

ONTARIO
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE
DE L'ONTARIO

GRIEVANCE
SETTLEMENT
BOARD

COMMISSION DE
RÈGLEMENT
DES GRIEFS

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GSB # 2196/97
OPSEU # 98A198

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Renee Turcotte)

Grievor

- and -

The Crown in Right of Ontario
(Ministry of the Solicitor General &
Correctional Services)

Employer

BEFORE

Eva E. Marszewski Vice Chair

**FOR THE
GRIEVOR**

Lily I. Harmer
Gowling, Strathy & Henderson

**FOR THE
EMPLOYER**

Roslyn Baichoo
Legal Services Branch
Management Board Secretariat

HEARING

October 28, 1998

The grievor, Renee Turcotte, is a probationary employee who grieves that she has been dismissed without just cause contrary to **Article 21.1** of the Collective Agreement. She seeks reinstatement with full retroactivity and benefits.

The parties are in agreement as follows:

1. The grievor was at all material times a probationary employee.
2. There are no allegations of discrimination which would invoke the application of the **Human Rights Code**.
3. The grievor was terminated on November 25, 1997, pursuant to Section 22(5) of the **Public Service Act**. The reasons given by the Ministry were that pursuant to Section 22(5) of the Public Service Act, the grievor was released for failure to meet the requirements of her position.

Section 22 (5) of the **Public Service Act** reads as follows:

22(5) A deputy minister may release from employment any public servant during the first year of employment for failure to meet the requirements of his or her position. R.S.O. 1980, c.418, s.22(5)

It was common ground between the parties that prior to the amendments to the **Crown Employees Collective Bargaining Act R.S.O. 1993, c.**

38, "C.E.C.B.A." this Board had the jurisdiction to examine the release of a probationary employee and determine whether or not it was a bona fide release or a release masquerading as an unjust or disciplinary dismissal. The parties were in agreement that at the time of their submissions herein, this issue had not been canvassed by any Board decisions subsequent to the amendments to **C.E.C.B.A.** However, pre-amendment decisions were reviewed by both counsel in order to provide a fuller perspective on the instant issue.

The relevant portions of the old Section 18 (2) of **C.E.C.B.A.** read as follows:

(2) In addition to any other rights of grievance under a collective agreement, an employee claiming

(c) that he or she has been disciplined or dismissed or suspended from his or her employment without just cause,

may process such matter in accordance with the grievance procedure provided in the collective agreement, and failing final determination under such procedure, the matter may be processed in accordance with the procedure for final determination applicable under section 19. R.S.O. 1980, c. 108, s. 18.

Section 18(2) no longer exists and has not been replaced by an equivalent provision. However, Section 7(3) of **C.E.C.B.A.** still provides as follows:

Deemed provision relating to arbitration. - Every collective agreement relating to Crown employees shall be deemed to provide for the final and binding settlement by arbitration by the Grievance Settlement Board, without stoppage of work, of all differences between the parties arising

from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

The relevant provisions of the collective agreement read as follows:

ARTICLE 21 - DISCIPLINE and DISMISSAL

21.1 It is understood that the right of the Employer to discipline or dismiss employees shall be for just cause. The Employer's right to discipline or dismiss is subject to the right of an employee to grieve such action.

21.2 For greater certainty, it is understood that nothing in Article 21.1 confers on a probationary employee any right to grieve or arbitrate his or her dismissal.

ARTICLE 22.8 - DISMISSAL

22.8.1 Any probationary employee who is dismissed or released shall not be entitled to file a grievance.

22.8.2 Any employee other than a probationary employee who is dismissed shall be entitled to file a grievance at the second stage of the grievance procedure provided he or she does so within thirty (30) days of the date of the dismissal.

1. Employer Submissions:

The employer raised the preliminary objection that the Board lacks the jurisdiction to deal with the grievance due to the 1994/1995 amendments to **C.E.C.B.A.** which removed the "just cause" provision from the statute. In addition, the employer relied upon various provisions of the collective agreement which preclude probationary employees from grieving or taking to arbitration their release from employment.

Counsel for the Employer submitted that since the **Leslie** case, a termination characterized as a release fell under the ambit of Section 2 of the Collective Agreement and therefore could not be dealt with in the arbitration process.

Article 2 of the collective agreement contains the Management Rights clause which specifies, inter alia, that:

....the right and authority to manage the business and direct the workforce, including the right to hire and lay-off, discipline, dismiss or suspend employees for just cause shall be vested in the Employer. It is agreed that these rights are subject only to the provisions of this Agreement and any other Collective Agreement to which the parties are subject.

It was contended that in the past, Section 18(2) had been used as the source of the entitlement of probationary employees to access the grievance and arbitration procedure in order to establish whether or not they had, in fact, been dismissed without "just cause" or whether they had been released for failure to meet the requirements of their position. It was submitted that the removal of the "just cause" provision from **C.E.C.B.A.** precluded probationary employees from grieving their termination and having the Board review the termination to determine whether it was a disciplinary measure or a bona fide release.

Furthermore, Counsel for the Employer also referred to Article **22.8** of

the Collective Agreement which seeks to prevent probationary employees from grieving their dismissal or release and **Article 21.2** which re-iterates an intention to prevent probationary employees from grieving or arbitrating dismissal.

In conjunction with **Articles 22.8** and **Article 21.2**, the employer has also relied upon **Article 22.14.6** which reads as follows:

The GSB shall have no jurisdiction to alter, change, amend or enlarge any provision of the collective agreements.

In conclusion, it was submitted on behalf of the Employer that the provisions of the current collective agreement reflect the exact intentions of the parties, in that the union clearly gave up the right of probationary employees to grieve their termination. Any attempts to include such a right would be equivalent to a change, amendment or enlargement of the collective agreement, each of which is specifically prohibited by **Article 22.14.6**. It was thus submitted that in this instance the Board has no jurisdiction to consider the grievance that is the subject matter of the issues in question. Counsel for the employer relied upon the following decisions in support of her submissions: **The Queen in right of Ontario (Ministry of Correctional Services) v. Ontario Public Service Employees Union and The Grievance Settlement Board** (1990), 74 O.R. (2d) page 700 (Ont. Div. Ct.), **Jacmain v. Attorney General of Canada et al.** (1977), 81 DLR (3d) 1 (S.C.C.), **Haladay and the Crown in Right of Ontario** (Ministry of Industry & Tourism) (1979),

22 L.A.C. (2d) 145 (K.P.Swan) and **Maureen Leslie and Ministry of Community & Social Services** (GSB No. 80/77)(G.W.Adams).

2. Union Submissions:

In its submissions, the Union relied upon the combined effect of Section 7(3) of **C. E.C.B.A.** quoted above and **Article 21.1** of the Collective Agreement dealing with Discipline and Dismissal.

The Union's argument can be summarized as follows. By virtue of **Article 21.1**, the collective agreement contains a "just cause" provision which confers a substantive right upon all employees, subject only to any restrictions set out in **Article 21.1**. Furthermore, it was submitted that **Article 21.2** of the Collective Agreement only deals with procedural rights. Since it is well established by the caselaw in Ontario that procedural rights cannot defeat substantive rights, it was submitted that the Board retains the jurisdiction to review the dismissal of probationary employees in order to determine whether or not the dismissal was a bona fide release or a disciplinary measure masquerading as a release. Consequently, the issue as framed by Counsel for the Union is whether or not, despite the **C.E.C.B.A.** amendments, **Article 21.1** contains a "just cause" provision which constitutes a substantive right available to probationary employees to grieve

their termination from employment and proceed to an arbitration hearing. It was submitted that the Board may hear evidence with respect to the facts and circumstances of the case in order to determine whether or not there was "just cause" for the dismissal or whether the termination was a bona fide release.

Counsel for the Union relied, *inter alia.*, upon decisions of this Board in the following cases: **Re Shaw and the Ministry of Community and Social Services A. Barrett** (410/88) , **Re Ambrey and the Ministry of the Attorney General**, P. Knopf (429/84) **Re Leslie and the Ministry of Community and Social Services G.W.Adams** (80/77).

In the alternative, Counsel for the Union submitted that even if the Board were to find that **Article 21.1** did not contain a substantive "just cause" provision which could be relied upon by probationary employees, there is a line of cases which has concluded that there is an implied term in a collective agreement that management cannot act in a manner which is arbitrary, discriminatory or in bad faith. If so, then in the Union's submission, there is a difference between the parties with respect to whether or not such standards can be implied in the instant collective agreement vis a vis probationary employees and if so, whether management's actions with respect to this grievor therefore met these implied standards. The following cases were cited, *inter alia.*, in support of the Union's alternative submissions: **Re Maritime Telegraph & Telephone Co. Ltd. and Atlantic**

Communication & Technical Workers' Union (1990) 11 L.A.C. (4th) 172, **Re McIntosh and the Ministry of Government Services** July 22, 1993, (N.Dissanayake) (3027/92) and **Re Brampton Hydro Electric Commission and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1285 et al.** (1993) 15 O.R. (3d) 773.

3. The Decision:

The Board's jurisdiction stems from the legislative will as expressed in the applicable legislation. The parties' Collective Agreement cannot supersede the legislative will. In this case, this Board's jurisdiction is rooted in Section 7(3) of **C.E.C.B.A.** which provides that

every collective agreement relating to Crown employees shall be deemed to provide for the final and binding settlement by arbitration by the Grievance Settlement Board.... of **all differences** between the parties arising from the interpretation, application, administration or alleged violation of the agreement...." [emphasis added].

The [Board's] decision in Haladay, supra, at page 152, stated as follows:

Where we have jurisdiction to determine a dispute, we have full authority to grant a remedy on the merits, including a statutory remedial authority (such as reinstatement in non just dismissal cases) would sometimes far exceed that which is available to the court. Where we have no jurisdiction, we can grant no remedy at all; we do

not have inherent jurisdiction to right all wrongs, or to try to. We can right only those wrongs which fall within the jurisdiction given us by statute or by collective agreement. Where we do have jurisdiction, we can require a full hearing on the merits, not merely order reasons to be given. Where we have no jurisdiction, an employee who has grieved must pursue, like Constable Nicholson, a remedy in the courts.

The applicability of these principles was confirmed in the decision of the Divisional Court in the case of **Ontario (Minister of Correctional Services)**, *supra*, at page 711. The relevant portion of the Court's decision reads as follows:

The court must be careful not to confuse the agreement of the parties limiting or taking away an employee's right to grieve with the question of the jurisdiction given to the Board by the legislature. The Board has, as I have already stated, the jurisdiction given to it by the legislature, no more and no less. The parties cannot tamper with that jurisdiction. The parties can agree, as they have done here, that a probationary employee cannot grieve and that an employee can only grieve if she commences her grievance in a timely fashion. That agreement does not change in any way the jurisdiction of the Board. It simply takes away the right to grieve in certain circumstances. The jurisdiction given to the Board by s. 19 (1) of the Act to settle or decide all "differences between (the parties) arising from the interpretation, application ... or alleged contravention of the agreement, including ... whether a matter is arbitrable" remains intact. The Board, in deciding whether an employee cannot grieve because she is probationary, or because she has not grieved within the time prescribed by the agreement, must of course do so in light of the facts and the words used by the parties in the agreement. But in so deciding, it will be making the very decision that by the Act it has the sole jurisdiction to make and its decision will only be subject to judicial review if it is patently unreasonable.

Over the years, many cases have dealt with questions relating to the jurisdiction of the Grievance Settlement Board to consider issues related to the

termination of probationary employees. The state of the applicable law prior to the amendments to Section 18 was summarized in **Re Haladay**, supra, at page 146, where arbitrator Swan quoted Section 17(2) [equivalent to s. 18(2) of **C.E.C.B.A.** prior to the amendments in question] and then concluded as follows:

The collective agreement in operation between the parties at the material time is the 1978 Working Conditions agreement. In that agreement, the parties have severely limited the access of probationary employees to the grievance procedure. Article 27.6.1 provides: "Any probationary employee who is dismissed or released shall not be entitled to file a grievance."

On the other hand, all employees have an independent right to come before this Board in certain cases. That right is set out in the **Crown Employees Collective Bargaining Act, 1972** (Ont.), c. 67, s. 17(2) [s. 17 and 18 repealed and re-enacted 1974, c. 135, s. 9; am. 1978, c. 79, s. 1]:

17(2) In addition to any other rights of grievance under a collective agreement, an employee claiming,

- (a) that his position has been improperly classified;
- (b) that he has been appraised contrary to the governing principles and standards; or
- (c) that he has been disciplined or dismissed or suspended from his employment without just cause,

may process such matter in accordance with the grievance procedure provided in the collective agreement, and failing final determination under such procedure, the matter may be processed in accordance with the procedure for final determination applicable under section 18.

This Board has dealt, over the years since its creation, with a number of cases involving probationary employees within the statutory, regulatory and contractual structure which binds these parties and this grievor. We should note that our jurisdiction is statutory only, and has two main branches. First, we are vested with jurisdiction to hear and determine disputes about the interpretation, application, administration or alleged contravention of the collective agreement; this jurisdiction arises under s. 18 of the **Crown Employees Collective Bargaining Act, 1972**. Second, beyond that jurisdiction and independent of it, we have the jurisdiction set out in s. 17(2), quoted above. We have no other authority to intercede between the parties; we do not have any inherent jurisdiction to do justice - or what we may conceive to be justice - or to provide remedies, no matter how desperately a

particular case may cry out for relief. The Board is a creature of the statute, and derives its jurisdiction solely from the statute.

In the **Ambrey** case, *supra.*, Arbitrator Knopf stated as follows:

the Crown Employees Collective Bargaining Act gives employees claiming unjust dismissal the right to grieve that matter before the Grievance Settlement Board **in addition to** any right that may be contained in the Collective Agreement. [emphasis added]

In the instant case, due to the amendments to **C.E.C.B.A.** which resulted in the removal of the 'just cause' provision from Section 18(2), the second of the two above-mentioned branches is no longer available to the Board as a basis for taking jurisdiction. Prior to the amendments in question, **CECBA** imposed a limitation on management rights regardless of the specific Collective Agreement provisions negotiated by the parties. By removing the statutory limitation of 'just cause' upon management rights, the legislature took away from employees the overriding protection of a statutory 'just cause' provision. Obviously, it still left the door open to the parties to negotiate such a provision. Presently, in the event that the parties omit or qualify a 'just cause' provision, the legislation no longer contains a saving provision giving employees the protection of a "just cause" clause.

Today, the Board's remaining jurisdiction is thus rooted in Section 7(3) of **C.E.C.B.A.** which provides for the "final and binding settlement by arbitration" ... "**of all differences between the parties** arising from the interpretation,

application, administration or alleged violation of the agreement,....". (Emphasis added). Section 7 had previously existed essentially in the same form in the old Section 18 and thus the cases decided under Section 18 of **C.E.C.B.A.**, such as **Re Haladay**, *Supra.*, still apply.

Prior to the **C.E.C.B.A.** amendments in question, it was well established that the Board was entitled to examine the termination of a probationary employee to determine whether or not the termination could properly be characterized as a bona fide release or whether it was a disciplinary termination masquerading as a release. If it was found that the termination was a bona fide release, the jurisdiction of the Board was exhausted. However, if the termination of the probationer took place as the result of disciplinary action against that employee, then the Board had the jurisdiction to examine the circumstances of the termination. The **Toronto Hydro** (*supra*) and **Ontario Hydro** (*supra*) cases set out the rationale which has been followed consistently since then.

In April, 1980, in the **Re Toronto Hydro** case, *Supra*, Mr. Justice Linden, as he then was, characterized the issue before him as follows:

The issue raised in this application is whether a collective agreement can deny probationary employees access to arbitration in order to contest their dismissal in the light of s. 37 [am. 1975, c. 76, s. 10 of the Ontario Labour Relations Act, R.S.O. 1970, c. 232.

The sole legislative context for Mr. Justice Linden's decision was Section 37 of the **Ontario Labour Relations Act** which is identical, in its relevant portions, to the wording of Section 7(3) of **C.E.C.B.A.** It should also be noted that the Court did not have before it a further legislative provision similar to that contained in the former Section 18(2) of **C.E.C.B.A.** The court considered the identified issue in light of a provision in the collective agreement which provided, inter alia, that "no employee shall be disciplined or discharged without just and sufficient cause."

Mr. Justice Linden thus quoted from Arbitrator Barton's award, which was under review, at p. 20 and 21, as follows:

The next question is whether Art. 36.02 [denying probationers access to arbitration to contest dismissal] has any effect. Fundamental to this question is the question of whether or not Art. 36.02 is a substantive or procedural provision. It seems to me that the right to lodge a grievance as distinguished from the procedures that must be followed during the course of pursuing that grievance is a substantive right. What this agreement seems to do is confer upon the employees the right not to be discharged without just cause, confer on the employees the right to initiate grievances, and then take away the right to grieve dismissal from a group of those employees, particularly new employees during the first three months of their probationary period. Thus what we have is an agreement which confers the right, confers a right to enforce the first mentioned right, and then takes away the power to do so from a small group of employees in the unit. In my view, art. 36.02 is void as contrary to s. 3 of the **Labour Relations Act** because it does this.

In our view, the arbitrator correctly read the provisions of Arts. 36.02 and 55.01 together. The language used in the agreement is clear and unambiguous. A general substantive right to have their employment terminated only for just and sufficient cause was conferred by Art. 55.01 on all employees, including probationary employees. Access to the grievance procedure, however, was purportedly withdrawn from probationary

employees by art. 36.02. Thus, the probationary employees were given a substantive right, but the machinery of enforcing that right, should they differ with their employer about the substantive right, was denied them.

If the withdrawal of the substantive right, given in Art. 55.01 to all employees, is to be taken away from probationary employees, that intention should be expressed in clear language. Nowhere in the agreement is there a provision which says, in express terms, that probationary employees may be dismissed without cause. Consequently, in our view, the interpretation adopted by the arbitrator here was the only one that the language could reasonably bear.

Almost three years to the day later, in 1983, in the **Re Ontario Hydro** case, *Supra*, the Ontario Court of Appeal considered the question of whether or not there was a difference between the parties where the collective agreement gave probationary employees the right to grieve a dismissal but appeared not to give them the right to go to arbitration. The court found that there was a difference between the parties where an arbitrator interpreted a collective agreement as conferring on a probationary employee a right assertible in the circumstances against the employer notwithstanding a term in the collective agreement barring the resort to arbitration on behalf of a probationary employee. **Article 2A.1** of the Collective Agreement in the Ontario **Hydro** case arguably provided a lesser substantive right to probationary employees than the provision contained in **Article 21.1** of the instant case and read as follows:

Any allegation that an employee, other than a probationary employee, has been demoted, suspended, discharged or otherwise disciplined without just cause shall be a fit matter for the Grievance and Arbitration procedures as provided for in this Collective Agreement.

The court quoted from the decision of the majority of the Board of Arbitration as follows:

...In an industrial relations context the purpose of a grievance procedure is to resolve differences between the parties and, in our view, the correct construction of Art. a.2 is that in the event the union considers that a probationary employee has been discharged without just cause this constitutes a difference between the parties which the collective agreement provides is a fit matter for the grievance procedure only.

Writing on behalf of the majority In the **Ontario Hydro** case, supra, at p 682-3, Morden J.A. (as he then was) described the manner in which provisions in the collective agreement could give rise to an "arbitrable difference" :

In my view, unless the "matter" which is included in the collective agreement is capable on the facts of the case of giving rise to a justiciable issue, and in this respect it would not be so capable unless (in the present context) it involved the conferral of a right on the employee against the employer, then I do not see how it could give rise to any arbitrable difference.

Morden J.A. then set out a two-step process which an arbitrator must follow in order to determine whether or not there is a 'difference' between the parties for the purposes of s. 37(1), as follows:

First, the facts have to be determined, which in this context means that the collective agreement must be interpreted, and then the statutory

provision has to be interpreted with a view to deciding whether it is applicable to the facts as determined. In the first stage, if the arbitrator interprets the agreement as conferring on the complaining employee a right assertible in the circumstances against the employer, then there is a difference within the meaning of this word (more accurately the word is "differences") in s. 37(1). In the present case the board of arbitration interpreted the agreement as creating a right in a probationary employee, based on an allegation of discharge without just cause, which could give rise to a "difference". The difference was one relating to the interpretation, application or administration of the collective agreement. If this is the conclusion on the interpretation of the agreement, then any provision in the agreement which blocks the resort to arbitration to determine the right would be void as contrary to s. 37(1).

Of course, if the process takes a different turn during the first stage then it may be that no "difference" will emerge which would entitle the union or employee to proceed to arbitration. An arbitrator may interpret the agreement as conferring no right on an employee which could give rise to a difference capable of being adjudicated by arbitration.

I do not suggest that the two steps are mutually exclusive and, in this respect, I refer to the relevance of the principle which favours that interpretation which makes the agreement valid in preference to that having the opposite effect. This principle reflects a factor which should be taken into account in the process.

I think that the adjective "substantive" affords a reasonable description of the nature of the rights with which we are now concerned which can give rise to a "difference". Broadly speaking, collective agreements confer on the parties, including employees, certain rights which may be asserted against the other party. In the present case the board of arbitration, in one of its descriptions of what the agreement provided, said that the agreement conferred on probationary employees "certain protection based on the principle of just cause". These protection, I think, embody substantive rights. The other kind of rights which will be found in collective agreements relate to the machinery for enforcing these substantive rights or protection and a convenient description of them is "procedural".If the impediment to arbitration is an absolute procedural bar, as opposed to an absence of a substantive right to be submitted to arbitration, then there is an arbitrable difference.

As a consequence of the logic in the above cases, if it is found by the Board that a probationary employee has a right assertible against the employer,

then there is a difference between the parties and such a difference is to be resolved in a final and binding manner by arbitration by the Grievance Settlement Board.

Does the probationary employee in this case have a right assertible against the employer?

Further to the analysis of Mr. Justice Morden in the **Ontario Hydro** case, it is of critical importance to analyze the relevant provisions of the collective agreement in order to answer the question of whether the grievor has a "right" which is "assertible in the circumstances against the employer..." . If so, then there can be a "difference" between the parties arising from the "interpretation, application, administration or alleged violation" of the agreement. If there is a difference' between the parties, then, Section 7(3) of **C.E.C.B.A.** provides that such a difference must be resolved in a final and binding manner by arbitration by the Grievance Settlement Board.

The specific articles of the collective agreement in question contain a complex web of apparently conflicting provisions. They can be summarized as follows:

On the one hand, the following provisions confer rights, or by their

silence, do not take away rights granted elsewhere in the collective agreement:

a) Sub-section 1 of **Article 21** (which is entitled "Discipline and Dismissal") contains the "just cause" provision and applies both to discipline and to dismissals.

b) Sub-Section 2 of **Article 21** does not take away from probationers the right to access the grievance or arbitration procedure in disciplinary matters.

c) **Article 22.8** does not specifically preclude probationers from grieving matters of discipline.

On the other hand, the following provisions limit the rights of probationers:

a) **Article 21.2** re-iterates the fact that probationary employees do not have the right to grieve or arbitrate dismissal.

b) **Article 22.8**, entitled "Dismissal", states that probationary employees who are "dismissed or released" shall not be entitled to file grievances.

When all of the relevant provisions of the collective agreement are taken together, I find that they can be summarized, de minimis, by the following two propositions:

1. Since the Collective Agreement does not prohibit probationary employees from grieving or arbitrating disciplinary measures taken against them by the

Employer, probationers are entitled to have access to the grievance and arbitration procedure with respect to matters of discipline on the basis that the discipline has been imposed without just cause.

2. Probationary employees cannot grieve or take to arbitration a release or a non-disciplinary termination.

These two propositions reflect the parties' mutual interest in two competing principles: the protection of employees' right to work and the protection of management's discretion to manage the work-place. The resolution of the issues in this case depends upon the point of intersection of the two principles as established by the provisions in the collective agreement.

In a matter between these same parties, in **Re Leslie and the Crown in Right of Ontario (Ministry of Community and Social Services)**, (1978) 22 L.A.C. (2d) 126 (Adams) determined that because the language in Section 18 (2) of CECBA did not contemplate the concept of release, the question of whether a matter could be heard by the Board depended upon whether or not the grievor had been released or dismissed as the result of disciplinary action. In the **Leslie** case, it was found that

"...this Board is of the opinion that the employer cannot camouflage either discipline or the termination of an employee for a reason other than the employee's failure to meet the requirements of his position, as that phrase is explained in the **Square D Co. Ltd.** case by the guise of a 'release' under

Section 22(5) of the **Public Service Act**. This Board therefore, has jurisdiction to review a contested release to insure that it is what it purports to be. ... The Board must only be satisfied that the employer, in good faith, released the employee for a failure to meet the requirements of his position. As long as the Board can be satisfied that the employer has made an evaluation of that kind, it has no jurisdiction to review the fairness or correctness of that termination under Section 17(2)(c). (Now 18(2)(c) of the **Crown Employees Collective Bargaining Act**).

The question raised in this case can therefore be narrowed and re-stated as follows: Can a probationary employee grieve a termination which he or she alleges is in fact a disciplinary measure? Did the parties intend to give a probationer the right to access the grievance and arbitration process only in the event that the discipline is minor, but not if the discipline is dismissal, the 'capital punishment' of disciplinary measures? One of the most important purposes of the grievance and arbitration procedure is to provide impartial, neutral, third party review of the facts and circumstances leading up to the imposition of discipline. Setting aside issues of arbitrariness, bad faith or discrimination which would trigger the application of a separate line of cases, what if the evidence were to disclose a misapprehension of facts, a miscommunication, a mistake or other circumstances which would lead to the conclusion that a disciplinary dismissal was totally unwarranted and the appropriate discipline only merited a written warning, a one-day suspension or exoneration instead of dismissal?

Therefore, the question in this case is whether Article **21.1** goes so far as to confer upon probationary employees a substantive right assertible against the employer not to be dismissed without "just cause". **Article 21.1** provides that the Employer has the right to discipline or dismiss employees for "just cause" subject to the employees' right to grieve. In my view, **Article 21.1** does not distinguish between different types of employees and confers upon all employees an unqualified substantive right not to be dismissed without 'just cause'. **Article 21.2** sets out the procedural right of access to the grievance and arbitration process. The cases are many and they are all in agreement and confirmed by the Ontario Court of Appeal, that a procedural provision cannot constitute a bar to and defeat a substantive right. Consequently, it follows that neither **Article 21.2** nor Article 22.8 cannot defeat the substantive right set out in **Article 21.1**. I thus find that the question of whether a disciplinary measure, up to and including termination, taken by an employer against a probationer is or is not an appropriate disciplinary measure taken with "just cause" in the specific circumstances of a case, constitutes a "difference" between the parties which entitles them to proceed to have that "difference" resolved by arbitration pursuant to Section 7(3) of **C.E.C.B.A.**

I find that this Board has the jurisdiction to engage in the process of determining whether or not the release is a bona fide release "for failure to meet

the requirements of his or her position" or whether the release constitutes de facto camouflage for disciplinary action taken by the employer against the probationary employee. In the latter case, the disciplinary action may be examined and reviewed in order to establish whether the discipline, up to and including termination, was warranted at all, pursuant to all the considerations that normally apply in Board reviews which involve the application of the "just cause" standard.

My conclusion is consistent with the one and only interpretation which is able to reconcile the various provisions of the collective agreement and give effect to both **Article 21** and **Article 22.8**, that being the interpretation that finds that probationary employees cannot grieve a non-disciplinary termination but may grieve a termination which has been made for disciplinary reasons.

Of course, this conclusion leaves both the parties and the Board in the usual conundrum that in those cases where there is a "difference" between the parties with respect to whether or not the measure taken against the employee is disciplinary, and whether or not the discipline imposed ought to have been less than discharge, the Board must take jurisdiction in order to determine whether or not the termination was a disciplinary dismissal or a bona fide release and there must be a hearing with evidence and submissions. The parties must adduce all the necessary evidence with respect to the facts and circumstances

and the Board must take jurisdiction at least initially in order to determine whether or not the termination was the result of a disciplinary measure or whether it constituted a bona fide release. If the Board finds that the termination was a bona fide release, then that is the end of the matter. However, if the Board finds that the termination was a disciplinary dismissal then the Board may hear evidence with respect to "just cause". Depending on the specific facts and circumstances of a case, it may be practical for the parties to adduce call all the evidence and have the Board reserve its decision until the end of the hearing on the preliminary question of whether or not a particular termination of a probationer is a disciplinary dismissal or a non-disciplinary release.

For all of the reasons and considerations set out above, I deny the preliminary objection raised on behalf of the employer and find that this Board has the jurisdiction to proceed with a hearing with respect to the grievance in order to determine whether on the one hand, the grievor was simply released or whether on the other hand the grievor was dismissed for disciplinary reasons. In the latter case, the Board may hear evidence and submissions to determine whether it should exercise its discretion to vary or nullify the discipline imposed.

Dated at Toronto this 11th day of August 1999.

A handwritten signature in cursive script, reading "Eva E. Marszewski". The signature is written in dark ink and is positioned above the printed name of the signatory.

Eva E. Marszewski - Vice-Chair