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Arbitrator's jurisdiction to impose lesser penalty and just cause provisions

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Where a statute or collective agreement provides that no employee shall be discharged without just cause, may an arbitrator still refuse to reinstate an employee after finding that there was no just cause for dismissal? This question was taken up by the Ontario Divisional Court in *United Steelworkers of America, Local 12998 and Liquid Carbonic Inc.*, issued on June 12, 1996.

The arbitrator in the case determined that the employer had cause, but not just cause, to dismiss the grievor. However, he declined to order the grievor's reinstatement, reasoning that reinstatement was not a viable option in view of the grievor's "unusually uncooperative and confrontational attitude". Accordingly, he ordered that the grievor be paid four months' wages in lieu of reinstatement.

At the time, s. 45(9) of the Ontario *Labour Relations Act* gave arbitrators the jurisdiction to substitute a lesser penalty where it was found that the employer had imposed a penalty for cause. Section 43.1(1) provided that every collective agreement was deemed to have a clause providing that employees could not be discharged or disciplined without just cause.

The union applied for judicial review of the decision arguing that, under the *Act*, an arbitrator could not use the "lesser penalty" power to substitute one form of discharge for another, when the facts disclosed that there had been no just cause for discharge. The union also contended that the arbitrator had erroneously applied common law conceptions of dismissal with reasonable notice in the context of a collective bargaining regime.

The court rejected the union's application, noting that the arbitrator did not think that he was applying the common law doctrine of reasonable notice. Arbitrators have on occasion resorted to the exceptional response of a money remedy for dismissal, and the arbitrator in this case knew that what he was doing was exceptional, the court stated.

Turning to the provisions of the *Labour Relations Act*, the court observed that nowhere in the *Act*, including s. 45(9), was the reinstatement of an employee made mandatory. Rather, s. 45(9) had been inserted into the *Act* to allow arbitrators to tailor a disciplinary penalty to the circumstances of the misconduct.

Although s. 43.1(1) had been introduced by the government of the day to require that every collective agreement contain a "just cause" provision, it did not constrain in any way the remedial authority of an arbitrator who found that just cause for discharge or discipline did not exist. The more specific statutory provision addressing remedies was s. 45(9) and it had to govern, the court held.