[Translation]

Adjudication of Grievance

between

Canadian Air Traffic Control Association,

the Association or CATCA

-and-

NAV – Canada,

the Employer

Grievance: 97-002, Gary Crompton (dismissal)
(NAV-Canada File: 97-A-45)

Adjudicator: André Rousseau, LL.D.

Counsel: Sean T. McGee, for the Association
Robert Monette, for the Employer

The adjudication hearing took place at Dorval, Quebec, on the following dates: January 21 and 22, July 6 and 9, November 23, December 8, 11 and 17, 1998.

On December 28, 1998, the Adjudicator received a copy of an arbitral award which was submitted to him, in accordance with the undertaking given at the hearing, as a complement to the arguments presented by the Association.

ADJUDICATOR'S AWARD

NATURE OF GRIEVANCE

On February 5, 1997, Gary Crompton lodged the following grievance (S-1):

> I grieve my dismissal from employment effective January 20th 1997. This action was without just cause.
>
> CORRECTIVE ACTION REQUESTED
>
> Reinstatement with full compensation and to be otherwise made whole.

SUMMARY OF THE EVIDENCE

On January 22, 1998, I had the opportunity to familiarize myself with the Control Centre and Control Tower facilities at Dorval Airport and with the organization of operations at the said facilities, at which time the parties' representatives provided me with a brief overview of the job of an air traffic controller.

On the same day, the parties entered into a transaction, which is filed in the record as Exhibit R-2: the said document makes reference to two (2) disciplinary notices, one dated August 16, 1995, filed in the record as Exhibit R-3, and the other dated November 14, 1995, filed in the record as Exhibit R-4; the said notices and transaction read as follows:

R-2: Transaction entered into on January 22, 1998:

> "[Translation]
>
> ...
>
> In consideration of the Grievant's admission as to the well-foundedness of the disciplinary notices of August 16, 1995 and November 14, 1995 concerning the incidents of July 5, 1995 and October 18, 1995, the parties agree, in order to save time needed for the adjudication of these matters, that the disciplinary action taken in respect of these notices be changed to 1 day and 3 days of financial penalty, respectively.
>
> The parties retain the right to adduce evidence and plead the facts relating to these incidents at the time of the adjudication of the disciplinary notice and disciplinary action taken in respect of the events of January 1, 1997.
>
> ..."

R-3: Disciplinary notice of August 16, 1995 concerning an infraction committed on July 5, 1995:

> [Translation]
>
> ...
>
> NATURE OF INFRACTION: Failure to report an operating irregularity
>
> On July 5, 1995, while you were on duty, you failed to report an operating irregularity involving two aircraft for which you were responsible.
>
> In accordance with the instructions set out in the Air Traffic Control Operations Manual (TP 701), paragraph 125.1, you are required to report to your supervisor any event that appears to indicate that an operating irregularity has occurred.
>
> This is to inform you that your salary will be reduced by the equivalent of two days' pay as a financial penalty for this infraction.
>
> This action is intended to serve a remedial purpose and to encourage you to take the necessary steps to avoid any recurrence, which would result in harsher disciplinary measures being taken against you.
>
> A copy of this letter will be placed in your personnel file. If you consider this action to be unjustified, you may file a grievance in accordance with the provisions of your collective agreement.
>
> ..."

R-4: Disciplinary notice of November 14, 1995 concerning an infraction committed on October 18, 1995:

> "[Translation]
>
> ...
>
> NATURE OF INFRACTION: Absence from work without a valid reason
>
> Mr. Crompton, on October 18, 1995, you advised your supervisor at around 8:20 AM that you wished to avail yourself of sick leave for a 6:30 AM shift, stating that you had forgotten to do so earlier, the whole only after your supervisor had left you a message on your answering machine.
>
> This attitude is unacceptable to management, and considering:
>
> - the number of times (4) within the past two (2) years that you have reported for work between 25 minutes and 2 or more hours late;
> - the inconsistency of your statements as to the reasons and circumstances for your absence on October 18, 1995;
> - your failure to verify the interval between the shifts scheduled for October 17 and 18, 1995 and your irresponsibility in not observing the collective agreement between CATCA and the Treasury Board as it pertains to the interval between shifts;
> - the numerous, varied and significant consequences that your absence and call of October 18, 1995 had for the operation of the Montreal Control Centre;
> - the failure to abide by the instructions concerning the time to be observed for calling in sick prescribed by Air Traffic Services with a view to ensuring prompt service to users;
> - your failure to meet your obligation to know and consult your work schedule where required; and

- your previous record in connection with the failure to meet your obligation to report an operating irregularity;

Management is of the opinion that you are in serious breach of your professional and contractual obligations as an air traffic controller and employee of Transport Canada. Compliance with the obligations associated with such a position is essential and, in order to alert you and heighten your awareness of your duty to observe the instructions that apply to persons in your position, the following action will be taken:

- the leave of October 18 will be unauthorized and without pay; and

- a total monetary penalty equivalent to a minimum of five (5) days' work will be imposed upon you.

A copy of this letter will be placed in your personnel file.

If you consider this action to be unjustified, you may file a grievance in accordance with the provisions of your collective agreement.

...."

The dismissal notice, which is dated January 15, 1997 but was presented to the Grievant on January 20, 1997, which notice is filed in the record as Exhibit R-5, reads as follows:

"...

Mr. Crompton:

On January 1, 1997, upon your reporting to work, both your supervisors witnessed that your breath smelled strongly of alcohol. Your supervisors and the shift manager made you aware that they considered you were not in a position to accomplish your duties, because your faculties were impaired by alcohol. You were offered the possibility to pass a scientific test to prove if you were intoxicated or not, which you did not attempt to do.

Moreover, in spite of a direct order by your supervisors to the contrary, you took an active control position at approximately 16h50, jeopardizing the air navigation safety and security.

You reported to work with your breath smelling of alcohol and even though specifically directed by your supervisors not to assume active control duties, you proceeded to do so. We consider, by doing so, that you have demonstrated a serious lack of reliability, and you have put the air safety and security in jeopardy which is unacceptable in our industry.

Considering that your file already contains two (2) disciplinary measures: two (2) days and five (5) days of financial penalties, and in considering the gravity that the present infractions could have had on safety and security, I conclude that the trust the Employer is entitled to receive from you no longer exists and, as a result I have no choice but to discharge you as of today, from the Air Traffic Controller position that you occupy with Nav Canada.

../2

I invite you to call Miss Doris Drault of the Pay and Benefits Services at (514) 633-3523 for the adjustments that will be required to your pay file.

If you disagree with this disciplinary measure, the dispute resolution process negotiated with your association is at your disposal.

Regional Executive Director
Air Navigation Services

Victor Dupéré

...

It was acknowledged by the parties that the grievance had been validly brought before the Adjudicator.

The Employer called Jacques Grandmont, who has been a shift manager at the Montreal Control Centre for eleven (11) years; he was a shift supervisor for one (1) year and a controller for eleven (11) years.

The witness outlined the main activities of the Control Centre in providing guidance for aircraft operating under instrument flight rules, and the Control Tower in providing guidance for aircraft operating under visual flight rules. The Control Centre manages air traffic capacity and monitors the flight plans established for each aircraft; the air space monitored is divided into four (4) zones.

Air traffic controllers occupy either a "*radio*" position, which involves communicating with flight personnel, or a "*data*" position, which involves coordinating flight plan information.

Position reports are compiled from flight progress strips; radar control locates the aircraft, ensures that it is on course and a safe distance away from other aircraft: longitudinal, lateral and vertical distances between aircraft are controlled in accordance with prescribed standards.

Mr. Grandmont indicated that each controller held a professional licence. He described the tasks performed:

- in a "*radio*" position, the controller communicates with flight personnel, assigns routes and altitudes to be observed and monitors compliance with the instructions given via radar; he authorizes altitude, route and speed changes: a portion of the air space is subject to his authority;

- in a "*data*" position, the controller forms a team with another controller in a "*radio*" position, except during periods when there is limited activity and the positions can be combined; in a "*data*" position, the controller is responsible for managing flight plan information, relaying information to neighbouring control centres, preparing control estimates and monitoring the flight progress strip.

Mr. Grandmont stated that the Montreal Control Centre has approximately one hundred and sixty (160) controllers, including some thirty supervisors; some thirty flight operations officers handle flight plans. During the day shift, approximately forty (40) controllers are on the job; at night, the number goes up to around fifty (50); there is a period of overlap when the shifts take over from one another.

The witness noted that the supervisors were members of the same union as the controllers (CATCA) and were responsible for ensuring that the operations ran smoothly; supervisors participate in certain air traffic control tasks and decide whether jobs will be combined or kept separate, depending on the volume of traffic.

Mr. Grandmont affirmed that each controller performs his duties in a particular sector of the control zone; assignment to another sector requires a period of "certification" and training lasting several months. A favourable medical report is a condition for maintaining a

controller's licence: controllers who are forty (40) years of age or older must have a medical examination every year, younger controllers every two (2) years.

The witness affirmed that work schedules were known at least two (2) weeks in advance.

Mr. Grandmont stated that he had known Gary Crompton for approximately twenty (20) years and that he had taken part in the investigations relating to the events referred to in the aforementioned disciplinary notices R-3 and R-4.

Concerning the notice R-3, the witness related that he had been advised by an American Airlines representative that a detection system on board an aircraft had picked up the presence of another aircraft quite close by, while the crew believed the aircraft to be well positioned and completely safe; the American Airlines representative wanted to check whether the crew had done everything it should have in the circumstances.

Mr. Grandmont consulted the documents relating to the air traffic control operations for July 5, 1995, being the date given to him by the person he had spoken with; there were no notes concerning the situation referred to. Mr. Grandmont listened to the recordings of the communications between the controllers and flight crews and determined that the controller Gary Crompton had failed to stop an American Airlines aircraft from climbing to a higher altitude, in contravention of a vertical separation standard.

The witness characterized the situation as an operating irregularity and filed in the record, as Exhibit R-6, an extract from the Operations Manual which defines what an operating irregularity is and requires that it be reported to the supervisor. The witness added that this obligation had always existed, so that corrective action could be taken, if necessary, to avoid any anomaly.

Mr. Grandmont met with Mr. Crompton on July 20, 1995 and asked him if anything special had happened on the previous July 5; Mr. Crompton replied that nothing had happened. The witness then played back the recordings of the communications with the aircraft in Mr. Crompton's presence and Mr. Crompton told him that he had not wanted to acknowledge to the pilot that he had made an error concerning the altitude authorized.

Mr. Grandmont contacted the American Airlines representative again to advise him that the crew had not been in any way responsible for the incident of July 5, 1995.

The investigation report prepared by Mr. Grandmont was filed in the record as Exhibit R-9. The witness was involved in the disciplinary decision (R-3).

Concerning the disciplinary notice R-4, the witness stated that on October 18, 1995, Mr. Crompton had been scheduled to start work at 6:30 AM but it was only at 8:20 AM that he had telephoned to say he would not be coming in. Mr. Grandmont explained that the Grievant's absence, at the start of the shift, had created various problems concerning the air traffic control operations, as no one had been called in to work in the Grievant's place since it had not been known in advance that he would not be coming in.

The witness related that at around 6:45 AM, a supervisor had telephoned Gary Crompton's house and, receiving no answer, had left a message on his answering machine. Mr. Grandmont filed in the record, as Exhibit R-7, the policy relating to cancellation of a work shift, which provides that the cancellation must be notified before 6:00 AM for shifts starting before 9:00 AM.

The witness stated that he met with the Grievant to obtain his explanations concerning his absence and the circumstances of the matter; when asked why he had not reported for work at the start of his shift, Mr. Crompton replied that he thought he had called in to advise that he would not be coming in.

Mr. Grandmont listened to the recording of the telephone call the Grievant had made to his supervisor: Mr. Crompton apologized for his absence, saying he had wanted to take a sick leave but had forgotten to call to advise that he would not be coming in.

The witness pointed out that on October 17, 1995, the Grievant had agreed to work overtime, finishing his schedule at 11:30 PM; this did not leave an eight (8) hour rest period before he was scheduled to resume work at 6:30 AM; the Grievant told the manager that he had not realized this the day before when he agreed to do the overtime.

The witness noted that Mr. Crompton had been between twenty five (25) minutes and two (2) hours late for work on four (4) occasions during the previous two (2) years.

Mr. Grandmont stated that he had been involved in the recommendation of the penalty imposed (R-4). The investigation report prepared by the witness was filed in the record as Exhibit R-8.

Under cross-examination, the witness acknowledged that the disciplinary notice R-3 made reference to the failure to report an operating irregularity but contained no allegation to the effect that the Grievant had lied, the witness adding, however, that he had pointed out to Mr. Crompton verbally that this aspect would be taken into account in the evaluation of the penalty to be imposed.

Asked whether he had had any discussions with Larry Lachance, between October 1995 and January 1997, concerning Gary Crompton's drinking, Mr. Grandmont replied that he did not remember any such discussions between Mr. Lachance and himself. He stated that he had not been aware that Mr. Crompton had a drinking problem, adding that no one had told him about any such problem.

The witness acknowledged that the Grievant's absence on October 18, 1995 had not had any impact on operational safety.

Under further questioning by the Employer's attorney, Mr. Grandmont stated, with respect to the events of July 5, 1995, that the Grievant was the only person who could have known of the operating irregularity that had occurred, until it was revealed by the investigation.

The witness added that Mr. Crompton had not brought up the matter of a drinking problem as an explanation for the events referred to in R-3 and R-4.

The Employer called Robert Gervais, a supervisor of the south sub-unit at the Control Centre; he has been a controller since 1977 and has held the position of supervisor since 1988.

On January 1, 1997, Mr. Gervais was on duty from 2:00 PM to 10:00 PM and Mr. Crompton started his shift at 3:30 PM; in celebration of the New Year, each person had brought in a dish for a pot luck supper to be held in the control room.

At around 3:00 PM, Mr. Gervais took over from a controller so that he could look after the table preparation for the supper. At 3:15 PM the witness saw Gary Crompton, who was exchanging wishes with co-workers and who came toward him; when he shook hands and exchanged the customary good wishes with the Grievant, Mr. Gervais noticed "*a very strong smell of alcohol*" on the Grievant's breath.

Mr. Crompton seemed "*OK*", according to the witness, apart from the alcohol smell. When asked how the Grievant's eyes looked, the witness answered:

"*A little glazed, maybe.*"

Mr. Gervais asked someone to take over from him at the position he was manning, and discreetly motioned to the Grievant that he wished to talk to him. He met with the Grievant and told him that his breath smelled of alcohol and that he would be better off "*anywhere else but at the Centre.*"

According to Mr. Gervais, the Grievant's reply was that it "*wasn't that bad.*"

Mr. Gervais explained that at the start of the shift, a controller spends approximately fifteen (15) minutes reviewing the situation and instructions before assuming an active "*radio*" or "*data*" position.

The witness stated that a controller needed all his faculties to perform his work and that in his opinion, the Grievant was not in command of all his faculties. He said that when he told Mr. Crompton that he would be better off "*anywhere else but at the Centre*", Mr. Crompton had left the control room.

Mr. Gervais stated that at around 3:30 PM, his colleague David McBride, also a supervisor, arrived at work; the witness told Mr. McBride what had happened regarding the Grievant, and then took a break. When he got back from his break, Mr. Gervais went back to a control position; upon seeing the Grievant who was heading toward the south sub-unit, the witness asked Mr. McBride to go and see Mr. Crompton and advise him of his assessment of the situation.

Mr. Gervais related that David McBride had come back shortly thereafter, saying that he had detected a smell of alcohol and had asked the Grievant not to assume a control position; Mr. McBride told him the Grievant had asked if he could stay on the premises and the authorization had been granted.

Mr. Gervais stated that he had continued his control work and that at one point, upon looking to his right, he had seen Gary Crompton sitting at a "*data*" position. Mr. Gervais had finished the manoeuvres he was engaged in, and then signalled to the Grievant that he should leave the position, after assigning someone to relieve him.

Shortly thereafter, Mr. Gervais received a call from Mr. McBride, who told him he had contacted the acting manager, Armand Gaudet, and the latter had advised him that the Grievant should not be allowed to work and that Barry Downing, shift manager, should be informed. The witness informed Mr. Downing and a meeting was held between him and the two (2) supervisors, whereupon it was agreed that the Grievant should be called to a meeting.

Mr. Crompton was summoned to a meeting which took place at around 6:00 PM, which meeting was attended by Gilbert Légaré as union representative. At the said meeting, Mr. Downing related what he had learned, stating that a strong smell of alcohol had been detected on the Grievant's breath and that it was up to him to disprove this.

At this point in the meeting, Mr. Légaré left the room for a few minutes, accompanied by the Grievant. When the meeting resumed, Mr. Légaré pointed out that it would not be easy to have the Grievant's blood alcohol level analysed on January 1; Mr. Downing said a test could be done at a police station or a hospital. It was suggested that the Grievant be driven and Mr. Légaré requested permission to leave work for this purpose. Mr. Légaré returned to work later on.

Mr. Gervais added that no test results were ever communicated to him.

During his cross-examination, the attorney for the Association asked the witness if he had prepared a report on the events of January 1, 1997; the witness replied that he had, and his report was examined by the attorney.

Mr. Gervais affirmed that at around 4:30 PM, on January 1, 1997, neither he nor Mr. McBride was at a control position. Asked to specify what his words to the Grievant were, the witness stated that he had told him:

"*Gary, you reek, you should be anywhere else than here.*"

According to the witness, Mr. Crompton did not agree with his assessment and answered:

"Not that bad."

When asked whether the Grievant had performed any control duties between 3:50 PM and 4:10 PM, the witness replied that he had not.

Mr. Gervais acknowledged that Mr. Downing had not ordered the Grievant to go for a test and that Mr. Légaré had not undertaken to have him do so.

Asked to state what he had observed about the Grievant's eyes on that day, Mr. Gervais replied:

"Shiny eyes, glazed, as we say."

The witness stated that he had not verified how Mr. Crompton had performed the control duties during the period when he was at a control position on January 1, 1997. Mr. Gervais did not prepare a report of an operating irregularity.

Under further questioning by the Employer's attorney, Mr. Gervais explained that the Grievant had assumed a control position after the intervention by the supervisor McBride. The witness said he had found someone to relieve Mr. Crompton as soon as he saw him at a control position.

The witness stated that the question of the burden of proof had arisen during the meeting with the shift manager because Gilbert Légaré had said it was alleged that there was *"a strong smell of alcohol"* and that he was wondering what obligation the employee had to prove anything.

The Employer's attorney asked the witness to file in the record the report he had prepared on January 2, 1997, following the events: the filing of the document was allowed, because it had been examined by the Association's attorney during his cross-examination. The report was filed in the record as Exhibit R-10.

The employer called David McBride, supervisor, who has been working for twenty (20) years; he was on duty on January 1, 1997, starting at 3:30 PM. The witness related that shortly after he arrived, his colleague Robert Gervais had told him that he had asked Mr. Crompton to leave the control room because he smelled of alcohol and not to come back until he was fit for work.

Mr. McBride stated that the Grievant had come back to the control room at around 4:20 PM and was heading toward the two (2) supervisors, when Mr. Gervais suggested that the witness go and meet Mr. Crompton so that he could see for himself the condition Mr. Crompton was in. Mr. McBride went to greet the Grievant. The following is his summary of what ensued:

> *"We talked. I was at two (2) to two and a half (2.5) feet away. Pretty strong smell of alcohol when he spoke. I told him he could not work at the board. Gary asked if he could just sit behind..."*

The witness related that there were some tables on which food and coffee had been placed and that he had agreed that Mr. Crompton could stay in the room. Shortly thereafter, Mr. McBride left the control room for a break: he took the opportunity to call Armand Gaudet, manager, and asked him what he should do about what had happened; Mr. Gaudet asked him to refer the matter to Barry Downing, shift manager.

Mr. McBride stated that he had told Garry Crompton *"not to work at the board"* because he was of the opinion that he *"was not in a condition to work."* The witness affirmed that working as a controller *"when under the influence"* was prohibited.

Following his call to Mr. Gaudet, the witness spoke to Mr. Gervais and, shortly thereafter, a meeting was held between them and Mr. Downing; it was decided to summon the Grievant to a meeting, along with a union representative if he wished one to accompany him.

At the meeting with Mr. Crompton, Barry Downing advised him of the supervisors' observations about his condition and told him he had been deemed unfit to work and that it was up to him to show that he was fit to work; Mr. Légaré, acting as union representative, requested a break so that he could talk to certain people.

The meeting resumed some ten minutes later and the question arose as to how it would be possible for the Grievant to prove that he was fit to work, seeing that it was January 1. Mr. McBride said the Grievant was authorized to leave work for the remainder of his shift so that he could obtain proof that he was sober, if indeed he was; Mr. Légaré was given leave to accompany the Grievant.

Asked to clarify what he meant by "*working at the board*", the witness replied:

> "*Assume an operation position, transmit and receive information, or talking to aircraft, or data position.*"

The witness was asked to comment on a transcription of an extract from the tape on which the activities for January 1, 1997 were recorded, which transcription is filed in the record as Exhibit R-11; the extract pertains to certain verbal exchanges between a control position, occupied at the time by Gary Crompton, and another control centre, between 4:52 PM and 5:14 PM. Mr. McBride affirmed that Mr. Crompton had transmitted certain information to another control centre.

Mr. McBride added that prior to the meeting with the Grievant, Mr. Gervais mentioned to him that he had seen Mr. Crompton sitting at a control position, whereupon Mr. McBride told Mr. Gervais that he had asked the Grievant not to assume a control position; Mr. Gervais advised Mr. McBride that he had made the same request of the Grievant.

The witness pointed out that before assuming a control position, it was essential that a controller examine the data or instructions pertaining to equipment, weather and other matters, in order to ensure that his information was as up to date as possible. On January 1, 1997, there was ample staff available, given the needs for that day.

Under cross-examination, the witness affirmed that at the more formal meeting with the Grievant, it was mentioned that the Grievant would have to demonstrate that he was not under the influence of intoxicating substances, if he wished to work.

Asked to explain the position adopted by management in this regard, the witness stated:

> "*It was a logical position, we were not nurses or doctors, to have a blood sample or a medical assessment.*"

The witness acknowledged that smell is not an indicator of the degree or acuteness of the impairment of one's abilities, but added that in his opinion, the Operations Manual prescribed zero (0) tolerance for alcohol; asked whether the Manual prohibited any trace of alcohol in the blood, the witness replied that there were two requirements:

> "- *not showing up under the influence of alcohol;*
> - *stop drinking no less than eight (8) hours before shift.*"

Asked whether the Operations Manual used the words "*being impaired*", Mr. McBride replied:

> "*100% aware of what you're doing. You are, or you're not.*"

He added that this was his understanding of the applicable requirements.

The attorney for the Association asked the witness whether, upon reviewing the transcription R-11, he found it to contain any remark by the Grievant that was indicative of inappropriate action or inadequate work performance. The witness replied that he could not

comment from a reading of the document alone, being unaware of the traffic that needed to be controlled at the time.

Under further questioning by the Employer's attorney, the witness filed in the record, as Exhibit R-13, an extract from the Operations Manual, which reads as follows:

> "...
>
> **111.3**
> No employee of the Air Traffic Services Branch shall participate in any operational function: *(N)*
>
> A. within 8 hours after the consumption of any alcoholic beverage;
> B. while under the influence of intoxicating liquor; or
> C. while under the influence of a drug that impairs one's ability to carry out one's duties.
>
> ..."

The Employer called Larry J. B. Lachance, who has been manager of operations at the Montreal Control Centre since September 1991; he has worked in air traffic control for twenty-two (22) years; he gave a brief outline of his career and a summary of the hierarchical organization of the Centre.

Regarding the nature of the work and requirements for being a controller, Mr. Lachance stated that it required one to be very alert, both mentally and visually, and to have a long visual and auditory attention span; he pointed out that controllers work in teams and are required to make decisions quickly, sometimes within a few seconds.

The witness stated that he had directed the investigation concerning the events of January 1, 1997; he noted that Mr. Crompton had been suspended, with pay, pending the conclusions of the investigation. Mr. Lachance, accompanied by François Leblanc, a labour relations counsellor, met with the people who had been involved in the events.

Describing the interview held with the Grievant, the witness stated that Mr. Crompton had maintained that he was not under the influence of alcohol when he reported for work on January 1, 1997, that he had occupied a control position, but that this was before 4:30 PM and before he received the order not to do so.

Mr. Lachance went on to say that he advised Mr. Crompton that there was evidence to the effect that he had occupied a control position after 4:30 PM; Mr. Crompton stated that he did not believe such evidence existed.

During the same interview, Mr. Lachance asked Mr. Crompton what steps he had taken to prove that he was not under the influence of alcohol: the Grievant replied that he was not required to prove anything, but that he had stopped at two (2) restaurants but they had no breathalyser equipment. The witness affirmed that the Grievant then said:

> "*The burden of proof is on the accuser.*"

Mr. Lachance noted that he mentioned to the Grievant that Mr. Downing had suggested he go to a police station or a hospital, to which Mr. Crompton replied that he had not done so.

According to the witness, he then asked Mr. Crompton if he had anything to say and Mr. Crompton said that if the supervisors had detected a smell of alcohol, it was not his breath, but possibly his clothes, which he had worn the previous day.

Mr. Lachance affirmed that he advised the Grievant that the playback of the tape recordings showed that he had occupied a control position after 4:30 PM.

The witness stated that he had been advised of the incidents involving the Grievant in 1995, and that he had approved the steps that were taken. Concerning the notice R-3, Mr. Lachance pointed out that the Grievant had concealed an incident, which had initially prevented the department from being able to investigate and make a decision as to the quality of the procedures observed. Regarding the notice R-4, the witness stated that Mr. Crompton had lied about the circumstances of his call to advise that he would not be coming in to work.

Concerning the grounds for the penalty of dismissal, Mr. Lachance stated that management had lost confidence in the Grievant, who had not wished to acknowledge that he had been drinking and maintained that he had occupied a control position before 4:30 PM, whereas the playback of the tape recordings showed that it was after 4:30 PM. The witness emphasized that the Grievant did not show any remorse concerning his conduct and that safety considerations were at issue.

Mr. Lachance noted that controllers, when they start work, do not always have to meet with a supervisor; he pointed out that each controller has a duty to ensure that he is in a condition to work.

The witness stated that he was aware that Mr. Crompton had had drinking problems in the past; management had met with the Grievant at the time and some of his co-workers had encouraged him to take steps to deal with the problem, which, among other things, was causing him to be late for work.

Mr. Lachance explained that some time around 1992 or 1993, there had been an incident where Mr. Crompton had been required to submit to tests, including blood tests, to verify his condition: the witness said that Mr. Crompton was required to have a yearly medical examination in order to maintain his controller's licence; in 1996, the Grievant had such an examination and his licence was renewed.

Lastly, the witness stated that at the interview of January 6, 1997, the Grievant had not alleged that he had a problem with alcoholism.

Under cross-examination, Mr. Lachance stated that he was familiar with a part of the employee assistance program called "*Chemical Dependency Education and Rehabilitation Program*", filed in the record as Exhibit S-2: the said program is a result of an agreement with the Association and sets forth the terms and conditions for an employee to return to the job following a detoxification period.

Acknowledging that alcoholism is treated as a disease, Mr. Lachance affirmed that he was aware in January 1997 that Mr. Crompton had been involved in situations involving alcohol consumption. Asked whether he knew if the Grievant had followed any detoxification treatment or program, the witness replied that Mr. Crompton had been treated at a clinic for a "*potential problem with alcoholism*" in the early 1990s.

Mr. Lachance stated that he had known that the program in question was not completed at the time, because Mr. Crompton had decided not to continue with it; he said he was not aware whether the Grievant had encountered problems at the time in getting the cost of the program paid for by the Employer.

The witness acknowledged that he had considered these events to be over, in January 1997, when he examined all the elements that led to his decision; he explained that in January 1997, he was not under the impression that Mr. Crompton had a problem with alcoholism.

In response to questioning concerning his allegation that the Grievant had lied during the interview of January 6, 1997, Mr. Lachance stated that the Grievant's story had changed as the meeting went along: on January 1, the Grievant had not told the supervisors that the smell of alcohol was coming from his clothes; he only brought up this excuse as the meeting progressed; in addition, according to Mr. Lachance, the Grievant had lied about the time when he occupied the control position.

The witness stated that there had not been any investigation of an operating irregularity in connection with the events of January 1, 1997, because the facts did not indicate that this was necessary. Asked whether, on January 6, 1997, Mr. Crompton had said anything about his alcohol consumption on December 31, 1996, the witness replied:

> *"In answer to a question about his consumption, he talked about his clothes and said he had not drunk anything after midnight (12:00 AM) on December 31."*

Mr. Lachance acknowledged that the supervisors considered Mr. Crompton to be a competent controller.

The report of the investigation conducted by the witness was filed in the record as Exhibit R-14.

Under further questioning by the Employer's attorney, the witness stated that during the interview of January 6, 1997, Mr. Crompton had denied that Mr. Downing had suggested, on January 1, 1997, that he get tested at a hospital or a police station.

The Employer called François LeBlanc, a labour relations counsellor with the Employer. He affirmed having attended the Grievant's interview on January 6, 1997; he gave an account of a portion of the interview, noting that the Lakeshore Hospital had been mentioned:

> *"You didn't think of going to Lakeshore? Didn't Barry suggest that you go to the hospital?"*
>
> (Grievant's reply)
>
> *"He didn't say anything about Lakeshore."*
>
> (New question)
>
> *"And the police?"*
>
> (Grievant's reply)
>
> *"The burden of proof is on the accuser."*

The Association called Doctor Jean-Pierre Chiasson, who holds professional certificates from the American Society of Addiction and is the director of a clinic specializing in the treatment of alcoholism and other substance-based dependencies.

The physician described various forms of psychoactive substance dependency, noting that abuse of such substances did not necessarily entail dependency. Dr. Chiasson saw Mr. Crompton, for an initial evaluation, on February 7, 1997, further to a request originating with a representative of the Association; at the time, Mr. Crompton was not following any treatment or therapy.

The witness stated that the February 1997 evaluation had included a clinical portion – examination and interview – as well as a series of psychometric tests. During the interview, the physician learned that Mr. Crompton had been stopped by the police on three (3) occasions for driving an automobile while under the influence, in 1976, 1994 and 1996.

The physician related what Mr. Crompton had told him about his activities of December 31, 1996; the Grievant said he had attended two (2) parties, one from 9:00 PM to 1:30 AM and the other from 2:00 AM to 6:00 AM; at the second party, he said he only drank beer containing 0.5% alcohol.

The physician affirmed that the physical examination of the Grievant had not revealed many objective signs of alcoholization. It emerged from the interviews and tests that Mr. Crompton had used cannabis for approximately twenty (20) years: he described himself as a "*social drinker*", who rarely got drunk, who used cannabis a few times a week.

According to the physician, the loss of his job caused the Grievant moderate stress. Dr. Chiasson's diagnosis was one of slight to moderate dependency and he recommended treatment, as well as total abstinence; the recommended course of action was a program of intensive therapy on an outpatient basis, with a follow-up period. The witness recalled that Mr. Crompton had been reluctant to acknowledge his problem, which reluctance is frequently encountered in persons with dependencies.

Acknowledging that he had no certain information concerning the Grievant's condition on January 1, 1997, the witness stated that the smell of alcohol on a person's breath does not justify the inference that he is under the influence; the fact that a person has had little sleep can have an impact on the quality of his work and his faculties.

Under cross-examination, the witness affirmed that his expert opinion had been requested by the Association. He pointed out that various tests were administered, on February 24 and 25, 1997: in this regard, he noted that on February 24, an alcohol screening test had been scheduled, but was postponed to the following day because the Grievant had said he was unable to urinate.

When the test was administered on February 25, 1997, the result was positive, indicating that the Grievant had drunk alcohol during the preceding days.

The witness repeated that very few conclusions could be drawn on the basis that a person smelled of alcohol, unless a psychomotor assessment was made.

The Association's attorney asked the physician whether Mr. Crompton had discussed his work activities on January 1, 1997: Doctor Chiasson, referring to the text of his report, stated that the Grievant had told him that he had not performed any work that day, that he had had discussions with his superiors and had been granted leave.

Questioned in connection with another note in his report, the witness stated, with regard to his additional report of March 18, 1997, that Mr. Crompton, during his last appointment, had not wanted to submit to the cannabis screening test by way of a urine sample.

The physician acknowledged that Mr. Crompton exhibited few physical or mental factors indicative of a state of dependency. Moreover, the Grievant had never belonged to any groups providing help for persons with dependencies on alcohol or other substances. The physician stated that using cannabis seemed to him to represent a significant risk factor in connection with the work of an air traffic controller.

Lastly, the witness outlined certain possible effects of even slight alcohol intoxication:

- a certain euphoria;
- impaired attention, concentration and judgment;
- slowing of reaction times and reflexes.

Dr. Chiasson added that the same was true for intoxication caused by cannabis.

The Association called Gary Crompton, who was an air traffic controller from 1974 to January 1997; he had been assigned to the south sub-sector of the Control Centre since February 1977.

The Grievant stated that prior to 1992, he had not had any problem with alcohol, with the exception of one arrest, in 1975, for driving under the influence. In the fall of 1992, at an appointment with the physician from the health service, he told the physician that he was having problems with alcohol and the physician, Doctor Rossignol, referred him to Doctor Michèle Cousineau for a special evaluation.

According to Mr. Crompton, Doctor Cousineau's report, which was conveyed to the physician from the health service, described him as a high-risk drinker, but not alcohol-dependent; it was recommended to the Grievant that he contact a specialized clinic, which he did: the person in charge of the clinic, after various tests, suggested that he have therapy once a week for sixteen (16) weeks.

Mr. Crompton went to see Doctor Rossignol again and understood that the cost of the therapy would be borne by the Employer; he started the therapy, but abandoned it when he learned that neither the Employer nor the insurer was going to pay for it. Mr. Crompton did not continue the therapy at his own expense, and he did not try to find any other therapy or assistance programs.

The Grievant pointed out that he was on authorized sick leave when he began the therapy.

Mr. Crompton gave an account of his activities during the evening of December 31, 1996: he attended a party at friends between 9:00 PM and some time between 1:30 and 2:00 AM and drank beer and champagne; then, accompanied by other people, he went to visit other friends, where he only drank beer containing 0.5% alcohol; he slept for around five (5) hours and had a meal before reporting for work.

According to the Grievant, he went to work dressed in the same clothes he had had on all night; he was tired and had a cold, but felt that he was in a condition to perform his duties. Before going into the control room, he went to study the notes and messages. Upon entering the control room, he walked toward Robert Gervais, supervisor, to find out whose position he could take over; Mr. Gervais was at a control position at the time.

Usually, a controller who is ready to assume a position consults the list of staff on duty, erases the name of the person he is going to relieve and writes in his own name in its place. Mr. Crompton stated that it was not necessary to meet with a supervisor before starting work.

When he approached Robert Gervais, the latter said to him:

"*You smell like you've been drinking.*"

Mr. Gervais crossed his hands to form an "X", and asked him to sit down in the back and wait. Mr. Crompton related that he stayed in the control room for about ten minutes, until around 3:45 PM, and then he told Mr. Gervais he was leaving the room, to which the supervisor agreed.

According to Mr. Crompton, he returned to the control room forty-five (45) minutes later and went to sit down with some co-workers. He stated that just before he came back to the control room, he had bumped into Dave McBride, next to a coffee machine; Mr. McBride told him he smelled of alcohol and asked him not to assume a control position; he told Mr. Crompton he could sit in the room and that he would talk to him later.

The Grievant recounted that at one point, while he was conversing with co-workers, Robert Gervais had requested that someone go and take over at a "*data*" position; since none of his co-workers had responded, the Grievant had gone to assume the position. In this regard, he stated:

> "*Dave McBride had given me the order not to work, after I had worked the data position.*"

Concerning the meeting called by Barry Downing on the same day, the Grievant said that Mr. Downing had stated that, in the opinion of the supervisors, he had been considered unfit to perform his duties, because he smelled of alcohol; Mr. Downing had suggested that a blood alcohol test could clarify the situation.

Mr. Crompton explained that Gilbert Légaré, as union representative, had acted as spokesman during the meeting; during a break in the meeting, Mr. Légaré had contacted Pierre Drapeau, an officer of the Association, to obtain advice regarding the attitude that should be adopted with respect to the suggestion of submitting to a test; Mr. Légaré told Mr. Crompton there was a procedure to be followed concerning the test, and that unless that procedure was followed, it was better for him not to agree to undergo a test.

When the meeting resumed, it was still Mr. Légaré who did the talking for the Grievant; Mr. Légaré asserted that it would be hard to get a blood alcohol test taken on January 1, and he proposed to Mr. Downing that the Grievant be granted leave for the remainder of the shift.

Mr. Crompton related that Mr. Légaré had gone to drive him home; during the trip, Gilbert Légaré proposed that the Grievant go for a blood alcohol test; to that end, they went to two (2) restaurants: one did not have the necessary equipment; the other had equipment but it was not working.

The Grievant stated that on January 6, 1997, he was summoned to a meeting which was attended by Messrs. Lachance, LeBlanc, Downing and Légaré. Mr. Lachance told him that the purpose of the meeting had to do with allegations of insubordination and reporting for work when he was not in a condition to work.

Mr. Crompton affirmed that questions were then put to him about what he had done and what he had drunk on December 31, 1996; he stated that he gave a detailed account of what he had drunk and that he denied reporting for work "*impaired or under the influence*".

The Grievant related that during the said meeting of January 6, 1997, his superiors seemed to be accusing him of not submitting to a blood alcohol test on January 1; it was in that context that he had countered with the statement that the burden of proof was on the accuser.

Concerning the allegation of insubordination, he was told that he had performed work at a control position after two (2) supervisors had asked him not to do so.

According to Mr. Crompton, the assertion that he had assumed a control position after receiving instructions prohibiting him from doing so was inaccurate.

The Grievant stated that he had realized that he needed help and had appealed to the Association, which had assisted him financially in connection with the medical evaluation performed by Doctor Chiasson.

Mr. Crompton related that he began his controller's training at age nineteen (19), at which time he held a high school diploma. He gave a description of the occupations he has held since his dismissal, emphasizing the stress he experienced and the significant decrease in his income.

The Grievant stated that during his entire career, he had never disregarded any orders. He recalled that on January 1, 1997, he had had a cold, was congested and could not perceive that he smelled of alcohol, if in fact he did.

Under cross-examination, Mr. Crompton acknowledged that in October 1992, he had reported for work while under the influence of alcohol, and that a test had established that he was under the influence; it was the supervisor Robert Gervais who had accompanied him to a medical clinic so the test could be administered.

Following that event, the Grievant was on sick leave and received a disciplinary suspension of around ten days; at that time, the Transport Canada health service took away his controller's licence for a certain period of time.

Mr. Crompton stated that the cost of the therapy he was to undergo, in the fall of 1992, had not been borne by the insurer, because the specialized clinic was not directed by a

physician. The cost was $2,100 and the Grievant had not considered paying this amount himself; he acknowledged that his income, in 1992, was around $140,000; he had not joined any associations providing assistance, such as Alcoholics Anonymous, at the time.

Mr. Crompton stated that in January 1997, he was not undergoing any therapy. He explained that in 1993, when he came back to work, the maintenance of his controller's licence was made subject to certain conditions, which included a periodic alcohol testing program.

The Grievant stated that he did not drive his car to get to the second New Year's Eve party. He acknowledged that he used cannabis off and on, but stated that he had not used any on the night of December 31 to January 1.

Concerning his initial exchanges with Robert Gervais on January 1, 1997, the Grievant repeated that the supervisor had told him he smelled as if he had been drinking and that he should sit down in the back and wait; according to Mr. Crompton, he did not understand, at that point, that Mr. Gervais was asking him not to work at all during the day; he acknowledged, however, that it was unusual for a supervisor to make such a request.

The Grievant said he could not remember with whom he had exchanged wishes that day. He said he complied with Mr. Gervais' request and stayed in the back for around fifteen minutes, and then he left the control room to go and smoke a cigarette.

According to Mr. Crompton, he returned to the control room approximately fifteen (15) minutes later; in this regard, he explained:

"*I sat in the back, as before.*"

The Grievant related that he was conversing in a friendly manner with co-workers when Mr. Gervais had turned to the group, requesting that a controller go and take over a control position next to the one then being manned by Mr. Brassard. According to Mr. Crompton, the three (3) co-workers he was conversing with were wondering who would respond to Mr. Gervais' request, and he went to take over the position that needed to be filled.

Acknowledging that Mr. Gervais had not been addressing him in particular, Mr. Crompton said he did not know whether Mr. Gervais saw him when he went to assume the position.

Asked whether, at the meeting of January 6, 1997, he had denied working after 4:30 PM on January 1, the Grievant replied that he could not remember any precise time being mentioned, or Mr. Lachance referring to any particular time in connection with the playback of the tape recordings.

Mr. Crompton affirmed that he had been present when the audio recordings were played and that he had acknowledged at the time having made a mistake concerning the time as of which he thought he had stopped doing control work on January 1, 1997.

With reference to document R-11, which says he stopped working at 5:14 PM on January 1, 1997, Mr. Crompton stated that following Mr. Gervais' intervention, he had left the control room, gone to get a coffee and bumped into Mr. McBride on his way back to the control room: it was then, according to the Grievant, that David McBride had ordered him not to assume a control position.

The Employer's attorney asked the Grievant if he had received a copy of a letter in which his attorney had stated that it would be possible for him to testify that he did not remember being told not to assume a control position: the Grievant acknowledged receiving a copy of the letter in question, adding that he had advised his attorney that he did remember the circumstances of the requests received from the supervisors.

Mr. Crompton related that when Gilbert Légaré went to drive him home, he had suggested that it would be worthwhile getting the results of a breathalyser test.

Concerning the meeting of January 6, 1997, the Grievant said he did not state at that meeting that the last time he drank anything was around midnight on New Year's Eve; he said his statement had been that he drank champagne at midnight.

Mr. Crompton acknowledged going before an Arbitration Board for purposes of employment insurance; the Board's decision was filed in the record as Exhibit R-15; an extract is reproduced below:

> "[Translation]
>
> ...
>
> Did the appellant lose his job because of his misconduct?
>
> At the first hearing, the appellant affirmed to us that at the time of the events that resulted in his dismissal, he did not act deliberately and knowingly. It follows that there was no misconduct within the meaning of the Employment Insurance Act.
>
> ..."

The decision (R-15) goes on to refer to two (2) documents provided by Mr. Crompton for the purpose of establishing that at the time in question, he was suffering from alcoholism and undergoing therapy.

Under further questioning by the attorney for the Association, the Grievant filed in the record, as Exhibits S-3 and S-4, two (2) documents relating to a course of therapy begun on June 10, 1997; the document S-4 refers to Doctor Chiasson's expert examination of February 7, 1997; Mr. Crompton explained that these were the same documents as were presented to the Arbitration Board, which are referred to in the Board's decision (R-15).

The Association called Gilbert Légaré, an air traffic controller since 1970 and a union representative. Mr. Légaré affirmed that he served as the Grievant's spokesman at the meeting of January 1, 1997.

The witness related that Mr. Downing had suggested that a test be taken with a "*breath analyser*", but had not formally ordered one to be taken; following that suggestion, the meeting was suspended and the witness contacted Mr. Drapeau, president of the Association local; Mr. Drapeau recommended that they not follow up on the suggestion, unless it was made binding.

Under cross-examination, Mr. Légaré affirmed that he was present on January 6, 1997, at the Grievant's interview with Mr. Lachance; he said he did not remember the matter of the burden of proof coming up, either on that day or on January 1, 1997.

In reply to various questions by the Employer's attorney, the witness replied that he could not recall the exchanges that had ensued, adding that he had not taken any notes at the meetings.

The Association called Fazal Bhimji, vice-president, labour relations with the Association. He stated that NAV-Canada had a monopoly over civil air traffic control in Canada, with a few very rare exceptions in the case of certain private airports. The witness explained that there were hardly any possibilities for employment in air traffic control outside the employer's jurisdiction.

As for employment outside Canada, recruitment was mainly for positions in airport zone management, and not for "*en route*" air traffic control, which is the area for which Mr. Crompton had training.

Under cross-examination, Mr. Bhimji acknowledged that Switzerland was recruiting for air traffic controllers.

The Employer presented evidence in rebuttal, calling François LeBlanc to testify again. The latter stated that he had taken part in the preparation of the investigation report filed in the record as Exhibit R-14; he pointed out that he had taken notes at the meetings referred to in the document.

The Employer's attorney asked the witness whether the Grievant had stated, during the interview, the time at which he had stopped consuming alcoholic beverages on New Year's Eve; the Association's attorney objected to this questioning, stating that Mr. Crompton had not been cross-examined on the basis of notes taken during the interview; the Association's attorney submitted that procedural fairness dictated that the Grievant would first have to have been questioned in that context during cross-examination, and only then could the Employer introduce other testimony to try and refute the answers provided.

I allowed the questioning to proceed, on the basis of its relevancy and also because the Grievant had heard the testimony of the witness Lachance on the point and had had the opportunity to examine Exhibit R-14.

Mr. LeBlanc stated that, according to his notes, Gary Crompton had claimed, at the meeting of January 6, 1997, that he had stopped drinking at around midnight on December 31, 1996.

THE EMPLOYER'S ARGUMENT

The Employer's attorney submitted that the Grievant had failed to meet his obligations on January 1, 1997, had disregarded clear orders and had attempted to conceal certain facts in order to try to escape the possible consequences: the trust entailed in the employment relationship had been broken.

Recalling the events surrounding an operating irregularity in July 1995, which events are summarized in the documents R-3 and R-9, the Employer's attorney stressed that the most serious aspect of these incidents was the fact that the Grievant had concealed them.

According to the Employer's attorney, the Grievant had adopted a similar attitude in October 1995 concerning an absence: he suggested that he thought he had notified the Employer that he would not be coming in to work, whereas his message of the same day indicated that he had forgotten to do so.

The Employer's attorney pointed out that these prior disciplinary notices were not contested, even though the penalties had been reduced by way of a transaction.

The Employer's attorney submitted that on January 1, 1997, the Grievant had reported for work while he appeared to be under the influence of alcohol, the whole in accordance with the observations of two (2) supervisors; the supervisors had issued requests to the Grievant, one at around 3:30 PM and the other at around 4:30 PM, that he not perform any controller's duties.

The Employer's attorney argued that the Grievant had disobeyed the instructions of his superiors and assumed a control position from 4:52 PM until 5:14 PM, when the supervisor Gervais realized the situation.

Recalling that at the time of the incidents, the Grievant had made no reference to a problem with alcoholism, the Employer's attorney argued that the defence of alcoholism was only raised at the adjudication stage, while the Grievant had continued to claim that prior to his taking up control duties, he had not received any clear instructions prohibiting him from doing so.

The Employer's attorney emphasized that several witnesses had taken notes while the events or meetings were going on. The two (2) supervisors, in particular, who are themselves controllers, had provided a substantial amount of detail concerning the time frame of the events and the course they took.

According to the Employer's attorney, the Grievant's testimony contained a number of contradictions in relation to the versions provided by him at other times: his statements to Dr. Chiasson and Mr. Lachance concerning the time at which he had stopped consuming alcoholic beverages were not the same. The Grievant had maintained that he had worked before 4:30 PM, until he learned what was on the tape recordings.

The Employer's attorney argued that unless the Grievant's perception was impaired, on January 1, 1997, owing to his condition, he had disobeyed clear orders, given by two (2) supervisors, one (1) hour apart. He had told Doctor Chiasson that he had not worked that day.

The Employer's attorney pointed out that during the interview on January 6, 1997, the Grievant had offered the excuse that the smell of alcohol had come from his clothes, whereas he made no mention of this on the day the incidents occurred: at the hearing, he stated that he had been suffering from a cold; while preparing for the adjudication, he told his attorney that he did not remember receiving the order not to assume a control position, but at the hearing, he tried to establish that the order was received after he actually took up a position.

The Employer's attorney stressed that the Grievant had provided no excuse or explanation at the meeting of January 1, 1997, nor had he protested the decision to stop him from working or made any attempt to refute the supervisors' opinion as to his condition.

Noting that the notice of disciplinary action (R-5) had not been imposed on account of alcoholism or substance dependency, or in connection with absenteeism, the Employer's attorney submitted that the Employer had had no indication leading it to believe that the Grievant was suffering from any such problems. The dismissal was based on a refusal to abide by instructions and on the fact that the Grievant had reported for work while under the influence of a substance.

The Employer's attorney noted that there was no evidence that the Employer had been informed that the Grievant had any problems related to alcoholism or substance dependency following his sick leave and suspension in early 1993, nor had the Grievant referred to any such problem in January 1997.

The Employer's attorney submitted that neither the Grievant's behaviour nor any objective physical signs had clearly indicated a state of dependency on alcohol or other substances; the physician whose testimony was heard on behalf of the Grievant had not assessed the risk of recidivism: indeed, such an assessment was very important in connection with the job of an air traffic controller.

The Employer's attorney argued that the defences offered by the Grievant could not be easily reconciled in the circumstances, namely:

- he contended that he was not under the influence of alcohol;

- he offered dependency on alcohol as an excuse for his behaviour.

The Employer's attorney made certain observations about the nature of the job and the level of qualifications required to perform it; he asserted that the fact that the Grievant had been drinking did not justify the conclusion, in the circumstances, that certain of his actions

were involuntary or that his conduct should be excused: the attorney referred to a substantial body of case law in this regard.[1]

THE ASSOCIATION'S ARGUMENT

The Association's attorney began by reviewing the accusations formulated in the notice of dismissal and pointed out that one of the grounds cited was that the Grievant's faculties were impaired by alcohol: therefore, the adjudication stage was not where the drinking issue had been introduced.

Concerning the allegation of insubordination, the Association's attorney submitted that the Grievant had first been told to stay in the back and wait; as for the subsequent request that he not assume a control position, it was, in a sense, countermanded by the request of the supervisor Gervais: when he addressed a group which included the Grievant, the supervisor had not indicated that the Grievant was excluded from responding to the request to take over a control position.

With respect to the Grievant's condition upon reporting for work, the Association's attorney submitted that a distinction had to be made between the employer's right to choose, as a precautionary measure, not to assign an employee to his duties, and the right to take disciplinary action against him on the grounds that he was physically incapable of working; relying on a few arbitral awards[2], the Association's attorney argued that the proof of intoxication had to be based on a combination of precise and conclusive factors.

The Association's attorney noted that the Grievant had in fact assumed a control position for approximately twenty minutes, and that the Employer had no specific fault to find with work that had been done.

The Association's attorney submitted that the Grievant had let his representative do the talking for him at the meeting of January 1, 1997, and had abided by the advice received concerning the test, which had been suggested rather than imposed; the Employer could not blame the Grievant for not following up on a suggestion.

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1 Sidbec-Dosco Inc. et Les Métallurgistes Unis d'Amérique, Local 8897, [1991] T.A. 63;
Gouvernement du Québec et Syndicat de la fonction publique, Diane Fortier, November 3, 1995;
Syndicat de la fonction publique du Québec Inc. -vs- Diane Fortier et al., S.C. Montreal, Justice Louis Crête, November 5, 1996;
Lab. Société en commandite et Syndicat des travailleurs de la Société Asbestos Ltée, Gilles Ferland, November 25, 1991, 92T-99;
Brasserie Molson et Union des routiers, André Sylvestre, May 20, 1998;
Mines Noranda Ltée et Syndicat des travailleurs de la Mine Noranda (CSN), Guy E. Dulude, May 25, 1982, T82-346;
Fraternité des chauffeurs d'autobus, S.C.F.P. c. C.T.C.U.M., Quebec Court of Appeal, January 27, 1986, 86T-100;
Transports Provost Inc. et Syndicat des travailleurs de l'énergie et de la chimie, [1991] T.A. 1005;
Re Canadian National Railway Co. and U.T.U., 43 L.A.C. (4th) 124, M.G. Picher, October 6, 1994;
Syndicat canadien des communications, de l'énergie et du papier et Panneaux Chambord inc., Martin Côté, September 30, 1996, 96T-1465;
Compagnie minière Québec Cartier v. United Steelworkers of America and René Lippé, [1995] 2 S.C.R. 1095;
Re Smoky River Coal Ltd and United Steelworkers of America, 52 L.A.C. (4th) 409;
Canadian Airlines International Ltd v. C.A.L.P.A., 39 B.C.L.R. (3d) 131, July 10, 1997, B.C. Court of Appeal;
Syndicat des Travailleurs et Travailleuses de la S.A.Q. et Société des alcools du Québec, André Rousseau, March 19, 1993.

2 Re Cami Automotive Inc. and Canadian Automobile Workers, 12 L.A.C. (4th) 30;
Re Rockwell International of Canada Ltd and United Automobile Workers, 23 L.A.C. (2d) 324;
Canada Post Corp. and Canadian Union of Postal Workers, S.J. Frankel, June 22, 1994.

The Association's attorney pointed out that the witness Lachance had maintained that the Grievant had denied drinking alcohol on December 31, 1996, whereas the entirety of the evidence pointed to the Grievant's having acknowledged that he had been drinking. Moreover, management was aware that the Grievant had had problems with alcoholism.

Commenting on the testimony of the medical expert, the Association's attorney argued that a number of factors had established that the Grievant was experiencing a problem with dependency at the time of the dismissal. In spite of this situation, the Employer had adopted a punitive approach, rather than giving the Grievant the opportunity to be treated in a suitable program agreed to by the parties; the employer's duty to offer assistance before terminating the employment was acknowledged in the arbitral case law[3]: in this context, evidence of subsequent events could be admitted.

The Association's attorney maintained that several kinds of intervention were possible in the circumstances; in his view, the Grievant's rehabilitation posed hardly any difficulties. The attorney referred to a number of arbitral awards which had analysed the prospects for rehabilitation and concluded that the employment should not be terminated where the employee was capable of reporting for work and performing adequately.[4]

Lastly, the Association's attorney submitted that the Grievant had a considerable amount of seniority, which should be taken into account; it was especially important that his seniority be considered given the very high degree of difficulty in finding employment as an air traffic controller.[5]

DECISION AND REASONS

During the testimony of Dr. Chiasson, the Employer's attorney had argued that the introduction of evidence bearing on events subsequent to the dismissal should be restricted, he also stressed the difficulty in reconciling the two (2) aspects of the defence put forward by the Grievant; these arguments were repeated during the summation:

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3 Re Castlegar & District Hospital Society and British Columbia Nurses' Union, 64 L.A.C. (4th) 107, B.C. Nurses' Union, pp. 17-18, pp 20-23;
Re Canada Safeway Ltd and United Food & Commercial Workers, 59 L.A.C. (4th) 432, pp. 17-18;
Re Alcan Smelters and Chemicals Ltd. and Canadian Auto Workers, 55 L.A.C. (4th) 261, pp. 45 et seq.;
Liquor Control Board of Ontario and Ontario Liquor Board Employees' Union, 54 L.A.C. (4th) 193, pp. 12-13 et seq.;
Re Bell Canada and Communications, Energy and Paperworkers Union of Canada, 58 L.A.C. (3d) 1;
Re Mitchell Island Forest Products Ltd. and Industrial Wood and Allied Workers Union, 60 L.A.C. (4th) 73;
Re Peel Memorial Hospital and Service Employees International Union, 52 L.A.C. (4th) 254,
Re Westmin Resources Ltd and Canadian Auto Workers, 63 L.A.C. (4th) 135, pp. 39 et seq

4 Air Canada and C.A.W., Loc. 2213, [1992] 33 L.A.C. (4th) 241;
Alberta and A.U.P.E. (Carmichael), [1991] 17 L.A.C. (4th) 328;
Alcan Smelters and Chemicals Ltd and C.A.S.A.W. Loc.1 (Nyce), [1993] 38 L.A.C. (4th) 110;
Boise Cascade Canada Ltd. (Fort Frances Paper Division) and C.P.U., Loc. 306, [1989] 8 L.A.C. (4th) 55;
Canada (Treasury Board - National Defence) and Herritt, [1996] 58 L.A.C. (4th) 297;
Canadian Airlines International Ltd. and I.A.M. District Lodge 721, [1990] 17 L.A.C. (4th) 437;
Canadian Forest Products (Fort St.James Division) and I.W.A. - Canada, Loc. 1-424, [1992] 32 L.A.C. (4th) 110;
Nova Scotia (Department of Transportation) and C.P.U.E., Loc. 1867, [1988] 1 L.A.C. (4th) 285;
Union Carbide Canada Ltd. and Energy & Chemical Workers Union, Loc. 593, [1987] 31 L.A.C. (4th) 204.

5 S. Green and Transport Canada, Federal Court of Canada, J. Cullen, July 8, 1997, and decision of the Public Service Staff Relations Board, April 6, 1998.

- neither on the day the events occurred nor at the meeting of January 6, 1997 did the Grievant acknowledge that his faculties were impaired; moreover, he did not mention any problem with a dependency;

- after the dismissal, the Grievant tried to obtain a medical opinion in order to allow him to assert that he had a dependency, as if to excuse his conduct on January 1, 1997 on that basis.

Unlike numerous situations examined in the case law concerning problems with absenteeism and fitness for work, the situation under review here was treated from the outset as a disciplinary matter.

This case is not about the Grievant's ability to perform his job adequately, nor does it involve an administrative decision whereby the Employer concluded that the employee was no longer fit to perform his job competently on a regular basis.

The dismissal notice (R-5) cites two (2) specific grounds:

1. reporting for work while under the influence of alcohol, as evidenced by the strong smell of alcohol coming from the Grievant's breath;

2. performing control duties in contravention of an order given by the two (2) supervisors on duty at the time.

We must first examine whether the grounds cited were in fact borne out by the evidence provided.

I The Grievant's condition upon arriving at work

The witness Gervais related that at around 3:30 PM on January 1, 1997, when he greeted the Grievant, he noticed that the Grievant's breath smelled very strongly of alcohol; when he remarked as much to Mr. Crompton, the latter replied that it was "*not that bad*".

The witness McBride, who spoke to the Grievant at around 4:30 PM, referred to a "*pretty strong smell of alcohol*": further to this observation, the supervisor McBride ordered the Grievant not to assume a control position.

The Grievant's testimony and all of the circumstances of the day in question indicated that Mr. Crompton greeted several co-workers that day, had conversations with some of them or exchanged greetings: no testimony by any of the witnesses heard contradicted the assessment of the supervisors Gervais and McBride concerning the smell of alcohol on the Grievant's breath; the Grievant stated at the hearing that a cold or flu made it impossible for him to smell his own breath at the time; this circumstance was not mentioned on January 1 or January 6, 1997.

It should be emphasized that on January 1, 1997, the Grievant did not really dispute the supervisors' appraisal, either at 3:30 PM or at 4:30 PM or when he was summoned to a more formal meeting at around 6:00 PM.

Indeed, the Grievant was not ordered to submit to a test to measure the amount of alcohol on his breath or in his blood, but he did not follow up on the suggestion to take a test if he wished to show that the supervisors were wrong in their assessment.

In the absence of scientific means that could have provided a more certain indication of the Grievant's condition, it is necessary to assess all the circumstances in order to arrive at a determination of whether the Grievant's faculties were impaired.

At the meeting of January 6, 1997, the Grievant maintained that the smell of alcohol noticed on January 1 came from the clothes which he had worn the day before; in order to give the impression that he was not under the influence of alcohol, upon arriving at work, he had stated that he had not consumed any alcohol after midnight.

The explanation to the effect that the smell came from the clothes, in addition to the fact that it was not put forward on the day the incidents occurred, is not very plausible and cannot serve to refute the unequivocal testimony of the two (2) supervisors.

As for the Grievant's statement concerning the time that he stopped consuming alcoholic beverages on New Year's Eve – at around midnight – it was untrue, since he told Dr. Chiasson on February 7, 1997 that he had drunk alcohol until 1:30 or 2:00 A.M.

As Doctor Chiasson said in his testimony, it is not easy to conclude that someone is intoxicated based only on the fact that his breath smells of alcohol where there is no other indication of the state of his psychomotor functions; he pointed out that a lack of sleep can also affect a person's mental functioning. The physician highlighted various possible effects of intoxication, even slight intoxication.

At 3:30 PM, and again at 4:30 PM, on January 1, 1997, the supervisors were of the opinion that the Grievant should not perform his air traffic controller's work. The supervisors did not have any decisive method of verifying, on the spot, whether the Grievant was fully capable of performing his duties, of reacting with the quickness, acuity and judgment required in the controller's job.

The supervisors had to make a decision and they chose not to take any chances, because the strong smell of alcohol on the Grievant's breath led them to fear, quite legitimately, that his faculties might be impaired.

I conclude that the Grievant showed signs of alcohol intoxication on January 1, 1997, based on the reasonable assessment of the supervisors Gervais and McBride. The Grievant did not take any steps to contradict that assessment: I infer from this that he was aware of his condition, despite the fact that he did not pay proper heed to the instructions of the supervisors not to assume a control position.

II The performance of controller's duties in spite of an instruction from the supervisors

The Grievant did not refute the fact that the supervisor Gervais, at around 3:30 P.M., asked him to stay away from all control positions; Mr. Crompton provided an interesting detail in this regard: Mr. Gervais crossed his hands in an "X" to indicate to him that he should not assume a control position.

The Grievant also did not refute the fact that he was given a formal and clear order by Mr. McBride, but maintained that it was only after he had worked at a control position that this order was received.

Mr. McBride's testimony, however, establishes that it was around 4:30 PM when he discussed with the Grievant the fact that he had noticed the smell of alcohol and issued the instruction not to perform any controller's duties.

In fact, it was approximately twenty (20) minutes later that Mr. Crompton disobeyed this instruction, according to the documentary (R-11) and oral evidence.

As I indicated previously, it seems to me that Mr. Crompton did not pay sufficient heed to the supervisors' instructions, probably owing to the slightly intoxicated state he was still in that afternoon.

When he described the effects of an intoxicated state, even a slightly intoxicated state, Dr. Chiasson stressed that mental functioning is affected, while motor function may remain adequate; the physician noted that slight intoxication was more likely to cause euphoria and affect judgment, especially the ability to discriminate between what is and is not dangerous.

The Grievant did not say that his condition was such that he did not understand the instructions received; he offered no explanation of what led him not to comply with the instructions, other than to say that Mr. Gervais had asked for someone to go take over a control position.

As he said in his testimony, Mr. Crompton was conversing at the time with three (3) co-workers, all of whom were available to work: it was he who decided to go take over the position that needed to be filled, against the orders he had received.

The supervisor McBride indicated that the staff on duty that day was amply sufficient to meet the needs of the facility's operations. The Grievant should have stayed away and let a co-worker do any control work that needed to be done.

What probably happened is that the Grievant, after initially complying with the orders received, did not heed them sufficiently and took the initiative of assuming a control position, without requesting express authorization from either of the supervisors who had ordered him not to do so.

Accordingly, the ground of insubordination has been proven.

Evidence was adduced not only as to the events of January 1, 1997, but also, secondly, as to the Grievant's dependency on intoxicating substances, as per the testimony of Dr. Chiasson.

The assessment by the physician was made after the dismissal and was based in large measure on the answers provided by the Grievant during interviews and questionnaires; the physician acknowledged that Mr. Crompton did not show many physical signs of alcoholism or substance dependency.

The evidence also revealed that management, and in particular Mr. Lachance, had been informed of drinking problems experienced by the Grievant in late 1992 and early 1993.

It is important to point out, however, that management had had no indication, since that time, that Mr. Crompton had experienced or was experiencing any problems with alcohol or narcotics. Neither on January 1, 1997 nor on the occasion of the interview of January 6, 1997 did the Grievant refer to an alcohol or other dependency in order to explain or excuse his conduct.

The medical assessment of February 1997, subsequent to the dismissal, and the treatment undertaken by the Grievant beginning in June 1997 – according to document S-3 – could not have been taken into consideration by the Employer, which conveyed its decision on January 20, 1997.

In light of the medical evidence of the Grievant's dependency, the Association's attorney contended that before dismissing the Grievant, the Employer had an obligation to allow him access to the help contemplated in the agreement filed in the record as Exhibit S-2

In this regard, I take the liberty of referring to certain remarks made by me in a decision rendered in 1993:

> "[Translation]
>
> ...
>
> When the employee's state of health is at issue, the tribunal is often led to consider events subsequent to the decision of administrative discharge, in particular in order to determine whether the illness that gave rise to the absence was treated and whether the employee is cured or rehabilitated.
>
> But in the context of disciplinary dismissal, it is surely only with a great deal of caution that the tribunal

> can go beyond the time frame that existed when the employer took its decision.
>
> ..."[6]

In this case, it is not the Grievant's state of health that was at issue, but certain specific events which occurred on January 1, 1997 and had an impact on the safety of the air traffic control operations.

The Grievant did not give the Employer any indication to the effect that he was experiencing a problem with dependency on alcohol or any drug, either during the months preceding the dismissal or during the meetings that were held concerning the incidents in question.

I cannot, retrospectively, make it a requirement for the Employer to have considered offering help and assistance, when the Grievant's problem was unknown to the Employer at the time of the dismissal.

It is also important to note that the Grievant's action was taken after the dismissal, with a view to obtaining an expert opinion and not as part of an attempt to reach out for assistance.

In the circumstances and considering the grounds for the disciplinary action that was taken, the Employer cannot be reproached for not offering the employee assistance: there were no clear signs that the Grievant was in need of assistance and the Grievant did not ask for any assistance when he found himself confronted with the events of January 1, 1997.

In other words, it would be unfair to evaluate the justification for the Employer's decision on the basis of facts which the Employer did not have at the time the decision was taken.

The Association's attorney made reference to the Grievant's seniority, which was slightly over twenty (20) years of service.

Taken in isolation, an employee's seniority may constitute a circumstance that mitigates against the imposition of disciplinary action as harsh as dismissal. But in this case, such a circumstance must be weighed carefully, in light of the prior disciplinary record and the mechanism set out in section 7.03:

> "...
>
> 7.03 Notice of disciplinary action which may have been placed on the personnel file of an employee shall be destroyed after two (2) years have elapsed since the disciplinary action was taken provided that no further disciplinary action has been recorded during this period. The employee shall be notified orally when such notice has been destroyed.
>
> ..."

Given the restriction that this clause places on the Employer's ability to refer to the previous disciplinary record, the relative value of the seniority factor must be tempered accordingly.

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6 Syndicat des Travailleurs et Travailleuses de la S.A.Q. et Société des alcools du Québec, André Rouseau, March 19, 1993, p. 34.

In addition, the Grievant's personnel file included two (2) instances of disciplinary action taken for events that occurred in July 1995 and October 1995. These incidents had demonstrated a lack of sincerity on the Grievant's part.

The explanations proposed by the Grievant at various times were not always consistent, raising, once again, the question of his sincerity and, consequently, of his trustworthiness.

Considering that on January 1, 1997, the Grievant reported for work while his faculties were influenced and impaired by alcohol;

Considering that on January 1, 1997, the Grievant did not obey the clear instructions of his two (2) supervisors, the whole without a legitimate excuse;

Considering the previous disciplinary record, as referred to herein;

Considering the particular safety requirements associated with the air traffic control domain;

I conclude that the Employer has shown just cause for dismissal.

For these reasons, the grievance is dismissed.

Award rendered at LAVAL, March 8, 1999

(Signed)
André Rousseau, LL.D.