

IN THE MATTER OF AN ARBITRATION

BETWEEN: SAPUTO DAIRY PRODUCTS CANADA

AND: MILK AND BREAD DRIVERS, DAIRY
EMPLOYEES CATERERS AND ALLIED
EMPLOYEES, TEAMSTERS LOCAL 647

AND IN THE MATTER OF THE GRIEVANCE OF M. VILLENEUVE

ARBITRATOR: J.F.W. Weatherill

A hearing in this matter was held at Ottawa on April 12 and 13, 2016.

M. Russell, for the union.

J.-D. Boucher, for the employer.

AWARD

In this grievance, dated November 27, 2015, the grievor, an employee of some seventeen years' seniority and classified as Utility, alleges that his employment was terminated without just cause.

The employer's grounds for discharge are set out in a letter dated November 27, which reads as follows:

This letter is to confirm the discussion that took place on November 27, 2015.

Mario, on July 10, 2015, you were suspended for 5 days and presented with a final notice regarding your abusive and violent language and behaviour at work, placing another individual's safety at risk. At that time you admitted your actions were wrong and admitted you shouldn't have reacted that way.

Considering this event, during the week of August 24, 2015, we met with all employees and reinforced our position towards violent acts and language. Our message was clear, we do not tolerate any violent act or language towards any individual and/or any employee. Any such behaviour would result in a termination of employment.

Regardless, on November 18, 2015 you were involved in an incident in the cafeteria to which you threatened a fellow employee. You said to him: "I'll take that coat and choke you with it".

We have met with you on November 18, 2015 to discuss this incident. Given the circumstances and the seriousness of the situation, we suspended you for investigation.

Our investigation revealed your actions not only showed a total disregard towards previous interventions made with you but that you also knowingly and purposely threatened a fellow employee. Your actions also clearly contradict the Saputo Anti-harassment and Violence policy and contradict your last chance agreement given to you on July 15, 2015. It is our responsibility to ensure that we maintain a work environment free of any violence whether verbal or physical, given these circumstances, we have no other option but to end your employment effective immediately.

It is clear that there was an “incident” in the cafeteria on November 18. While there are, naturally, some variations in the evidence as to what took place and what was said, I am convinced that all the witnesses testified to the best of their recollection. There are few, if any, very serious conflicts in the evidence. The question before me in respect of the incident is essentially one of determining the real nature of what took place, and whether or not whatever the grievor said could properly be characterized as a threat which would call for some disciplinary action.

As the grievor correctly put it in his evidence, the matter has its roots in a separate incident which occurred on Monday, November 16, the first day of the grievor’s work week, which consists of three twelve-hour shifts, in which he works as part of a team. On that day the grievor noticed, not for the first time, it seems, that a fellow employee, a union Steward, was wearing a sort of hoodie jacket on the production floor. The employer operates a dairy at this location, and of course it must be operated in good sanitary conditions. Employees are supplied with appropriate uniforms which are laundered by the company and kept at the plant (article 14 of the collective agreement). It was inappropriate for that employee to have been dressed as he was on the production floor. It may well be that he would be subject to discipline on that account, although no representations were made in that respect and it would appear no discipline was imposed. The grievor, however, reported the matter to a supervisor although it does not appear in the evidence that any action was taken.

The result of that incident is that the grievor was, over the next couple of days, treated by at least some of the other employees, and in particular by the Chief Steward, as a pariah, and referred to as a “rat”, for having informed the supervisor of the other employee’s improper – and indeed dangerous – dress. Perhaps it would

have been more diplomatic for the grievor to have informed the joint Health & Safety Committee, but it was not wrong for him, and may even be considered to have been his duty, to point out the improper clothing. In recent years, it has been widely recognized that “whistleblowers” must not be made victims of reprisal. It is clear, however, that in this case the union, through its Chief Steward and others did in fact victimize the grievor. It does not appear that the employer took any action about that.

As a more general part of the background to the incident of November 18, and to the effect on the grievor of the events of those three days (his harassment – and it was that – by fellow employees), are the facts of the grievor’s physical and medical condition. The grievor suffers from insulin-controlled diabetes; he was, at the time, taking antidepressant medication; he suffers from occasional hypoglycemia and was diagnosed earlier in the year with testicular cancer. As well, he was quite recently separated from his common-law wife.

On Wednesday, November 18, during the morning portion of his shift, the grievor was again the subject of harassment from the Chief Steward and perhaps others. He spoke to his supervisor, and told him that things were not good between him and the Chief Steward, who had called him a rat, and suggested the two of them should not be working together that day. The supervisor said he would look into it, but nothing was done.

In the afternoon of November 18, the grievor was taking his break in the cafeteria, when several union Stewards entered the room. They had been attending a meeting of the Joint Labour-Management Committee. They were wearing, or had with them, new jackets which had been provided by the union. The grievor said to one of the Stewards (not the Chief Steward), “You should have half a jacket, because you only represent half the employees”, or words to that effect. The Steward replied “We don’t represent guys that get other guys into trouble” or, according to another witness, “We don’t represent rats”. The union is, of course, the representative of all employees in the bargaining unit whether they are popular or not and the union has, at the arbitration level, provided the grievor with fair and forceful representation.

The Chief Steward overheard the grievor's remarks and, making a gesture with his hands and fingers suggesting a bird chirping, said "chirp, chirp, chirp", clearly intending to mock the grievor. He said to the grievor, "Mario, that's all I ever hear from you". The Chief Steward's evidence is that he then picked up his lunch kit and tea cup, and went toward the corridor leading out of the building, and that he "kind of laughed". The grievor's evidence is that as the Chief Steward was leaving, he said "come on outside" to the grievor. That language might be taken to constitute an invitation to come outside for a fight, but whether such an interpretation should be given depends on the context in which it is uttered, and the intonation given. In the instant case, having regard to all of the evidence, I do not consider that the Chief Steward was inviting the grievor to fight, although he was provoking his anger.

The grievor, foolishly no doubt, got up quickly and followed the Chief Steward down the corridor to the door. He was walking hurriedly, although not running. The physical events in the corridor are captured on video from a monitor in the corridor, although there is no audio.

The events in the cafeteria and the corridor were observed, and to some extent overheard, by a supervisor who had come into the cafeteria looking for either the grievor or another employee to perform some task. He heard some of the conversation about the jackets and observed the Chief Steward gesturing and heard him make the "chirping" sound. His evidence is that the grievor said "I should choke you with that jacket", and that the Chief Steward said "I'm going outside now". The Chief Steward left, and, according to the supervisor, the grievor "chased" him down the hallway. As I have noted, however, the video does not show that the grievor was running. The grievor caught up with the Chief Steward as the Steward reached the doorway. The supervisor thought the grievor grabbed the Steward by the arm, and the video shows a movement of this sort – perhaps a clutching of the sleeve. There was certainly no blow, and the Steward's evidence is that the grievor did not touch him. The supervisor told the two employees to stop, and the Chief Steward continued out the door, while the grievor at once returned to the cafeteria.

According to both the grievor and the Chief Steward, the events occurred approximately as the supervisor described them, although their evidence (in which there is some variation) is that there was an interchange between them in the

doorway. It was the Chief Steward's evidence that the grievor asked: "What's your fucking problem", and that he, the Steward, replied: "You're my fucking problem". From the video, it seems unlikely there was any other conversation at that time, and the incident was over.

As to the "choking" remark which, according to the letter of termination set out above, constituted a threat "knowingly and purposefully" made, the grievor denies that he made any such remark, although, as noted, it was the evidence of the supervisor that it was made, and the Steward confirmed that the grievor had said "something about a coat" to him. On all of the evidence, it is my conclusion that if the grievor did make such a remark – and he certainly did mention both jackets, as noted above, and a coat, being a reference to the improper dress of the Steward on November 16, which had led to the harassment against him – he did not utter it as a threat. I find the grievor had no intention of threatening or of carrying out a threat against the Chief Steward or any one else. The Chief Steward, whose evidence was, as noted, that he heard such a remark, testified that he was not at all threatened. Such a "threat", of course, would have been impossible for the grievor to carry out and, while I consider the remark or something like it was probably made, it was obviously bluster, made in the heat of anger which the Chief Steward and others had provoked. On all of the evidence, I find that the grievor did not "knowingly and purposefully threaten a fellow employee" as the employer alleges.

Shortly after the incident described above, the supervisor who had observed it reported to the Plant Manager that there had been "almost a fight between two employees". The Manager then requested that the employees involved be called. The Chief Steward had not yet left the premises, and was the first to be interviewed by the Plant Manager and the Production Manager. His statement is similar to the evidence described above. The grievor then gave a statement which, again, was essentially similar to that described above, and he denied saying anything about choking but when the supervisor, who was present, said that he had heard the grievor say it, the grievor said he did not remember that. A third employee, who had been present in the lunchroom, was called, and confirmed generally the events as described, although he said he did not hear anything about "choking with a jacket". At the end of his interview, the grievor was advised that he was suspended pending investigation of the matter.

The next day, November 19, the grievor sent, or attempted to send, an email to the Plant Manager, apologizing for his “wrong doing in arguing with a fellow employee”. On November 20, his son, also an employee, delivered a letter from the grievor to the manager, apologizing and explaining his personal situation. On the following Monday, the Chief Steward had a conversation with the Plant Manager in which he was in tears, telling her that he had not felt the situation was unsafe, that he should not have made his gesture or “chirping” comment, and that he would feel comfortable working with the grievor again. He referred to the grievor, with whom he had worked throughout his sixteen years at the plant, as a good friend, and as his “little brother”. The Chief Steward, I find, had indeed provoked the grievor’s conduct on November 18 as, more generally, had the harassment carried out by various employees on the previous days.

The termination letter set out at the beginning of this award refers to a previous five-day suspension imposed on the grievor on July 10, 2015 in which the grievor was involved in an exchange of abusive language and a pushing match with another employee. The grievor was advised to take advantage of the company’s Employee Assistance Program and in particular to take a course in anger management; the grievor did take such a course. The grievor did not grieve the suspension, and acknowledges that the discipline was justified in that instance.

The suspension notice of July 10 also states that it constitutes “a final warning and failure to improve your behaviour as well as any other instances of violence or harassment will result in the termination of your employment”. In the present case, the discipline notice of November 27 set out above states that the grievor’s actions “contradict your last chance agreement given to you on July 15, 2015”. The prior suspension notice does not, however, constitute a last chance agreement. Neither the union nor the grievor agreed to any such thing, nor did the discipline notice so state. The company, in that earlier discipline, did state it was giving the grievor a “last chance”, but there was no sort of formal agreement that any further cause for any discipline whatever would necessarily lead to discharge. At the hearing of this matter, no representations were made as to this, and it is sufficient to say that at the time of the incident in question here, the grievor’s discipline record consisted of one five-day suspension. In this respect, I note that the collective agreement contains a twelve-

month sunset clause in respect of discipline (article 26.07). This was not the subject of any representations at the hearing of this matter.

The evidence before me does not support the employer's allegation that the grievor "knowingly and purposely threatened a fellow employee". It is my finding that no threat was made. It may be arguable that in the circumstances there was no cause for discipline, but from what has been described, it is clear that there was an argument between employees while in the workplace, and that this argument was sparked by the grievor's sarcastic remarks, even although these were a reaction to the harassment of the grievor by other employees. Further, the grievor acknowledges that his behaviour was blameworthy. It is my conclusion in all of the circumstances that some discipline was appropriate in this case.

Article 8 of the collective agreement deals with "Rules Applying to Termination of Employment". Article 8.01 is as follows:

8.01 The Company may discharge, or dismiss any employee for just or proper cause upon one (1) week's notice or one (1) week's pay in lieu of notice, except that the Company shall have the right to summary dismissal or discharge upon any of the following grounds or similar serious causes:

- (i) Stealing or dishonesty*
- (ii) Drinking while on duty or being under the influence of liquor or illegal drugs while on duty; and*
- (iii) Direct refusal to obey orders given by the proper party unless such orders jeopardize life, health, or safety of the employees.*

The reasons set out for the termination of the grievor's employment are not among those which would justify summary dismissal or discharge. It does not appear that article 8 was complied with in this case, or that any payment in lieu of notice was made. There is no evidence on that matter and no representations were made in this

respect. However, and in view of the disposition which is made of this matter, I consider the question to be moot.

For all of the foregoing reasons, it is my conclusion that just cause for the termination of the grievor's employment has not been made out. In my view, a five-day suspension would not have gone beyond the range of reasonable disciplinary responses to the situation. In reaching this conclusion I have considered the grievor's seniority, his discipline record and the fact of provocation as well as the totality of the circumstances described above.

It is accordingly my award that the grievor be reinstated in employment forthwith, without loss of seniority or other benefits; that the termination be stricken from his disciplinary record and that a five-day suspension be substituted therefor; and that he be compensated for loss of earnings, subject to the deduction of payment for the period of the five-day suspension. As a result, it is declared that the grievor's disciplinary record now consists of a five-day suspension dated July 10, 2015 and a five-day suspension dated November 18, 2015.

I remain seised of the matter for the purpose of dealing with any issue relating to the compensation payable to the grievor, and to complete the award.

DATED AT OTTAWA, this 22d day of April, 2016



Arbitrator