

OFF-DUTY CONDUCT

Arbitrators have recognized that unless a substantial and legitimate business reason exists, the employer has no authority, control, interest or jurisdiction over an employee's behaviour outside the hours of his employment.¹

The criteria set out in *Millhaven Fibres*² has often been applied by arbitrators to determine if the behaviour complained of by the employer constituted work-related behaviour, and therefore subject to discipline. The criteria are as follows:

- 1. Did the grievor's conduct harm the employer's reputation or product?**
- 2. Did the grievor's conduct render him unable to perform his duties as an employee in a satisfactory manner?**
- 3. Does the grievor's conduct lead to a refusal, reluctance, or inability of other employees to work with him?**
- 4. Has the grievor been guilty of a serious breach of the Criminal Code, and is this conduct injurious to the general reputation of the employer and its employees?**
- 5. Has the grievor's conduct made it difficult for the employer to manage its operations efficiently and to direct its workforce efficiently?**

It has been acknowledged there is no business interest in the public sector, but there is a public interest. As a result, the standards of employment differ. Most public sector employers have policies with respect to general conduct and personal gain as a result of an employee's position. These are invariably considered by arbitrators when establishing the latitude given to public sector employers in regulating off-duty activity. A number of decisions from the public sector are summarized below.

Hugh Dashney³, a Customs Inspector, was convicted under the Criminal Code of defrauding the Department of National Health and Welfare of approximately \$10,000.00 over a five year period. He forged his deceased mother's signature to cash her pension cheques. The adjudicator found the conduct incompatible with the role of a customs inspector whose integrity and honesty must be above reproach. A Customs Inspector has considerable power in conducting searches, making arrests and seizures and assessing goods and collecting duties. In general, s/he ensures the law is obeyed. The adjudicator found that the misconduct harmed the reputation of the customs service and, at the same time, brought all its members into disrepute. The adjudicator cited several decisions. He quoted E.B. Jolliffe, Q.C., in his capacity as Chief Adjudicator, who stated in Dixon (166-2-555) that he who robs the Crown is not entitled to be employed by the Crown. Adjudicator Cantin, in upholding the discharge, concluded that the relationship of trust between employer and employee was irrevocably severed.

In the **Dunn**⁴ decision, the grievor was a Customs Officer who brought a gun into Canada without declaring it to customs officers and without the necessary permits as required by law. It was found that Customs Officers are not only in the same position as the travelling public, but also in a position of trust. The adjudicator found no mitigating factors and the 10 day suspension justified and reasonable.

Robert Dupont⁵ was employed as a language teacher. He also taught conversational French during off-duty hours. He was discharged for using his position for personal gain in that he solicited students he taught during the normal work day for off-duty classes. "Moonlighting" was permitted or tolerated by the employer, but tutoring students in attendance at the employer's training facility was not permitted. The grievor tutored students from the employer's facility on a few occasions but did not charge them a fee. The adjudicator reduced the discharge to an eight month suspension. The grievor was found to be negligent in not filing a report under the *Conflict of Interest and Post-Employment Code for the Public Service*. However, he was a loyal employee of long service with an unblemished disciplinary record. He was well liked by both colleagues and students and the employer-employee relationship of trust was not compromised by the grievor's misconduct, as the employer's case was based largely on the immediate, frank and direct admissions made by grievor.

David Légère⁶, a Correctional Officer, was discharged after he assaulted two Royal Canadian Mounted Police (RCMP) officers in a public place and destroyed public property after being detained by the RCMP. His personnel record reflected a problem with alcohol and his criminal record showed three alcohol-related offences. The adjudicator found that the employer was justified in concluding the grievor's conduct had harmed or at least could harm its reputation. The employer had reason to be concerned for the safety of other employees and inmates given the requirement to carry a firearm at times and the grievor's predisposition to become intoxicated. It was decided the employer was justified in exercising its disciplinary powers. However, the discharge was reduced to a one year suspension because the grievor was an alcoholic and had taken the necessary steps to achieve sobriety following discharge.

Wayne Kirkwood⁷, a Correctional Officer, developed a social relationship with a co-worker. He was acquitted in criminal proceedings of assaulting her. The adjudicator reached a different conclusion and supported the employer's finding that the grievor did indeed assault his co-worker. It was also proven that some employees felt uneasy about working with the grievor, and the assaulted co-worker was subjected to derogatory remarks by colleagues and inmates and eventually was forced to move temporarily to another Institution because she could not bear to be in contact with him. The adjudicator found a nexus between the off-duty conduct and the employment relationship and saw no reason to disturb the five-day financial penalty.

Jacques Dupuis⁸ was a Customs Officer who had a lengthy disciplinary record of alcohol-related misconduct. The culminating incident occurred during off-duty hours when the grievor first identified himself as an employee of the federal government to obtain a preferential hotel rate and later, while in a very advanced state of intoxication, was involved in altercations with hotel staff where he displayed aggressive and crude behaviour. In a loud voice within the presence of customers, he identified himself to a security guard as a customs inspector by showing him the Department's badge and threatening to telephone the Regional Collector. The grievor was discharged for compromising the standards of conduct contained in the employer's *Code of Conduct and Appearance* in order to derive personal gain and for publicly compromising the image and professional reputation of the employer. As the acts were alcohol-related, the adjudicator assessed the rehabilitative potential of the grievor by examining evidence of events subsequent to discharge and was persuaded to substitute the discharge with a lengthy suspension.

- ¹ Canadian Labour Arbitration (Brown and Beatty), Third Edition at page 7-29
- ² Millhaven Fibres Ltd., Millhaven Works, and Oil, Chemical and Atomic Workers International, Local 9-670 (1967), 1(A) Union-Management Arbitration Cases 328 (Anderson)
- ³ Hugh Dashney, PSSRB File 166-2-14177
- ⁴ Dunn, PSSRB File 166-2-16570
- ⁵ Robert Dupont, PSSRB Files 166-2-16641 and 16642
- ⁶ David Légère, PSSRB File 166-2-16308
- ⁷ Wayne Kirkwood, PSSRB File 166-2-22226
- ⁸ Jacques Dupuis, PSSRB Files 166-2-18883 and 18893