Leading Cases

There are a number of cases which are accepted as "leading cases" and which will be familiar to many arbitrators. These include the following:

1. ***Wm. Scott & Co.*** [1977] 1 CLRBR 1.

This case identifies the three issues to be answered in a discipline arbitration, an identifies a list of factors (though not exhaustive) which should be considered by an arbitrator with respect to penalty in a discipline case. As to the three questions:

> 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?

The factors to be considered include the following:

(i) Seriousness of the offence;

(ii) Premeditation or repetitive conduct;

(iii) A momentary or emotional aberration;

(iv) Provocation;

(v) Clean discipline record;

(vi) Previous discipline which did not correct the problem;

(vii) Consistent treatment of the grievor compared with other employees in similar situations;

The case, in explaining the process, says this:

> 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.

2. ***Edith Cavell Private Hospital*** [1982] 6 LAC (3d) 229

This is a leading case on what an employer must prove to support a discharge of an employee for non-culpable (non-blameworthy) reasons. This would apply to such things as involuntary absenteeism, incompetence and the like. In this case, the arbitrator says this:

> It is not open to an employer alleging a want of job performance to merely castigate the performance of the employee. It is necessary that specifics be provided. An employer who seeks to dismiss an employee for a non-culpable deficiency in job performing must meet certain criteria:
>
> (a) The employer must define the level of job performance required.
>
> (b) The employer must establish that the standard expected was communicated to the grievor.
>
> (c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.
>
> (d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job and that reasonable efforts were made to find alternate employment with the competence of the employee.
>
> (e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

3. ***B.C. Central Credit Union***, B.C.L.R.B. Decision No. 7/80, affirmed on appeal by B.C.L.R.B. Decision No. 299/84.

This case establishes the principle that if an arbitrator decides that discharge was not justified, he or she must order reinstatement and cannot substitute some other remedy, save in exceptional circumstances (where the job no longer exists, the employer has shut down the operation, and the like).

4. ***Re Hoogendoorn and Greening Metal Products*** (1967) 65 D.L.R. (2d) 641.

This case establishes the necessity of notifying potentially-affected third parties that they are entitled to attend and participate in the arbitration proceeding.

5. ***Faryna and Chorny***, [1951] 4 WWR (NS) 171.

This case establishes the principles upon which a trier of fact should assess the credibility of witnesses. It establishes that credibility is not based solely on the demeanour of the witness in the witness box, but the arbitrator must

> reasonably subject a story to an examination of its consistency with the probabilities that surround the currently-existing conditions. ... The real test of the truth of a 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. (p. 174)

6. ***Nanaimo School District v. C.U.P.E.*** [1977] 1 CLRBR 39.

This case deals with the use of hearsay in an arbitration. Though it may be admitted into evidence, there are two restricted rules on its use:

> Those rules can be stated as follows:
>
> (a) Uncorroborated hearsay evidence should not be preferred to direct sworn testimony;
>
> (b) Hearsay evidence alone should not be admitted to establish a crucial and central question. (at p. 43)

Note: This case has been undermined somewhat in ***British Columbia and B.C.G.E.U. (Keough)*** (1995) 30 CLRBR (2d) 97, a more recent Labour Relations Board case which suggests that an arbitrator could rely on hearsay evidence alone in making a crucial finding of fact provided the evidence is "reliable and necessary".

7. ***Wigmar Construction*** (1984) 7 CLRBR (NS) 99.

This case establishes the principle that an arbitrator is entitled to draw an adverse inference by the failure of a party to call some witness it ought to

have called in support of its case. In coming to this conclusion, the Labour Relations Board cited from an evidence text known as *Wigmore on Evidence*, as follows:

> ... the failure to bring before the tribunal some circumstance, document or witness when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party ...

The adverse inference to be drawn is that the evidence would not have helped that party's case, but would have hurt it.

You will almost inevitably have to face this issue if you do not call a grievor as a witness in a discipline case. Sometimes facing the adverse inference is better than the alternative.

8. ***UBC and C.U.P.E.*** [1977] 1 CLRBR 13.

This case establishes the principles upon which "extrinsic evidence" may be called by a party in order to assist the arbitrator in interpreting a collective agreement.

Such evidence may be called whether or not the collective agreement is alleged to be "clear on its face". There need not be an ambiguity before you can call this evidence.

This case establishes that you can call evidence of the bargaining history (what the parties said to each other at the bargaining table) and any past practice engaged in by the parties which bears on the interpretation of the collective agreement.

What is important is the mutual intention of the parties with respect to the language, as identified in the extrinsic evidence.

9. ***John Bertram & Sons*** 18 LAC 362

This case establishes the conditions required before an arbitrator can rely on evidence of past practice; the practice must be consistent and known to persons with sufficient authority in both management and union ranks.

10. ***Cominco v. Westinghouse Canada Limited*** (1979) 11 B.C.L.R. 142.

This case deals with the overused phrase "fishing expedition" as a response to a request for production of documents and particulars. In this case, the B.C. Court of Appeal said this:

> Counsel said that one cannot embark on a fishing expedition. I find little help in that statement. I take it that a fishing expedition describes an examination for discovery that has gone beyond reasonable limits into areas that are not and can not be relevant. In those waters, one may not fish. In other waters, one may. That one fishes is not decisive, it is where the fishing takes place that matters.

If you are faced with an objection that you are "fishing" with respect to document production, cite this passage and tell the arbitrator you are fishing in relevant waters.

11. ***SFU and A.U.C.E.*** 2 CLRBR (NS) 329

This Labour Relations Board decision establishes that an employer is bound by the duty to act fairly when exercising a discretion under the collective agreement. This most commonly arises when it is exercising a discretion under the management rights clauses, but would apply to any discretion being given to the employer in the collective agreement. In that case, the Board said this:

> ... a clear principle which arises from Part 6 of the Code may be expressed as follows: within the context of a collective agreement, a party who a discretion must exercise it 'reasonably' so as not to defeat the legitimate rights and expectations of the other parties to the collective agreement. A party who, in the exercise of its discretion, acts in a manner that is arbitrary, discriminatory or in bad faith does not act reasonably. Reasonableness also includes, by its very nature, an element of fairness. This principle is all-pervasive in the arbitral jurisprudence which has developed throughout Canada over the last thirty years. (at p. 344)

12. ***B.C. Womens Hospital*** (1995) 29 CLRBR (2d) 72.

This case establishes the principle that production of documents and particulars are a principle which is express or implied in the *Labour Relations Code*. It also establishes the principle that if a document is not produced by a party, and the production of that document may have affected the result of the case, then the failure to produce that document

results in the denial of a fair hearing and the award will be overturned. (see p. 79 through 84)

13. ***Pacific Press Limited*** (1983) 2 CLRBR (NS) 277.

This is the leading case on an arbitrator's power to order pre-hearing production of documents.

14. ***Re School District No. 33 and Chilliwack Teachers' Association*** (1990) 16 LAC (4th) 94.

This is the leading case on a higher standard of proof being required for cases alleging some moral, ethical or criminal conduct on the part of a grievor. (see especially p. 117 through 119)

15. ***Vancouver General Hospital and B.C.N.U.***, B.C.L.R.B. No. B81/93.

This case sets out the procedural requirement if an arbitration board is going to take a view. Those are as follows:

(i) All parties must be present.

(ii) All members of the tribunal or board must be present.

(iii) any witnesses who are questioned must be sworn prior to the view.

(iv) Questions can only be asked in the presence of all parties and their counsel.

(v) A record of any questions must be kept by both the board and the parties.

(vi) When the hearing reconvenes, all parties must be accorded the opportunity to question witnesses who were questioned at the view.

(vii) If new evidence arises by questioning witnesses at the view, both parties must be given an opportunity to deal with these new areas of evidence even if it expands the hearing.

(viii) The procedure can only be deleted or modified with the consent of all parties.

16. ***Vancouver School Board v. Vancouver Teachers' Federation*** (1996) 56 LAC (4th) 8

This Labour Relations Board decision deals solely with the issue of when you can call rebuttal evidence.

17. ***Rayonier Canada (B.C.) Ltd.*** [1975] 2 CLRBR 196

This is the classic case setting out the rationale for and extent of the union's duty of fair representation.

18. ***Brian E. Davies***, B.C.L.R.B. Letter Decision No. L61/83

This case provides a succinct, but thorough, description of the terms "arbitrary", "discriminatory" and "bad faith" under Section 12.

19. ***KVP*** 16 LAC 73

The classic case setting out the test for whether "company rules" are valid and enforceable, or not.

20. ***Pacific Forest Products*** (1984) 17 LAC (3d) 435

This case deals with relief against a collective agreement that limits under Section 89(e) of the *Labour Relations Code*. See especially P. 437.