IN THE MATTER OF AN ARBITRATION

BETWEEN

ST. VITAL SCHOOL DIVISION NO. 6

(hereinafter referred to as the "Company")

- and –

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3470,

(hereinafter referred to as the "Union")

Re: Grievance of Bert Tarko – Dismissal

BOARD OF ARBITRATION:	P.S. Teskey, Sole Arbitrator
DATES OF ARBITRATION:	May 27th, 2002
LOCATION OF ARBITRATION:	Winnipeg, Manitoba
APPEARANCES :	R.A. Simpson, Counsel for the Company K. McIlroy, counsel for the Union Bert Tarko, Grievor

AWARD

At the commencement of the hearing, the parties agreed that I was properly appointed and had jurisdiction to hear and determine the matters in question.

The Grievance (Ex.3) dated September 17,. 2001 alleges that Mr. Tarko was unjustly terminated on September 4, 2001 from his employment with the Division (more specifically at the Ecole St. Germain) and seeks reinstatement into his current classification (Head Custodian) with the appropriate redress.

The letter of dismissal (Ex. 2) dated September 4, 2001 and signed by Mr. Kolba, the Director of Facilities, reads as follows:

> "On July 27 I met with you and a representative of the union to discuss the incident, which occurred on June 28, 2001 at Ecole St. Germain School where a parent volunteer was injured and hospitalized. In that meeting I shared with you on July 24, 2001, I received additional information from the insurance company pertaining to this incident. This information advised that the parent had initiated a claim to be reimbursed for medical expenses as a result of this injury and described the unsafe act that you participated in while supervising the parent volunteer, specifically moving the bucket ladder while the parent was inside of it. I shared with you that the seriousness

> of this issue required further consideration with the Superintendent of Schools, Mr. Terry Borys, who was on vacation and returning in late August.
>
> We have now had an opportunity to review this incident. In doing so we have considered your work history as well, with the most concerning incident being the recent meeting with you in April of 2001 formalizing concerns we had with respect to your personal safety practices. With respect to the June 28th incident we cannot find any extenuating circumstance, which would have caused you to act in an unsafe manner. Nor wee you able to provide any logical reason you're your actions in our meeting on July 27th.
>
> It is our decision that although this incident, alone, is inexcusable, your work history clearly demonstrates an employee who lacks the dependability and consistency that we require in our work practices in the school division. It is on this basis that we advise you that effective immediately your services are terminated."

Mr. Kolba was the only witness presented by the Division and the Grievor was the only witness called by the Union.

It was not in dispute that the proper stages of the grievance procedure had taken place. I was requested to retain jurisdiction should there be any form of monetary remedy depending upon my ultimate finding.

The Job Description was entered as Exhibit 8. In general terms, the summary indicates:

> 'Under the direction/supervision of the School Principal and Facilities Administration. Maintains daily, periodically and annually as required, the physical school plant and grounds in a safe, clean comfortable, attractive and efficient condition within the guidelines, regulations and policies of the St. Vital School Division."

The first duty and responsibility listed is "inspection of facility and grounds, insuring cleanliness and safety to all".

The "Custodial Operations and Procedures Handbook" was tendered as Exhibit 9. I do not intend to refer to that at length but, clearly, it stresses the importance of adequate safety procedures and the need for attentiveness to same.

The event that triggered the dismissal was an accident occurring in the school during the evening of June 28, 2001. A group of three parent volunteers had come to the school to take down the decorations after the graduation the intent was to save them for later) and Mr. Tarko (after completing his regular shift at 3:30 p.m.) had agreed upon an overtime basis to return to the school to assist them.

To make a long story short, Mr. Tarko, being physically unable at the time himself to go up on the bucket ladder, had positioned it for the first three lines of decorations. To stabilize the ladder requires the use of "outriggers". There was no problem with the first three but on the fourth line there was a most definite problem. He had forgotten to place the outriggers in position which resulted in the ladder being unstable.

Ms. Wight, the parent volunteer on the ladder was attempting to hold down the decorations to him and he had moved up the ladder to some extent. The ladder titled and Ms. Wight fell off from a height of approximately ten feet. She was hospitalized for approximately five days and her injuries involved a fracture of her left humerus (which required a surgical procedure) as well as a fractured elbow and some cracked ribs. There is an outstanding insurance claim against the Division which has not yet been settled.

Mr. Tarko promptly reported the incident and I might add that, both from his testimony at the hearing and the documentary evidence, it is clear that he has been forthright and direct in accepting his responsibility for the accident. The issue is whether his conduct in that instance, in conjunction with his past record (which includes some eleven other injuries during his twelve

years of employment), are sufficient to justify discharge. I also find that, while a number of those previous injuries were likely avoidable, none were as a result of malice or willfulness. The issue is one of carelessness and negligence.

Until the incident in question on June 28, Mr. Tarko had hurt only himself. The concern of the Division is that he is "an accident waiting to happen" and could be a danger not only to himself but to other staff, or the students, or to parent volunteers.

On January 29, 1998 Mr. Tarko received a memorandum from Mr. Kolba (Ex. 17) which reads as follows:

> "Re Meeting, Thursday, January 22, 1998
>
> I wish to review the meeting we had in Germain Malabre's office with Germain, Pat and myself on Thursday, January 22nd. Currently we have some concerns with respect to the amount of absenteeism you have been experiencing.
>
> It was our perception that this absenteeism seems to happen around peak periods when there are Christmas concerts or extra work that needs to be done in the school. You have advised us that this is not the case and that your absenteeism is legitimate and related to problems you are having with your feet. At the time of our discussion you had missed approximately 30 working days this year due to illness. This extensive amount of absenteeism is having an effect on the school, as there are other staff in the building that are currently away on long-term disability.
>
> In order to ensure that you are in good health and able to attend to your duties, we are providing a copy of your job description and related letter of information, which you can provide to your physician. We would ask that your physician confirm that you are able to attend to your duties and ensure that your illness is not one of working environment and you have the health required to attend to your job. You have committed to provide us with this information and these letters are attached. We would appreciate a doctor's certificate in the next couple of weeks or sooner if possible.
>
> We discussed with you concerns that have been building up with the school administration pertaining to your initiative towards your work. Over the past couple of years, the occasions seem to have escalated where you are requested to do certain things that may be considered ancillary to your normal custodial responsibilities in the school; but certainly are not issues that could not be done by a custodian. Often when you are asked why you are unable to a certain task. Seldom, if ever, do you offer alternatives or appear to try to address other options available to have issues addressed. Simple examples would be the accumulation of snow on the exterior of the school. You may make one phone call to have the item dealt with but then do not take the initiative on subsequent occasions if it is not dealt with to check with Maintenance to see why it is not done. Another example would be when there is a complaint in the school about cleanliness or a certain job that has to be done you leave the issue and share it with the person who is responsible but do not attempt to clean it up or deal with the item. Teachers, too, have provided unsolicited comments in the presence of administration to colleagues indicating that it is their impression that you are not very ambitious and appear to do as little as possible with respect to your responsibilities.
>
> This information is shared with you to help you appreciate how you are visualized at Ecole St. Germain. It is our expectation in the School Division that our custodial staff have the ability to operate with indirect control. We expect them to take responsibility for the school building from a building operational standpoint. We, as administration, commend those custodians who endlessly maintain the school building in topnotch condition and openly and willingly assist in whatever way they can with any school

related or non-school related activities. Many of these activities are things that we as a School Division cannot mandate that you do. However, your indication of interest and attempt to assist in some ways can go a long way to change the image that you have developed amongst the teachers and administration at Ecole St. Germain.

After discussing some of these points with you, you shared that you did not agree with us on all of our points but also thanked us for bringing it to your attention because you were not aware that staff and administration perceived you in this light. You also shared that during the past year you have had a number of things going on personally including issues related to your health and that it has been a difficult year for your. We accept that this might be part of the reason that you are in the situation that you are in now. However, with your understanding of the perceptions that we have of you and your doctor's assessment, which should be completed shortly, hopefully you will be able to attend to your responsibilities competently.

Another issue we discussed also was related to your accumulation of banked time. I formalized with you that all banked time needs to be pre-approved and should be documented by time sheets signed by the school administrator and sent to my office for formal accounting purposes. You provided me with an accounting of banked time that you had saved up over the past couple of years and I was surprised to find that you had this documentation in your office whereas we did not record it in ours. You have committed to send your time sheets to Gayle Parr to have her formally record this information and in the future you will follow appropriate process.

My letter to you summarizes administration's issues of concern. I realize that in the past we have not formalized any of these items with you. We have committed to you that in the future we will begin to do so in order to help you appreciate what things you may be doing well and what things may need some improvement. If you have any questions or concerns or feel you need additional help or clarification understanding our responsibilities in the school, I would ask that you feel comfortable in contacting Germain Malabre, Bert Bonneteau or me for clarification. If the meantime I thank you in advance for our anticipated cooperation:.

On April 9, 2001 (less than three months before the June 28th incident) Mr. Kolba provided the Grievor with another letter (Ex. 16) which reads as follows:

"Re: Compensation Claims

Dear Bert,

Your most recent compensation claim has prompted us to conduct a Complete review of your work history as it relates to compensation Claims. We provide you with the following history:

April 6, 1990	Banged your ankle on a flat truck on wheels.
March 20, 1992	Slipped while carrying garbage hurt right foot.
March 23, 1993	Slipped on a wet floor, injured lower back
June 15, 1994	Lifting of steel platform, pulled muscle in lower back
March 10, 1995	Slipped on metal steps to hatch, sprained left wrist.
April 10, 1996	While in a crawl space slipped on a ground sheet and

	twisted knee.
December 5, 1997	While moving a projector cart, banged right thumb, caused swelling and a puncture.
December 2, 1998	Slipped on a metal roof hurt right wrist.
August 1999	Advised compensation, that in August of 1999 you were hanging banners in the gymnasium for a permit holder. Caused a strain in your left elbow.
January 1, 2000	Formally registered tennis elbow complaint
September 12, 2000	Slipped on multipurpose room floor when wet putting away lunch tables.

When reviewing the above incidents, it is obvious that you have an unusual level of accidents related to your requirements to attend to your duties.

The two main areas of concern are your inability to safely attend to activities in order to protect yourself, which is most evident in bangs, and scrapes and strains that you have received, as well as, a consistency of slipping while attending to normal work requirements. The first issue related to bang's scrapes and strains can only be attended to by your own attention to the work you have at hand. It is important for you to evaluate situations and apply control to your tasks in order to ensure that you are protected from personal injury. The issue related to slipping requires you to seriously evaluate the footwear you are wearing at the time each one of these incidents has occurred, as well as your physical ability to ensure proper balance and footing when attending to specific tasks.

When reviewing many of the incidents it is obvious that you have not paid careful attention to the working area. This is especially evident with the slipping incidents. Normally, we would expect that the area would be inspected to ensure that work could be safely attended to. This would require identifying potential areas that could cause injury, and taking appropriate safety tips to ensure that work can be completed safely.

It is my responsibility to advise you that your history has placed us in a position to begin to intensely evaluating your continued employment with the school division. Situations like this can be difficult for us to administer. Although you attend to your duties in an acceptable manner your work history clearly shows that you have an inability to do so at a level that can ensure your own personal safety. The position of custodian brings with it a responsibility to undertake tasks that, at times, present a certain level of risk. The majority of custodians have the ability to perform these jobs with little or no impact to them from a safety standpoint. However, in situations where an employee cannot meet this requirement it is our responsibility to either, accommodate the employee with alternative work, or consider that they have an inability to perform the work as required and sever the relationship for reasons of this inability, and the employees personal safety. It is our hope that as we continue to monitor you we can avoid implementing these measures. To assist you, please consider the following:

1. If you require any assistance from the school division with respect to the issues above please advise me immediately.

2. If there are any tasks, that are consistent with the normal custodian requirements, that you believe you are not able to do, we need to be advised

immediately in order to consider alternatives to ensure your personal safety.

3. If there are any tasks that do not fall within your current responsibilities, that you wish to attend to, you need to advise this office in order to obtain permission to do so.

4. Please ensure that you are wearing appropriate footwear when attending to your tasks. This would include a rubber-soled shoe with a tread during your normal working day, an appropriate boot when working outside in snow, and non-slip footwear when working on wet floors. Any industrial footwear store will be able to point you to the appropriate footwear. (Canadian Footwear, Marks Work Warehouse, etc.)

5. It is strongly advised, that you attend to your personal doctor to share with them the contents of this letter. In doing so it is possible that the doctor may be able to advise you whether or not these issues are related to a physical or medical deficiency. Should you choose to take this advice we would be agreeable to provide whatever information your doctor may request to assist them is assessing your situation.

6. Effective immediately, this office is to be advised of any injury regardless of whether or not you believe that it is a compensation injury. This would include injuries that occur outside of regular working hours. This information is extremely important in effectively monitoring your continued safety as it relates to personal issues and school division requirements.

I trust you can appreciate the importance of this issue. If there are any points you wish to discuss further, please do not hesitate to contact me; otherwise I leave this information to your attention and resolution."

There was some debate as to whether these were actual letters of warning in a disciplinary sense but I am satisfied that concerns about the Grievor's attentiveness and safety procedures had been made clear to him although that, in itself, is not dispositive of the issue before me.

Most of the facts are summarized in the above discussion but I intend to briefly summarize other relevant portions of the evidence of Mr. Kolba and Mr. Tarko.

Mr. Kolba testified that Mr. Tarko and started with the Division in 1989, originally at Glen Lawn Collegiate, and then became the Head Custodian at Ecole St. Germain in 1993. He had previously been a tradesman at Transcona Springfield Division and, prior to that, he had been employed with Canada packers until it closed.

Custodians were responsible for cleaning and preventative maintenance and safety. The schools are used in the evenings for various purposes by permit holders (some 1100 permits per year are issued) and the custodian is in charge of the building at night without direct supervision. Head Custodians are generally day workers but, on occasion, may perform extra work in the evenings. Head Custodians report to a supervisor who, in turn, reports to Mr. Kolba who only visits the school approximately once a month although the supervisors visit as required.

Mr. Kolba had been away the week of June 26th and returned on July 3rd. He received the accident report on July 4th. On July 24th he received an email from Mr. K. James (Ex. 12) acting on behalf of the Division's insurers specifying the details of the incident and noting that Ms Wight had a "sustainable claim" against the Division and any compensation would be subject to the deductible of $2,500.00. Until that point, Mr. Kolba had not been aware of all of the details of the incident.

On July 27th, he convened a meeting with the Grievor and Mr. R. Carriere, the President of the Union (the notes of same were tendered as Ex. 13 but need not be repeated). Mr. Tarko had been forthright and honest at the meeting in terms of what happened.

The parent volunteers had requested custodial help and Mr. Tarko was responsible for ensuring that help was provided safely.

Given the earlier meeting in April, Mr. Kolba "couldn't believe" that Mr. Tarko had again been negligent so soon after.

The Grievor had been on WCB at the time of the meeting and continued to be so until January 2002.

Mr. Kolba felt that the accidents were avoidable and that the Grievor was somewhat "lazy". In April, he had advised Mr. Tarko that his future employment was in jeopardy. He had felt that Mr. Tarko had taken that warning seriously.

The decision to terminate the Grievor was made not only on the seriousness of the culminating incident itself but in conjunction with the previous concerns about his safety practices. It was felt that he was not capable of performing in any capacity as a Custodian within the Division as there was minimal supervision and he might be placed in situations which could result in injury to himself or others. He had tried to resolve the problems previously with the Grievor but that obviously had not worked. There was no reason to believe that the situation would improve and he had lost confidence in Mr. Tarko.

In cross-examination Mr. Kolba acknowledged that there were various classifications of Custodian including Head Custodian, Evening Custodian, Custodial Aides (working at night) and Custodial Assistants (working days). There were some forty-two cleaning positions within the Division but, unfortunately, even though they had lesser responsibilities there was still the potential to hurt themselves or others. However, those positions did have less exposure to the general public although it could happen at times.

He also acknowledged that the Grievor had no previous suspensions on his disciplinary record.

The Grievor testified that he had started as a Night Custodian for three years at Glen Lawn Collegiate and had taken training in Power Engineering and Building Maintenance there. He had applied for the Head Custodian position at Ecole St. Germain and is fully bilingual which is an asset in this particular school.

He agreed that the Head Custodian position carried much more responsibility for safety.

Basically, the cleaners are assigned a set number of rooms and do not have that level of responsibility. At this school, there was one eight-hour cleaner position and one four hour cleaner position. The responsibilities were to clean the floors and take out garbage. Normally light bulbs were not changed. They also clean washrooms.

Mr. Tarko testified that he had not taken any of the previous warnings lightly. It was normal practice to fill out a claim for WCB purposes on any incident because it was difficult to tell what might happen later. He instructed his own staff to do that as well.

He was questioned to some extend about the incidents referred to in the April letter but I need not repeat all of that. It is fair to say that, particularly in a work environment such as this, accidents do happen. While they may be avoidable in many instances, people are not perfect but it is also fair to say that Mr. Tarko's previous absenteeism and safety record was legitimately of some concern to the Division.

When he had received Exhibit 16, he had gone to the doctor and had his eyesight checked and received reading glasses. He also purchased more expensive footwear with orthoticss which were of assistance in terms of his problems with his feet. He had taken the letter seriously and knew that his "job was on the line" and it was time to "buckle up a bit" although he had not considered it to be a formal written reprimand.

It was not a common practice within the Division to do regular performance evaluations and neither had he ever been sent to any safety courses. He had provided a doctor's certificate when requested.

With respect to the June 28 incident, he had been requested two or three times by the parent committee to work that evening as there was no other night staff available. He had set up the bucket ladder the first three times but not on the fourth. He readily acknowledged that he was to blame for that.

Ms Wight had agreed to go up the ladder as he could not do that because of an injury to his shoulder (which ultimately resulted in WCB).

When she fell, he had taken the proper procedures to contact he paramedics and firemen and she was removed by ambulance. He had called the Principal immediately to report the incident. He hade also filled out the required forms.

He had received no real training on the bucket ladder but was aware as to how it was to work. He had not particularly reviewed Exhibit 9, the Manual, and basically used it only for phone numbers for emergency purposes.

After the incident his first contact with Mr. Kolba was in July after the insurance agent had called. Mr. James had met with Mr. Tarko previously and Mr. Tarko had answered any questions that were asked of him.

He had received the termination letter on September 4th, the day before he had an operation on his shoulder.

Since his dismissal he has been trying to find work but has been unsuccessful to date. He has received a small amount of compensation from Hilltop Research in terms of being tested for several of their products.

Although he had had some six or seven interviews, those positions paid only in the range of seven to eight dollars which was considerably less than what he made.

He had been on WCB benefits until January and then on sick leave. He had just begun to receive EI benefits.

The Grievor testified that the termination had a "horrible effect" on himself and his family. His wife works with Home Care and he had gone to a psychologist to deal with the stress issues through the MGEU EAP Plan. He has been on an anti-depressant drug.

His testimony was that he wanted to return to work in some capacity, as he "liked the people".

In cross-examination he agreed that he had only briefly prior to the hearing been in a position to return to work. His counseling with the psychologist had ended in January.

He agreed that there were instructions to use the outrigger on the ladder itself and that he had used the ladder incorrectly causing a serious injury to the parent volunteer.

The previous letters of January 1998 and April 2001 had been placed in his file and, although he did not fully agree with the contents, no grievances were filed. He also agreed that safety was a "primary concern". Upon my questions, he indicated that he would be more careful now. June had been a hectic time as it was the end of the school term and he was tired and in pain from his shoulder on the night of the incident. He had not been as attentive as he ought to have because of the pain. He felt that, since there was no other staff available, he was required to assist the parent volunteers that evening.

In final argument Counsel provided me with a number of authorities which shall be discussed as necessary in the Decision portion of this Award. Those authorities included:

Re Cominco Ltd. and United Steelworkers of America, Local 480 (1996), 60 L.A.C. (4th) 246 (Bird, Q.C.)

Re Corporation of the City of Calgary and Amalgamated Transit Union, Local 583 (1997), 61 L.A.C. (4th) 317 (Lucas, Q.C.)

Re ITT Automotive Incl. and Canadian Auto Workers, Local 199 (1995), 51 L.A.C. (4th) 308 (Rose)

Re Noranda Minerals Inc. and Canadian Union of Base Metal Workers (1995), 49 L.A.C. (4th) 46 (Brunner)

Re Burns Meats and United Food & Commercial Workers Union, Local 832 (1994), 43 L.A.C. (4th) 416 (Teskey)

Re Burns Meats and United Food & Commercial Workers Union, Local 832 (1993) 38 L.A.C. (4th) 172 (Hamilton)

Re Shell Canada Ltd. and U.S.W.A. Local 9074, [1995] M.G.A.D. No 35 (Jamieson)

Re Cooney Haulage and Teamsters Union, Local 91 (1987), 28 L.A.C. (3d) 97 (MacDowell)

Re Corporation of The City of Windsor and Canadian Union of Public Employees, Local 82 (1985), 18 L.A.C. (3d) 332 (Weatherill)

Re Industrial Family (Hamilton) Credit Union Ltd. and Office & Professional Employees International Union, Local 343 (1995), 51 L.A.C. (4th) 443 (Hebdon)

Re County of Smoky Lake No. 13 and Canadian Union of Public Employees, Local 1461 (1989), 7 L.A.C. (4th) 353 (Power)

Mr. Simpson argued that the issue was primarily one of safety. There had been prior concerns expressed and, clearly, that was one of the primary responsibilities of the Grievor.

There had also been concerns expressed about the Grievor's attentiveness and "laziness". Mr. Tarko was "an accident waiting to happen" in terms of being careless and negligent despite being in a position of considerable responsibility.

It was not unreasonable for the Division to have concerns about possible further injury to either himself or to others.

Counsel conceded that Mr. Tarko had been forthright and honest in terms of what happened but also noted that Mr. Kolba had not been vindictive at all and had been fair. The decision of the Division not to put him back into any position had been fully considered but should not be disturbed. It was submitted that I should not do what the Division was not prepared to.

The Grievor had been given opportunities to improve his performance but they appeared to have little affect. The fact of the incident occurring some three months after the April letter and meeting was tremendously significant.

The Grievor himself had not provided any satisfactory answer as to what would change if he was placed back into work.

It was not possible to "discipline somebody into being safe" and it was suggested that such a remedy would not work here. Accordingly, no further opportunity ought to be provided, as there was no real reason to believe that he would perform differently.

Ms McIlroy took a different approach. She relied upon the concept of progressive discipline and noted that the grievor's disciplinary record did not include any previous suspensions or demotions. Although there was cause for discipline, something less than termination would suffice in this instance.

Mr. Tarko had been tired and was in paid at the time of the incident. He had felt that he had to come in because there was no other staff. He had been honest and recognized the seriousness of the incident.

It was suggested that no decision had been made immediately after the incident because the real concern was only raised after the contact by Mr. James. Despite the liability, that was not sufficient to justify discharge.

His previous disciplinary record was only two written reprimands even if it was accepted that those were reprimands.

A series of fairly minor mishaps (eleven over twelve years) in this particular environment was not grounds for dismissal.

There was no evidence that more serious corrective discipline would not work in this case. It was possible to demote the Grievor to a cleaning position or to take other measures.

Counsel reminded me that this was an accident which might have been preventable but was not intentional. It was careless but not intended.

Mitigating factors included twelve years of service, his remorse and honesty, the lack of intent, his health problems, and the potential for reinstatement.

Accordingly, it was submitted that I should intervene and exercise my jurisdiction to substitute penalty.

In reply, Mr. Simpson stressed the nature of the Grievor's employment was in a school and working under no or little direct supervision. Accordingly, it was not reasonable to place him back into any employment.

Mr. Kolba, when he had found out all of the details of what happened, did act reasonably quickly and the concerns of the Division were real and significant.

DECISION

This is not an easy case to determine.

Firstly, I intend to deal with the authorities. As usual, none of them have the exact same fact situation but the principles are important to consider in light of this specific facts here.

Re Cominco Ltd. was a discharge case involving an employee working as a loader whose duties including loading sampling and testing highway shipments of dangerous chemicals. His experience ought to have provided him with enough forewarning to have avoided the mistake he made which was also negligent. There was a step discipline program which largely replaced escalating suspensions with pay with intense counseling (p. 252).

At pp. 253-254, Arbitrator Bird referred to the decision of Arbitrator Kelleher in Re Northarm Transportation Ltd. and CBRT and quoted the following extract:

> "Counsel for the Employer relied in his argument on Alcan Smelters and Chemicals Ltd. and Canadian Association of Smelter and Allied Workers, Local 1, unreported, January 9, 1985 (Hope). The case involved the termination of an employee for negligent work performance. In the course of the Award, the arbitrator made these remarks:
>
> > "The conduct of the grievor in the incident giving rise to dismissal was deserving of discipline. In circumstances where the conduct giving rise to a dismissal relates to deficiencies in the work, the initial question for an arbitrator in considering whether dismissal is an excessive response relates to whether the evidence will sustain the inference that the grievor can be expected to meet and maintain an acceptable standard of performance if he is reinstated….

> No such inference can be drawn on the evidence before me. The employer did impose discipline and took reasonable steps to encourage the grievor to address and resolve his difficulties. The grievor indicated repeatedly to management that he would pay greater attention to this work. For a period of time following each incident the grievor, at least apparently, did concentrate on his duties.
>
> But invariably the grievor lapsed back into moments of inattention. *It seams reasonable to project that it would only be a matter of time until the grievor's inattention would result in serious repercussions. There is no basis for assuming that if the grievor was reinstated he would repair his deficiencies.* In short, on the evidence before me I cannot conclude that dismissal was an excessive response to the circumstances." (at 28-29; emphasis added)
>
> These comments are of equal application to the present case. There is simply no basis for concluding that if Mr. Gale were reinstated, he would perform in a careful manner on a consistent basis."

There was also suggestion that the Grievor in that instance go to a "different and less demanding position" but the Grievor insisted that he wanted his old position back.

Ultimately, the arbitrator decided that the Grievor had, by his repeated carelessness over the previous three years, destroyed the possibility of the employment relationship remaining viable by substituting a lesser penalty. The discharge was upheld.

Re Corporation of The City of Calgary involved a number of issues that are not relevant here but did involve concerns about work performance, safety violations, and a preventable accident becoming a culminating incident. In that instance, the discharge was also upheld. Leaving aside the other issues which complicated matters, (the Grievor had died before the hearing) the conclusion is found at p. 347 of the Award:

> "The City had cause to discipline the Grievor as a result of the accident of December 20, 1994 and, in light of his disciplinary record, was justified in dismissing him. We have not been convinced on the evidence presented that the City discriminated against the Grievor. Finally, the Union was only able to establish a few of the usual mitigating factors and the lack of evidence of other mitigating factors, due to inability of the Grievor to testify, resulted in this Board being unable to conclude that it was just and reasonable in all the circumstances to substitute some other penalty for the dismissal.
>
> Accordingly, the grievance is dismissed."

Re ITT Automotive Inc. also involved safety violations and work performance and a lack of concern about safety matters. In that instance, there was come concern as to whether the Grievor's actions were deliberate and the finding was that he had deliberately damaged the equipment and posed a safety risk to himself. The discharge was upheld and the comments of the arbitrator at p. 311 are of some importance:

> "The conclusion I draw is the grievor was engaged in an unsafe work practice. I am prepared to accept he may not have fully appreciated the safety hazard associated with the wheel exploding, but this hardly excuses his conduct. Indeed, I would think there would have been greater awareness of the danger given there is a manufacturer's warning on the wheel that injury or death could result from a broken wheel."

The Grievor in that instance had only been employed for some thirteen months but the manufacturer's warning on the bucket ladder in this instance is similar.

Re Noranda Minerals Inc. involved contributory negligence upon the part of the manager (there is no such evidence) and the discharge was substituted with a thirty-day suspension without just pay. However, I do find that the factual circumstances were considerably different in that instance.

The two Burns Meats decisions (my own and Arbitrator Hamilton's) are also quite different in their facts. Arbitrator Hamilton had a situation, which was originally characterized as deliberate sabotage. The reasons for the Grievor's absences for compensation or sickness were not questioned and he had some eight years of seniority. The finding was that he had committed a careless or negligent act and that a significant penalty was warranted but one less severe than discharge. A three-month suspension was substituted.

My own decision (which referred to Arbitrator Hamilton's) substituted a four-month suspension for a careless and negligent act which involved safety. The finding was that it was unlikely that the Grievor would be re-involved in an occurrence of a similar nature but that was also based upon a previous clear disciplinary record despite lesser service than Mr. Tarko has.

Arbitrator Jamieson in Re Shell Canada dealt with a discharge as a result of the Grievor failing to close two valves at the petroleum distribution terminal which resulted in jet fuel being spilled upon the ground. The discharge was based upon the fact that this was a preventable incident. He had also been involved in a similar incident two years previously as well as having two preventable accidents on his record concerning vehicular accidents.

The arbitrator referred to his earlier decision concerning Simplot and noted at p. 5:

> "On reinstatement though, which was without compensation, the employee was demoted and his continued employment was conditional on certain conditions which were placed for a one year term. More to the point, because the termination in the Simplot case was over job performance, just as it is here, the approach taken by Arbitrator Kelleher in Re Canadian forest Products Ltd. and I.W.A. Canada Local I-424, (1993), 36 L.A.C. (4th) 400; was adopted and the focus was placed on rehabilitative potential. Trustworthiness was also looked at in an operational dependability sense rather than on dishonesty which most of the cases referred to here involve. Taking into account the long service of the employee in the Simplot case and other normal considerations for mitigation such as candour, remorse and hardship for example, and also in the absence of reckless or bad faith acts or omissions on the employee's part, it was decided that he deserved another chance. Applying those criteria here, it seems to us that the Grievor is a prime candidate for rehabilitation and he deserves one more chance to prove that he can still be a valued employee and that he can operate in a safe and trustworthy manner."

The Board decided that a further chance was fair in that instance to determine that the Grievor could meet the "high standards of performance required". Demotion was not available in that instance and reinstatement into the previous position was ordered but with a suspension without pay for six months.

Re Cooney Haulage also involved a discharge resulting from a minor truck accident but with the Grievor had a poor previous record albeit only verbal warnings. The discharge was substituted with a five-day suspension. The arbitrator adopted the reasoning of an earlier award in Re North York General Hospital and Canadian Union of General Employees (1973), 5 L.A.C. (2d) 45 (Shime, Q.C.) as follows:

> "It is trite to say that the penalty imposed should fit the offence. Summary discharge may be warranted in extremely serious offences such as striking a foreman or theft; however, in less extreme situations, such as infraction of plant rules or carelessness in work performance, it is usual to find some form of corrective discipline in the form of warnings and then suspensions before an employee is discharged. The imposition of discipline is also subject to the

type of business or industry, which may have its own peculiar conditions.

One of the advantages to adopting a corrective disciplinary approach is that it enables the parties to know where they stand with each other. An employee who is subjected to corrective discipline knows that after receiving a warning he may receive a suspension and that after a suspension he may be discharged if he reports an offence.

Further, where the employer maintains a system of discipline an employee may grieve when discipline is imposed, which prevents stale incidents from being resurrected on a subsequent occasion. In this type of system an employee is given the opportunity to clear his record through the grievance arbitration procedure at the time of the incident and if he is not successful he is put on notice that his past record will be held against him.

However, if the employee's misdeeds are tolerated the employee may form the opinion that the lax standards are all that is reasonably expected by management. The employee is then lulled into a false sense of security. In this type of situation the sudden tightening of standards followed by the discharge of the employee, if done without warning, is manifestly unfair since the employer has tolerated the relaxed standards which had been in existence and which the employee may have considered to be the norm."

There are certain similarities to the instant case. Mr. Tarko only had disciplinary warnings (at most) but his misconduct is more serious than was the situation referred to above.

I am satisfied that the facts of Re City of Windsor are sufficiently different (although it did involve a demotion which was ultimately overturned and reinstatement ordered) such that it is not of great utility to me although it does stand for the proposition that in certain work, environments accidents do happen. A maintenance job does carry with it certain risks.

Re Country of Smoky Lake stands for that same type of proposition and also involved a reduction of penalty. However, in that instance as well, there was some fault laid at the feet of management.

Re Industrial Family (Hamilton) Credit Union Ltd. also substituted a lesser penalty than discharge. However, the Grievor in that instance had a clear disciplinary record and the arbitrator made a finding that there was the probability of a successful reinstatement.

Basically, the cases illustrate that arbitrators take a different approach in different cases depending upon the facts of each.

As indicated above, there is no question that Mr. Tarko's carelessness and negligence, although not willful, was serious and resulted in severe injuries to the parent volunteer – precisely the person he was there to protect. He did not intend harm but considerable harm came both to the individual and to the Division in terms of the insurance claim yet to be determined. While good intentions are always to be considered, they are not enough in themselves to establish rehabilitative potential. That is generally determined by previous history (which does not operate to the Grievor's favour in this instance) or some intervening change after dismissal again, there was none here).

However the two previous letters are characterized, there certainly were warnings to the Grievor about his safety practices and he acknowledge that himself as well as the fact that he was aware that his further employment was in jeopardy. Although I appreciate that he is both remorseful, and expressed at the hearing that he would take greater care in the future, there is considerable doubt in my mind that even now, the message has really gotten through. It is of concern to me that the incident occurred in June, only two months after the meeting and the last warning. I have attempted to balance that with the

knowledge that the Grievor was tired and in pain on June 28, but, even then, his conduct was inexcusable and could have been prevented with little physical effort but with some attention.

I have also taken into account that this is a school environment. Protection of the students, the public, and other staff, and Mr. Tarko himself are of primary importance.

The Grievor has considerable service (some 12 years) but that is only one factor. His record has not been unblemished.

To his credit he has been candid and forthright throughout.

While I certainly accept the concept of progressive discipline, it is not an automatic or mechanical process. In certain instances was noted by arbitrator Shime – see p. 20 herein) which involve extremely serious offences, there may not be the necessity of having a suspension step. Each case has to be decided upon its facts.

I have also given careful consideration to Mr. Simpson's submission that this is not an instance in which I should substitute my discretion for that of the Division's (in short, I should not go where the Division was not prepared to although I also realize I do have jurisdiction to do that in appropriate cases). The Division had considered all the circumstances and all the options including placement of the Grievor into another lower rated position.

Given all of the circumstances, I am not inclined to alter the decision of the Division. Given the seriousness of the misconduct and the damage resulting from it, there was prima facie grounds for discharge. I am also satisfied that either placing the Grievor back into his position as a Head Custodian or demoting him to some other position still creates an unreasonable risk to the Division.

There was no evidence as to an available vacancy in a lower ranked position in this instance. This is not a bumping situation. The issue is whether or not dismissal can be justified, not seniority rights. I do not find that I have much flexibility on this set of facts to find a creative alternative. I would also be reluctant to displace an existing employee simply to find a spot for the Grievor who was the author of his own misfortune. In this instance, the Grievor had been given an opportunity to rehabilitate himself and did not do so. There is no substantial basis to accept that his stated intention of being more careful would be carried out.

Accordingly, and with regret, I dismiss the grievance and uphold the discharge.

I wish to thank Ms McIlroy and Mr. Simpson for their usual able and succinct presentations. The parties shall share the expense of the arbitrator.

DATED this 3rd day of June 2002.

P.S. Teskey, Sole Arbitrator