

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GREATER VANCOUVER REGIONAL DISTRICT

(hereinafter referred to as the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION

(hereinafter referred to as the "Union")

(Mark Watson Dismissal)

Arbitrator:

H. Allan Hope, Q.C.

Counsel for the Employer:

Allan J. Hamilton

Counsel for the Union:

Chris Buchanan

Place of hearing:

Vancouver, B.C

Date of Hearing:

March 16, 1998

AWARD

I - The Dispute

The grievor, Mark Watson, was dismissed on September 10, 1996, from his position as an assistant area operator working in the sewage department of the Employer. He was first employed on July 3, 1990 and had in excess of six years of service at the time of his dismissal. The Employer dismissed the grievor on that date in response to what it viewed as a culminating incident of lateness which, when considered in the context of the grievor's discipline record, constituted just cause for his dismissal

The position of the Union was that the Employer had failed to establish that the facts proven in evidence revealed any grounds for discipline with respect to what it had characterized as a culminating incident. In particular, its position was that the incident of lateness upon which the Employer relied was fully explained by the unique circumstances and could not support the imposition of discipline.

II - Facts

It would appear that the grievor's first four years of employment were unremarkable in terms of discipline. However, on July 5, 1994 he received a verbal warning with respect to his attendance from his then supervisor, Terry Hicks. The warning read in part as follows:

Since January 2/94 you have had 24 days off. One day April 17/94 was with advance notice and January 13 & 14/94 you were off sick. The other 31 days have been taken off without notice and this is unacceptable.....

.....
You may consider this a verbal warning and any more time except sick time without notice will be with no pay....

The implausible and improbable response of the grievor in these proceedings was that his area operator had told him he could take the days off that he had taken without notice. That assertion was inconsistent with his discipline record, and, in any event, the warning was not grieved. A postscript was added to the letter of warning on September 1, 1994 which reads as follows:

Since July 5/94, you have taken August 4 & 5/94 off without notice and phoned in late (12:30 p.m.) on August 30/94.

That postscript was finalized in a memorandum to the grievor dated September 1, 1994 in which Mr. Hicks wrote in part, "You can consider this letter a written notice to be included in your personnel file. Any continuation of irresponsible time off will result in further disciplinary action". The grievor received a similar memorandum on April 5, 1995 that followed upon a discussion on March 22, 1995 about his poor attendance. In that memorandum the Employer wrote in part:

Since our conversation March 22/95 you have managed to be late and absent twice. March 24/95 you phoned in late (7:30) and March 27/95 you had not called in by 03:00. The next occurrence will result in further disciplinary action. This memo will be forwarded to personnel.

Approximately two weeks later, on April 20, 1995, the grievor failed to attend work, again without notice. That led to the following memorandum:

Following the review of the circumstances that led to your failure to attend work on April 30, 1995. I have found your excuses unacceptable. You had stated you contacted the yard at 7:10 am and you failed to leave a message on the answering machine. You then contacted Doug Smith at 7:20 am to inform him of your situation and requested him to pick you up. This request is not acceptable and we are not a taxi service.

You then waited until 9:15 a.m. to contact myself to explain your situation. You should have contacted your immediate Supervisor prior to starting your shift. You failed to take the appropriate steps to report your situation. You will from now on leave a message with a exempt supervisor. If you are unable to make contact you will leave a message with the time keeper, answering machine or control (444-8401).

That warning appeared to have no effect because the grievor was absent again on May 26, 1995.

That absence triggered a two-day suspension. The letter of suspension reads as follows:

It has been brought to my attention by Terry Hicks, Collections Supervisor, that there have been a number of occasions where you have not reported to work on time as scheduled. In each case when you were late for work, you were informed by your supervisor, Terry Hicks, that this behaviour was unacceptable. You were also advised that if you were going to be late that you were to notify your supervisor. On Friday, May 26, you were once again late for work and did not call in until 11:00 a.m. On April 21, there was meeting held with you, Steve McLure (Shop Steward), and myself, to discuss your failure to report to work on time and your history of lateness without appropriate notice. As well, we discussed specific procedures you were to follow in future if you were unable to report to work on time as scheduled. During this meeting, I made it very clear to you that this type of behaviour was unacceptable, and as well, a letter detailing the discussions of the meeting was given to you. Since this meeting, you continue to be late and call in after crews have already been dispatched. In review of the events that have occurred to date, combined with your previous and ongoing record of tardiness, you are hereby being suspended for two (2) days without pay effective Wednesday, May 31, 1995. (emphasis added)

There were incidents over the following year which were addressed verbally and which were recorded in a letter of June 18, 1996. That letter reads as follows:

In review of your recent attendance record, there have been a number of occasions where you have not reported to work on time as scheduled. In each instance you were advised by me that this behaviour was unacceptable. In particular, on Thursday, May 23, I met with you and reviewed your record of lateness, as well as your past record related to your failure to report to work on time. I clearly indicated to you that if a further incident was to occur, appropriate disciplinary action would be taken.

Since this meeting, you continue to be late for work. The consequences of your failure to report to work on time has a direct impact on the crew(s) you work with, resulting in work tasks not being able to be performed.

A summary of events is as follows:

- July 18, 1995 - No call in. Arrived at 7:45
- October 4, 1995 - called in 8:00. Arrived at 8:30. Crew held waiting.
- March 4, 1996 - No show. Called in in morning and said had personal problems.
- March 25, 1996 - No show. No call.
- May 1, 1996 - Special job set up, crews waiting at 6:30. Arrive at 6:50. No call in.
- May 23, 1996 - Meeting with me to review standards and expectations of reporting to work on time and consequences of disciplinary action if reoccurrence.
- June 14, 1996 - Crew waiting at 7:00 to start. No show. Called in at 7:50.

In review of the events that have occurred to date, combined with your previous and ongoing record of tardiness, and your earlier suspension for the same reasons (letter May 29, 1995), you are hereby suspended for five (5) days without pay effective Wednesday, [June 19], 1996 to Tuesday, [June 25], 1996 inclusive. The following will serve as a reminder to you that your employment relationship with the GVRD requires you to report to work on time as scheduled. If you are unable to report to work on time, you are to call me directly on my cell at 880 - ##### or my direct line 444 - 8####. In discussing the reasons for your tardiness, your responses have been limited to: "alarm clock not going off", "too much traffic", "slept in". These are not sufficient reasons to warrant your actions and are things you can manage or correct.

If there are any other reasons for your inappropriate actions you need to let me know. Future incidents of this nature will be dealt with through a path of progressive discipline and may result in the termination of your employment. (emphasis added)

In the meeting of May 23, 1996 referred to in the letter, the grievor's supervisor, Bob Legge, told him that excuses relating to excessive traffic, including traffic accidents, were not acceptable explanations for being late. However, approximately six weeks later, on July 30, 1996, the grievor once again failed to report for work. That triggered a letter from the superintendent of the Vancouver sewage area, Thomas Land. The letter was dated July 31, 1996 and reads as follows:

I On Tuesday, July 30, 1996 you once again failed to report to work on time as scheduled without any reasonable explanation. Based on your past history of not reporting to work on time and resulting disciplinary action combined with yet another event of not reporting to work on time, you are hereby suspended for ten (10) days without pay effective Thursday, August 1, 1996 to Thursday, August 15, 1996 inclusive. It is important for you to be aware that this continued lack of responsibility in not reporting to work on time as scheduled seriously affects the crew(s) you work with and our ability as an employer to effectively meet our operational demands. Your continued inability to report to work for reasons such as in this case "lost car keys", "alarm clock not going off", "too much traffic". "slept in" are not sufficient to warrant your actions and are things you can manage or correct. If there are any other reasons for your inappropriate actions you need to let us know, so that we can work with you to try and correct them. Your employment relationship with the GVRD requires you to report to work on time as scheduled. Your continued inability has reached the point where it is seriously jeopardizing your future employment relationship with us. Future incidences of this nature will result in your termination of employment. (emphasis added)

Approximately three weeks later, on August 23, 1996 the grievor was again absent from work with no advance notice. He did call at 7:30 am. to explain that he had been ill and the Employer accepted that explanation. Instead of imposing further discipline, the Employer emphasized to the grievor that in cases of illness he was required to give advance notice to his supervisor that he would not be reporting in. The Employer's view of the circumstances appeared in the following letter dated August 28, 1996:

On Friday, August 23, 1996 you yet again failed to report to work on time as scheduled (7:00 am) and did not call in until 7:30 am. On Tuesday, August 27 when you reported back to work we met with you to discuss the circumstances surrounding your failure to call in prior to your 7:00 am start time. Your response was that you were too ill to get to the phone one block from your house. In our letter to you on July 31, 1996 it indicated that your failure to report to work on time or call in prior to the start of your shift to your Supervisor, Bob Legge (880-#### cel or 444-8#### direct line), would result in your termination. Given the mitigating circumstances of your illness we have decided that this written letter will serve as your final notice clarifying our expectations with regards to your responsibility to call your supervisor in advance of you shift if you are unable to report to work as scheduled. Any employee who is sick is required to notify their respective supervisor accordingly and this applies to you also. Being sick is not a reasonable excuse for your not calling in and is not acceptable. It is your responsibility to have the necessary circumstances in place such that you can communicate to your supervisor. As we discussed with you in our meeting of August 27 you must report to work on time. As well, it is your responsibility to make the necessary arrangements to allow you're the ability to call into your supervisor in advance if your are unable to report to work on time as scheduled. Should you not call in, it will result in your termination of employment. Once again, if there are any other reasons for your inappropriate actions you need to let us know, so that we can work with you to try and correct them. (emphasis added)

The incident that gave rise to his dismissal came 12 days after that letter, on September 9, 1996. The termination was recorded in the following letter dated September 10, 1996:

Review of your past record and lengthy history of not reporting to work on time, combined with your most recent incident of not reporting to work on time on Monday, September 9, reflects an ongoing failure to fulfill your employment obligation. In reference to our previous letters and in particular our letter of July 31, 1996, we clearly indicated to you that "too much traffic" is not sufficient to warrant your actions and is something you can manage or correct and that future lateness would result in the termination of your employment. In consideration of your past history of not reporting to work on time combined with the culminating incident, this will advise you of your immediate termination.

The events surrounding September 9, 1996 were in dispute. There was no dispute about the fact that the grievor was required to report ready to commence work at 7:00 a.m. It is also agreed that he did not arrive until 7:10 a.m. Finally, it is agreed that he telephoned to his supervisor Mr. Legge at 6:51 a.m. to advise that he was en route. However, the salient details with respect to when he left for work, the extent to which he was delayed by a traffic accident on the Port Mann Bridge, and whether the fact of the accident excused his lateness, were in dispute.

In presenting its case the Employer called evidence from three witnesses. The first witness, Harold Clark, was a senior personnel officer at the material time. He first became aware of the grievor when he reviewed his file in preparation for the meeting that resulted in the June 18, 1996 letter. Mr. Clark prepared the letter in advance of the meeting for Mr. Legge's review and signature. He then attended the meeting and took notes that he used to refresh his memory in giving evidence.

It can be seen in the letter that reference was made to a meeting between Mr. Legge and the grievor on May 23, 1996. The significant aspects of the May 23, 1996 discussion and the meeting of June 17, 1996 from the Employer's perspective were the fact that they were in response to the grievor's pattern of poor attendance, including unauthorized absences without notice; arriving late; and arriving late without prior notice.

Mr. Clark said that, in the meeting, Mr. Legge reviewed the meeting of May 23 and reiterated that the grievor had been cautioned at that time that discipline would follow if he failed to report for work on time or failed to contact the Employer in a timely fashion with respect to any proposed absences. I pause to note that Mr. Legge began a computer record of attendance problems with the grievor when he became responsible for supervising him. A copy was filed in these proceedings. The record he prepared with respect to the meeting of May 23, 1996 reflects that during the meeting the grievor offered as one of his explanations for lateness that he was sometimes delayed by

traffic accidents, including accidents on the Port Mann Bridge.

The response of Mr. Legge in the May 23 meeting and the June 17 meeting was to say that, because of the history of the Port Mann Bridge, the grievor should plan to be at work one half hour earlier than start time. I digress to note that a misunderstanding arose in the evidence in which Mr. Legge was heard to say that he had told the grievor to leave home one half hour earlier. That understanding of the facts was perceived as being in apparent contradiction with the later evidence of Mr. Legge who said that neither he nor any other supervisor to his knowledge had told the grievor when to leave home.

The reconciliation of that contradiction is reflected in the computer notes and in Mr. Legge's evidence. That is, in the record of the May 23, 1996 meeting the following notation appears; "I suggested that because of the location he lives in and the history of the Port Mann Bridge that he leave earlier and plan to be at work a half hour earlier than we start". In any event, returning to the chronology, Mr. Clark said that in the June 17 meeting, Mr. Legge, both in reference to the May 23 meeting and in the June 15 meeting, emphasized that traffic problems and accidents were not acceptable excuses for arriving late at work.

In terms of the grievor's response and attitude, Mr. Clark said that he made an error in the letter. He wrote that the proposed suspension be effective May 19, 1996 to May 25, 1996, being dates that had already passed. The dates should have read June 19 to June 25. He said that when the error was noted in the meeting of June 18, the grievor jumped up and said, "I've served my time". He said he took from that comment and the grievor's general demeanour during the meeting that he wasn't taking the issue seriously. He said that the grievor did not apologize for his conduct and the impact it was having on the Employer's work schedules and his fellow crew members. Neither, said Mr. Clark, did the grievor express or demonstrate any remorse.

In that same vein, Mr. Clark recalled that, rather than accepting responsibility for his actions, the grievor expressed the belief that he was being disciplined as an act of discrimination by the Employer because of comments he had made at a joint union management meeting earlier. Mr. Clark quoted Mr. Legge as having replied that the grievor's pattern of attendance problems caused disruption in the crews and that proper attendance was important. He said he told him that, because of the Port Mann Bridge, it was important for the grievor to plan for accidents and incidents in order to be at work on time. Mr. Clark said that when the grievor was informed that he was to receive a five-day suspension, his reply was, "You're crazy - I'm out of here", following which he jumped up and abruptly left the meeting.

Mr. Clark said he next participated in the meeting with the grievor on July 31, 1996 attended by Mr. Land the superintendent of the Vancouver sewage area with respect to the letter of July 31, 1996. The meeting was convened in response to the fact that the grievor was late on July 30, 1996. Mr. Clark said that, once again, he drafted the July 31, 1996 letter in advance of the meeting. The grievor was represented in the meeting by shop steward Steve McLure, the union official who had represented him in most of his discussions with management. Mr. Clark said that Mr. Land reviewed the grievor's problem with lateness and attendance and advised him that he would receive a 10-day suspension and that any further lateness would lead to his termination. He said that the grievor commented that he recognized that the Employer, "had had enough" and that he realized he would be fired on the next occasion of lateness. He said that Mr. McLure, the shop steward attending with the grievor, acknowledged that the grievor, 'does not have any more chances'.

Mr. Clark said that in response to the grievor's apparent inability to attend work regularly or on time, he asked if there were any circumstances that mitigated the pattern that emerged and if the grievor was aware of the Employee Assistance Program (EAP) sponsored by the Employer. He said that the grievor responded to the question by standing up and rolling up his sleeves, following which

he extended his arms and said, "I'm not a junkie. I may like my beer but I'm not addicted". He said it was significant to him that, once again, the grievor did not apologize for his actions and did not offer any indication that he would make adjustments to avoid further problems. He said that the grievor "never took ownership" of his problems and again suggested that the Employer "was picking on him". He said that once again it was emphasized to the grievor that traffic problems were not an acceptable excuse for being late.

Mr. Clark then gave evidence with respect to the incident on October 23, 1996 when the grievor did not report for work and did not report his intended absence until 7:30 am. At that time the grievor offered an explanation that he had been ill with diarrhea, that he did not have a phone at his home, and, because of his illness, he could not get to the closest phone, which was a pay phone a block away, until 7:30 a.m. The Employer accepted his explanation, both for his absence and for his failure to call in and elected not to impose discipline. However, he was cautioned that employees who are sick are required to call in before their shift commences. The incident was recorded in the letter of August 28, 1996.

Mr. Clark said that the issue had to do with the obligation of employees to report intended absences due to illness in advance of their starting time. He said that during the meeting a distinction was made between an intended absence caused by sickness and coming late. He said it was made clear to the grievor that he continued to face termination if he reported late and that it was necessary for him to plan for bridge traffic, accidents and delays and that, while the Employer expected him to phone in when he anticipated being late, phoning in would not excuse lateness. H. Clark said that he emphasized to the grievor that he had received his last chance on the basis of his past record and that he would be dismissed if there was a further incident of lateness. He quoted the grievor as having said that it was "pretty self-explanatory" that he would be fired if he was late again.

Mr. Clark said with respect to the incident giving rise to the grievor's dismissal that he received a telephone call about 10:00 a.m. on September 9, 1996 from Mr. Land, who informed him that the grievor's supervisor, Mr. Legge, had received a telephone call from the grievor at 6:50 a.m. saying that he was stuck in traffic and would be late. He said that Mr. Land advised him that another sewer worker, Joella Brown, had arrived at work in advance of the start time. The significance of that fact was that the Employer was of the understanding that Ms. Brown lived further away from work than the grievor and that she was also required to travel over the Port Mann Bridge to get to work.

In his evidence, the grievor, apparently for the first time, advised the Employer that he in fact lived beyond Ms. Brown. The Employer's understanding was based upon what it believed to be the grievor's place of residence. In particular, the Employer believed that he lived in Langley relatively close to the 200th Street access to the freeway leading to the Port Mann Bridge. The grievor indicated that he actually lived at ### King Street in Fort Langley and had lived there for five years. His access to the Port Mann freeway from the King Street address was at 232nd Street access. He said that his route into work took him past the residence occupied by Ms. Brown, who also used the 232nd Street access. He said that he passed in front of her residence each morning coming to work and he could tell if she had left before him from the presence or absence of her vehicle in the driveway of her residence.

I repeat, the Employer began these proceedings with the understanding that the grievor resided off the 200th street access.

I note further in that regard that in all of the letters written to the grievor commencing on May 29, 1995 and ending with his dismissal on September 10, 1996, the address to which the letters were addressed was 19630 - 86th Avenue in Langley, an address which is in the vicinity of the 300th street access. The implication is that in the 15 months over which he was receiving letters addressed to him at that address he did not find it necessary to correct the Employer's records. On his evidence in these proceedings that he had lived on King Street for five years, he had resided there since early in

1993, two years before the first of the series of letters commencing with the May 29, 1995 letter.

In any event, returning to the evidence of Mr. Clark, he said that in the telephone call he reminded Mr. Land of the grievor's discipline record and the fact that he had been put on notice that any further lateness would result in his dismissal. He said that he urged Mr. Land to keep that fact in mind when he reviewed the circumstances. Mr. Land gave evidence and confirmed the evidence of Mr. Clark with respect to the meeting that gave rise to the letter at July 31, 1996 and the 10-day suspension. He then gave evidence about the events of September 9, 1996. Mr. Land said that in response to the discussion with Mr. Clark, he reviewed the grievor's discipline file. His discussion with Mr. Clark, as stated by Mr. Clark, was initiated as a result of a discussion with the grievor's supervisor, Mr. Legge.

Mr. Land said that Mr. Legge advised him that he had received a phone call from the grievor who said he was late because he was tied up in traffic. Mr. Land said that; "We were aware of the fact that he was at the point of termination and we discussed that this would be the day when we looked at a potential dismissal". Mr. Land said that the grievor arrived at his office at approximately 7:15 am. and interrupted a meeting he was having with another employee. He quoted the grievor as saying, "I'm late - am I fired?" Mr. Land said that the grievor explained that he would like to know if he was fired because he didn't want to go out with the crew if that was the case. He said that he told the grievor to join the crew and that the grievor's response was to shake his head and leave the room.

Mr. Land said that he could not recall the grievor having offered a reason for his lateness in his brief discussion with him at 7:15 a.m. He had a recollection of saying to the grievor that Ms. Brown had made it to work on time and that he, Mr. Land, knew that she followed the same route. He recalled that the reply of the grievor was that he had left about five minutes later than Ms. Brown. He said that the grievor's usual demeanour is cocky and that he did not seem disturbed on that occasion

about the prospect of being fired. He described the grievor as being more concerned about spending a day with the crew if he was to be fired and that the grievor reflected what he viewed as a poor attitude

Mr. Land said that he made the decision to dismiss the grievor. He said that the decision was made during a meeting with the grievor that afternoon in which he was represented by Ron Long, the senior shop steward. Mr. Long was quoted as having said during that meeting that an accident on the Port Mann Bridge had delayed traffic and that many employees were late. Mr. Long was not called as a witness but was quoted further as having said that most of the Lower Mainland had been late that morning. However, no evidence was called to support the assertion that an accident had disrupted traffic on the Port Mann Bridge to the point where any employees other than the grievor were late. In any event, in the meeting the grievor's explanation was given, following which there was a brief caucus in which Mr. Land discussed the circumstances with Mr. Legge and Mr. Clark and made the decision to dismiss the grievor.

In these proceedings the grievor repeated his explanation. He said he was late due to a traffic accident on the Port Mann Bridge and that in the meeting Mr. Long had produced records to verify that fact. The records were produced in these proceedings. They disclosed that the accident occurred at 5:51 a.m. and was cleared at 6:07 a.m., for an elapsed time of 16 minutes. There was a further record indicating that the "west bound caution lights were turned off at 6:39 a.m. The Employer doubted the accuracy of that record. The evidence was that, in the ordinary course, caution lights are turned off coincidental with the clearance of the accident. In addition, the Employer produced a record written at 6:10 a.m. to the effect that; "MVA clear. Caution lights off on w/b (Westbound) point". It was an extract from a diary maintained by the operator of the wrecker assigned to the bridge to clear the accident on the day in question. It was a handwritten entry in a time sequential diary and it was improbable on the facts that it was in error.

The grievor, as stated, said in his evidence that for the past five years he had lived at ### King Street in Fort Langley, a location that was farther from the work place than Joella Brown. He said that on September 9, 1996 he left home at 5:45 a.m. He said that when he went by Ms. Brown's residence, he saw that she had already left. Once on the freeway, said the grievor, traffic stopped at 176th Street in the vicinity of the Weigh Scale, at approximately 6:05 a.m. or 6:10 a.m., and remained at a stand still for 15 or 20 minutes. The grievor said that he got to the mid-point of the Port Mann Bridge about 6:30 am. and that traffic was moving steadily. He said that he crossed the bridge and turned off the freeway at the first exit, stopped at a service station, and then made his 6:51 am. telephone call to Mr. Legge. In short, on his evidence, it took him 22 minutes to travel from the centre of the bridge to the Brunette exit and make his telephone call. He arrived at work 19 minutes later at 7:10 a.m.

The grievor denied that he had made his telephone call from the Weigh Scales. He said that on a prior occasion he had checked and discovered that there was no pay telephone at that location. The evidence was that, at least at the time of the hearing, there was a pay phone at that location. The only evidence as to whether a telephone existed at the time was that of the grievor. In seeking to explain why he had checked to see if there was a telephone at the weigh Scales, the grievor said that he was checking in order to know where a phone could be found if in fact he was ever tied up in traffic and needed to report in. The implication in that aspect of his evidence was that Mr. Legge must have been wrong in his recollection because no phone existed at the Weigh Scales.

I pause to observe that the grievor gave the impression in giving his evidence that he fashioned explanations to fit the facts. His explanation with respect to the presence of a telephone at the Weigh Scale was an example. Aside from a certain glibness which was evident in his responses, the grievor's explanation was incongruous. The explanation began in the context of whether he had told Mr. Legge that he was telephoning from the Weigh Scale. His reply was that there was no telephone at

the Weigh Scale on the north side of the freeway headed west, although there was one at the Weigh scale on the south side headed east. It then became necessary to explain his knowledge of those facts and he offered the explanation that he had checked the location to determine if there was a phone. That led to the question of why he checked and he said it was because he wanted to know if there was a phone at that location in the event he were to become stalled in traffic and had to place a call to the Employer.

Previously the grievor had said that he had acquired a cellular telephone some months earlier to facilitate contacting the Employer if he were to be caught in traffic. When asked why he did not use his cellular telephone, he said that he did attempt to use it but discovered that it had been left on all night and that the battery was flat. None of those answers were proven to be untrue. However, I accept the evidence of the Employer that the grievor's statement to Mr. Legge in his telephone call was that he was stuck in traffic and was calling from the Weigh Scales. Accepting that fact, his replies with respect to the presence or absence of a telephone at the Weigh Scales was inconsistent with his statement to Mr. Legge. The significance of where the call was made is that if the grievor had placed his telephone call from the Weigh Scales at 6:51 a.m., it would indicate that he was running late in his trip to work regardless of any stall in traffic occasioned by an accident that had been cleared at 6:07 a.m., approximately 45 minutes before the call.

Returning to the evidence of the grievor, he said that he normally left home at 5:45 to 5:50 am. and arrived at work at 6:45 to 6:50 a.m. at the latest. He said that he had changed his practice with respect to leaving for work as a response to the 10-day suspension imposed on him for being late. Prior to that time, said the grievor, he normally left for work from "5:50; 5:55, 6ish". After he received the 10-day suspension he started to leave at "20 to, [or] quarter to 6, so as to arrive at work on time". He said that he spoke with Ms. Brown that morning and asked her if she "had seen the truck", being a reference to the truck that had been involved in the accident on Port Mann Bridge. He

quoted her as having said that it was one-lane traffic. He said that she told him that, “She just squeaked in under the wire - just before 7”. He said, “She is usually there ridiculously early”. When pressed, he elaborated and said, “she is there at 6:30 am. to 6:40 a.m. - ridiculously early”.

Mr. Legge gave evidence about the morning of September 9, 1996 and said that he was at work when he received the call at 6:51 a.m. from the grievor. He said the grievor told him that he was “stuck in traffic” and that he was “out (of his vehicle) at the Weigh Scale using the phone”. He said he turned around and saw Joella Brown standing there. He didn’t speak to her at the time. He said that she lived off 232nd Street and that the grievor lived off 200th Street. (The grievor had not given evidence at that stage and had not informed the Employer that he did not live at the address indicated in the letters sent to him.

Mr. Legge said that he spoke with Ms. Brown by telephone later in the morning. He said that she told him that she had left for work at 6:00 a.m. and had arrived at 6:40 a.m., 20 minutes ahead of start time. He said that she described traffic as being slow and steady. Mr. Legge recalled in the context of the grievor’s explanation that when he discussed his attendance problems with him in the meeting on May 23, 1996, the grievor said that traffic, including accidents on the Port Mann Bridge, delayed him on occasion and made him late. Mr. Legge said that he told the grievor to “plan to be at work earlier”, and that he emphasized that traffic accidents and traffic problems were not acceptable excuses.

Mr. Legge said that in a later meeting, on July 3, 1996, he had received a telephone call from the grievor at 6:55 a.m. to say that he was caught in traffic because a car had gone into the ditch. He said he spoke to him on that occasion and told him that Randy Block, who lived in Abbotsford, and Ms. Brown, who came from Langley, had made it to work on time that day on the same route and that traffic was fine. He said he informed the grievor that he should be leaving earlier in the morning to avoid traffic problems and that if others could make it on time, so could he.

III - Position of the Employer

The submission of the Employer was that reporting late for work is conduct deserving of discipline in the sense contemplated in Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union. Local P-162 [1977] 1 C.L.R.B.R. 1 (Weiler). Reporting late, like any other absence, must be authorized, said the Employer. It can be authorized in advance of the lateness or afterwards if an explanation is offered that the Employer accepts. In this case the lateness of the grievor was not authorized in advance and, said the Employer, his explanation was not acceptable. In particular, said the Employer, the explanation was one the grievor had offered on prior occasions. It had been specifically rejected by the Employer. The remedial path of progressive discipline had been followed, said the Employer and that the grievor could have been under no illusion with respect to what would happen if he reported late again. The grievor had conceded as much in discipline meetings, said the Employer, and there was no basis for concluding that dismissal was excessive.

The Employer cited Alcan Smelters and Chemicals Ltd and Canadian Association of Smelters & Allied Workers. Local 1 (Oliviera Arbitration), February 12, 1993, unreported; Re Culinar Foods Inc. and American Federation of Grain Millers. Local 242, (1995) 48 L.A.C.(4th) 99 (Brand); MacMillan Bloedel Limited, Cameron/Franklin River Division and IWA-Canada, Local 1-85 (Preusche Grievance), July 20, 1989, unreported (Bird); and Re Cominco and United Steelworkers America. Local 480, (1996) 60 L.A.C. (4th) 246 (Bird).

The Employer cited the Alcan decision for the proposition that lateness constitutes a valid ground for the imposition of discipline. It relied on Culinar Foods as support for the principle that a culminating incident of lateness, in the context of the principles of progressive discipline, can amount to just cause for dismissal. In terms of the implications of a failure to respond to corrective discipline, the Employer cited the decision of Arbitrator Munroe in MacMillan Bloedel for the following comments on pp. 7-8:

Taken as a whole, the grievor's disciplinary history reveals someone unwilling to accept the responsibilities and obligations of gainful employment that the vast majority of employees would regard as basic to the employment relationship. I must frankly say that the company has been enormously patient with the grievor. certainly, the company has followed the path with the grievor. Certainly, the company has followed a path of corrective discipline: by trying earlier and more moderate forms of discipline which have not proven successful in solving the problem.

The decision of Arbitrator Bird in MacMillan Bloedel was relied on for similar observations where the grievor was dismissed for a culminating incident of lateness following a history of progressive discipline that failed to redress the grievor's conduct, Finally, the Employer relied on the decision of Arbitrator Bird in Cominco Ltd. for his analysis of the culminating incident doctrine and the implication that a pattern of persistent failure to respond to escalating penalties will constitute just cause for dismissal.

IV - Position of the Union

The position of the Union was that, the grievor, on his undisputed evidence, had left home in sufficient time to make the journey to work, including an allowance for the possibility of traffic delay. The Union pointed out that witnesses called by the Employer had conceded that accidents do happen and that every employee, at one time or another, reports late because of extraordinary traffic conditions. On the facts, said the Union, the Employer had failed to prove that the grievor's lateness was conduct deserving of discipline and had therefore failed to prove a culminating incident which would justify the dismissal.

In support of its submissions the Union cited Re Houston Forest Products Co. and. IWA, Local 1-424, (1984) 17 LA.C. (3d) 211. (Germaine); Moan Smelters and Chemicals Ltd. and Canadian Association of Smelter & Allied Workers. Local 1 (Oliviera Grievance); Pinette & Therrian Mills Ltd.

And IWA, Local 1-425 (Gonyer Grievance), March 7, 1985, unreported (Brokenshire); Mostad Publications Ltd. and GCUI, Local 525-M (Reddick Grievance), January 15, 1995, unreported (Taylor); and Re Canada Post Corp. and CUPW (Gauthier), (1990) 18 L.A.C. (4th) 64 (Swan).

Houston forest Products was relied on for the proposition that the essential question in a dismissal for a culminating incident of lateness is whether, on the particular facts, the employment relationship can be restored. The union relied on Alcan for the proposition that a culminating incident of lateness will not support dismissal unless the facts invite the conclusion that the grievor cannot be relied on to report on time in the future. There it was concluded on p. 21 that the culminating incident did not invite the conclusion that “the grievor [was] not capable of meeting and maintaining an acceptable standard of conduct”.

The Union relied on the decision in Pinette & Therrien Mills for the analysis commencing on p. 9 in which Arbitrator Brokenshire accepted the assertion that a culminating incident of lateness had occurred beyond the control of the grievor. On p. 13 the arbitrator wrote:

If the incident that gave rise to the discharge had been deliberate absence or lateness through conditions within reasonable control of the Grievor, the penalty of discharge would be just and equitable.

He went on to note that he accepted the grievor’s assertion that he was late in circumstances beyond his reasonable control. The Union noted a similar result in the decision of Arbitrator Taylor in Mostad Publications. In that case the arbitrator accepted that a culminating incident of absence without permission arose by error. Finally, the union relied on the decision of Arbitrator Swan in Canada Post for a similar proposition.

The essence of the Union’s position was that lateness can be seen as culpable or non-culpable de

pending on the particular facts and that a non-culpable act of lateness will not support the imposition of discipline, regardless of the prior discipline record of the employee and regardless of whether the application of progressive discipline would justify the dismissal of the employee in the face of a culpable act of lateness.

The position of the Union was that the facts in this dispute support the conclusion that the Employer failed to establish on a balance of probabilities that the actions of the grievor were within his reasonable control on the morning in question and the conclusion must be that his lateness was non-culpable because it did not result from a failure on his part to take the steps necessary to ensure that he arrived at work on time. The Union argued that the precautions taken by the grievor would have seen him arrive at work with time to spare if it had not been for the intervening accident that delayed traffic. Its position was that the Employer was not at liberty to reject a valid explanation for lateness and, in effect, to imply culpability in an incident which was clearly non-culpable.

V - Decision

On the facts, the grievor was late for work without authorization and without a valid excuse. The incident on the day in question could not be considered in isolation from the grievor's history. That is, he gave the same explanation he had given in the past that the Employer had rejected as unacceptable because it failed to accommodate the delays the grievor was likely to encounter on the Port Mann Bridge route he followed to work. On the facts, the question of when the grievor left for work was not shown by the Union to be relevant. The fact is that he did not leave in sufficient time to accommodate an accident on the Port Mann Bridge that stopped traffic for approximately 15 minutes.

That is not to say that lateness due to a major disruption in traffic that closed the bridge or the

freeway for a significant period would not be a valid excuse. If, for example, the Union had been able to prove the assertion that large numbers of persons, including other employees, had been late that morning, it may have pressed the Employer to a different conclusion or triggered a different result in these proceedings. That is, it was not open to the Employer to impose on the grievor an obligation to report for work regardless of the circumstances. However, the grievor was a prisoner of his past performance and could not excuse lateness on the basis of the very event that he had been repeatedly warned he would be required to accommodate.

It is correct to say that the onus on the Employer was to prove conduct deserving of discipline and to prove further that the conduct in question constituted just cause for the grievor's dismissal. That legal burden did not shift to the grievor at any stage of the proceedings. However, the evidentiary burden of providing an explanation for an unauthorized absence from work did repose on the grievor. In that context, lateness that has not been approved is an unauthorized absence and it is for the employee concerned to justify it. Here the justification offered by the grievor consisted of an explanation that the Union presented as constituting proof that the lateness was beyond the grievor's control. However, the facts do not support that conclusion.

It was well within the control of the grievor to determine when he would leave for work in order to report on time. On his evidence, Ms. Brown had left five minutes earlier than him. I digress to note that Ms. Brown was not called as a witness by either party. Hearsay evidence was given by Mr. Legge on behalf of the Employer with respect to a discussion with her that day, and, as stated, the grievor gave hearsay evidence of a discussion with her. The submission of the union was that the hearsay evidence could not be relied on to contradict any facts given in direct evidence, including the evidence of the grievor. That position was of significance because the comments attributed to Ms. Brown by Mr. Legge were inconsistent with the facts asserted by the grievor.

But, ignoring the contradictory hearsay evidence adduced by the Employer, Ms. Brown was present at work, at the latest, at 6:51 a.m. Hence, on his own evidence, if the grievor had left at 5:40 a.m. instead of 5:45 a.m., he would have arrived on time. That conclusion is based on his evidence that he left five minutes after Ms. Brown. He did not indicate how he gained knowledge of when Ms. Brown left but the inference to be drawn was that he learned it in his discussion with her, the implication being that she left five minutes before he passed her home, thus inviting the conclusion that if he had left his home five minutes earlier he would have arrived at work at the same time she did.

I agree that the arbitral authorities prohibit the use of hearsay evidence to contradict direct evidence given on vital issues of fact. Here the question, apart from the contradictions in the hearsay evidence, is whether the version of events given by the grievor support his assertion that his lateness was due to circumstances beyond his control. The principles that govern the reception of hearsay evidence do not support the conclusion that direct evidence of a fact that is in dispute must be accepted as correct. Evidence given by witnesses with respect to disputed facts is weighed on the basis of the principles defined in Faryna v. Chorny, [1952] 1 D.L.R. 354 (B.C.C.A.). The test was addressed on p. 357 in the following terms:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the 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.

The evidence of the grievor invites the conclusion that he was not being frank with respect to the events of that morning. His assertion that he left sufficient time to accommodate traffic exigencies is not consistent with the evidence. That is, accepting as I do the evidence that he told Mr. Legge at

6:51 a.m. that he was at the Weigh Scales, I conclude that he was late for work at that stage and that the traffic accident, if it had any influence on his progress, was not the cause of his lateness. His evidence that he left for work at 5:45 a.m. is doubtful if it is accepted that he telephoned from the Weigh Scales more than an hour later at 6:51 a.m. However, even accepting his evidence that he usually left for work at 5:40 or 5:45 a.m.; that he left at 5:45 a.m. in the morning in question; and that he was five minutes behind Ms. Brown, the conclusion was that if he had left at 5:40 a.m. instead of 5:45 a.m. he would have been at work at the same time as Ms. Brown.

In any event, there is an onus upon an employee reporting late for work to provide an explanation for her or his lateness. That onus weighs more heavily with respect to employees who have accumulated significant disciplinary records for lateness to the point of having received a caution that further incidents of lateness will result in dismissal. Here the onus upon the grievor was to offer an explanation for his lateness that supported the conclusion that his failure to attend on time arose as a result of circumstances beyond his control. His explanation fell far short of meeting that requirement.

The implication in the position of the grievor was that because he could establish that an accident had actually occurred that temporarily closed bridge traffic, his lateness must be seen as being beyond his control. It was, with respect, a naive position for the grievor to take. In effect, he was saying that because he was able to prove that, on this occasion, an accident had actually occurred, that fact should excuse his lateness even though he had been cautioned to leave sufficient time to accommodate that very circumstance. The facts were that the accident stopped traffic for a 15 minute period that ended at or before 6:10 a.m. The further fact was that Ms. Brown, following the same route in a normal routine, was at work on time. The grievor failed to establish that the accident and the consequential delay were extraordinary events that were beyond his reasonable anticipation.

In summary, for the reasons given, the reliability of the grievor's account of events was in

doubt, and, in any event, accepting it as accurate, it did not support the conclusion that he had left work in time to accommodate the possibility of the very event that he had relied on to explain his lateness in the past. The Employer had cautioned him that he could not avail himself of that excuse in the future. On those facts, nothing supported the conclusion that the grievor could be relied on to regularly attend work on time in the future. Nor were there any other facts developed which would mitigate the seriousness of the grievor's misconduct. In the result, the grievance is dismissed.

DATED at the city of Prince George, in the Province of British Columbia, this 16th day of April, 1998.

(Signed)

H. ALLAN HOPE, Q.C. - Arbitrator