

H E A D N O T E

CAAT

OPSEU # 87X41

OPSEU LOCAL 0556

ARTICLE(S)

RAI, Savita (OPSEU) vs. George Brown College  
Award dated 21 October 1988 (Jane Devlin)

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The Board finds the College had just cause for dismissal of the grievor, a teaching master, for work performance problems dating from December 1983 until October 1987, related to alcoholism. The Board notes differing view of arbitrators concerning post discharge evidence of rehabilitation on the issue of just cause. The Board rejected both views and followed Cooke and Ministry of Labour, a GSB case, 22 LAC (2d)1, that post discharge evidence is only relevant to whether the Board should exercise its remedial jurisdiction in the event it finds just cause. In this case, the Board finds the grievor has taken a first step towards rehabilitation, but she has taken this step before without success on several occasions. Furthermore, in this case the grievor had not accepted responsibility for her alcoholism as late as August 1988, ten months following her dismissal. The Board declines reinstatement in spite of 20 years of excellent service by the grievor before problems started in 1983. Dismissal upheld.

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IN THE MATTER OF AN ARBITRATION

B E T W E E N:

GEORGE BROWN COLLEGE OF APPLIED ARTS  
AND TECHNOLOGY

- AND -

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

GRIEVANCE OF SAVITA RAI

BOARD OF ARBITRATION:

JANE H. DEVLIN  
RENE ST. ONGE  
GERRY CAPLAN

CHAIRMAN  
COLLEGE NOMINEE  
UNION NOMINEE

F. G. HAMILTON for the College.

R. N. NELSON for the Union.

AWARD

The Grievor, Savita Rai, was discharged from her employment as a Teaching Master with the College on October 20, 1987 and the reasons for discharge are contained in the following letter from J.G. Turner, Vice-President, Administration:

"

...

October 19, 1987

Ms. Savita Rai  
133 Timberbank Blvd.  
Agincourt, Ontario  
M1W 2A2

Dear Ms. Rai:

On Friday, October 16, 1987, you arrived at the College in a state in which you were unable to function in a normal manner, apparently as a result of alcohol consumption. So severe was your condition that it was necessary to physically assist you from the Staff Lounge to the Health Centre.

For several years, the College has attempted to assist you in resolving your personal problem without success. You were warned that any repetition of your inappropriate behaviour would result in the termination of your employment.

In view of Friday's incident, I have no alternative but to terminate your employment with the College effective Tuesday, October 20, 1987.

You will be paid three month's salary in lieu of notice.

Yours truly,

J.G. Turner  
Vice-President  
Administration

:e

cc: D. Light  
S. Layton  
E. Lord  
R. Santin  
K. Singh

..."

Mrs. Rai's seniority with the College dates from 1963 and prior to 1983, it would appear that there were no complaints about her teaching performance and that her work record was excellent.

For purposes of the grievance before the Board, the first significant event occurred in December of 1983. At that time, the Grievor was teaching mathematics at the College's St. James Campus and Dr. Shirley Holloway was the Chairman of the Mathematics and Science Department. On December 16, 1983, Dr. Holloway met with the Grievor and with Eric Lord and Amy Thornton, the President and Chief Steward of the academic bargaining unit, respectively. The purpose of the meeting was to discuss a number of complaints which had come to Dr. Holloway's attention concerning the Grievor's teaching performance. These complaints apparently emanated from students and were conveyed to Dr. Holloway by Bob Kotyk, the Chairman of Commercial Studies/Secretarial Arts. The complaints involved matters such as lateness, erratic attendance at class, forgetfulness and the Grievor discussing her personal problems with students during class time. Dr. Holloway testified that the substance of the complaints was discussed at the meeting of December 16th, that the discussion was productive and that it was agreed that the Grievor would attempt to make a fresh start.

In January of 1984, a student complained that the Grievor did not attend a class and in late February, Dr. Holloway received another memorandum from Mr. Kotyk containing concerns similar to those expressed previously. For the first time, there was also a suggestion that a student had smelled alcohol on the Grievor's breath during class. Mr. Kotyk concluded his memorandum to Dr. Holloway by requesting that Mrs. Rai not be assigned to instruct Secretarial Arts students in the future.

Dr. Holloway forwarded a copy of Mr. Kotyk's memorandum to the Grievor and suggested that the Grievor seek professional counselling if her instructional problems were the result of personal difficulties. Dr. Holloway also indicated that teacher training was available through the Staff Development Department and Dr. Holloway personally offered to assist the Grievor in any way she could.

In early March of 1984, Dr. Holloway received a further memorandum from Mr. Kotyk and in discussing the complaints raised in this memorandum with the Grievor, Mrs. Rai suggested that she was not being given a fair opportunity to defend herself and that if students had complaints, they should be made to her directly. Mrs. Rai reiterated this view in a memorandum to Dr. Holloway in early March and also requested that Dr. Holloway, Mr. Kotyk and Mr. Lord attend her classes in order to observe her teaching first hand. For the information of Dr. Holloway, the Grievor also attached to her memorandum, a copy of

an evaluation which had been conducted of one of her classes on February 28, 1984. The evaluator was extremely complimentary about the Grievor's teaching ability and rated the lesson as excellent.

Dr. Holloway did not actually have an opportunity to observe a class taught by the Grievor because on March 20, 1984, the Grievor injured her ankle and was off work for the balance of the academic year.

In the fall of 1984, there were a number of occasions on which the Grievor was late or absent from class on short notice. In mid-December, Dr. Holloway received a complaint that the Grievor had been late for class and that when she did arrive, she had difficulty standing. Dr. Holloway testified, however, that she was unable to locate the Grievor that day and so did not have an opportunity to verify her condition. In any event, in mid-December, Dr. Holloway was also advised that there had been other occasions of absence from class of which she was not previously aware and that the Grievor was alleged to have given a student credit on a test paper for answers which were incorrect. As a result of these complaints, Dr. Holloway spoke with Mr. Lord who proposed a meeting with the Grievor. Dr. Holloway, however, had some difficulty contacting the Grievor and as the end of term was approaching, the meeting did not actually take place until the new year.

In early January 1985, the Grievor attended a meeting with Dr. Holloway, Mr. Lord and Miss Thornton. Dr. Holloway reviewed the various complaints which had been made and the Grievor indicated that she could not cope with her work as she was experiencing emotional problems. Although the Grievor mentioned that she had recently been divorced, she denied having a drinking problem. In any event, Dr. Holloway testified that she felt that if the Grievor could address her personal problems, she would once again be an effective Teaching Master. As a result, there was some discussion of the Grievor participating in the Employee Assistance Programme. This Programme was the product of an agreement between the College and the Union and is designed to assist employees experiencing health or personal difficulties to identify and resolve their problems. Employees may participate in the Programme voluntarily but, in the event that progress is not made, mandatory conditions may be imposed. In this case, however, no such conditions were imposed at the meeting in early 1985, although all present agreed to assist the Grievor in seeking a solution to her problems.

During January, February and early March of 1985, the Grievor's pattern of intermittent lateness and absenteeism continued and there was at least one occasion on which the Grievor did not attend class and did not notify the College that she would be absent. In addition, on February 25th, the Grievor was discovered asleep in the staff lounge when her class was scheduled to begin and she had to be wakened by other faculty

members. Although the Grievor then went to class, she evidently did not remain there for the entire teaching period.

At approximately 1:00 p.m. on March 8, 1985, Dr. Holloway was advised that a number of students had complained that the Grievor had been fifteen minutes late for class and that when she did arrive, she was staggering and her breath smelled of alcohol. Dr. Holloway proceeded immediately to the Grievor's classroom where she found Mrs. Rai sitting at the side of the room, propped on one side of her chair. She was not teaching and, according to Dr. Holloway, she looked unwell. Dr. Holloway then went in search of Mr. Lord or Miss Thornton but as neither was available, she contacted Ray Santin, the Dean of the Academic Division and advised him that she intended to remove the Grievor from class. As Dr. Holloway returned to the Grievor's class, she found the students putting on their coats and observed the Grievor discussing her personal problems with them. After the students left, Dr. Holloway suggested to the Grievor that she was drunk, which the Grievor did not deny. Dr. Holloway then instructed the Grievor not to return to active teaching duties the following week and advised her that she would be considered on sick leave.

Following the incident of March 8, 1985, another Teaching Master was assigned to the Grievor's classes and the Grievor's request to return to work was denied until such time as she could resolve her personal problems. The College did,

however, give the Grievor permission to use her office on campus during her absence.

On April 1, 1985, Malcolm Sykes, the College Director of Human Resources wrote to the Grievor reviewing events to date and outlining the nature of the Employee Assistance Programme. Mr. Sykes advised the Grievor that as repeated attempts to assist her had been unsuccessful, it had become necessary to initiate mandatory conditions. In this regard, Mr. Sykes indicated that an appointment had been made for the Grievor to see Dr. Ian Hector, the College's Medical Consultant on April 25th and that Miss Thornton was prepared to accompany the Grievor to that appointment. Until April 25th, the Grievor was to be considered on leave of absence with pay and thereafter, the College would review the situation based upon an assessment from Dr. Hector. Mr. Sykes further informed the Grievor that she was to refrain from using her office on campus until further notice. (Evidently some Teaching Masters were disturbed by the fact that the Grievor was using her office on a regular basis and yet was not required to perform teaching duties.) Finally, the Grievor was advised that failure to comply with the conditions set out in the letter would leave the College no alternative but to terminate her employment on the grounds that she was unable to carry out her assigned duties and would not engage in a remedial programme to assist in her return to work.

The Grievor evidently attended the appointment with Dr. Hector and following an automobile accident in the spring of 1985, she remained on sick leave for the balance of the academic year. In July of 1985, the Grievor was advised that the mandatory conditions previously imposed were to be removed and that she was to return to regular teaching duties in September of that year. The Grievor was also informed that Miss Thornton and Mr. Sykes, as representatives of the Employee Assistance Programme, would continue to monitor her performance and that she was expected to conduct herself in a professional manner. In the event that the Grievor did not do so, she was advised that the College would be compelled to terminate her employment.

On July 31, 1985, Mr. Santin wrote to the Grievor to inform her that when she returned to work in September, she would be assigned to the Casa Loma campus. The Grievor objected to this transfer, however, and testified that, in her opinion, it simply created additional stress. Mr. Santin, on the other hand, testified that he believed that the stress associated with such a transfer was offset by the fact that it would provide the Grievor with an opportunity to make a fresh start.

In September of 1985, John Taylor was the Chairman of the Liberal Studies Department at the Casa Loma campus and as such, he was responsible for the Upgrading Department to which the Grievor was assigned. In this Department, the students range in age from 18 to 55 and the curriculum is delivered by

individual learning module. Classes are generally small; the students work at their own pace and the Teaching Master acts primarily as a facilitator. As the provincial government sponsors some students, there is a requirement for Teaching Masters in the Upgrading Department to attend progress meetings with Manpower Counselors to review student performance. An assignment to the Upgrading Department is not generally considered to be onerous for a Teaching Master and it is for this reason that Mr. Santin testified he chose this particular assignment for the Grievor.

In mid-October, 1985, Mr. Taylor learned that the Grievor had been late for four classes that month as a consequence of which he instructed her to report daily to Kaye Singh, the Mathematics Co-ordinator. The Grievor testified that she found this to be a humiliating experience and caused her to believe that, despite previous assurances to the contrary, she would not be treated like other faculty members.

In the fall of 1985, Mr. Taylor testified that he heard a number of complaints regarding the Grievor's teaching performance and in December, he attended a meeting at which he found the Grievor to be disoriented and he detected an odour of alcohol on her breath. When he questioned the Grievor as to whether she had been drinking, the Grievor replied that she had eaten some strong Indian food.

In early 1986, Mr. Taylor forwarded a memorandum to Mr. Santin outlining his concerns with regard to the Grievor. The Union, however, objected to the content of this memorandum as a result of which the College agreed to remove it from Mrs. Rai's personnel file. For this reason, the Board declined to allow the memorandum to be introduced into evidence.

On March 5, 1986, a meeting was held involving Mr. Santin, Mr. Taylor, the Grievor and Miss Thornton. At the meeting, the College reviewed its concerns and the Grievor was advised that the College intended to impose a period of "close monitoring". This was to take the form of observation of the Grievor's classroom performance on the part of Mr. Taylor and, in addition, discipline was to be imposed to address incidents of lateness, absenteeism and perceived incapacity on the part of the Grievor to carry out her teaching duties. This was to involve a five-step disciplinary process which would culminate in dismissal. The course to be followed by the College was also confirmed in a memorandum to the Grievor from Mr. Santin dated March 10, 1986.

With regard to the monitoring of the Grievor's classroom performance, Mr. Taylor prepared two reports which were introduced into evidence. The first report is dated April 7, 1986 and was based upon Mr. Taylor's observation of seven classes taught by the Grievor. The major concern expressed in the report related to the Grievor's tendency to publicly criticize and

embarrass students. The Grievor testified that she disagreed with Mr. Taylor's criticism and in respect of one particular incident, suggested that where lateness is a recurring problem, it may be appropriate to challenge a student in front of other members of the class.

The second monitoring report is dated May 26, 1986 and was based upon Mr. Taylor's observation of six classes conducted by the Grievor. Mr. Taylor noted that very loud and public interaction with students continued to occur in approximately one-half of the classes which he observed. During the remaining classes, Mr. Taylor found that the Grievor was making a conscious effort to maintain a quieter presence in the classroom. Mrs. Rai also disagreed with the criticism made by Mr. Taylor in this report and, in fact, suggested a number of times in her evidence before the Board that Mr. Taylor engaged in a pattern of personal harassment against her.

The first step in the disciplinary process outlined to the Grievor in the meeting of March 5, 1986 was imposed on May 7th of that year. At that time, the Grievor received a disciplinary memorandum as a result of being discovered asleep in the staff lounge at 9:00 a.m. when she was scheduled to be in class. Although the Grievor admitted falling asleep in the staff lounge, she advised Mr. Taylor that she had been up all night trying to place a long distance call to her mother in India who was ill.

Subsequently on May 13, 1986, Mr. Taylor issued a memorandum to the Grievor regarding a number of absences in April and early May and noting a pattern of Friday absenteeism. The Grievor was advised that in future, all absences due to illness would have to be substantiated by a medical certificate. Although there were three further absences in May for which Mr. Taylor requested certificates, he testified that his request was complied with in respect of some, but not all, absences.

The second disciplinary incident occurred on May 21, 1986 at which time the Grievor failed to attend a scheduled progress meeting as a result of which, she was suspended for one day with pay. In this instance, the Grievor responded with a memorandum to Mr. Taylor indicating that she had met with Miss Thornton on May 21st and had simply forgotten that a progress meeting had been scheduled. She also expressed the view that other Teaching Masters had missed meetings, that no action had been taken against them and that she was being harassed.

On June 13, 1986, the Grievor was suspended for one day without pay, again for failing to attend a scheduled progress meeting. In respect of this incident, the Grievor testified that she understood that Mr. Taylor was to be away on the day of the meeting and that she was not informed that another faculty member would be taking his place. The Grievor also testified that alcohol played no part in this or any of the other incidents for which the College imposed discipline. Although the Grievor

disagreed with the action taken in each case, she conceded that no grievances were filed.

Miss Thornton, however, did take issue with the action taken by the College in the spring of 1986 and outlined her concerns in a memorandum to Mr. Santin. Miss Thornton suggested to Mr. Santin that an agenda had been set for the Grievor's dismissal in June of that year and that the College was actually harassing Mrs. Rai rather than assisting her. At the hearing, Miss Thornton also testified that if the College is aware of an employee's referral to the Employee Assistance Programme, discipline is generally held in abeyance. In addition, Miss Thornton produced a document entitled Employee Assistance Programme, which is dated 1986 and which provides that upon formal referral to the Employee Assistance Programme, normal disciplinary procedures are suspended. Finally, Miss Thornton testified that in the spring of 1986, she accompanied Mrs. Rai to meetings with the College in her capacity as a representative of the Employee Assistance Programme and not as a Union Steward.

During the summer of 1986, Alan Quaile, a Union representative who was assigned to assist the Grievor during Miss Thornton's absence on vacation, approached Mr. Taylor and suggested that monitoring the Grievor's classes was stressful for her and he requested that it be discontinued. Following discussions with Mr. Santin, Mr. Taylor acceded to Mr. Quaile's request. During the fall of 1986, the Grievor was not involved

in any incidents warranting discipline and again at the request of Mr. Quaile, the College advised the Grievor that minor infractions in the areas of punctuality and attendance would not result in the College invoking the next step in the disciplinary process. Mrs. Rai was reminded, however, that more serious performance deficiencies would have that effect.

On March 11, 1987, Mr. Taylor received a call to the effect that the Grievor was in her classroom and in some distress. Mr. Taylor proceeded to the Grievor's class where he found Mrs. Rai sitting in chair, bleeding from the knee. She was disoriented and Mr. Taylor testified that he detected a strong odour of alcohol on her breath. The Grievor was assisted to the Health Centre and as a result of this incident, she was suspended for two days without pay.

The Grievor testified that on the morning of March 11, 1987, she slipped on some ice in the parking lot and that she did not have time to go to the Health Centre, as she would have been late for class. The Grievor denied drinking that morning although she conceded that she may have been suffering the effects of drinking the previous evening. In any event, the Grievor testified that the real cause of her distress on the morning of March 11th, was the fact that she had been informed of a lawsuit against her for two million dollars as a result of a car accident in which she had been involved two years previously.

On March 23, 1987, Sally Layton, who succeeded Mr. Sykes as Director of Human Resources, advised the Grievor that she was required to attend a three-week residential programme at the Addiction Research Foundation. The programme was to begin on April 19th and during the programme, Mrs. Rai was to be considered on leave of absence with pay. Prior to April 19th, the Grievor took vacation for some period and was also given a non-teaching assignment in the Human Resources Department.

The Grievor enrolled in the Addiction Research Foundation programme on April 19th and was discharged for non-participation on April 27th. In particular, the Grievor refused to attend gym sessions; she was late for a number of other sessions and she maintained throughout that she did not have an drinking problem. In respect of her refusal to attend gym, the Grievor testified that she previously suffered an injury to her ankle and would have risked re-injury if she were to be involved in sports. Despite this, however, the Grievor testified that she was advised that her participation was mandatory. The Grievor also explained that having to wait in line at the Income Tax Office to obtain an income tax form caused her to be late for one of the other sessions.

On May 6th, 1987, Mr. Turner wrote to the Grievor informing her that successful completion of the Addiction Research Foundation programme or a similar programme was a condition both of her return to active teaching duties and of her

continued employment. The Grievor was, therefore, suspended without pay effective May 15, 1987.

Sometime subsequent to May 6, 1987, a meeting took place involving Mrs. Layton, the Grievor and a representative of the Union. At the meeting, the Grievor indicated that she did not have a problem with alcohol and that for this reason, the Addiction Research Foundation programme had not assisted her. A discussion then took place concerning other arrangements that might be made to fulfill the conditions of the letter of May 6th. As a result of this discussion, the Grievor was referred to Dr. Hector on June 7, 1987. At that time, the Grievor advised Dr. Hector that she did not suffer from alcohol dependency, nor apparently was she experiencing any other problems for which she required assistance. The Grievor testified that she made these statements as she did not feel comfortable discussing her personal problems with the College's Medical Consultant.

Further discussions then ensued with Mrs. Layton with regard to the means by which the Grievor could satisfy the requirements of Mr. Turner's letter. It was ultimately agreed that the Grievor would meet regularly with her personal Physician, Dr. Sai and with Mrs. Layton to discuss her progress. On the basis of this agreement, the Grievor was returned to active teaching duties effective July 13, 1987.

Over the course of the summer of 1987, the Grievor met on a number of occasions with Mrs. Layton who testified that all appeared to be going well. The Grievor also met with Dr. Sai who prescribed Antibuse, although the Grievor testified that she did not find this particular treatment helpful. The Grievor explained that she was seeking a treatment which would alleviate her desire to drink and that Antibuse simply made her ill when she did consume alcohol. As a result, the Grievor testified that in September of 1987, she returned to the Addiction Research Foundation and was scheduled for tests in early October.

On October 16, 1987, Mrs. Layton was approached on her way to a meeting and advised that the Grievor was drunk and had passed out in the staff lounge. With Mr. Turner and Mr. Lord, Mrs. Layton proceeded to the lounge where she found a number of faculty present and the Grievor asleep on the couch. Mrs. Layton testified that it took some time to waken the Grievor and that when she managed to do so, the Grievor's eyes were glazed and she smelled strongly of alcohol. At first, the Grievor appeared not to recognize Mrs. Layton. Mrs. Layton then assisted the Grievor to the door of the staff lounge where Mr. Turner and Mr. Lord assisted her to the Health Centre.

Mrs. Layton spent some time with the Grievor at the Health Centre and testified that the Grievor admitted that she had been drinking and that she had not been seeing her doctor regularly as previously agreed upon.

Mrs. Layton later met with Mr. Turner and discussed the course of action to be taken by the College. Mrs. Layton testified that she and Mr. Turner reviewed the efforts made by the College to assist the Grievor, the fact that the Grievor had not responded positively to these efforts and the College's responsibility to its students and to other faculty. Taking these factors into account, Mrs. Layton testified that it was her recommendation that the Grievor's employment with the College be terminated. The Grievor was advised of her termination by the letter of October 19, 1987 which is set out earlier in this award.

The Grievor acknowledged that throughout the course of her employment with the College, she did not at any time admit that she was an alcoholic. She testified that she began drinking in 1982 or 1983 at which time she was experiencing a number of personal problems. In 1982, she was divorced from her husband of twenty-five years and her sister committed suicide. In 1983, the Grievor's father and father-in-law both passed away. In addition, at the end of 1983, the Grievor's son-in-law came to Canada from India and as he could not get a position as an intern, the Grievor assumed responsibility for his support as well as for the support of herself, her two children and a grandchild. Between 1983 and 1985, the Grievor voluntarily participated in the Employee Assistance Programme and testified that she discussed her personal problems with Amy Thornton from time to time. In 1985 and 1986, the Grievor attended meetings of

Alcoholics Anonymous and in May of 1986, at the insistence of her family, she enrolled in a programme at the Addiction Research Foundation which involved attending weekly meetings. The Grievor did not complete the programme, however, as she testified that she had to travel to the United States to be with her daughter who had recently given birth to a child.

Following the termination of her employment in October of 1987, the Grievor again approached the Addiction Research Foundation. Initially, she testified that she could not enroll in the residential programme which she had attended previously because she was no longer employed. She subsequently conceded, however, that she was refused admission because she had been discharged from the programme previously. In any event, the Grievor was referred to the Jean Tweed Centre and upon being advised that there were no openings until January, both the Grievor and Miss Thornton approached Mrs. Layton. Mrs. Layton testified that she contacted the Jean Tweed Centre on the Grievor's behalf to assist her in obtaining an early admission but that this was not intended to affect the action taken by the College to terminate the Grievor's employment.

In mid-November, 1987, the Grievor enrolled in the four-week residential programme at the Jean Tweed Centre which she completed in mid-December. By the end of December, however, the Grievor conceded that she was drinking once again. The

Grievor expressed the view that she was simply too devastated by the loss of her employment to benefit from treatment at that time.

On December 31, 1987, the Grievor was drinking in a parked vehicle when she was approached by a police officer and charged with having care and control of an automobile while under the influence of alcohol. The Grievor was scheduled to appear in court on February 21, 1988 but failed to do so as she testified that she was angry that she had been charged when her vehicle was not even in motion. As a consequence of the Grievor's failure to appear on February 21, 1988, a bench warrant was issued. In April 1988, the Grievor was again charged with having care and control of an automobile while under the influence of alcohol and as a result of the outstanding bench warrant, she was arrested and spent some time in jail. The Grievor pleaded guilty to the various charges against her in late June of 1988 and was sentenced to attend a residential programme at Bellwood Health Services, a recognized treatment centre for alcohol and drug dependency.

Margaret Kay, the Co-ordinator of Nursing and Patient Care at Bellwood, testified that the Grievor completed the four-week residential programme in July of 1988 and at the time of the conclusion of the hearing in late August of 1988, the Grievor had attended a number of weekly sessions as part of a five year follow-up programme. Mrs. Kay testified that to the

best of her knowledge, the Grievor has been abstinent and that she is now able to return to work on a full-time basis. As long as the Grievor remains in the follow-up programme, Mrs. Kay testified that there is hope that she will be able to control her alcoholism.

It was the submission of Mr. Hamilton, on behalf of the College, that prior to the Grievor's discharge, there was significant lateness and absenteeism and a number of occasions when the Grievor attended work under the influence of alcohol. While admittedly the Grievor was a long service employee, Mr. Hamilton contended that she resisted numerous efforts on the part of the College to assist her and, in fact, throughout the course of her employment, she never did admit her dependency on alcohol. It was submitted that the action taken by the College must be assessed on the basis of events as they existed in 1987 and, in these circumstances, the College clearly had cause to discharge the Grievor. Even if the Board were to consider post-discharge evidence of rehabilitation, however, Mr. Hamilton suggested that the Grievor has had little success with treatment programmes to date and that she has not accepted full responsibility for her alcoholism. As a result, if the Grievor were to be reinstated there would, in all likelihood, be a repetition of previous misconduct. Given the College's responsibility both to its students and to other faculty, Mr. Hamilton requested that we dismiss the present grievance.

It was the submission of Mr. Nelson on behalf the Union that the Grievor has twenty-four years of service with the College and that prior to 1983, she had an excellent record. Mr. Nelson conceded that it is only recently that the Grievor has come to terms with her alcoholism although he suggested that rehabilitation is a lengthy process and that the Grievor has made a strong beginning. In addition, Mr. Nelson submitted that in a number of respects, the procedure followed by the College was flawed and he suggested that we ought to take this into account in framing an appropriate remedy. In all the circumstances, Mr. Nelson requested that we reinstate the Grievor on the condition that she continue treatment at Bellwood and that she abstain from alcohol. Mr. Nelson contended that the College would not be prejudiced by such an order as the College would have the benefit of the Grievor's long service and experience and yet at the same time, would be protected by the conditions imposed.

Dealing firstly with the procedure followed by the College, Mr. Nelson submitted that the imposition of discipline in the spring of 1986 was inappropriate given the Grievor's participation in the Employee Assistance Programme. A number of documents, however, were introduced into evidence dealing with the Employee Assistance Programme and only in the document dated 1986 is there any reference to the imposition of discipline being suspended. This document was not signed by the College and the Union and the evidence is simply not sufficient to find that it was approved and implemented by the parties. On this basis, we

cannot conclude that the College was constrained from disciplining Mrs. Rai in the spring of 1986.

Secondly, Mr. Nelson submitted that the College acted improperly in imposing discipline given that the memorandum from Mr. Taylor to Mr. Santin was ultimately removed from the Grievor's personnel file. We must also reject this argument, however, as discipline was not imposed in response to any events outlined in Mr. Taylor's memorandum but was imposed in response to misconduct in which the Grievor engaged subsequently. Moreover, that discipline, it will be recalled, was never grieved.

Finally, Mr. Nelson contended that the College failed to allow the Grievor an opportunity to appear before the Policy Administration Committee. In this respect, Mr. Nelson referred to a College policy on drugs and alcohol which provides that if an employee is terminated as a result of poor performance attributable to alcohol or drugs, the case must be presented to the Policy Administration Committee. The particular policy referred to, however, is dated December 1, 1980 and was introduced into evidence by Miss Thornton, who was aware that some amendments to the policy were required and who could not be sure that the policy is even currently in effect. It should also be noted that no reference was made to a requirement to appear before the Policy Administration Committee until final argument by the Union. In all the circumstances, therefore, it cannot be

concluded that the procedure followed by the College was improper and as a result we turn to the merits of Mrs. Rai's grievance.

Complaints about the Grievor's performance surfaced as early as 1983 and leaving aside the substance of the complaints about which the Board heard no direct evidence, the College responded by offering to assist the Grievor. Given an excellent work record of some twenty years, the College evidently recognized that the Grievor was experiencing some personal difficulty which was manifesting itself in absenteeism, lateness and poor work performance. As acknowledged by Mrs. Rai at the hearing, she consistently denied that she was an alcoholic and after numerous attempts to assist the Grievor in addressing and resolving what she described as personal problems, the College imposed discipline in the spring of 1986. Although alcoholism is now generally recognized to be an illness and denial is a common feature of that illness, nevertheless, where an employee denies alcohol dependency, in our view, an employer cannot be faulted for responding to the employee misconduct which results by the imposition of disciplinary sanctions. In this case, the Grievor also resisted the College's efforts to obtain treatment for her and in addition to intermittent absenteeism and lateness, we find that on a number of occasions the Grievor attended work suffering from the effects of alcohol and unable to carry out her teaching duties. The Grievor was repeatedly warned that if she did not seek treatment and that if her performance did not improve, her employment would be terminated. It must be concluded, therefore,

that on the basis of events as they existed in October of 1987, the College had cause to terminate the Grievor's employment.

As indicated earlier in this award, the Union offered evidence of the Grievor's efforts at rehabilitation subsequent to October of 1987 and the issue is whether the Board has jurisdiction to consider this evidence. This issue has been the subject of debate among arbitrators and in a series of awards referred to by Mr. Hamilton, it has been held that the assessment as to the likelihood of the employee fulfilling his employment obligations in the future, is to be made as of the date of discharge: Re Corporation of the City of Sudbury and Canadian Union of Public Employees, Local 207 (1981) 2 L.A.C.(3d) 161 (P.C. Picher) and Re Canada Post Corp. and Public Service Alliance of Canada (1986) 22 L.A.C.(3d) 236 (Hinnegan). In these awards, post-discharge evidence of rehabilitation has not been considered on the basis that such evidence could invalidate the employer's decision to discharge although this decision was quite proper at the time it was made.

In contrast to the views expressed in the awards referred to by Mr. Hamilton, other arbitrators have determined that it is quite appropriate to consider evidence of treatment and rehabilitation subsequent to the date of discharge: Re British Columbia Telephone Company and Telecommunication Workers' Union (1978) 19 L.A.C.(2d) 98 (Gall); Re Canada Post Corporation and Canadian Union of Postal Workers (1982) 6

L.A.C.(3d) 385 (Burkett) and Re Windsor Western Hospital Centre Inc. (I.O.D.E. Unit) and Service Employees' Union, Local 210 (1984) 19 L.A.C.(3d) 151 (Brandt). The rationale for this approach is that if the employee has rehabilitated himself subsequent to the date of discharge, then the disorder precipitating the termination has been corrected and it would not be fair or just to ignore this circumstance. The remedy, it has been said, can be tailored to take into account the point in time when the employee would have been in a position to fulfill his employment obligations.

In our view, for the purpose of determining cause for discharge, a Board of Arbitration must consider the events as of the date upon which action is taken by the employer. Were this not the case, as suggested in the awards referred to by Mr. Hamilton, the Employer's decision would be subject to constant review. At the same time, the Board has remedial jurisdiction to modify the penalty of discharge and, in determining whether to exercise this jurisdiction, the Board may consider evidence of rehabilitation which occurs subsequent to the date of discharge. This approach was adopted by the Grievance Settlement Board in Re Cook and the Crown in Right of Ontario (Ministry of Labour) (1979) 22 L.A.C.(2d) 1 in which the Board considered evidence of rehabilitation in determining whether to exercise its discretion pursuant to s.18(3) [now s.19(3)] of The Crown Employees Collective Bargaining Act. That section provides that where the Board determines that a disciplinary penalty or dismissal is

excessive, it may substitute such other penalty for the discipline or dismissal as it considers just and reasonable in all the circumstances. In dismissing an application for judicial review of the Board's decision in Re The Queen in Right of Ontario and Grievance Settlement Board et al. (1980) 107 D.L.R.(3d) 599 (Ont. H.Ct.), Mr. Justice Osler, who delivered the judgment of the Court, had this to say:

"

...

I therefore find that the board was within the power given to it by statute when it determined that the penalty of dismissal in the instant case was excessive and when it substituted a period of suspension without pay, coupled with a form of probation requiring continued treatment for alcoholism. The Ministry submitted that the board had no right to consider events occurring after the discharge and that it did in fact take into account the grievor's actions in seeking treatment and attending meetings and such activities as were required. As is well known, in exceptional cases when a convicted person has made significant progress towards reformation or rehabilitation while awaiting the hearing of an appeal, the Court of Appeal will take such matters into account and modify a sentence accordingly. I can see nothing wrong or beyond its power when the grievance settlement board acts upon similar principles.

..."

Although the Grievance Settlement Board is constituted pursuant to The Crown Employees Collective Bargaining Act, Article 11.05(g) of the Collective Agreement before the Board is similar in all material respects to Section 19(3) of that Act.

The issue, then, is whether, taking into account the evidence of events which occurred subsequent to October of 1987, it is appropriate to modify the penalty of discharge imposed by the College. As indicated earlier, the hearing concluded in late August of 1988, almost one year subsequent to the date of discharge. At that time, the Grievor had completed a four-week residential programme at Bellwood which she had been ordered to attend by the court, presumably as a term of her probation. The Grievor had also attended a number of weekly sessions as part the five year follow-up programme. At the hearing, the Grievor admitted that she is an alcoholic and testified that she has abstained from alcohol since April of 1988 and that she intends to complete the follow-up programme at Bellwood. There can be no question that the Grievor has taken an important first step in the process of rehabilitation although it will be recalled that this is a process which she has undertaken before, previously without success. Moreover, we must agree with Mr. Hamilton that even in August of 1988, the Grievor had not accepted responsibility for her alcoholism. In many cases, she blamed others for what occurred, offered excuses for her behavior and did not appear to appreciate the seriousness of having attended class under the influence of alcohol or the effect of this conduct on her students.

Hopefully, the Grievor will be able to bring her alcoholism under control but at this point, we cannot say with any degree of confidence, that if the Grievor were returned to

teaching, there would not be a repetition of what occurred previously. The Grievor would not be returning to a workplace in which constant supervision is either appropriate or reasonable and the consequences to other faculty and students of the Grievor attending work under the influence of alcohol, cannot be ignored. The Grievor has undertaken treatment in the past which she has not completed and has only recently begun again, the lengthy process of rehabilitation. In August of 1988, Mrs. Kay put it no more strongly than there is hope that the Grievor will be successful.

A case such as this is extremely difficult, particularly as the Grievor is a long service employee and for many years, her work record was excellent. Undoubtedly, it was because of the Grievor's long service that the College persisted over a number of years in its efforts to assist the Grievor in addressing and resolving her problems. In October of 1987, however, after repeatedly advising the Grievor of the consequences of continued misconduct and her failure to obtain treatment, the College had cause to terminate Mrs. Rai's employment. While some positive steps have now been taken toward rehabilitation, given the lengthy period which has elapsed since the date of discharge and the fact that the Grievor still does not accept responsibility for her alcoholism, we do not find that there is an appropriate basis upon which to modify the penalty imposed.

In the result, and for the reasons set out, the grievance is hereby dismissed.

DATED AT TORONTO, this 21st day of October, 1988.

  
Chairman

"Rene St. Onge"  
College Nominee

See dissent attached  
Union Nominee

## DISSENT: SAVITA RAI GRIEVANCE

October 8, 1988

Savita Rai is entitled to a conditional re-instatement. As the Chair states, it is legitimate to take into account events subsequent to the discharge. The key event during that period was clearly the first successful completion of a rehabilitation program in the five years of Ms. Rai's alcoholism.

According to Margaret Kaye, coordinator of nursing and patients' care at Bellwoods and the only medical authority to testify at the hearing, Ms. Rai had successfully completed a four-week residential program and had already moved into the follow-up phase of the program. "As far as I'm concerned," Kaye stated, "she can return to work now." And in response to the question: "Will it be a long time before we know she's okay?", Kaye responded forthrightly: "No, we're hopeful."

This situation logically leads to the conclusion set out in Re. B.C. Telephone Company and telecommunication Workers: "While the past record and culminating incident are of critical importance...the Board must also consider the facts that Mr. K. entered a treatment centre after he was discharged and that Mr. J., director of the treatment centre, testified that it was his opinion that Mr. K's chances of rehabilitation are good."

Even if no one can assert with confidence that Ms. Rai will never drink again, we have Re. Windsor Western Hospital and Service Employees Union: "We cannot agree with the suggestion that before reinstatement can be effected, the underlying causes for the original absenteeism must have completely disappeared."

Ms. Kaye says Ms. Rai "can return to work now". According to Re. Canada Post and CUPW, "If it is proven at an arbitration hearing that an employee who has been terminated for blameless absenteeism is likely to be regular in attendance in the future, it seems to me that the proper balancing of interests requires that the employee be returned to his employment. The prejudice to an employee who is capable of regular attendance in the future but is nevertheless terminated is substantial. On the other hand, it is difficult to understand how an employer is prejudiced by maintaining in employment an employee of possible long standing who is capable of regular attendance in the future."

It is of course true that Ms. Rai was not terminated for innocent absenteeism strictly speaking. On the other hand, her case sounds remarkably like the one described in Burkett (above). "The employee...has been absent from work for reasons beyond his control. He has suffered some mental or physical infirmity that has prevented him from being regular in attendance...It would not be fair or just to permit the termination of an employee for reasons which he is powerless to control...if the prognosis is that the disorder precipitating the termination has been

corrected or is likely to disappear within the foreseeable future."

There can be no denying the disruption Ms. Rai caused the College during those years. But it is surely at least a plausible analysis to suggest that her dismissal was the beginning of enlightenment for her. Unfortunately, she had by no means yet hit bottom, the point at which recognition of one's true state begins to dawn. That cathartic moment took several further public humiliations: arrest, trial, the failure of another rehabilitation attempt. Finally, finally, comes the moment when she recognizes that she is a helpless alcoholic, a self-revelation that provides the strength to complete the first important phase of the Bellwoods program --the longest she had gone in ages without drinking.

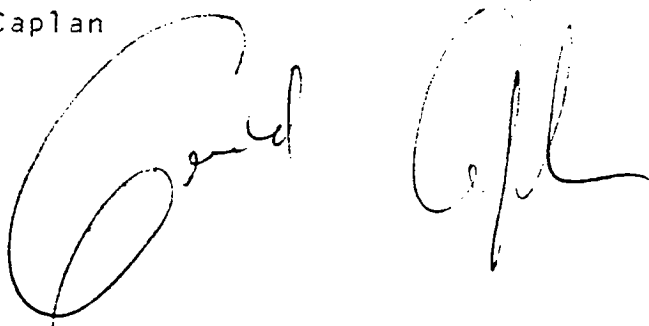
That she still refuses to take the blame for many of the unhappy events in the previous years does not demonstrate that she is not "ready" to return to work. It simply, and naturally, shows that the road to full recovery is a long one, but that she has made a crucial beginning. Crucial enough for Margaret Kaye to have confidence that she can resume work. What qualified witness testified before us that she is NOT qualified to return to work?

It is true that the College was generous in its treatment of Ms. Rai during her dark years. Why would it be asking so much of the College to give one final chance to a 24-year employee? Burkett's words again: "The prejudice to an employee who is capable of regular attendance in the future but is nevertheless terminated is substantial. On the other hand, it is difficult to understand how an employer is prejudiced..."

For the College, the worst possible consequence of conditional re-instatement is that Ms. Rai relapses, causes an unfortunate incident, and is terminated once for all. But for Ms. Rai, the "prejudice" is incalculable. At her age and with her record, no other teaching position is possible. It may even be that no other employment of any kind is possible. The harshness of that possibility far transcends the appropriate penalty for the difficulty that her sickness caused the College for four years.

While precedents on this matter undeniably conflict, there are at least a number that make conditional re-instatement a plausible decision in this case. When one looks at the human dimension of the case, that should make conditional re-instatement an irresistible decision. Ms. Rai deserves one more chance before she is discarded to the fortunes of an unforgiving society.

Gerald Caplan

A handwritten signature in cursive script, appearing to read "Gerald Caplan", written in dark ink on a white background.