

11.4 THEFT

Historically, arbitrators have viewed theft as being among the most egregious forms of misconduct, one which justifies discharge because it destroys the trust which is fundamental to the employment relationship. The actual value of the stolen property, accordingly, was often considered to be of little significance in the determination of whether just cause exists or in the choice of penalty. However, many recent decisions suggest that, while theft continues to be considered a very serious offence, dismissal does not automatically follow. In deciding whether to uphold a discharge, the arbitrator should inquire whether the trust relationship between the employer and the employee has been irremediably destroyed. The particular facts of each case — including the nature of the business, the level of employee supervision, the seriousness of the offence, the admission or non-admission of wrongdoing, the existence of genuine remorse, and the credibility of the grievor — will all affect the outcome of the inquiry. An example of the modern approach is *Livingston Distribution Centres Inc. and Teamsters, Local 419* (1996), 58 L.A.C. (4th) 129 (MacDowell).

Some arbitrators, taking this modern approach still further, suggest that in deciding whether discharge is appropriate, the interest of the employer in deterring acts of theft should be balanced against the entitlement of individual employees to have their conduct assessed on the basis of whether the employment relationship is capable of being restored. In this analysis, the nature of the employer's business, including its vulnerability to theft, is a major factor. A leading example of such an approach is *MacMillan Bloedel Ltd. and I.W.A., Local 1-85* (1993), 33 L.A.C. (4th) 288 (Hope).

The decision in *Richardson Terminals Ltd. and T.C.U., Lodge 650* (1998), 85 L.A.C. (4th) 104 (Shime) provides a comprehensive summary of the arbitral treatment of theft in recent cases. The arbitrator concluded that the trend is to reinstate an employee found to have committed theft if the offence was an isolated incident, the employee promptly admitted his or her misconduct when confronted by the employer, and upholding the discharge would result in "grave and serious economic hardships". Moreover, while acknowledging that a number of arbitrators are of the view that the value of the items stolen is irrelevant, Arbitrator Shime concluded that the tendency in recent cases has been to reinstate the grievor, subject to an unpaid suspension, if the goods are of "minimal or inconsequential value". "These acts", he opined, "unlike acts where items of substantial value are taken, are not considered by arbitrators to be so harmful to the employment relationship that discharge is the inevitable result, particularly where there is some indication that corrective action may resolve the problem" (at p. 118).

Some arbitrators have extended this individualized approach to the retail food industry, which has historically maintained a policy of zero-tolerance for

theft by employees. For example, in *New Dominion Stores and C.A.W., Local 414* (2002), 111 L.A.C. (4th) 265, Arbitrator Herlich rejected the argument that the “automatic arbitral penalty” for theft in the industry is discharge, holding that the employer’s legitimate interest in deterrence “must be balanced against what is otherwise just and reasonable in relation to particular employees” (at p. 274). At the same time, the decision of Arbitrator Chertkow in *Canada Safeway Ltd. and U.F.C.W., Local 2000* (2002), 108 L.A.C. (4th) 161 indicates that the traditional approach to theft in a retail food setting continues to be influential.

In *1293446 Ontario o/a Comfort Suites and U.F.C.W., Local 206* (2004), 127 L.A.C. (4th) 436, Arbitrator Trachuk accepted the proposition that the doctrine of “recent possession of stolen goods” can be applied by arbitrators to assist in determining whether an employee has committed theft. This common law doctrine, which is frequently applied in criminal theft cases, permits an adjudicator to draw the common-sense inference that a person found in possession of recently stolen goods is the person who stole them, or at least is a party to the theft. The doctrine is subject to the qualification that it may not be reasonable to draw such an inference where the person in possession of the goods provides another plausible explanation.