engineers, Local 115 (Goudreau), [2006] 152 L.A.C. (4th) 232, (H. A. Hope, Q.C.), February 27, 2006;

Re Stelco Inc. (Hilton Works) and United Steelworkers of America (Currie), [1994] 40 L.A.C. (4th) 229, (S. Tacon), April 18, 1994;

Re Canadian Broadcasting Corp. v. Canadian Union of Public Employees (Sgrignuoli Grievance), [1980] C.L.A.D. No. 12, 23 L.A.C. (2d) 227, (H. W. Arthurs), January 31, 1980;

Re Brewers Retail Inc. v. United Food & Commercial Workers International Union (United Brewers' Warehousing Workers' Provincial Board) (O'Connell Grievance), [2000] O.L.A.A. No. 200, (J. Sarra), March 24, 2000;

Re City of Vancouver and Vancouver Municipal and Regional Employees Union, [1983] B.C.C.A.A.A. No. 204, 11 L.A.C. (3d) 121, (H. A. Hope, Q.C.), July 6, 1983;

Re Toronto East General Hospital Inc. and Service Employees International Union, [1975] O.L.A.A. No. 139, 9 L.A.C. (2d) 311, (B. M. Beatty, C. Hamilton, R. C. Filion), June 12, 1975;

Re St. Michael's Centre Hospital Society and British Columbia Nurses' Union (Mendoza Grievance), [1997] B.C.C.A.A.A. No. 567, (R. Germain), September 19, 1997;

Re Martin Richard McKinley, appellant v. BC Tel, British Columbia Telephone Company, BC Telecom Inc., BC Tel Services Inc., BC Tel Systems Support Inc., B.C. Mobile Ltd., BC Tel Properties Inc., Canadian

Telephones and Supplies Ltd. and TSI Telecommunications Services International Inc., respondents, [2001] S.C.R. 161; S.C.J. No. 40; 2001 SCC 38, (McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.), January 24, 2001;

Re Sooke School District No. 62 v. Sooke Teachers' Assn., [1995] B.C.A.A.A. No. 260, (H. A. Hope, Q.C., P. Bell, A. Blakey), July 4, 1995; and *Re Stelco Inc. (Hilton Works) and U.S.W.A., Local 1005*, [1994] O.L.A.A. No. 1127; 35 C.L.A.S. 60, (Louisa M. Davie), May 24, 1994.

IV

In *Re Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B. Decision No. 46/76, (P.C. Weiler, Chair, C.J. Alcott and A. Macdonald, Members) July 26, 1976, the panel described the arbitrator's function in discharge cases beginning at paragraph 13 as follows:

.... arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

Normally, the first question involves a factual dispute, requiring a judgment from the evidence about whether the employee actually engaged in the conduct which triggered the

discharge. But even at this stage of the inquiry there are often serious issues raised about the scope of the employer's authority over an employee, and the kinds of employee conduct which may legitimately be considered grounds for discipline. (See for example *Douglas Aircraft* (1973) 2 L.A.C. (2d) 56.) However, usually it is in connection with the second question -- is the misconduct of the employee serious enough to justify the heavy penalty of discharge? -- that the arbitrator's evaluation of management's decision must be especially searching:

In the instant case the facts are not in serious dispute; nor is the first *Wm. Scott* question. The employee has "given just and reasonable cause for some form of discipline by the employer".

The Union's case included an assertion that the Supreme Court in *Martin Richard McKinley* (supra) has "shaken the cob webs off the (unrealistic) view of dishonesty in the employment context". The Employer argued that *McKinley* stood for the application of employment termination adjudication in the civil context in the same manner that arbitrators have applied it in the labour law context for years. The High Court beginning at paragraph 55 commented:

... I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the consequences of dishonesty would remain the same, irrespective of whether the impugned behavior was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.

Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding

circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as “dishonesty” might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee’s conduct can be labeled “dishonest” would further unjustly augment the power employers wield within the employment relationship.

In my view the High Court’s comments quoted above are in accord with the just cause considerations described in the much earlier *Wm. Scott* (supra) reasoning by the Weiler panel in the labour law context.

The Union’s argument, that not admitting to wrongdoing does not change the character of the offence, was supported by the 2007 *Canada Safeway* case (supra) which, at paragraphs 68, 76 and 77, reads:

I have found, on the balance of probabilities, that the Grievor tossed the margarine tub. In my view, based on the above, the issue then becomes whether or not discipline and/or discharge is warranted because of that act. The failure of the Grievor to admit to the margarine incident does not change the nature of the conduct for which he was disciplined. While the Grievor’s failure to admit and explain on a timely basis may have an effect on the severity of the penalty imposed, in the circumstances here, the Employer cannot morph the offence into one of “*honesty/integrity*” based on the failure of the Grievor to admit to conduct for which the Employer believes it has compelling evidence. The Employer argued that the “*first step*” to re-establishing an employer-employee relation was timely admission. However, the offence for which discipline was imposed, and warranted, in this case remains the throwing of product in the plant, and not the Grievor’s subsequent denial.

...

In the circumstances, the Grievor is entitled to the benefit and rehabilitation that progressive discipline would bring. While I understand the Employer's concern and attempt to curtail the horseplay that occurs in the warehouse area, I am not satisfied that a wholesale abandonment of the theory of progressive discipline, in this case, is necessary to achieve that result. For the reasons I have expressed, I am of the opinion that the discharge of the Grievor was excessive in the circumstances.

There was no dispute by the Union that some discipline was appropriate for the conduct that the Grievor engaged in. I have considerable sympathy for the Employer's concern that the horseplay, which the Grievor admitted to, be stopped. An appropriate disciplinary response for the Grievor's conduct will no doubt assist in that respect. In assessing the appropriate response, I have taken into consideration all of the circumstances including: the Grievor's failure/refusal to admit to the conduct; his apology provided to the Employer prior to the second interview; the Grievor's contrite remorse exhibited at the hearing; and, his commitment to not repeating the behavior. I have also considered the Employer's need to enforce appropriate operational conduct in the warehouse where limited supervision is available and its need, in that respect, to impose penalties that will deter others.

In the instant case I am unable to restrict my considerations to the offence of being late returning from break. To do so would be to ignore the impact to the employment relationship that resulted from the Grievor lying to her Employer. If the Grievor returned to work based on adjudication only of the late return from a break, how could the required trust relationship be rebuilt? In the event that there is to be a return to work, it can only occur with an acknowledgement that it was the lying that caused the fracture in the relationship. It is also worth noting that Arbitrator Hornung, Q.C., in the above quote recognized that a failure to admit "may have an effect on the severity of the penalty imposed".

The Employer's reference to the *McRae Waste Management Ltd.* decision (supra) was in part to distinguish between the employment consequences of silence in the face of interrogation from that of lying to the Employer. The *McRae* Board quoted from *Tober Enterprises Ltd.*, IRC No. C54/90, (1990), 7 CLRBR (2d) 148, at paragraph 17 as follows:

While *Tober* establishes that a refusal to cooperate with an investigation is not in itself a culpable act, it allows for an exception in these terms:

On the other hand, where an employee deliberately attempts to deceive his employer by a false or misleading explanation, the employee's conduct is clearly blameworthy and threatens the basis of the employment relationship. The employee's behavior is equally blameworthy where he knowingly allows his silence to damage the legitimate business interests of the employer (at p.10).

The Employer's view was that Ms. Hunt was silent about the truth at the August 8 meeting, which was akin to lying given what Ms. Benson said at that meeting, that she lied on August 10 and again on August 12, all of which were serious employment offences. The Union's view was that even if an employee lies at arbitration, such behavior is not necessarily fatal to the employment relationship (re: *Stelco, Brewers Retail, Sooke School District*).

I am satisfied, on a careful review of the evidence, considered in light of the relevant case law that the Grievor's conduct on August 8, at the meeting with Mr. Ho, was blameworthy. It was a lie of omission. As well her conduct of August 10 and August 12 was blameworthy as she lied to the Employer at both meetings. I am unable to adopt the proposition that

Arbitrator Hornung appears to adopt in *Safeway* (supra) in the particular circumstances of the instant case, that it is only the offence of taking too long a break that is under consideration by this Board. Ms. Hunt was not fired for taking too long a break. She was fired for lying to the Employer about it.

The leading case with regard to witness credibility is *Faryna v. Chorny*, [1952] 2 D.L.R. 354: British Columbia Court of Appeal (O'Halloran, Robertson and Bird, J.A.), May 16, 1952. The Court described the assessment of credibility as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

There were discrepancies between the Grievor's testimony and the management witnesses testimony at the hearing. There were also discrepancies between the management witnesses testimony. None of these discrepancies were sufficient to conclude that anyone was lying to this Board. They were not discrepancies on the crucial points of the case. Generally management's recollection of events is preferred, in part, as they were buttressed by notes taken at the time or written the day after. The Grievor took no notes at the August meetings.

The conflict in testimony between Ms. Alcos and the Grievor was different and somewhat troubling. Ms. Alcos testified that when Melina and Ashlea returned to the bakery from the August 8 meeting with Mr. Ho, Melina was concerned that they would get in trouble and that Ashlea said "don't worry about it, they can't prove it or do anything about it". Ms. Alcos testified that later Ashlea said "if they do anything, her dad would know what to do". Ms. Alcos said she wrote down these comments in a statement for the lawyer in December 2010. Ms. Alcos was very certain about what she heard, almost adamant. Ms. Hunt was equally adamant about not saying "don't worry about it, they can't prove it or do anything about it". Ms. Hunt did testify that she said if she was in trouble she would talk to her father.

The difference between Ms. Alcos' and Ms. Hunt's testimony about whether the "don't worry about it" comment was made or not is irreconcilable and will be commented on later in this award.

The salient facts are not in dispute in this case. Ms. Hunt was late coming back from break. She allowed Mr. Ho to believe she was on a combined 2 -

15's break by not correcting Ms. Benson at the meeting in Mr. Ho's office on August 8. That was a lie of omission. Ms. Hunt testified that at the August 10 meeting "I didn't mention the first 15". She had been asked to account for her day and breaks of August 8. She lied by not mentioning the "first 15". In cross-examination concerning the meeting of August 12 Ms. Hunt said "I lied".

The above is part of the consideration in answering the second *Wm Scott* question:

... was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case?

The offence of taking too long a break is not particularly serious. Management advised that a first offence warrants a verbal warning or a written warning. The Employer advised that, had Ms. Hunt corrected Ms. Benson at the August 8 meeting with Mr. Ho, she would have received a written warning. It is the breach of trust by lying to the Employer, and whether such breach has destroyed the employment relationship beyond repair, that is the question for this Board.

In *British Columbia Transit* (supra), at paragraph 23, Arbitrator McDonald quotes:

Pacific Press (a division of Southam Inc.) —and—
Communication, Energy & Paperworkers Union, Local 115-M,
[1997] B.C.C.A.A.A. No. 558, September 11, 1997 (Greyell) at
page 15:

“Arbitral authority is clear that honesty is a significant – perhaps the most significant – element in the employment relationship. Honesty has been referred to as the “touchstone” of the employment relationship” Philips Cables Ltd. (1974), 6 L.A.C. (2d) 35 at 37. Employers must be able to trust that employees will be honest in all aspects of their working relationship “not only in the secure handling of employer property but also in applying for and utilizing benefits under the Collective Agreement. However, dishonesty per se does not automatically warrant dismissal. A number of factors need be considered including the nature of the dishonest conduct, whether the incident in issue arises from a momentary aberration or had been deliberate or planned, the seniority and service record of the employee and whether the employee is genuinely contrite and has made a prompt and forthright apology.

Arbitrator Greyell, in my view correctly outlines the importance of honesty in an employment relationship. He also outlines a number of considering factors appropriate to an assessment regarding dismissal. Arbitrator McDonald’s review of case law continued as follows:

North Okanagan-Shuswap School District #83 –and– Canadian Union of Public Employees, Local 523, [1988] B.C.C.A.A.A. No. 404, June 26, 1998 (Thorne) at pages 22-23:

“There is no question that employee dishonesty is grounds for dismissal. It is equally clear that trust is a prerequisite for a continuation of the employment relationship. Employees, who lie to their employer, are generally viewed by arbitrators as having breached their employment contract. This breach is generally viewed as irreversible, in the absence of sufficient mitigating factors to support a conclusion that the trust relationship can be restored.

In re: Alcan Smelters and Chemicals Ltd. and Canadian Association of Smelter and Allied Workers, Local 1, unreported, July 6, 1983 (Hope), the arbitrator had the following to say on the subject of trust at page 21:

There is ample arbitral authority which supports the contention that a breach of trust or fiduciary duty is deserving of immediate dismissal. The rationale of that line of authority is that an employee in such position must be above reproach and suspicion. The essence of the reasoning is that where the only security available to an employer is the trustworthiness and honesty of the employee, the very nature of the employment imposes a heavy burden on employees to remain scrupulously honest in their dealings on behalf of the employer”.

...

White Spot Restaurants (a division of White Spot Limited) – and– C.A.W. – T.C.A. Canada, Local 3000, [1996] B.C.C.A.A.A. No. 552, November 26, 1996 (McPhillips), where the employer established that it had just and reasonable cause for some form of discipline, and the issue was whether discharge was excessive. At pages 18-19:

“In summary, Ms. Bindra’s behaviour was extremely serious although is not a classic case of theft. As well, Ms. Bindra is a relatively short term employee but one who does not have a serious disciplinary record, nor is she in a high position of trust. However, the basic fact remains that she was dishonest with her Employer and then she had persisted in her dishonesty throughout her testimony before this board. Even in situations where she did admit to certain events in her testimony, such as the conversation about the doctor’s note requests from Ms. Kosturos, Ms. Bindra was initially evasive and then only admitted those events in the face of compelling evidence. In my opinion, lack of truthfulness before an arbitration board is particularly critical in cases where dishonesty is at the root of the behaviour for which the employee was discharged.

There are numerous authorities which indicate that trust is a cornerstone of the employment relationship and there is little basis for this Employer to conclude it would be able to trust Ms. Bindra in the future.

Ms. Bindra also has not indicated to the Employer or to this board that she is at all contrite about her actions and indeed has persisted throughout the hearing in the position that she had done nothing wrong. ...the fact that Ms. Bindra has persisted in falsely asserting her innocence throughout the hearing makes it impossible for this board to conclude the Employer's decision to terminate should be overturned and a lesser penalty substituted."

In the instant case, in addition to the other evidence and the submissions of counsel, it will be a careful review of Ms. Hunt's conduct at the meetings with the Employer, and in particular a review of her conduct at the arbitration hearing, that will tell if the employment relationship can be repaired or if the Employer's decision to terminate should be upheld. Arbitrator McDonald's analysis continued at paragraph 58:

In the circumstances of this case, where the Grievor has persistently lied, there has been no recognition, appreciation, contrition, or apology available for consideration. There is no evidence as to any prospect for rehabilitation. In addition, I am not confident that the Grievor would not do it again.

Arbitrator McDonald's review reflects the current state of the case law with respect to honesty. In the instant case at the arbitration hearing Ms. Hunt admitted that she mislead Mr. Ho on August 8. Ms. Hunt admitted she lied to management on August 10 and again on August 12. She said she was scared and whatever she said "just came out". She said that she was sorry, that she loved her job and wanted it back.

The distinction between this case and a number of the cases referred to in the *BC Transit* case is that in this case at arbitration the grievor admitted she had lied. The first three considerations in *Wm. Scott* are applicable to the instant review:

- (i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
- (ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
- (iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?

In conducting a *Wm. Scott* review the first consideration is the seriousness of the immediate offence. Ms. Hunt's action of taking too long a break was described by the Employer as time theft and in terms of seriousness the Employer advised that taking too long a break typically resulted in a verbal or written warning. Had Ms. Hunt come clean on August 8 or August 10 she would have received a written warning. In *Versacold Canada* (supra) Arbitrator Bruce was adjudicating a case in which she concluded, at paragraph 62 that: "The Grievors committed a premeditated act of dishonesty designed to obtain wages for time not worked" – theft by misuse of time cards. The distinction is that the premeditated time card theft was a much more serious offence which, on its own without other considerations, will often result in a decision to discharge the employee(s).

In the instant case the Grievor lied to the Employer, however admitted to lying at the arbitration hearing. In *Versacold* the Grievors lied at the arbitration hearing.

I find that in both the instant case and in *Versacold* that lying to the Employer in the circumstances to be a serious breach of trust which often attracts discharge and the discharge is often upheld in arbitration in similar circumstances. One question here is: Is the lie about a relatively minor employment offence of a late return from a break less serious than a lie about involvement in a premeditated scheme to steal via time card misuse? The seriousness of the initial offence may be a mitigating factor in circumstances where the Grievor does not fully understand the potential consequence of her subsequent conduct. Is Ms. Hunt a better candidate for consideration of a lesser penalty?

The second *Wm. Scott* consideration is premeditation. I heard no evidence to suggest that the length of the break on August 8 was premeditated. It is also unclear whether the lying on August 10 and 12 was planned or premeditated. It was certainly ill advised, especially given the number of cameras in the store.

Ms. Hunt's length of service is insufficient to draw on as a mitigating factor. Her short record is otherwise unblemished. Her service is not an aggravating or mitigating factor. It is a neutral factor. The Weiler panel commented on arbitral enquiry:

The point of that overall inquiry is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. (That attitude may be seen in such recent cases as Phillips Cables (1974) 6 L.A.C. (2d) 35 (falsification of payment records); Toronto East General Hospital (1975) 9 L.A.C. (2d) 311 (theft); Galco Food Products (1974) 7 L.A.C. (2d) 350 (assault on a supervisor).) Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question. Within that framework, the point of the third question is quite different than it might otherwise appear. Suppose that an arbitrator finds that discharge and the penalty imposed by the employer is excessive and must be quashed. It would be both unfair to the employer and harmful to the morale of other employees in the operation to allow the grievor off scot-free simply because the employer overreacted in the first instance. It is for that reason that arbitrators may exercise the remedial authority to substitute a new penalty, properly tailored to the circumstances of the case, perhaps even utilizing some measures which would not be open to the employer at the first instance under the agreement (e.g. see Phillips Cables, cited above, in which the arbitration board decided to remove the accumulated seniority of the employee).

In the instant case I have trouble believing the Grievor concerning Ms. Alcos' testimony. While Ms. Alcos seemed unusually adamant, it may be that she was a bit nervous testifying. I also can not conclude that Ms. Alcos had an interest that was greater than the Grievor's interest in the outcome. The Grievor's testimony on that point was also uncharacteristically adamant. In the end, with the help of *Faryna v. Chorny*, (supra) I have to choose a

version, and it is Ms. Alcos'. That translates to an aggravating consideration for reinstatement of Ms. Hunt.

The Employer also argued that I should draw an adverse inference based on the fact that the Union did not call Ms. Benson to testify. The Union's position was that no such inference could be drawn (*Re: Barbara-Jean Steele and International Union of Operating Engineers, Local 963 and Board of School Trustees of School District No. 39 (Vancouver)* [2001], B.C.L.R.B. No. B77/2001 (Sharon Kearney), March 7, 2001). Given the above conclusion on the Alcos testimony, it is unnecessary for this board to deal with the adverse inference question as at this point it is academic.

In terms of mitigating factors, the Grievor at arbitration admitted she had lied to her Employer at the August meetings. The Grievor provided a written apology dated October 6, 2010, which may have been mainly self-serving, however it contained the comment "I know now what I did was wrong" and she asked that management accept her "sincere apology". These acts distinguish this Grievor from those in *Versacold* and from a number of the Grievors referred to in Arbitrator McDonald's review in *BC Transit*.

At the hearing Ms. Hunt was soft spoken. She acknowledged her wrong doing and tried to say why she lied, saying she was scared, felt intimidated and that what she said just came out. It was somewhat like the description of a deer in the headlights; an autonomic response. In the main, I accept that evidence.

Ms. Hunt could not be described as “quick-minded, experienced and confident witnesses,” ... or a shrewd person “adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth”. (*Faryna v. Chorny*)

It was clear that she did not have the experience to insist on a Shop Steward’s presence at the August 8 meeting or to ask to have a discussion with the Shop Steward prior to going into the August 10 meeting. The fact that her parents were Shop Stewards did not assist her with the August meetings. It also seemed that Ms. Hunt did not recognize the seriousness of the situation. She now understands the seriousness of the employment offence of lying to management.

At the time of the hearing Ms. Hunt testified she was 18 years old and lived at home with her parents and siblings. Ms. Hunt is a young 18 in terms of her short work life experience and in terms of her understanding the reality of the serious consequences of her behaviour at the time.

The Weiler panel in *Wm. Scott* concluded that: “The point of that overall inquiry is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge”. As Arbitrator Greyell observed in *Pacific Press*: “dishonesty per se does not automatically warrant dismissal”.

In my opinion Ms. Hunt is a candidate for conditional reinstatement. I am of the view that she has rehabilitative potential and that she will use this second chance to rebuild the required trust between herself and management.

I find in the particular circumstances of this case, for this particular Grievor, that discharge is an excessive response.

Ms. Hunt is to be reinstated to her employment with Overwaitea Food Group without loss of seniority. It will be Ms. Hunt's responsibility to rebuild the trust between herself and management.

Ms. Hunt's offence was one of the most serious employment offences, as it is at the core of what has been described as the cornerstone of the relationship. The Employer has a right to expect a serious sanction in cases of breach of trust and a sanction that is a clear message to others within the Employers operation of its enterprise, that lying to the Employer is unacceptable and a serious breach of trust.

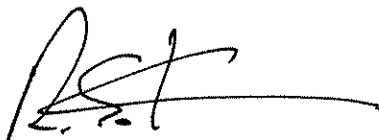
In recognition of the seriousness of the offence and the legitimate need for deterrence, Ms. Hunt will receive no pay for the period between her termination and return to employment and her record will reflect a three month suspension for the offence described in the Corrective Action Report.

I will retain jurisdiction in the unlikely event of implementation difficulties.

All of which is so ordered.

I thank counsel for their helpful submissions.

Dated at Vancouver British Columbia this 11th Day of February 2011.

A handwritten signature in black ink, appearing to read 'R. S. Keras', written over a horizontal line.

Ronald S. Keras
Arbitrator