IN THE MATTER OF AN ARBITRATION

BETWEEN:

NAV CANADA

(hereinafter referred to as the "Employer")

AND:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

(hereinafter referred to as the "Union")

(Jody Croft Arbitration)

Arbitrator:	H. Allan Hope, Q.C.
Counsel for the Employer:	Colin G.M. Gibson
Counsel for the Union:	Peter J. Barnacle
Place of Hearing:	Richmond, B.C.
Date of Hearing:	November 24 and 25; and December 21, 22 and 23, 1999

A W A R D

I - The Dispute

The Grievor in this dispute, Jody Croft, was dismissed on January 16, 1997 from her position as a probationary employee. At the time she was in training to qualify as an Instrument Flight Regulations, (IFR), air traffic controller, in the West Specialty Area of the Vancouver Area Control Centre. Her dismissal came approximately three months into a term of employment that commenced on October 7, 1996. It was her second term of employment as a Controller. On both occasions she was hired by Nav Canada's predecessor, Transport Canada. However, she was a new-hire at the material time, having resigned from Transport Canada effective September 11, 1996, approximately three weeks before she was re-hired. On November 1, 1996 her employment contract was assigned to Nav Canada.

In short, the Grievor's initial employment and her reemployment were with Transport Canada but her reemployment occurred while air traffic control in Canada was undergoing privatization. She was hired and rehired by Transport Canada but was dismissed by its successor, Nav Canada. She was dismissed in a letter dated January 16, 1996 that reads as follows:

> In a conversation of today, Mr. C. Myers, Manager of ACC Training, advised that you were unable to meet the required standards for the training programme in which you were participating. For this reason, please be advised that <u>you are now released on probation</u> this date, and you will receive two weeks pay in lieu of notice. (emphasis added)

The term, "released on probation", means dismissed. The dismissal led to the filing of a grievance dated January 30, 1997 in which it was alleged that the Grievor had been wrongfully dismissed

and that her training had not been conducted in accordance with the program in which she was enrolled. The remedy sought in the grievance was reinstatement to the Grievor's IFR training program with compensation for her wage loss. The grievance reads in part as follows:

> In accordance with Article 6 ... relating to the termination of employee's employment, we hereby grieve that Jody Croft was wrongfully dismissed and that training was not conducted as per the Vancouver Area Control Centre Unit Qualification Training Program ... We request that Jody Croft be re-admitted to the IFR training program and made whole. (emphasis added)

The Unions's claim for reinstatement to the IFR program was abandoned at the commencement of these proceedings. It was replaced with a claim that the Grievor was entitled to have been placed in a training program for a Visual Flight Regulation (VFR) Controller position as an alternative to dismissal. The claim for wage compensation was continued. The change in the Union's claim was recorded in a letter dated September 8, 1999 in which the Union wrote:

> We have had the opportunity to review the training issue and be advised that the union does not intend to challenge at arbitration the decision to cease training Ms. Croft in January, 1997. Our review is, however, that the employer had an obligation in law to undertake a reasonable job search for positions with NAV CANADA prior to any decision to terminate Ms. Croft's employment. This is a right that arises under the just cause protection provided in the collective agreement. The employer cannot avoid such an obligation by attempting to enforce purported terms and conditions entered into at the time of hire and in conflict with the collective agreement. (emphasis added)

The "purported terms and conditions entered into at the time of hire", was a reference to one of the conditions agreed to

by the Grievor in her letter of employment with Transport Canada. It was to the effect that if she failed to qualify for the position to which she had been appointed, she would be dismissed. It was conceded for purposes of this hearing that the Grievor would have been bound by that agreement under the public sector principles having application as between probationary employees and Transport Canada. The position of the Union, in effect, was that the Grievor could not be held to that agreement under the private sector principles that govern employer-employee relations between Nav Canada and the Grievor.

In any event, said the Union, the parties entered into a transition agreement to accommodate the move to the private sector which included recognition of enhanced rights vested in probationary employees with respect to dismissal. The provision reads as follows:

> No employee shall be disciplined or discharged except for just cause. However, the discharge of a probationary employee for non-disciplinary reasons may be carried out at the discretion of the Employer at any time during the probationary period. The Employer's discretion must be exercised in good faith, without discrimination and in a non-arbitrary fashion. (emphasis added)

The position of the Union was that the Employer was obliged under that language to establish that the dismissal of the Grievor was reasonable in the arbitral sense and that failing to offer her an opportunity to train for a VFR position prior to dismissal was unreasonable. I note in that context that the question of the obligation to offer an opportunity to train arose in retrospect. That is, no direct claim of entitlement to train was made until September 8, 1999, more than two and one-half years after the Grievor's dismissal. The position of the Employer on the merits was that the Grievor continued to be bound by the terms of employment she had agreed to in her Transport Canada letter of appointment. Its alternative

position was that its failure to offer a training position, when viewed in retrospect, met the test set out in the transition agreement.

The dispute involves an interpretive issue arising out of the move of the parties from the regulatory regime that governs the public service to the regime that governs private sector industrial relations. In particular, as stated, it was generally conceded between the parties that, under the principles that governed Transport Canada, probationary employees had no access to a third party review of a dismissal. By contrast, the statutory and arbitral principles that govern Nav Canada incorporate a third-party review of such dismissals. In addition, in the transition to the private sector, these parties chose to define the rights of probationary employees who had been dismissed. Hence, the interpretive issue between the parties relates to the mutual intention to be imputed to them with respect to the language they adopted relating to probationary employees and, in broad terms, the extent to which the general arbitral principles relating to the dismissal of probationary employees are to be applied in this employment relationship.

In addition to that initial question, subordinate questions arose with respect to preliminary objections raised by the Employer that the Union, in its change in remedy, was seeking to introduce an issue which had not been raised in the filing of the grievance or in the discussion of it during the grievance procedure. Its further position was that the remedy of reinstatement to a VFR training position was beyond my jurisdiction as an arbitrator. The Employer's objections were addressed in a preliminary decision published between the parties on October 13, 1999. The two objections raised were adjourned to be pursued in this hearing.

In summary, in these proceedings the issues raised are whether the grievance as pleaded encompassed the issues raised and the amended remedy sought by the Grievor; whether an arbitrator under

this collective agreement has the jurisdiction to grant the remedy sought; and, whether the facts surrounding the dismissal of the Grievor meet the test contemplated in the arbitral authorities and the collective agreement with respect to the termination of the employment of a probationary employee.

II - The Facts

The employment history of the Grievor with Nav Canada and its predecessor, Transport Canada, was set out in broad terms in the Preliminary Decision. She commenced her initial employment as a Transport Canada employee in July of 1990. During that period she qualified as VFR controller in Kelowna and an IFR controller in Vancouver. She resigned her employment in Vancouver on March 13, 1996 with her resignation to take effect on April 21, 1996. Initially she sought to transfer from Vancouver to Edmonton, but, when that request was not granted, she resigned and applied for employment in Edmonton. She was rehired in Edmonton effective April 22, 1996 in circumstances that became a transfer. Approximately five months later, on September 11, 1996, she resigned her position in Edmonton and returned to Vancouver. She was rehired in Vancouver on October 7, 1996 in the IFR training position she occupied at the time of her dismissal. As indicated, her dismissal came approximately three months later on January 17, 1997.

The Grievor's moves between Vancouver and Edmonton were initiated by her in response to continuing family problems which were set out in her initial request for a transfer from Vancouver to Edmonton. That request was made in a letter dated December 11, 1995 which includes the following extract:

> I request a transfer to Edmonton Centre, as soon as possible, on compassionate grounds. For the past five years I trained and worked in pursuit of an IFR Air Traffic Control license, separated

> from my husband and four children, more than half the time. While I attained the license, I paid for it with loss of family unity. We live in a family ripped apart by separation. I am buckling under the stress of coping with the situation, while my husband is unable to move to the Lower Mainland. These, and other extenuating circumstances compel us to request a transfer to Edmonton a means of bringing our family back together. It is time to repair the damage. Without accommodation of a transfer, I am forced to consider terminating employment in the Pacific Region and applying in the Edmonton Region. Please understand this radical action is additional hardship on my family due to loss of wages, potential moving expenses, reduction to AI2 (if my application was successful), and would only be considered as a last resort. I am confident I can be a more effective Air Traffic Controller, and serve the system better, without the continual stress I currently suffer from separation. I urge you to consider this request seriously and compassionately as I must save my family. (emphasis added)

As stated, the Grievor's application for a transfer was not approved with the result that, on March 13, 1996, she resigned and advised that she was "seeking employment at the Edmonton Area Control Centre as an IFR Area Traffic Controller". Her resignation was accepted on March 19, 1996. On April 10, 1996 she was offered an opportunity to train for a position in "IFR Air Traffic Control in Edmonton Area Control Centre En Route Specialty". That offer was made in a letter dated April 10, 1996 which included a notification that Transport Canada intended to commercialize the air navigation system in 1996 and to transfer its operations to a new employer. The Grievor was advised that the position to which she was appointed formed part of "the new employer's establishment". She was informed that she would receive notification that she would be transferred to Nav Canada with a letter of offer from Nav Canada outlining the terms and conditions of her employment. The Grievor accepted her appointment on those terms.

On April 22, 1996 the Grievor received a letter from Transport Canada offering her "a deployment" to Edmonton. Deployment is a term used in the public service to describe a transfer. In that letter she was again advised that "the position to which you are being deployed is designated for transfer to NAV CANADA coincidental with the impending commercialization of the Air Navigation Services Component of Transport Canada Aviation". The Grievor endorsed her acceptance of the offer on the letter on April 1, 1996 and completed a "consent to deployment" on the same date.

The effective result was that when the Grievor commenced training in Edmonton, it was on the understanding that her employment would be transferred to Nav Canada. As stated, she resigned her position in Edmonton on September 11, 1996. Her resignation was accepted the following day. I digress to note that there was a dispute between the parties with respect to her progress in training in Edmonton. Evidence was called by the Employer to the effect that the Grievor was perceived as failing to progress satisfactorily to the point where there was a concern about whether she was going to qualify for the IFR position for which she was in training. In addition, the opinion was expressed that her performance in training caused the Employer to conclude in hindsight that she may not have been able to qualify for a VFR position.

That evidence was adduced to support the Employer's submission that if the test of reasonableness asserted by the Union is seen as having application, the Grievor's performance in training in Edmonton compelled a finding that the decision not to offer her a VFR training position was reasonable. The Grievor and the Union challenged the evidence. The Grievor's evidence was that her understanding was that she was progressing satisfactorily in her training in Edmonton and that she would have qualified in the ordinary course if she had not resigned her employment.

In the final analysis, that difference was not relevant to the resolution of the dispute. On the evidence it was clear that the Employer did entertain doubts about the likelihood of the Grievor qualifying in Edmonton and developed further doubts about her capacity to qualify for a VFR position. However, those opinions were generated in retrospect and were not expressed to the Grievor or the Union in any formal sense at the material time. In any event, those concerns did not prevent the Employer from rehiring the Grievor in Vancouver within a month of her resignation in Edmonton. The rehire of the Grievor is inconsistent with a finding that the Employer, at that time, considered her to be incapable of qualifying for an IFR or VFR position.

As stated, the Grievor was rehired by Transport Canada effective October 7, 1996 into a training position "under the special procedures for Canadian candidates with previous air traffic control experience". The position for which she was selected was in the West Specialty Area of the Vancouver Area Control Centre, being a position equivalent to the one she was occupying when she resigned on March 13, 1996. Her appointment, which was in writing, was to a "12-month probationary period" for what was described as "requalification training". Once again, the Grievor was put on notice that her employment contract was to be assigned to Nav Canada when air traffic control operations were transferred to it on November 1, 1996. In particular, the letter contained the following notice:

> You should be aware that on April 1, 1996, Transport Canada signed an Agreement to Transfer with NAV CANADA, a private sector corporation, to transfer the provision of civil air navigation services in Canada to NAV CANADA. The Transfer Date has been scheduled for November 1, 1996. In order to ensure the continuity of your training, NAV CANADA has agreed to assume Transport Canada's obligations under this contract, provided you grant your consent to such an assignment. Your signature accepting the terms of this contract will also constitute your

written consent to the assignment of the contract to NAV CANADA. (emphasis added)

The Grievor accepted the terms set out in her letter of appointment including the assignment of her "contract" to Nav Canada and the condition relating to her dismissal in the event of her failure to qualify for an IFR position. The Grievor failed to qualify. Specifically, she was advised that the Employer had made the decision that she was failing to demonstrate the ability to meet the training standards required in her training program. The Grievor did not challenge that decision at the material time. However, in the grievance filed on her behalf on January 30, 1997, two weeks after her dismissal, it was alleged that her dismissal had been unlawful and that her training had not been conducted properly.

As noted, the submission with respect to training was abandoned just prior to the commencement of this hearing and the alternative claim that the Grievor was entitled to be appointed to a VFR training position in a tower was substituted. There were vacant VFR positions available in various towers when the Grievor was dismissed. However, as stated, she did not make application for any of those vacant positions and did not assert a contractual right to claim one. In short, the facts do not support the conclusion that the Grievor was denied an opportunity to train for a tower position at the time of her dismissal, as opposed to failing to consider offering her an additional training position.

At one stage the Grievor raised the question informally with respect to whether she could be considered for a tower. Similarly, the president of the Union, Fazal Bhimji, asked during the grievance procedure if the Grievor had been considered for a tower. However, those informal initiatives did not amount to an assertion of a contractual right to claim such a position and the failure of the Employer to follow up on those questions did not amount to a denial

of an asserted right to train for a tower vacancy. The inference invited by the facts is that the claim for a right to train for a tower position evolved from a review of the facts by Counsel for the Union in the context of the conversion to the private sector and the enhanced protection afforded to probationary employees under the language agreed to by the parties in their hiatus agreement.

But the fact that the assertion of the right arose in retrospect did not defeat its validity. The question remained one of whether the law of the collective agreement supported the claim. In particular, the question was whether the dismissal of the Grievor reflected a decision by Nav Canada which, to paraphrase the transition agreement, was "exercised in good faith, without discrimination and in a non-arbitrary fashion". That question was raised in retrospect and must be answered in retrospect. In effect, the questions posed are, was there a positive obligation on the Employer to offer the Grievor a tower position in the absence of a request, and, if not, was there an obligation to offer her a position when she sought one through Union counsel?

In terms of the facts relevant to those questions, appointments to train for tower positions were subject to the Employer's training policy for Controllers. As stated, Controllers can qualify for IFR or VFR positions and can be certified in either one or both classifications. In the Grievor's case, she held certifications as a VFR Controller as a result of having qualified for a tower position in Kelowna and an IFR Controller as a result of having qualified in her first period of employment in Vancouver. However, Controllers must train and qualify for each position they seek. Hence, neither of those certifications qualified her to claim the IFR vacancy for which she was training in Edmonton or the IFR position for which she was training in Vancouver.

The Union did not challenge that aspect of the Employer's training policy. The aspect of the policy that became controversial was a requirement by the Employer that training positions be offered subject to its goal of having the maximum number of Controllers available to qualify for IFR positions. Offering the Grievor a tower position was not consistent with that goal. In the normal training routine, applicants without prior Controller experience receive institutional training at the Employer's training centre in Cornwall, Ontario. That training is designed to equip applicants to occupy training vacancies in both IFR and VFR positions. In that training structure, applicants who qualify at Cornwall are placed in IFR training positions in one of the various control centres if vacancies exist. If no vacancies exist, trainees are assigned to any VFR training position available in a tower.

There are two categories of positions in towers, regular positions, which are called "substantive" positions, and what may be called "streamer" positions. Streamer positions are those filled by trainees who are in the IFR stream and who are awaiting assignment to an air traffic control centre for training as an IFR Controller. Streamer positions are temporary in the sense that trainees who fit the streamer criteria are restricted to spending a maximum of two years in a tower before being required to fill an IFR training position in a control centre.

In the application of its training policy, the goal of the Employer is to limit the number of substantive positions in towers in order to maintain the highest number of streamer positions available to facilitate its IFR program. In pursuit of that goal, the Employer "releases" probationary employees who fail to qualify for an IFR position unless they have achieved the final phase of their multi-phase training. Trainees who fail to qualify in the final phase are given an opportunity to train for a VFR tower position. The reasoning behind that exception is that trainees who achieve the final phase of training

are seen by the Employer as continuing to possess the potential to train for an IFR position. Granting the Grievor a VFR training position would be a departure from the training policy and would permit her, if she succeeded, to occupy a substantive position in a tower, effectively taking that position out of the IFR "stream".

I conclude on those facts that if the Grievor had sought a right to train for a VFR position when she was dismissed, the response of the Employer would have been that she was bound by the term she agreed to with respect to her failure to qualify and, in any event, because she had not reached the final phase of training, she was not eligible to claim a training position in a tower. In effect, that was the position taken by the Employer in retrospect when the issue was raised in these proceedings. In particular, the Employer said that its training policy constituted a valid reason for rejecting an application by the Grievor to train for a tower position.

Quite apart from its training policy, the Employer submitted that the facts compelled the finding that the Grievor was not entitled to claim a VFR training position and that denying her such a claim was not a violation of the just cause provision of the transition agreement as it applied to probationary employees. Its evidence was that it was not satisfied with the progress of the Grievor in her training for the IFR position in Vancouver. Carey Myers, the manager of training at the Vancouver Area Control Centre, gave evidence to the effect that the deficiencies perceived in the Grievor's response to training compelled the conclusion that she would be unlikely to qualify for a VFR position. That opinion was challenged by the Union and the Grievor.

On the evidence of Mr. Myers, the Grievor laboured through her training. Her performance triggered criticism from her on-the-job instructors (OJI). The OJI's are bargaining unit Controllers who

provide in-service instruction to trainees and an evaluation of their performance to management. There is a second level of training supervision in the bargaining unit in the form of training supervisors who coordinate training with trainees, OJI's and management. The evidence of Mr. Myers was that a consensus emerged amongst all persons involved in the Grievor's training to the effect that her progress did not justify continuing her in the program. The Grievor and the Union accepted that decision when the Union withdrew the allegation that her training had been deficient.

Mr. Myers' evidence became controversial with respect to the opinion he offered regarding the Grievor's suitability for VFR training and a further opinion relating to difficulties he perceived the Grievor as having experienced in qualifying for her first IFR position in Vancouver. The Union objected to that evidence on the basis that her prior training was not relevant to the issue of whether she should have been offered an opportunity to train for a vacant VFR position in a tower. The evidence was received subject to that objection.

Mr. Myers then spoke about the interview in which he advised the Grievor that she was being terminated. He described her as being outwardly calm and said that she had expressed no opinion about being terminated. He said that she did not request an opportunity to train for a tower. He indicated there had been some previous discussion in which she had indicated that she was having difficulty with the infidelity of her husband but that she did not indicate personal problems as an explanation for her training difficulties on that occasion.

III - <u>The Grievor's "Employment Contract"</u>

The initial position of the Employer on the merits was that the Grievor was bound by the terms and conditions she agreed to in

her October 2, 1996 letter of employment. As stated, the terms included an acknowledgement by the Grievor that if she did not qualify as an IFR Controller, she would be "rejected on probation", being the equivalent of dismissal. That aspect of the "contract" raised two questions. The first was, assuming that individual contracts of employment have the force of law under the statutory regime governing employer-employee relations in the public service, is such a contract enforceable in the statutory regime governing parties to collective agreements under the Labour Code of Canada?

That subject has been addressed extensively in the judicial and arbitral authorities. See Brown & Beatty, Canadian Labour Arbitration, para. 2:1210, pp. 2-16 to 2-18 citing McGavin Toastmaster Ltd. v. Ainscough [1975], 54 D.L.R. (3d) 1, 75 C.L.L.C. 14,277 (S.C.C.) and Board of Governors of Southern Alberta Institute of Technology (1990), 12 L.A.C. (4th) 420 (Jones). The consensus is that private sector employment relationships governed by collective bargaining legislation, generally speaking, are not consistent with a right in employees to make individual binding agreements with employers.

The second question raised by the Grievor's "contract" is whether her agreement that she would be dismissed if she failed to qualify for an IFR position amounted to an agreement to accept a particular employment result if she failed to achieve a satisfactory level of performance in training. That issue arises in the authorities where parties agree that particular conduct will constitute grounds for dismissal. Agreements of that nature normally apply to acts of culpable misconduct but the reasoning has been extended to conduct, such as absenteeism, which may be either culpable or non-culpable. That subject has also been addressed extensively in the authorities, both judicial and arbitral. See Canadian Labour Arbitration, para. 7:4100, p. 7-161 to 7-168.

The principles that apply to the review of a dismissal under a collective agreement that provides for dismissal in response to particular circumstances turn on the language of the legislation that governs the contractual relationship. The significance of the legislative regime in the review of dismissals by arbitrators where such agreements are recognized was considered in Re Toronto Transit Commission and Amalgamated Transit Union, Local 113, (1997) 58 L.A.C. (4th) 143 (Springate). Arbitrator Springate was reviewing amendments to the Ontario Labour Relations Act which introduced that right in parties in language similar to that which appears in the Canada Labour Code.

The language is cited on p. 149 as follows; "... the collective agreement does not contain a specific penalty for the infraction that is the subject matter of the arbitration". Arbitrator Springate concluded that an arbitrator lacked jurisdiction under that language to substitute a different result where parties have agreed to dismissal as an appropriate response to particular circumstances. That same language appears in the Canada Labour Code and, in my view, Arbitrator Springate's reasoning applies to collective agreements negotiated under its terms.

Similar reasoning has been applied where parties have recorded a similar agreement outside of a collective agreement. See Canadian Labour Arbitration @ p. 7-162 and Domtar Sonoco Containers and International Woodworkers - Canada, Local 1-1000, (1993) 28 L.A.C. (4th) 11 (Thorne) @ p. 19 where the Arbitrator wrote:

> The employer would not have been able to discharge the grievor successfully for no reason but would have to be able to show that he had not met the standards of performance agreed upon. To that extent the right to grieve and to go to arbitration was preserved by the agreement. What the agreement did do, however, was to restrict the scope of the review of a board of arbitration to the factual question of whether the terms of

> the agreement had been breached. Accordingly, I ruled that my jurisdiction was limited by the terms of the agreement, so that the burden on the company was to make out a breach of the agreement justifying the dismissal of the grievor according to its terms. (emphasis added)

On the facts in this dispute, that reasoning would limit the obligation of the Employer to proof that the Grievor failed to qualify for the position for which she was training. I am of the view that the reasoning of Arbitrator Thorne also applies to the review of dismissals under the Canada Code, including dismissal on non-culpable grounds related to work performance. Distinctions arise between dismissals initiated in response to culpable as opposed to non-culpable acts. However, the standards of review set out in the governing legislation and the arbitral and judicial authorities apply to all dismissals in the sense that an employer who dismisses a seniority rated employee, whether on culpable or non-culpable grounds, must establish just and reasonable cause for its action. Similarly, an employer who dismisses a probationary employee, whether for culpable or non-culpable reasons, must meet the appropriate test that governs the particular employment relationship.

However, in my view of the facts, there is no need to address the significance in law of the Grievor's "employment contract" and her agreement that failure to qualify would result in her dismissal. The legal status of the condition that a failure to qualify in training would result in dismissal was addressed only in passing by the parties and it would be inappropriate to impose a ruling on an issue fundamental to the hiring process without affording them a full opportunity to address the issue. If resolution of that issue were fundamental to the resolution of the dispute, I would consider it necessary to invite the parties to make further submissions.

However, I do not consider it necessary to resolve those questions in order to render a decision dispositive of issues raised.

Rather, I considered it appropriate to flag the questions that arise where an employee agrees to terms and conditions of employment separate from the collective agreement that amount to an agreement made out of the presence of the Union to accept dismissal in response to particular circumstances. In addition to the question of the competence of individual employees to agree to be bound by such terms, there is the additional question of the enforceability of such an agreement, even assuming the Union is a party to it.

The parties will be well-advised to consider the implications of "employment contracts" in the substantially different arbitral regime that exists in the private sector where arbitrators, generally speaking, have jurisdiction to review any dismissal of an employee, albeit with restrictions relating to available remedies. However, in this case, the questions raised can be addressed on the basis of whether the facts support a finding that the decision of the Employer was in breach of the provision agreed to in the transition agreement with respect to the dismissal of probationary employees.

IV - Findings of Fact

As stated, at the time of her dismissal, the Grievor was a probationary employee with approximately three months of service. She had a history of employment with Transport Canada. In that context, I find that nothing in the arbitral or judicial authorities would serve to incorporate that prior employment with the three-months of service the Grievor had accumulated as a new employee. Her status, as indicated in her letter of employment, was that of a new-hire employee with previous air traffic control experience who was an applicant for an IFR training position.

I further find that the Grievor's claim to a right to train for a tower was belated in the sense that the claim was made just prior to the commencement of these proceedings. The previous

references to training for a tower were informal and did not incorporate a claim of entitlement to that right. I further conclude that the Grievor failed to meet the requisite standard in her three months of training and that she did not achieve the final phase of that training prior to her dismissal.

Finally, in terms of the Employer's application of its training policy, I find that there were exceptions to the rule that VFR training positions would only be offered to IFR trainees who failed to qualify if they had reached the final phase of their training. But those exceptions arose in circumstances where the Employer had a need to establish a particular VFR vacancy as a substantive position. There was no evidence of exceptions that arose where no specific circumstance existed. In particular, there was no evidence of trainees being placed in tower training positions in the absence of a circumstance relating to the needs of the Employer as opposed to the needs of a particular employee.

V - Positions of the Parties

(i) The Employer

The Employer's first position was to repeat its preliminary objection with respect to my jurisdiction. It first submitted that the Union had not raised the claim of entitlement to train for a VFR position in its filing of the grievance or during the grievance procedure. However, on the facts, what can be said is that while the Union did not raise that issue formally prior to the letter from Union counsel, the facts do not support a conclusion that the Union disavowed or waived the claim. In particular, the inquiries with respect to a tower position raised by the Grievor and the Union president, Mr. Bhimji, were inconsistent with a finding that the Union had waived any of the Grievor's rights in law arising from the expanded arbitral review of the dismissal of probationary employees.

In this hearing the Employer supported its position with evidence called with respect to the exchanges that took place during the grievance procedure. The evidence was to the effect that, in addition to the language of the grievance, no claim to entitlement to train for a tower position was made during the grievance procedure. The position of the Employer was to the effect that the failure to assert that right in the written grievance or during the grievance procedure was fatal to the Union's claim. Its alternate position was that an arbitrator has no jurisdiction to grant the remedy sought by the Union.

The position of the Employer on the merits was that its decision to dismiss the Grievor was in accord with the terms and conditions of the her employment. Those terms were set out in her letter of appointment dated October 2, 1996. As stated, her employment was in the form of an appointment which was subject to a 12-month probationary period with the proviso that if she failed to qualify as an IFR Controller she would be dismissed. The Grievor did fail to qualify, said the Employer, and her dismissal was in accord with the terms of her probation.

The Employer relied on the following authorities: Edith Cavell Private Hospital, (1982) 6 L.A.C. (3d) 229 (Hope); National Harbours Board, (1982), unreported (Hope); Transair Ltd., [1978] 2 C.L.R.B.R. 354 (LaPointe); McRae Waste Management, (1998) 71 L.A.C. (4th) 197 (Sanderson); B.C. Rail and CUTE 6, March 1, 1990, unreported (Hope); Hawker Siddeley Canada Inc., Orenda Division, (1991) 21 L.A.C. (4th) 289 (Joyce); and Canadian Labour Arbitration, para. 7:5000 to para. 7:5020 on pp. 7-253 to 271. The decisions in Edith Cavell and National Harbours Board relate to the test employers are expected to meet in the non-culpable dismissal of seniority rated employees on the basis of poor work performance. The Employer urged that the Union in this dispute was, in effect, seeking to have those tests extend to probationary employees, a move which the Employer saw as

inconsistent with the nature of probation, the jurisprudence and the language of the collective agreement.

The Employer relied on the decision of the Canada Labour Board in Transair to support the proposition that parties to a collective agreement governed by the Canada Labour Code are free to define the extent to which the dismissal of a probationary employee is subject to review by an arbitrator. The parties, said the Employer, had defined a limited right of review in their adoption of the term, "exercised in good faith, without discrimination and in a non-arbitrary fashion". Its position was that the facts failed to establish that its decision was flawed by bad faith, discrimination or arbitrariness. In that context the Employer argued that the onus was upon the Grievor and the Union to establish that its exercise of discretion failed to meet the test prescribed in the collective agreement.

In that context, the Employer relied on the decision in McRae Waste Management and its discussion of the concepts of reasonableness and arbitrariness in terms of the dismissal of a probationary employee. On the basis of that reasoning the Employer urged that its onus in the first instance was limited to establishing that it had a reason to dismiss the Grievor and that the onus then fell to the Grievor to establish that the decision was flawed by discrimination, arbitrariness or bad faith. The decision of Arbitrator Joyce in Hawker Siddeley was also cited for the assertion that the onus in the dismissal of a probationary employee lies on a union. The Employer relied on BC Rail for the reasoning with respect to the scope of the discretion vested in an employer in the dismissal of a probationary employee.

(ii) The Union

The position of the Union on the merits of the grievance was that the circumstances were governed by the transition provisions

of the collective agreement dealing with matters of discipline, particularly the requirement that in dismissing a probationary employee the Employer must act "in good faith, without discrimination and in a non-arbitrary fashion". Its position was that dismissing the Grievor in the particular circumstances was unreasonable in the arbitral sense. There were VFR positions available in towers at the material time for which the Grievor, on the basis of prior employment, could be expected to qualify, said the Union. Refusing to permit her the opportunity to train for one of those positions was arbitrary and discriminatory, said the Union, first because it denied her a right that had been extended to other employees who had failed to qualify during IFR training, and, in any event, because the refusal to permit an employee who had previously qualified as a VFR Controller an opportunity to train for a tower position was arbitrary. She should have been afforded an opportunity to defend her employment, said the Union.

In support of its position the Union relied on Canadian Labour Arbitration, para. 7:500 at p. 7-253 to 271; Pacific Western Airlines and Canadian Airline Flight Attendants Association, (1982) 30 L.A.C. (2d) 68 (Sychuk); Porcupine Area Ambulance Service and Canadian Union of Public Employees, Local 1484, (1975) 7 L.A.C. (2d) 182 (Beatty); Regional District of Nanaimo and Canadian Union of Public Employees, Local 401, (1980) 25 L.A.C. (2d) 34 (Vickers); Scarborough Board of Education and Ontario Secondary School Teachers Federation District 16, (1980) 26 L.A.C. (2d) 160 (Picher); Vancouver Island Regional Library Board and Canadian Union of Public Employees, Local 401, (1983) 10 L.A.C. (3d) 164 (Vickers); Nav Canada and Canadian Air Traffic Control Association, October 28, 1998, unreported (Jones); and MacNeil, Lynk and Engelmann, Trade Union Law in Canada, para. 7.160.

In Porcupine Ambulance Service the Union relied on the comments of Arbitrator Beatty on p. 186 where he wrote:

> We would go further and state that in any case involving the discharge of a probationary employee the employer must not only prove the acts complained of which precipitated the discharge, but in addition he must demonstrate this reasonably supports his conclusion that discharge was appropriate.

In District of Nanaimo, Arbitrator Vickers, as he then was, cited a decision of Arbitrator Ladner on pp. 38-9 for the following proposition:

> However, the employer must make a fair assessment and give the employee a fair opportunity to prove his or her ability.

The Union saw that reasoning as requiring the Employer to afford the Grievor an opportunity to demonstrate her ability to qualify for a tower position. Its submission was that the facts invited the conclusion that qualifying for a tower position involved a much less rigorous training routine than that required in IFR positions. The decision to deny the Grievor that opportunity was arbitrary, said the Union. In that context it relied on the decision of Arbitrator Picher in Scarborough Board of Education for his discussion on p. 177 of the term "arbitrary" and the meaning to be assigned to it in applying a test of reasonableness to a decision with respect to the termination of a probationary employee. Arbitrator Picher summarized his views with the statement that "arbitrariness" as a term, "means, at a minimum, that in considering the discharge of a probationary employee an employer must not demonstrate an attitude of not caring or failing to turn his mind to the merits of the issue".

The decision of Arbitrator Sychuk in Pacific Western Airlines was to a similar effect in terms of the test of good faith. It was cited for the proposition appearing on p. 76 that:

> In establishing that the decision to terminate [a] probationary employee was made bona fides, the employer must verify that the employee has been given a fair opportunity to demonstrate whether or not the employee possesses the appropriate qualifications and suitability for permanent employment and that the employer had made a fair assessment of the employee's qualifications and suitability for permanent employment, e.g., the employee must not set unreasonable standards. (emphasis added)

The decision of Arbitrator Vickers in Vancouver Island Library Board was relied on to support the assertion that probationary employees have a right to grieve dismissals. In that same vein, a decision of the Ontario Court of Justice (General Division) in Canadian Nav Canada and Canadian Air Traffic Control Association, November 23, 1999, 99-DB-348, unreported, No. F-1590, was cited as support for the position that an employee who is under disciplinary suspension at the time, the "class of work [he performed] was transferred from Transport Canada to Nav Canada", could not be denied employment for that reason. The additional issue in that case was whether Arbitrator Swan had jurisdiction to hear a grievance in which the refusal to employ the grievor was challenged. He concluded that he had that jurisdiction and Lane, J. of the Divisional Court agreed.

The Union relied on an extract from Canadian Labour Arbitration on pp. 7-254 to 255 and on p. 7-263 for the general discussion with respect to the rights of probationary employees who face dismissal and particularly for the discussion commencing on p. 7-263 to the effect that "the onus is on the employer to establish that any reasons for termination [must] have a foundation in fact". Its further submission based on the general discussion with respect to the rights of probationary employees was that an employer must establish facts that disclose that the decision to dismiss the employee was reasonable in the sense contemplated in the arbitral authorities

with respect to the test of reasonableness. Its submission was that the Employer failed to meet that test in this dispute.

VI - Decision

Turning first to the Employer's objections to jurisdiction to hear the dispute and to grant the remedy sought, my view is that those objections must be dismissed. In the context of the Union's belated assertion of a right in the Grievor to claim a VFR training position, I note that the grievance arose in the wake of the move from the public sector to the private sector. It was clear that probationary employees dismissed in the public sector were not entitled to a third party review of the circumstances. (See Leonarduzzi and Canadian Air Traffic Control Association, [1999] C.P.S.S.R.B. No. 46 (Potter)). In light of that history, it is reasonable to conclude that neither the Union nor the Grievor were quick to appreciate the significance of the change in culture in terms of her dismissal.

In any event, as stated, the entitlement of the Grievor to pursue her dismissal under the provisions of the transition agreement was not waived by her or by the Union either expressly or by implication. Hence, it remained a question of whether the grievance as pleaded could be read as encompassing the issue which was articulated by Counsel for the Union and whether raising it was prejudicial to the Employer in the sense contemplated in the arbitral authorities. I conclude that nothing in the facts adduced in the hearing on the merits invited the conclusion that the term, "wrongly dismissed", used in the grievance was not sufficient to embrace the question of whether the discretionary decision to dismiss the Grievor was "exercised in good faith, without discrimination and in a non-arbitrary fashion". That terminology amounts to an agreement between the parties that the dismissal of a probationary employee must be reasonable in all of the circumstances. The Employer failed to

establish that the issue raised by the Union fell outside the concept of "wrongly dismissed".

In terms of the Employer's second preliminary objection, the facts adduced and submissions made in this hearing did not support a finding that the law as it applies to the dismissal of probationary employees deprived me of jurisdiction to grant the remedy sought by the Union. The transition from the public sector to the private sector brought the dismissal of probationary employees under the regime in which probationary employees are recognized as having a right to resort to the grievance procedure to challenge their dismissal, including the right to seek reinstatement. There is no basis for concluding that seeking reinstatement to a VFR training position goes beyond that jurisdiction. Nothing in the facts supports the conclusion that the Union or the Grievor compromised that inherent right. The question for determination was whether the Employer's failure to offer the Grievor a VFR training position in the first instance, or its failure to offer such a position when a claim was advanced, was in breach of the just cause provision as it applies to probationary employees.

In considering that question, the facts are that the Grievor's performance as an IFR trainee fell below an acceptable standard and she was subject to dismissal as a probationary employee on that basis, provided only that the Employer's discretion was "exercised in good faith without discrimination and in a non-arbitrary fashion". The first question to be addressed in terms of the exercise of discretion is whether the transition provisions can be read as requiring the Employer to offer alternate employment to the Grievor as a positive obligation that arose, even in the absence of any assertion by her or the Union that she was entitled to claim that right.

That positive obligation has been recognized as having application to seniority rated employees who face dismissal on the

basis of non-culpable conduct related to work performance. See: Edith Cavell and National Harbours Board. However, I agree with the Employer that the reasoning in those authorities cannot be extended to the dismissal of an employee who faces dismissal by reason of the failure to achieve the standard of performance required of probationary employees. The test for probationary employees whose performance falls below the expected standard was addressed by Arbitrator Vickers in District of Nanaimo on pp. 38-9 where he cited Arbitrator Ladner for the following:

> If there has been a fair assessment and the employee has been given a fair chance to prove his or her ability, then an arbitrator ought not to interfere with the employer's conclusion that a probationary employee is unlikely to meet the standards reasonably required by the employer, should the arbitrator reach a different conclusion.

Hence, I conclude that there was no positive obligation on the Employer to make an unsolicited offer of a tower training position to the Grievor. To conclude otherwise would require a major change in the Employer's training policy and a potential compromise of its streamer program. If the Employer were to be seen as obligated generally to offer a tower training position to the Grievor, it would be obligated to make a similar offer to other IFR three-month trainees who failed to achieve the final phase of training. The fact that the Grievor was a "Canadian candidate with previous air traffic control experience", which was how she was described in her letter of employment, did not create a distinction that would support a claim on her behalf to treat her differently from other short-service trainees in the streamer program who were unable to qualify. To recognize in her a right to claim a VFR training position would require recognition of a similar right in other trainees and would thus compromise the Employer's streamer program.

The onus on the Union in this dispute was to adduce facts which would support the conclusion that the decision of the Employer to dismiss the Grievor was exercised in bad faith or was arbitrary or discriminatory. There was no assertion of bad faith and the decision to terminate the Grievor's training was not at issue. The Union, in effect, conceded that the decision that the Grievor was not meeting IFR training standards was not subject to challenge. Hence, the question was whether failing to offer her VFR training was arbitrary or discriminatory.

That question arose in retrospect. I was not able to find anything in the facts or the applicable principles which would impose a positive obligation on the Employer to offer the Grievor training for a VFR position in the absence of a formal request from the Grievor. The off-hand references to the VFR question raised informally by the Grievor and the Union subsequent to the dismissal were not the equivalent of the assertion of a right to claim a tower training position. The real question, then, is whether denying the request when it was made was a decision that can be seen as arbitrary or discriminatory.

The evidence of the Union in that regard was largely anecdotal and did not address the Employer's evidence that offering employees opportunities to train for substantive VFR vacancies would take tower positions out of the reach of "streamers". The streamer program represents a well-defined corporate and public interest policy. On the facts, to the extent that exceptions to the policy were made, they were made in response to particular circumstances that served the needs of the Employer. For example, the evidence of Richard Nye, the Union's vice-president of labour relations, was that he was given a substantive position in a tower where filling vacancies was difficult.

I am of the view that the Employer established that its decision to dismiss the Grievor at the material time was a reasonable response to her apparent inability to achieve satisfactory progress in her training. That decision was in accord with the Employer's well understood training policy. I am of the further view that the subsequent failure of the Employer to grant the Grievor an opportunity to train for a VFR position was also reasonable. In particular, that decision was also in accord with the Employer's training policy and reflected a legitimate goal to restrict access to tower positions in order to accommodate the streamer aspect of its training program.

It would be difficult to conceive of a category of employment in which high standards of training and performance are more essential than in air traffic control. Without putting too thick a brush to the canvass, air traffic controllers have the lives and safety of numerous people in their hands. They are required to make critical decisions in circumstances where their major resources are their training, judgment and decision-making ability. It is a category of employment which, according to the Grievor herself, requires a high level of expertise and an equally high level of self-confidence. The Employer is not only justified in setting and maintaining high standards, it is obligated in terms of public safety to bring that measure of control to its operations.

The facts did not support a conclusion that the decision made ex post facto by the Employer was discriminatory or arbitrary in the arbitral sense. The position of the Grievor, expressed approximately three years after the event, was that her difficulties in training arose from the increasingly intense distraction she was experiencing as a result of a collapsing marriage. She saw those events as robbing her of the confidence that she described as essential to Controllers. The Grievor said that her marital problems were now behind her and she was confident that she could function as Controller

if she was given that opportunity. That expression of optimism was not inconsistent with the facts.

In her prior employment the Grievor had qualified as both a VFR and IFR Controller, including qualifying in a position similar to the one for which she was training at the time of her termination. The only factor that reconciled these apparently conflicting levels of performance was the Grievor's marriage breakdown. (It may be seen as regrettable in retrospect that the Grievor did not seek a leave of absence or some other delay in her training which would accommodate her marital distractions). The Grievor was an impressive witness who exuded an air of competence, confidence and professionalism. Her difficulty was that she was not able to demonstrate that she possessed those qualities at the time of her dismissal and, while the fact that she has conquered her problems is admirable, it does not form a basis for granting the remedy claimed, nor does it render the Employer's decision unreasonable in the sense contemplated in the just cause provision and the arbitral authorities.

The Union expressed concern that if the Employer is free to dismiss all trainees who fail to qualify for positions prior to the final phase of training, it will introduce a new and troubling dimension to a working environment in which employees are required to train for any new position they seek to fill. As I understand it, the Union saw that fact as creating a potential for employees to become vulnerable to dismissal during a move to occupy any new position. The answer to that concern is that the Employer's training policy is not binding on arbitrators who are called upon to review dismissals under the just cause provision. The first rule in the exercise of such a jurisdiction is that every case turns on its particular facts and what is reasonable in one circumstance may be unreasonable in other circumstances.

This dispute involved a three-month employee who obtained a particular training position on the understanding that she would be dismissed if she failed to qualify. Accepting for purposes of this decision that she was not legally bound by the terms of her contract of employment, it presents a far different circumstance than that of a senior employee who, in effect, is seeking to transfer from one substantive position to another. If the collective agreement does not provide employment security for such employees, and that question was not canvassed, the facts themselves would create a substantially different scenario than the one encountered in this dispute.

I repeat, the Grievor was a three-month applicant who failed to qualify. The only fact that distinguished her from any three-month applicant who fails to qualify was found in her entry in a program for Canadian trainees with previous experience as a Controller. However, that fact did not revive her prior employment in terms of assessing the reasonableness of the Employer's actions. She failed to qualify for the position for which she was hired on probation and the decision of the Employer to dismiss her was not inconsistent with its policies and practice and was reasonable in the circumstances. In the result, I conclude that the Union failed to establish that the Employer was in breach of the collective agreement by reason of having dismissed the Grievor. In particular, the facts did not support a finding that the decision to dismiss the Grievor was not "exercised in good faith, without discrimination and in a non-arbitrary fashion". In the result, the grievance is dismissed.

DATED at the City of Prince George, in the Province of British Columbia, this 15th day of February, 2000.

H. ALLAN HOPE, Q.C. - Arbitrator