IN THE MATTER OF AN ARBITRATION UNDER THE
LABOUR RELATIONS CODE of BRITISH COLUMBIA, R.S.B.C. 1996 c.244

BETWEEN:

CANADA SAFEWAY LTD.
(the "Employer")

AND:

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1518
(the "Union")

Re: [redacted] Termination Grievance

AWARD

ARBITRATOR:	Nicholas Glass
COUNSEL:	Duncan MacPhail for the Employer
	Brendan Quinn for the Union
DATES OF HEARING:	June 21 and 22, 2011
PLACE OF HEARING:	Kamloops, B.C.
DATE OF AWARD:	July 20, 2011

AWARD

I. Issue

The grievor was dismissed from his employment on the 26th of November, 2010 for consuming the employer's product without paying. The grievor and the union on his behalf grieve the termination and say that the discipline of discharge was excessive in all of the circumstances of the case.

II. Facts and Background

The grievor is 59 years of age and unmarried, with two adult children. He has 35 combined years of service between his time at Woodwards and its successor Canada Safeway. He worked as a produce manager and a food floor manager at Woodwards, and at Safeway he worked as a produce manager. He also worked in the dairy, on the night crew, in produce and in the grocery section. Most recently he has worked as a retail clerk. He has not previously been disciplined.

On the 12th of November, 2010 the grievor was working on the 3:45 p.m. to 12:15 a.m. shift in the company of Sherry Nicholson, a Manager Trainee.

Sherry Nicholson was the first company witness. She had worked for the employer for 13 years. She had been at store #89 in Sahalee until 2009 and then at this store (#56) since then. She was and is a member of the union and has held the position of shop steward and other positions with the union including recruiter. She was stocking shelves with the grievor on the night of November 12, 2010. They were both changing over the ends of the aisles and putting up new ends for a new promotion starting the next day.

Quite late in the shift she testified that she was coming out of the back room and saw the grievor with his back to her going down aisle 5. He was drinking something and she watched him. He went further down the aisle and he stopped. She stated "I could see his elbow go up" and she then demonstrated a movement consistent with someone drinking and draining a liquid container of some kind. She then testified that she saw him place something on the shelf on his right side. She then went down aisle 5 and saw a container of chocolate flavoured drink called Carnation Breakfast. It comes in a package of four known as a tetra-pak and is normally displayed in aisle 4. She picked up the container, which she testified was empty, and put it on her wheeler and then went around the corner into the back room. She testified that she was not sure what to do. She saw the grievor loading his wheeler. There was no store manager there or any first assistant. She approached the grievor who started talking about some other task, and she said "Look at me", and held up the empty container. She then said "I saw you". He replied "Well, it was opened". She said "It does not matter you can't drink it". In saying this she made a face, because she thought he meant that the single container was open. The grievor understood this and then said "No, no, it wasn't open. The pack was open". She replied "It doesn't matter you still can't drink it". It was put to her that she then said "Don't ever ever ever do that again," but she stated she did not recall saying that.

She then put the drink down beside him and went back to the floor. She saw him next at the end of the shift when she was in the office and he was punching out. He came to her and he thanked her for confronting him. He said "It's the right thing to do". She then said "Why did you do it?" His reply was "I don't know but I knew as I was drinking it that it was wrong". She said "People get fired for that".

She had first-hand knowledge of this and when asked for examples referred to one girl being fired from the deli department when she took a chicken wing; also, an employee was fired from the Starbucks at Store #89 for taking a hot coffee (later it transpired that she gave it to a friend). Also an employee consumed some dairy product upstairs at Store #89 who was fired.

Ms. Nicholson then confirmed the policy and procedure for dealing with distressed product. It was to be taken to the reclaim centre in the back. The grievor should have taken the broken tetra-pak to the back room and included the separated container. The employer gets credit for such product from the supplier. I will say more about the employer's policies later on in this award.

Brad Kristian, the first assistant manager at store 56 gave evidence. He was approached by Sherry Nicholson who told him about the drinking incident the night before. After taking some advice he arranged an interview with the grievor with a union and management witness present. The grievor admitted to everything and offered no excuse. He said "It was stupid. I am sorry. I hope I won't lose my job". At the end of this interview Mr. Kristian suspended the grievor pending investigation. Then on the 26th of November he contacted the grievor by phone for a conference call together with Brendan Martin, store manager.

The conference call was recorded. The union did not object to the admission of the CD disc of the interview into evidence. It was agreed by the parties that the non-objection of the union was without prejudice to its right to object to the admissibility of audio recordings in future cases.

There is no verbatim transcript of this interview, but there was an internally generated company document which comes very close to a verbatim version of what is on the compact disc. I have listened again to the compact disc and followed along with the written document and have found it to be accurate in every material respect. For convenience I reproduce that below:

[redacted] Hello?

Brendan: Hi[redacted]?

[redacted] Hi.

B: It's Brendan phoning, how are you doing?

[redacted] Oh good Brendan, how are you?

B: Oh actually I'm sick right now but...

[redacted] Oh that's too bad.

B: ...other than that it's all really good. Anyway, [redacted], I'm phoning about a situation that occurred.

[redacted] Huh?

B: I'm phoning about a situation that occurred. And I've got Gary here as a Union witness if you're okay with that? Gary O'Hashey?

[redacted] Uh huh, Yeah.

B: So you're okay with that?

[redacted] Oh yeah, that's fine.

B: Ok so, [redacted] I guess ... Is there anything you want to add about what happened?

[redacted] Well, what ... the Union person was that ... It was a distressed item I was taking off the shelf, you know. In the cereal aisle. Then I swinged on to ... This is exactly what happened ... We pick distressed items off all the time. It's either fallen off the shelf or broken open or something. But the rest of it's back in a milk crate. So I put it in a milk crate and I walk around aisle five to take some items back, in aisle five. Then I was looking at the ingredients. I've never tried a Carnation Instant Breakfast and it was, I don't know, it was a stupid thing to do. But I was looking at the ingredients and I drink Boost, and ... like a meal-a-day type thing ... So I thought ... I don't know why I did it, but I opened one up and I took a sip, you know. And Shari saw me. And right after that she came in the back and approached me. And I explained to her what happened... It was something stupid ... I'm not usually in the habit of doing that at all, you know ever. I didn't mean it in a sense that I was going to be ripping the company off or anything, because I don't do that ...That's all I can say Brendan. It was an unfortunate mistake on my part ...And that ... I still don't know why I did it ... I was telling Jerry it was a

dumb thing to do. Even at the time that I was ... I was thinking ... But it wasn't an intentional act of vandalism or anything like that that I meant to happen. That's all I can say on my part.

B: And you know all about our purchase policy and all that?

[redacted] Yeah, I know, I know.

B: And you know about reclaim?

[redacted] Reclaim?

B: Yeah.

[redacted] Yeah, yeah. And I put it in the milk crate, and I put my cereal back. And the rest was still back in the milk crate in the back room when Shari came and she approached me. I just got shocked ... I knew that right away I was like ... nothing to hide. It was dumb ...

B: And you took the bottle and put it back on the shelf, though?

[redacted] No ... Oh no, I put one empty on the shelf. It was an empty carton.

B: The one you drank?

[redacted] Yeah, because I put it in the milk crate. And then I thought, Oh jeez, it's going to spill over, and knock over. So I ... It was a dumb thing I did. All I can say is I'm sorry for doing it. And I don't know even today why I did it. It was like ...

B: I thought I would've heard from you about this kind of thing.

[redacted] I know it does, Brendan, I know. I'm not in the habit of doing that kind of stuff.

B: No, I said I thought you would've contacted me, though.

[redacted] You?

B: Yeah.

[redacted] To what?

B: Just to talk about it, right?

[redacted] Oh, well, I'd planned .. I'm actually just in the process of writing a form letter to you ... Then sending it to you, bringing it in ... I'm just so embarrassed, ashamed, of what I did ...

B: Okay, I've got Gary here. And this is a letter that came down from HR.

[redacted] Right.

B: Ok? Human Resources.

[redacted] Right.

B: This letter .. It says "Dear [redacted] this letter is further to the company's investigation into your inappropriately consuming product without paying, which you have admitted. This action clearly is against company policy and completely severs the trust relationship we must have with our employees. I feel that beyond ... the trust relationship the company has with you is damaged beyond recovery and I have no choice but to terminate you from your employment."

[redacted] Alright ... One infraction in 35 years and ...

B: Just hang on a second. "...Upon receipt of this letter, you are discharged from your employment with Canada Safeway. You should note you are no longer welcome at any Safeway store." And ... "Yours truly ..." I have to sign the letter and Gary has to sign the letter as well.

[redacted] Alright, well if that's their feeling about it. You know, but, in my defense I just ... Honestly, it was an honest, stupid, dumb thing to do ... What can I say? I thought I was just, you know. I just don't think a simple act of ... my first offence of ... grazing. When I wasn't ... I never meant it as theft, you know.

B: I know, but ...It's pretty ... You said you were clear of the policy and we ...It's just not tolerated, right?

[redacted] Right.

B: And that's how their stance is.

[redacted] Ok.

B: Ok? And it's ..... and Terry Hallam, who's director of labour relationships. And you've already contacted the Union I know that, right?

[redacted] You have?

B: No, you have, I know that.

[redacted] I have, yeah.

B: I've spoken to them as well about it, so ... Ok?

[redacted] Ok then.

B: Thanks, [redacted]

[redacted] Ok bye.

B: Good luck.

Mr. Kristian confirmed that Canada Safeway employees are prohibited from consuming distressed products. This is reinforced at morning meetings, department huddles and one on one meetings. Policies with respect to this are posted near the time clock and in the coffee room. I will refer further to these policies later. His evidence was that the portion of the policy referring to employee purchases was posted across from the time clock and in the coffee room and that the portion of the policy addressing employee honesty and integrity was posted across from the time clock. They were contained in laminated clear plastic sheets.

The next employer witness was Brendan Martin, manager of store 56. He had held various positions with Canada Safeway and had been employed by them for 37 years. He referred to some of the policies which were posted and it is convenient to

reproduce these at this point. The employee honesty and integrity policy reads as follows:

> Employee Honesty and Integrity
>
> We insist that Safeway employees be honest in all of their dealings and maintain the highest standards of ethics and integrity.
>
> Dishonesty can take many forms, for example:
>
> - theft by not paying for merchandise;
> - consuming or "grazing" unpaid for product;
> - under-ringing merchandise;
> - taking a customer's Air Miles for personal credit;
> - fraudulent W.C.B. claims;
> - faking illness in order to receive sick pay;
> - lying about hours worked; or
> - misrepresenting any company financial or operating reports or records.
>
> **If an employee commits any act of theft or dishonesty termination of employment will result.**
>
> In addition, theft is a criminal offence and such an employee may be subject to criminal prosecution.

The employer purchases policy reads as follows:

> Employee shopping at Safeway is encouraged and appreciated. To ensure the utmost integrity in all employee purchases the following rules apply:
>
> 1. PURCHASES FOR IMMEDIATE CONSUMPTION shall be paid for at the front-end before consumption. Proof of purchase (till receipt) must be retained by the employee.
>
>   - Pharmacists, who may not easily leave their area, shall have Store Management arrange to have their purchases rung in.
>   - Night Shift Employees shall have the Lead Person ring in their purchases.
>   - Employee sampling (as opposed to offering a sample to a customer) or consuming product where the

packaging is damaged is prohibited. Such "sampling" or "grazing" is theft.

2. PURCHASES THAT ARE NOT FOR IMMEDIATE CONSUMPTION must be rung in and paid for at the front end of the Store (or Pharmacy in the case of prescriptions) and must immediately be removed from the Store as if the employee is a member of the general public.

    - Merchandise shall not be held in the store (e.g. at check-stands, in coolers or in the back room) for purchase at the end of a shift or a later time.
    - Employees shall not ring in their own purchases or select their own purchases by going behind a service counter (e.g. Deli). Employees shall be served by department employees like members of the general public.
    - Employees and members of their families or households shall not be given any special privileges.
    - Cashiers are not permitted to serve members of their family or same household. Such customers must be requested to make their purchases through another employee.
    - Pharmacists shall not prepare their own prescriptions or ring in their own purchases.
    - Night Shift Employees shall not purchase merchandise to be removed from the Store before the Store opens for business, unless a Cashier or Store Management (not the Lead Person) rings in the purchase.

3. DISTRESSED OR REDUCED PRODUCT offered for sale to the general public may be purchased by an employee on his/her day off, on a shopping trip before his/her shift begins or after completion of the shift while the Store is open for business. This means:

    - No special privileges.
    - All employee purchases must be made as if the employee is a member of the general public.
    - Distressed product shall not be held for an employee to purchase at the end of a shift or at any later time or held for members of an employee's family or same household.

- Employees in charge of the Store shall not reduce prices for their personal purchases or purchases by members of their family or same household.
- Any product specially discounted for an employee's purchase must bear the Store Manger's initials on the label.

THE REMOVAL OR CONSUMPTION OF ANY PRODUCT WHICH HAS NOT BEEN PAID FOR IS THEFT. THEFT OR DISHONEST CONDUCT WILL RESULT IN TERMINATION OF EMPLOYMENT AND POSSIBLE CRIMINAL PROSECUTION.

Mr. Martin confirmed that the employee honesty and integrity policy was posted at the time clock and in the lunchroom. The employee purchases policy was also, he said, posted in both these places. There was evidence later that the policy with respect to sampling was sent out to the stores over many years as well. There was no specific evidence on whether this portion of the policy was posted in any particular location. Mr. Martin also produced a poster approximately twelve inches by ten inches in size bearing the words: "GRAZING! IS IT WORTH YOUR JOB?"

This was displayed in the stock room by the bulk food area and also in the produce department area of the back room or stock room. He stated that these posters had been displayed for the last two to three years. He also stated that there were many other hard backed signs and computer generated signs over the years which had been on display in store #56 containing the same words. The posters or signs also contained variously the following messages: "No unpaid merchandise past this point". This was posted in the staff washrooms. "Don't let a moment of temptation ruin your career". This was displayed at the service desk.

Mr. Martin also testified that there were quite frequent "huddles" when employees would be gathered together with a store manager or supervisor and the policies about honesty and integrity and not taking product would often be the subject. Mr. Martin pointed out that grocery inventory had leaked something like $50,000 worth of product in the most recent six months.

Mr. Martin confirmed that the Canada Safeway policy prohibited grazing. He defined it as consuming items in the store and not paying for them. He stated that it was considered to be theft. He stated that he had had to address this issue many times before and his response has been identical in each case. The employment of the guilty party has been terminated. He gave some examples including an employee who gave a friend a drink at the Starbucks counter free, and was let go. A manager guilty of dishonesty in the operation of the fuel bar was let go as well. He also referred to a deli clerk who took a $0.25 dip out of the deli and was terminated. He said that recently a courtesy clerk had been let go for consuming chocolate bars and an apple. He was familiar with the two examples referred earlier by Ms. Nicholson which included a fifteen year employee at the Sahalee store being let go for discounting the price of some bagels. He stated that he referred to these examples of dismissals when he had huddles and "one-on-ones" with employees. He would make use of these examples and speak specifically of them as well as the consequences which resulted for these employees.

He stated that he totally supported the decision to terminate the grievor and when asked how he felt about taking the grievor back into employment he stated that it would be "very tough, not just for me but for the staff as well". When asked if he could trust the grievor, should he be reinstated, his answer was "Absolutely no. Trust has been damaged beyond recovery".

In cross-examination he conceded that it would be possible, but doubtful, for an employee to miss the "no grazing" posters if they were not normally working in the bulk food or produce area. He also agreed that he had not had any one-on-ones or huddles with the grievor about the specific topic of grazing. He had spoken to the grievor about the need for support in maintaining security, locking the back door and looking out for customer theft. He agreed that the fuel bar manager had been let go not just for eating liquorice and Chef Boyardee but also stealing cash. He also agreed that the employee who had been let go for discounting the bagel price had admitted

that he had done this many times. He was referred also to the case of [redacted] who was suspended for drinking juice, in July 2009. He agreed that this employee was suspended for one to two weeks and was taken back to work. However, he stated that this employee was a challenged employee who did not know right from wrong. The evidence disclosed that Mr. [redacted] was put back to work as a bagger. Apparently this is a position from which it is difficult to commit the same kind of employment offence.

He further confirmed that in supporting the dismissal of the grievor the fact that he had 35 years of discipline free record was not a factor. Also length of service was not a factor. His comment was "he did what he did". He also confirmed that the letter written by the grievor and received by management after the termination would not have made any difference to the result. He also confirmed that on some occasions during an investigation for grazing it would turn out that the employee had committed the offence more than once, or maybe several times, but that this did not affect the result. It was sufficient if the employee in question was caught grazing just once. In each case they would be dismissed. He confirmed that in the termination interview the grievor was not asked about whether or not he had grazed on other occasions.

Ms. Terri Griffing also gave evidence for the employer. She was a staff negotiator who reported to the Director of Labour Relations, Terry Hallam. Prior to that she worked for 15 years as a human resources advisor, more on the benefits and advisory side rather than the disciplinary side. She confirmed that there were seventy-four stores in British Columbia, open seven days a week except Christmas Day from 7:00 a.m. to midnight. There were a total of 9,000 employees. Often employees had to work without supervision and/or work when there were no excluded employees present. She stated that the employer was in a vulnerable position with a great deal of product displayed for sale, and very little supervision of staff. She stated that the company response to dishonest conduct was zero tolerance. The policies were clear and posted all over the worksite. There was regular communication and education

with the staff about the policies and there was consistent application of these policies. She stated that the honesty and integrity policy was province-wide and has been in place for at least the length of her service with the company which had been twenty-five years. She confirmed that the honesty and integrity policy and the employee purchases policy were common knowledge to all employees. They were reviewed at the time of hiring and were posted for years throughout the stores. The sampling policy, she also confirmed, was sent out to the stores over many years as well. I will reproduce that policy below:

> Sampling of product by customers is an important part of superior service. Safeway employees are encouraged to offer samples to help customers in making purchasing decisions. However, sampling must not be confused with improper consumption of product by employees, known as "grazing", which is theft. To ensure a clear distinction the following rules will apply to all employees:
>
> 1. SAMPLING BY CUSTOMERS
>
> Customers may from time to time ask employees about a product to help decide on a purchase. In such cases employees should offer a small sample of the product for the customer to try.
>
> - Such sampling by a customer is to be done only on the sales floor, not in the back room.
> - Such sampling is only for immediate consumption in the store, not for taking home.
> - The amount of sampling shall be only enough to allow the customer to be familiar with the product quality (e.g. one cookie, not the whole bag or package).
> - Where a package has been opened or product partially consumed for sampling, the remainder will be treated as distressed product and is not to be consumed by employees.
>
> 2. SAMPLING BY EMPLOYEES
>
> Employees may need to sample products from time to time, and may even be encouraged to do so in some departments to enhance product knowledge. However, such sampling must be

in a very small amount and only for the purpose of familiarizing employees with the product being sampled.

- Employees wishing to sample a product for the purposes of familiarity must first obtain permission from the Dept. Manager or Manager in charge of the store.
- It is O.K. for an employee to sample a product when prompted or requested to do so by a customer.

3. GRAZING

The following are examples of consumption of product by employees or "grazing", which is prohibited and <u>not</u> permitted as sampling.

- "nibbling" or consuming any unpaid for product while working (e.g. eating cheese or meat while preparing a deli tray; or pastries being removed from a display case).
- consuming distressed product or opened product set aside (e.g. eating chips from an opened bag set out in the back room).
- consuming remaining product which has been opened or used for sampling (e.g. eating the rest of an apple or a loaf from which a slice was provided to a customer for sampling).
- consuming product samples or demos on display for customers (e.g. employee walking by the deli counter helps him/herself to some chips and dip set out for sampling).

Please also refer to the *Employee Purchases* Policy for guidance on consumption of product in-store.

Remember, if ever in doubt, feel free to ask your manager before consuming any product!

Any employee found to be in violation of this policy will be subject to discipline including possible termination of employment.

In cross-examination it was pointed out to her that the sampling discipline policy implied that a violation could be subject to some discipline less than termination of

employment. For this purpose the final bolded sentence of this policy as above was referred to.

Ms. Griffing's acknowledged that while the words may have implied that something less than termination could result, (she said "I hear what you say"),the fact was that employees found guilty of grazing would be fired and were fired.

She confirmed that most of the employer's larger stores have full camera systems and store #56 was one of the largest stores. However, she stated that there was no full time watching or reviewing of the video camera recordings and that they were used as backup by security.

[redacted], the grievor was the only union witness. He confirmed that he was 59 years of age, unmarried with two grown children. He had worked for 35 years at Canada Safeway and previously at Woodwards, of which Canada Safeway was the successor.

His evidence was that he was on the shift from 3:45 p.m. until 12:15 a.m., with Sherry Nicholson. At around 11:30 p.m. he was replenishing aisle 4 and he went down aisle 4 towards the back of the store/warehouse/stockroom. He saw a carton of Carnation Breakfast on the floor and picked it up. He was going to put it back and saw that it was part of a four-pack. He had not seen that product before. He then noticed a broken package on the top shelf and realized that the single carton belonged to this four pack. He gathered the three remaining cartons of the four pack and put them in his milk crate which he used to store distressed items temporarily, on his wheeler. He still had the single carton in his left hand and looked at the content of the package and noticed that it was a new product. He stated that he was only aware of powdered product. He continued on his way to aisle 5 and half way up aisle 5 he pulled on the pull tab of the carton and "drank one big gulp" which amounted to about ½ of the container. His evidence was, "I said to myself "this is wrong ... I should not sample product without authority"". He stated that he was

not aware at the time of the term "grazing" but he was aware that consumption of product which was not paid for was prohibited. He was going to throw the container in the milk crate but then realized it would spill. He saw an empty spot on a shelf and took another sip out of the product to get it down past the spilling stage. He knew, he said, that if someone saw an open carton he could be in trouble. There was about a quarter of the contents left in the container, or less. He stated "I didn't drink it all". He stated his intention had been to put up the granola bars at the end of the aisle then come back down and take the Carnation container off the shelf and take it back to the warehouse for deposit in a plastic bag for open items or leak-prone items. He was not planning on telling anyone he had drunk it. He filled the granola shelves and by now it was near public closing time (12:00). He went down aisle 5 into the warehouse and forgot to pick up the empty, or near empty, container. He put his stock away and then noticed Sherry Nicholson walking down towards him. She said "I saw what you did". He stated he knew what she was talking about and asked her "What did you see?" She showed him the empty container and said "I saw you drink this". He testified that he then flushed and said "I drank that". She said "Why?" His reply was "I don't know why. I shouldn't have done it". He stated that he then apologized. She then said, according to his testimony "Don't ever, ever, ever do that again" and she then turned and walked away. It will be recalled that Ms. Nicholson's testimony was that she did not recall saying those words. He then went on with the closing procedures and Sherry called on the intercom "Time to go". He went to punch out and they walked out together. He apologized again and was embarrassed. He knew, he said, that it was an embarrassing moment for her too as they were pretty close and good friends. He testified that he then said "I'm glad you came up and approached me about that. It was the right thing to do. I'll never, never, never do that again". He did not recall Ms. Nicholson saying "People get fired for this" but admitted it was possible she had said that. He felt embarrassed and ashamed.

He went to work the next day and noticed his time card was not in his slot and went to speak to Brad in the office who said that he needed to talk to him about an issue.

The grievor knew what he was talking about and replied "For sure". He sat down and told Brad what had happened and replied to his request for an explanation. Brad told him that he needed a witness and the grievor said that anybody would do so Karla, another employee, arrived to fill this role. He stated that he admitted to everything that happened and then said "I'm sorry. It was a dumb moment. I can't believe I even did that". Brad then gave him a disciplinary document indicating a suspension pending investigation. His next contact with the employer was on November 26, 2010 when the telephone conference call occurred. I have already referred to the contents of that conversation and the will address it in some more detail later.

The grievor, in his evidence, referred to some of the points raised at the interview. He also confirmed that at the time of the interview he was in the course of writing a letter of apology which was not delivered until after his termination. I will refer further to that later. He referred to his statement in the interview that he never meant it as theft. He explained in his evidence that at the time he did it he was thinking of a customer who had asked him about the product in question. He elaborated on this in the letter referred to and it is convenient to quote from that below. Before doing so, his further statement at the hearing after stating that he never meant it as theft was to concede that it was wrong but at the same time when he did it, he was thinking of this customer ... he knew it could be construed as theft. But it was, he felt, an inappropriate act of sampling. At the time of the conversation he did not realize that "grazing" amounted to theft. He now knew that the company's opinion was that grazing was theft and he accepted that, now.

The grievor was referred to the employee honesty and integrity portion of the Company's policies. He stated that he had read their policies and handbook and he knew that this was one of them. He admitted that he had read and signed off on the company policies. He said he knew that procedure. The grievor was referred to a document entitled *Canada Safeway Ltd. Conditions of Employment and Our Working Role* and agreed that he had signed that document, on the 5th of December, 1988. This

document included the prohibition of grazing and defined it as "the practice of consuming merchandise in the store which has not been paid for".

The grievor stated that he had never seen the poster with the message "Grazing! Is it worth your job?" He said that it was not his practice to go into the produce section of the stockroom. He did go to the bulk foods area to get potato chips but the sign was not right at the bulk foods and he didn't work in the bulk foods area. He confirmed that he had regular daily contact with the supervisors but this was mainly to go over work to be done and there had been no discussions with him about grazing or its consequences. As far as employer's policies were concerned he confirmed that he was aware of employee purchases policy and had read it years ago. He was aware of the policy and the substance of it. As for the sampling policy, he conceded that he had reviewed it at some time. He was aware of the substance of it, but the term "grazing" was "new to him". When asked about his knowledge of the individuals who had been terminated from his store for breaches of the policy, his reply was that neither Brad nor Brenda had ever spoken to him about these examples. He did not say that he was unaware of them and later in cross examination he stated that he was in fact aware of them.

He was referred to his letter delivered through Sherry Nicholson, post termination and it is quoted here:

> Dear Sir/Madam
>
> I am writing to offer my sincere apology. My 35 years of service have been without incident up until now I have worked hard at numerous positions and have always put the company and customers first and foremost. It is important to myself to explain the circumstances that led up to this momentary lapse of judgement.
>
> a) approx. a month ago I had been asked by a customer about the item in question (Carnation Instant breakfast) at that time I recommended to them a product called Boost. A nutritional substitute meal.

b) working the shelf one evening I noticed a distressed product that had either been ripped open or dropped. This item happened to be a 4 pkg of Carnation Instant breakfast. The product was distressed, so I took it off the shelf, put it in a milk crate with other distressed items I had collected.

c) upon taking items back to the reclaim centre, in a very stupid moment I opened and sampled the product, not thinking what I was doing was actually theft.

Anyway what I want to project to you is that if it wasn't for thinking of that customer plus the item being distressed, this incident would have never happened. I only hope you will accept my sincere apologies. 35 years of service is a lot to lose over one momentary lapse of judgment.

Sincerely Yours,

[redacted]

The grievor confirmed at the hearing the truth of the letter above quoted and stated that it was important to him to write the letter and send it because he wanted to "articulate what had happened". He confirmed again that a customer had asked him about Carnation Instant Breakfast and he had recommended Boost which was a product he consumed himself. He stated that the offence of consuming the product was not premeditated.

In cross-examination, the grievor agreed with the proposition that it was wrong to steal from his employer, and that consuming product without paying is theft. He also agreed with the proposition that employees do not steal. That is dishonest. Canada Safeway relies on the honesty of its employees.

He agreed that he knew others had been fired for theft. He admitted that he had signed the employer's working rules back in 1988 but he was not familiar with the term "grazing", although that term is used in paragraph 5(i) of the rules. He said that the term "grazing" never "stuck with me". It was drawn to his attention that the honesty policy and the employee purchase policy both used the term grazing and he

agreed with this and that he had read these policies but nevertheless adhered to his position that the word never stuck with him. He however did not attempt to deny that he knew perfectly well that consuming product without paying for it was prohibited. He referred to a conversation with his landlord after his dismissal on November 26, and the landlord had said to him "They call it grazing". It was then put to him that he himself used the term "grazing" in the termination interview of November 26, 2010 which was before his conversation with the landlord. He then changed his story about this matter and said that the landlord told him this before he was fired. He also saw it in the manual when, as he put it, "backtracked" and looked at the manual to see what the outcome might be for his actions.

He again confirmed that he knew when he consumed the product that it was wrong and that it could be construed as theft and he knew this at the time.

In testing his characterization of his actions as "sampling", it was put to him that to taste a product it is not necessary to consume ½ or more of the container and to this his reply was "maybe". He agreed that after his initial "gulp" he had drunk more of the product before putting it up on a shelf to avoid detection.

It was also put to him that the container itself was empty when he put it on the shelf. His response was that it was "almost completely empty ... not very much left". He also continued his denial that he had ever seen the grazing posters located in the produce department and in bulk foods. His evidence was "I have never seen that sign". With regard to his post-termination letter to the employer, he said he knew he was in serious trouble and it was important to provide some explanation. He went through several drafts but the letter introduced into evidence was the one which he actually sent. He was asked why he made no mention of this customer request to Sherry when he was first confronted. He stated that he was in shock at being discovered. He was also asked why he made no mention of the customer request during his interview with Brad the next day. He stated that he was still in shock on that day. As for not mentioning it during the interview of November 26, prior to his

termination, his explanation was that at the time of the conversation on the 26th Mr. Martin had said to him "Nothing you say will change anything". When it was put to him that Mr. Martin did not say this and it was not to be found on the tape of the interview, his initial response was that maybe the tape had not been turned on at the time that Mr. Martin said this. It was then put to him that the tape was evidently a complete record of the complete conversation and it did not include this statement. In reply the grievor said, "Ok. It was complete. Ok. It was not said". The sum of this exchange was that there was no explanation offered by the grievor, aside from the one which he admitted was incorrect, for why he failed to mention before his termination that he had in mind a customer request about the relevant product, and without this in his mind he would not have sampled the product.

Employer counsel subsequently asserted that the post-termination letter explanation was false and deceitful. The story in the letter was also repeated by the grievor at the hearing. It was put to him that he had already agreed in his cross-examination that he knew what he was doing was theft, and yet his letter to the employer gave the impression that he was at most guilty of improper sampling, precipitated by a memory of a customer who had asked about the product. When asked to explain this discrepancy between what was in the letter and what he had admitted to at the hearing, he said that the letter "could be construed as wrong".

Pausing here, I did note at the hearing that the grievor, like many inexperienced witnesses, tended to agree with propositions put forcefully to him by counsel, and this was likely part of the source of some of the discrepancies in his evidence. At the same time, the post-termination letter did amount to a deliberate attempt to cast his actions in a more favourable light, suggesting that they arose from a desire to sample to the product, rather than from a straight desire to enjoy the consumption of the product for its own sake. I am quite satisfied from hearing all of the evidence and the grievor's different versions of what took place, that he simply consumed the product for the sake of consuming it and no other reason.

At the hearing he repeated during cross- examination that he "knew it was improper sampling" which again I take to be a further attempt to minimize or otherwise reduce the culpability of what he had done.

After the grievor's evidence and before argument commenced, counsel provided me with some details regarding the grievor's pension entitlement and whether or not there was any impact on his pension for having been terminated at age 59 rather than retiring at either 60 or 65. The short answer to my inquiry, agreed by counsel to be correct, was that the grievor's pension entitlement was not adversely affected in any way.

III. POSITIONS OF THE PARTIES

Mr. Quinn for the grievor and the union took the position that there is no automatic dismissal in the retail food industry, but that the usual factors should be properly considered in answering the question whether or not the discipline of discharge was excessive in all of the circumstances of the case. The grievor is entitled to an independent review of this question. See *Wm. Scott and Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can L.R.B.R. 1 (B.C.L.R.B.).

Mr. MacPhail for the employer agreed that the *Wm. Scott* questions should be posed and answered and that it was necessary to establish that the discipline of discharge was not excessive in all the circumstances of the case. He agreed there was no such thing as "automatic dismissal". However, he provided me with a substantial number of authorities, most of which were Safeway cases, demonstrating that in the case of theft by grazing or taking product, or theft by other forms of dishonesty, it is very rare indeed for a dismissal to be overturned by an arbitrator, regardless of length of service and regardless of the possession by the grievor of a discipline-free record. Mr. MacPhail also stated that the grievor was a poor candidate for reinstatement because he had demonstrated a failure over the course of the investigation and at the hearing, to acknowledge and confess the full extent of what he had done but had tried

deceitfully to minimize it. With this conduct and without a full and frank admission, there was no prospect of rehabilitating the employment relationship.

IV. DISCUSSION AND CONCLUSION

There are certain undisputed facts about the employment environment in the retail food industry which bear repeating, by way of introduction:

1. In the retail food industry margins are thin. Theft and pilfering by customers and employees, although involving individually items of small value, can make substantial inroads into revenue and profitability.

2. Employees work in an environment which is potentially tempting, handling edible product which is attractively displayed for sale, and is easily portable and/or consumable immediately.

3. Employees work in a relatively unsupervised environment, on sites which occupy large square footage and so the employer is vulnerable and the ability of the employer to trust its employees is especially important.

This has resulted in theft frequently attracting the discipline of discharge. Beyond that however it is necessary to decide in every case whether or not the discipline of discharge is excessive in all the circumstances. This approach remains mandatory for all arbitral review of dismissals, in the context of grievance arbitration.

In *Overwaitea Food Group v. UFCW Local 1518 (Anderson)* 2002 BCCAAA No. 173, at para 79, Arbitrator Laing provided a useful summary of the factors to be considered in retail food industry discipline cases involving dishonesty:

> 79 Again, the notion that theft, even with respect to an item of minor value, is to be treated as an extremely serious employment violation has been widely recognized by arbitrators. Perhaps the clearest expression of this principle is found in the following passage from arbitrator MacIntyre's

decision in *Overwaitea Food Group and United Food & Commercial Workers, Local 1518*, (supra) at p.2:

> There is a very clear policy in the food market industry in this province, to the effect that since food employees work under very little management supervision, and since they have access at all times to merchandise with little control, an extremely high duty of honesty and integrity is demanded. A very strict policy has become established, under which even a very small theft by an employee results in dismissal, and this policy is well known. To a large extent, this policy has been accepted by arbitrators dealing with cases of theft, but by statute and by custom, arbitrators still retain jurisdiction to require just cause for discipline and dismissal.

80 This does not mean that the only possible penalty for theft in the retail food industry is discharge. I refer also to the reasoning of arbitrator Hope in *Re MacMillan Bloedel Ltd. and I.W.A. Canada, Local 1-85* (supra) at page 302:

> In *MacMillan Bloedel, Harmac Division,* [November 2, 1989, unreported] Mr. Kelleher . . . . repeated observations he had made in *Western Pulp* [August 16, 1988] on p.11 as follows:
>
> > In the first place, theft is among the most serious of industrial offences. Second, the actual value of the goods stolen in not especially relevant. Third, dismissal is no longer to be considered as the automatic response to a detection of theft. The question is in each case whether the employment relationship can be restored. Fourth, where the grievor is confronted and is untruthful in denying the offence that is an exacerbating factor to be considered. Beyond that, each case must be decided on its own facts: the circumstances of the theft itself, the grievor's demeanor in giving evidence, and so on.
>
> I am of the view that the reasoning of Mr. Kelleher reflects the contemporary standard required in an application of the industrial relations principles articulated and reviewed by the former Labour Relations Board of British Columbia in *Wm. Scott & Co.* In particular, I am of the view that there must be a balancing between the interest of an employer in deterring acts of theft and the entitlement of individual employees to have their conduct assessed on the basis of whether the employment relationship is capable of being restored.

Arbitrator Laing continued at para 82:

> 82 For me to find that discharge is an excessive response in these circumstances, the grievor must demonstrate that there exist mitigating facts "consistent with the maintenance or restoration of the essential element of trust". For example, arbitrators will consider the presence of such mitigating factors as whether the grievor has apologized, shown remorse, or admitted wrongdoing, and whether the grievor has a clean disciplinary record.

Arbitrator Hamilton's comments at page 34 of his award in *MacDonalds Consolidated and Retail Wholesale Canada Local 468, CAW Division,* Manitoba, (unreported, August 2001, Hamilton) are also helpful:

> ....the case law is replete with statements that the value of the product taken is not a relevant consideration, particularly where (i) the actions are premeditated (as here) and (ii) the employer has put in place clear policies (as here). In *Canada Safeway Limited and United Food and Commercial Workers International Union, Local 175 (the Neill Award)* (unreported, February 10, 1993 (Satterfield) the following appears at p. 20:
>
> > "The value of that merchandise is not great but that is not a valid consideration, particularly where, as here, close supervision is not practically feasible, the Employer has addressed with the employees the ongoing problem of apparent employee theft and warned them that discharge from employment would be the consequence for any employee caught stealing merchandise and Neill has admitted that he knew that to be the case. The arbitrator in *Re Canada Safeway Limited and United Food and Commercial Workers, Local 409* (January 10, 1986), unreported (Joyce) cited with approval in the passage below from the award in *Re Air Canada and International Association of Machinists and Aerospace Workers* (1978), 18 L.A.C. (2d) 400 (Swan) at p. 404, in concluding that the value of property stolen cannot be a valid consideration in determining the appropriateness of the penalty because, in a retail food store, "...the opportunity is present to steal one item a day, perhaps worth only a few cents and perhaps two or three dollars":

> 'Where does this lead in the present case? The object stolen by the grievor was apparently a promotional token with the name of a commercial enterprise stamped on it; its absolute value would have been only a few cents. The value of the goods stolen, however, is not in my opinion a proper consideration. The same mental state is required to pilfer as to plunder and an employee's honesty is equally cast in doubt whatever the value involved.' "

I agree with the comments of Arbitrator McIntyre in *Canada Safeway and UFCW, Local 1518*, (1997) B.C.C.A.A.A. No. 280, at para. 32 where he stated:

> .... Not all of the cases cited justify a principle of "theft always equals dismissal". I agree with the statement of Alan Hope in *Re Canada Safeway and UFCW, Local 2000,* (1987) 29 L.A.C. 3rd 176, that theft or dishonesty in the retail food industry is not an offence that justifies dismissal ipso facto; but that it "does impose an extreme burden on an employee who occupies a position of trust to establish that his reinstatement following an act of dishonesty is consistent with a restoration of the essential element of trust". (p. 186)

He goes on to require that the employee "establish mitigating facts consistent with the maintenance or restoration of the essential element of trust".

> In that context, my statement in *Canada Safeway (Holly Chatwyn), supra* that in this industry the employers' "strict rules including dismissal for the slightest proven theft have been upheld in arbitrations many times". It is the truth, but perhaps not the whole truth. Mr. Hope characterizes the strict rules as applied "usually" or "generally", and I agree. An arbitrator in this province is not bound to dismiss, even if the employer's "rule" so states.

The arbitrator went onto find that while there was no doubt contrition in the case under consideration, there was "less than complete admission" and he went on to dismiss the grievance.

In *Canada Safeway and UFCW Local 2000 (Allen grievance)* 29 LAC (3d) 176, Arbitrator Hope said this at page 187, after reviewing a number of arbitral authorities:

> Those authorities acknowledge that dishonesty, by its very nature, usually results in an irreparable compromise of the employment relationship. In the retail food industry the opportunity and the temptation for employees to commit dishonest acts is great. Thus the relationship is generally acknowledged as having a fiduciary cast wherein all employees can be taken to understand that theft or other acts of dishonesty will invite dismissal.
>
> The imposition of dismissal for acts of dishonesty in that employment setting responds to two assumptions. The first is that employees can be taken to know that their employment is seriously at risk if they engage in such conduct, hence, the willingness of an employee to engage in that conduct places the suitability of that employee in extreme doubt. The second factor is the high degree of deterrence that employers in the industry are entitled to exact when offences in breach of the underlying trust relationship are committed. That is, the vulnerability of the employer makes it reasonable to impose relatively exacting standards and to put a heavy price tag on departures from the standards so as to blunt the temptation of other employees who are in a position to commit similar acts of misconduct. [At page 187]

Once found guilty of an act of dishonesty the grievor in a dismissal grievance faces the heavy burden of establishing that the essential element of trust may be restored, should he/she be reinstated. Earlier on in the same award at page 186 arbitrator Hope describes the burden this way:

> However, accepting that each dismissal must be examined on its unique facts, and accepting that reinstatement is available for all acts of misconduct, however grave, it must be acknowledged that an act of theft or other dishonesty in the retail food environment places an extreme strain on the relationship. An employee who admits dishonesty or is found to have acted dishonestly in that environment must, as stated, establish mitigating facts consistent with the maintenance or restoration of the essential element of trust.

See also *Fraser Lake Sawmills Ltd. v. IWA, Local 1-424* at paragraph 39. (Blasina) 2004 BCCAAA No. 294. And *Lucerne Foods Limited Winnipeg Bread Plant (Johnson)* beginning at page 72. Manitoba, unreported, December 2003 (Hamilton).

Length of service and a good disciplinary record are usually factors which weigh in the grievor's favour. But in *Canada Safeway -and- UFCW, Local 401,* Alberta, unreported, April 2 1996, (Randall) the Board said this at page 71:

> In discharge cases generally, an employee's long service and clear record are important factors. However, theft is a fundamental breach of the relationship of trust that exists between employer and employee. In the retail industry, where employees have more opportunity to steal and are not closely supervised, trust is even more essential. The element of deterrence must also be recognized.

Mr. Quinn for the union disagreed that length of service was to be ignored in these types of cases. He pointed out that length of service (both about 22 years) was a factor in the reinstatement of two employees in my decision in *Extra Foods (Park Royal) vs. UFCW Local 1518,* (unreported, Nicholas Glass, October 21, 2002). There is a fairly long line of arbitral authority to support the view that length of service may indeed be a factor to be taken into account by arbitrators in the retail food industry who substitute a lesser penalty. The notion of corrective discipline is not always to be discounted just because the employment offence is theft in the retail food industry. I provided a review of some of the authorities at paragraphs 77 to 81 of that award and reproduce it here:

> 77....In *New Dominion Stores and Retail Wholesale Canada (U.S.W.A., Local 414),* 60 L.A.C. (4th), p. 308 (Arbitrator Beck) stated at page 318:
>
> > "...I accept that theft or pilfering as it is sometimes called is a serious problem in the retail food industry. Accordingly, deterrence is a primary management consideration that results in the stringent policies which it attempts to communicate to its employees. But there is nothing so unique about the retail food industry that theft as a disciplinary matter ought to be automatically treated differently than, say, theft in a warehouse, a brewers retail outlet, a hospital or an airline commissary, to pick a number of workplace situations where cases involving theft have been reported. They are all places where employees work in a relatively open, unsupervised situation that allows opportunity for

theft. The concern of management in those industries is no less than that of management in the retail food industry, although I appreciate that in a supermarket the temptation and opportunity for pilfering is almost always present. And yet in those instances, the theory of progressive discipline has not been abandoned.

I do not wish to be understood to be saying that theft is simply another discipline matter and is to be treated as such. Clearly, theft may go to the root of the relationship of trust and confidence that is essential in many employment relationships. And a single instance of theft might lead to the conclusion that that relationship has been irretrievably broken. But that will very much depend on the facts of the particular case. To state the obvious, each case is unique on its facts and ought to be considered as such in imposing an appropriate penalty.

The following cases are examples of situations in which arbitrators declined to uphold a penalty of discharge in a case of theft. In *Re: New Dominion Stores and R.W.D.S.U., Loc. 414,* (1993), 31 L.A.C. (4th) 412 (Steward), the grocery manager of one of the company's large stores stole a carton of cigarettes with a value of $44.84. He had 25 years of seniority. Arbitrator Stewart imposed a six-month suspension and ordered that the grievor not be returned to a management position. Arbitrator Stewart ruled as follows [at pp. 417-18]:

> After carefully considering and weighing all of the facts of this case in light of the decisions that I have been referred to, I am not persuaded that the ultimate sanction of discharge is appropriate. However, I am of the view that deterrence is of extreme importance and that Mr. McLean ought to be penalized in such a manner that there can be no question as to the seriousness with which theft is viewed. I am of the view that a fair and just disposition of the matter is that discharge be substituted with an unpaid suspension of six months.

In *Re: National Grocers Co. and Teamsters Union, Local 419,* [1983], 11 L.A.C. (3d) 193 (Langille), Professor Langille cited the decision of Professor Arthurs in *Re: Canadian Broadcasting*

Corp., (supra), in mitigating the penalty of discharge to one of a three-month suspension. Professor Langille held as follows [at p. 207]:

> The fact that Mr. Lemieux denied the theft which I have found to occur is a serious matter and this is clearly a borderline case. Keeping in mind the need to balance the employer's as well as the grievor's interests, I remain of the view that it has not been demonstrated on the facts of this case that the application of the fundamental principles of corrective discipline will likely be fruitless, nor that to apply them would fail to give sufficient weight to the employer's legitimate interests. Taking into account the grievor's seniority record, the economic impact on himself and his employer, I am of the view that giving the grievor a second chance is what is required when all is considered. A substantial suspension of three months... is in order. (emphasis added)

In *Re: Great Atlantic and Pacific Co. of Canada and U.F.C.W., Locals 175 and 633,* [1983], 10 L.A.C. (3d) 199 (Kruger), Arbitrator Kruger declined to uphold a discharge on facts that are not dissimilar to those in this case. The grievor had worked for A & P for some 25 years and was working the night shift in a store that was open 24 hours a day. He was found to have stolen three packages of cheese, some apples and two packages of chicken. Arbitrator Kruger noted that "the company's position is that it is a long established well-known policy at the company that the penalty for theft in all cases is discharge. On only one occasion had the company deviated from this policy by permitting a long service employee to resign and take his early retirement pension instead of discharging him" [at p. 201]. However, he refused to uphold the company policy of automatic discharge. In substituting a penalty of four months suspension, Arbitrator Kruger held as follows [at p. 202]:

> On the other hand, there is good reason to individualize the approach to discipline. Both the Act [Labour Relations Act of Ontario] and the collective agreement clearly contemplate that each

> case will be considered on its merits. For arbitrators to provide a single response to all cases of dishonest behaviour would be a violation of this requirement."

78 Arbitrator Beck then went on to refer to a theft case where the grievor was 57 years old and had 37 years of seniority with a clean record: *Great Atlantic & Pacific Co. of Canada Ltd. and U.S.W.A. (Inserra)* (Davie, 1994, unreported). In that case, notwithstanding a strong presumption that discharge was appropriate arbitrator Davie took into account the grievor's extremely lengthy service and substituted a suspension.

79 In the *New Dominion Store* case decided by arbitrator Beck (supra), the grievor had 23 years of service and no prior record of discipline. The value of goods taken was $8.55. The arbitrator decided that a lengthy suspension should be substituted.

80 In *MacMillan Bloedel Ltd. and I.W.A.-Canada, Local 1-85,* 33 L.A.C. (4th), p. 288, arbitrator Hope found theft to be proved against the grievor who had approximately 26 years of service. Arbitrator Hope, at page 302 quoted with approval a passage from the decision of arbitrator Kelleher in re: *Cominco Metals and U.S.W.A., Local 9705,* January 15, 1988, unreported (Kelleher) at page 7:

> "Arbitrators often face the difficult issue of a long-term employee who has engaged in an isolated act of dishonesty and seeks relief from an employer's decision to dismiss. The employer has a legitimate interest in maintaining a consistent policy, in expecting honesty from its employees, and in deterring others in its work-force by taking dismissal action when dishonesty is detected. The employee, on the other hand, can often point to years of discipline-free service to support an argument that the misconduct is an aberration that will not be repeated. The balancing of these legitimate yet competing interests is the task of the arbitrator."

81 Although the arbitrator in *MacDonalds*, (supra) stated, "...the authorities state that length of service, standing alone, is not sufficient to mitigate the penalty of dismissal in cases of theft...", that may be too sweeping a conclusion, in light of the above.

Mr. Quinn also referred me to *Canada Safeway v. UFCW, Local 1518*, (2004) M.G.A.D. No. 44 (Teskey). In that Manitoba case the arbitrator reinstated the grievor in circumstances not that much different from the circumstances in the present case. The arbitrator appears to have been persuaded by the very lengthy service of the grievor and the serious economic hardship he would suffer if not reinstated. In substituting a very lengthy suspension for a dismissal, at para. 58 arbitrator Teskey stated:

> (The grievor) should have no illusions that, should there be any further misconduct, his employment future would be very bleak and neither should any other employee rely upon this Award as being allowed a "second chance". My decision has been very much determined by the grievor's very long and good performance with the company. However, that does not mitigate against what I consider to be a very serious penalty.

In that case the grievor was within five years of retirement and had worked for the company for 43 years.

Mr. Quinn also referred me to two Ontario cases of theft or dishonesty in which suspensions were substituted for dismissals, in the retail food industry. *Great Atlantic Pacific Co. of Canada v. UFCW, Local 175*; (2005) O.L.A.A. No. 377; and 2007 O.L.A.A. No. 25; 88 C.L.A.S. 117.

In this theft case as in so many others I have to weigh the competing considerations of loss of trust resulting in arguably irreparable damage to the employment relationship, and the existence of several mitigating factors, of which the most significant is the fact that the offence was an isolated one consisting of a momentary aberration in the course of 35 years of service.

There is also the issue of the failure of the grievor fully to acknowledge and confront the reality of what he did, and in particular, the failure to accept unequivocally that what he had done was theft.

Under vigorous cross-examination, the grievor eventually conceded that his conduct amounted to theft, but he was clearly less than committed to this proposition.

What was needed was a simple acknowledgement that he drank down the contents of the container because he felt like consuming them. However, this acknowledgement was never forthcoming. He persisted in advancing the theory that he was simply sampling the product. He was prepared to admit that it was "improper sampling" but the gist of his evidence at the hearing, as well as his interview on November 26, 2010, and his exculpatory letter delivered after the dismissal, was that he simply wanted to "try out" the product. It was "improper sampling"; he "never meant it as theft". In his interview on the 26th of November, 2010, he repeated or extended this theory when he stated that he "was looking at the ingredients. I've never tried a Carnation Instant Breakfast and it was, I don't know, it was a stupid thing to do. But I was looking at the ingredients and I drink Boost, and ... like a meal a day type of thing ... so I thought. I don't know why I did it, but I opened one up and I took a sip you know ..." Further on in the same passage he states "I didn't mean it in a sense that I was going to be ripping the company off or anything ..." At the hearing he continued to stand by his exculpatory letter, until in cross-examination he was reminded that he admitted that he knew what he was doing was theft and at that point his reply was "the letter could be construed as wrong". However, he never really disavowed the contents of the letter. He also never disavowed the idea that he was doing no more than sampling the product and was not intending to "rip off the company".

All this leads me to the conclusion that while the grievor admitted that what he had done was wrong, it was not a full and frank admission of what he had actually did. It remained to the end couched in terms designed to minimize the culpability of his actions.

In *Sooke School District No. 52 v. Sooke Teachers' Association,* (1995) B.C.C.A.A.A. No. 260 (Hope) the board of arbitration considered the fact that the grievor failed to acknowledge the full extent of his employment offence, and addressed the argument of the employer that this constituted a bar to his reinstatement (see para. 161). Arbitrator Hope then went on to review a number of cases in which an employee was reinstated despite a lack of willingness to confess and acknowledge his misconduct. At para. 166 the board of arbitration said the following:

> A review of the authorities invites the conclusion that the failure of a grievor to admit misconduct is a factor to take into account in the review of a dismissal in considering whether the circumstances mitigate in favour of reinstatement. Where the denial of misconduct invites an inference that the employee has failed to accept and acknowledge her or his wrongdoing and thus poses a risk of repetition of the misconduct, reinstatement will not be appropriate. However, the failure to admit misconduct does not disentitle the grievor to reinstatement in appropriate circumstances.

Here it is not a simple case of failing to admit any misconduct. The grievor at all times admitted that what he did was wrong. He admitted to consuming product without paying for it. However he tried to minimize the culpability of his offence during the investigation and at the hearing by talking about sampling and sipping the product and about a customer question related to the product affecting him, rather than just admitting to consuming the product for its own sake. This was not being fully candid, but the deception or obfuscation is not of the same order as a straight denial of the offence or the provision of a fully exculpatory but false excuse.

In *Wm. Scott, supra* the board of arbitration cited ten factors as relevant to the issue of mitigation, from *Steel Equipment Co. Ltd.* (1964) 14 L.A.C. 356, and these were incorporated into a shorter list of factors which are considered by most arbitrators to be appropriate in considering the issue of mitigation. These are:

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?

iv). Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?

v). Is the discharge of this individual employee in accord with the consistent policies of the employer?

With respect to the first question the seriousness of the offence is not in question and has been well established over many years and many arbitration awards.

With respect to the second question, I do not agree with counsel for the employer that the grievor's conduct can be described as premeditated. The action of consuming the product was almost contemporaneous with seeing it and picking it up. The suggestion that he may have taken several drinks from the container before putting it on the shelf does not in my view translate into premeditation. I also consider that the best evidence of the incident, which was that of Sherry Nicholson, established that he pretty well consumed the whole contents immediately. I find that this was so in spite of his attempts to minimize his consumption. It is fair to say that the offence was a momentary aberration rather than a premeditated act. There is also no evidence that his conduct was repetitive, although the existence of such evidence would be very unlikely as this kind of conduct usually attracts dismissal when first discovered.

With regard to the third factor, his length of service and clean disciplinary record are strong points in the grievor's favour.

As for the fourth factor, many arbitrators consider that the use of corrective discipline is generally inappropriate when the offence in question is as serious as theft. Employers are not obliged generally to follow a regime of corrective discipline, if it is established by the nature of the offence and the employee's conduct that the employment relationship is not capable of being restored. Nevertheless the comments of Arbitrator Beck in the first mentioned *New Dominion Stores* case (supra) should be borne in mind. Some arbitrators are of the view that there is a place for corrective discipline even in theft cases, especially when there is a history of long service and an otherwise excellent record.

As for the fifth factor, the discharge of the grievor is certainly in accord with the consistent policies of this employer. In fact, the evidence was that there was only one case involving this employer in British Columbia where discharge did not follow an offence of grazing or other theft of product, and that case involved an employee who was so challenged that he did not know right from wrong.

As for other mitigating factors the union also referred me to the decision of arbitrator Kinzie in *B.C. Hydro and IBEW, Local 258*, 94 L.A.C. 4th 305. In that case arbitrator Kinzie stated that he felt one of the most critical factors to be weighed in a case of this nature and in considering the question of whether the employment relationship is capable of being restored is "whether the employee concerned has frankly admitted his wrongdoing and accepted responsibility for this misconduct". At paragraph 54 he cites Arbitrator Thompson in *B.C. Hydro* (unreported, July 18, 1988) who made this statement:

> The preponderance of arbitral opinion in this province favours the dismissal of employees found guilty of theft in the absence of compelling arguments to the contrary. Perhaps the most compelling argument for an exception to that rule is prompt admission of guilt, a factor missing in this case.

There may well be some cases in which such a prompt admission is a major point in favour of the grievor, however, when as here, the grievor was caught red handed, I do not consider that a prompt admission is by itself a compelling argument for an exception to the rule. Further the grievor's efforts to minimize his offence by describing it on November 26 and at the hearing as improper sampling count against him in the sense that he cannot point to a full and frank admission as a mitigating factor. On the other hand his initial responses when confronted on November 12th and again on the 13th were straightforward and he made no excuse for his actions. He testified that he was "ashamed and embarrassed" and I accept the truth of that testimony. His later efforts at minimizing were the conduct of an employee desperate to save his job. He would have been much better advised to maintain a no excuse attitude, but I do not feel that his failure to do so should count so heavily against him as to neutralise all other mitigating factors.

In terms of assessing the economic impact of the dismissal on the grievor, it is to be recognized that the grievor will have a difficult time obtaining employment in the retail food industry in Kamloops if he is not reinstated. He is entitled to full pension benefits notwithstanding his dismissal, as there are bridging provisions in the pension scheme with the employer, which top up his pension to the full entitlement. But the economic impact of losing his job remains severe in spite of this.

I am influenced by the griever's very lengthy service of 35 years, and good disciplinary record, and to a lesser extent the severe economic consequences of dismissal.
I am also persuaded that the offence was a momentary aberration, not premeditated. He apologised on several occasions and admitted freely that he knew what he was doing was wrong, in the sense of consuming product without paying for it, even though he was reluctant to provide an unqualified admission as to his state of mind when committing the offence. I refer back to the quotation of arbitrator Laing's at page 26 above, identifying mitigating facts "consistent with the maintenance or restoration of the essential element of trust":

> For example, arbitrators will consider the presence of such mitigating factors as whether the grievor has apologized, shown remorse, or admitted wrongdoing, and whether the grievor has a clean disciplinary record.

Here, to a greater or lesser degree, the grievor has apologised, shown remorse, admitted wrongdoing, although not completely, and has an otherwise clean disciplinary record over a period of 35 years.

The case is very close to the line, and I have had difficulty balancing the interests at stake here. In the end I have concluded that discharge is excessive in all the circumstances of the case. The employer's policy which is sound and justified will I feel not be unduly compromised by the substitution of a very lengthy suspension, which will be a ten month suspension until September 26, 2011. In terms of rehabilitation of the employment relationship one cannot be fully confident that it will occur, but taking all the facts and circumstances into consideration I consider it more than likely that the grievor will return to productive duty and respond positively to the corrective discipline imposed. The length of the suspension will fulfil the employer's legitimate need to maintain deterrence.
The grievance is allowed.

IT IS SO AWARDED.

Nicholas Glass

Nicholas Glass, Arbitrator. 20 July, 2011.