

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**WASTE MANAGEMENT, INC.
(Hereinafter called the "Company")**

- and -

**UNIFOR, LOCAL 4268
(Hereinafter called the "Union")**

**GRIEVANCE OF Z. ZORIC
(Hereinafter called the "Grievor")**

ARBITRATOR: M. Rayner

APPEARANCES:

For the Company: Seann McAleese

For the Union: Len Poirier

Hearing held at St. Catharines, ON the 22nd day of November 2019 and virtually by teleconference the 10th day of March, the 14th and 15th days of April, and the 17th day of May 2021.

AWARD

This arbitration arises from the discharge of the Grievor on August 6th, 2019, based on an event that took place on Friday, August 2, 2019, of the civic holiday weekend.

The Company is a large, international waste management operation with more than two thousand employees and both commercial and industrial customers. The Grievor has worked for the Company for 18 years prior to discharge primarily as a driver, both roll-off and container delivery. He had also done other work such as painting, construction and welding at the request of the Company earlier in his employment.

At the time of the incident leading to his discharge, the Grievor was driving as a roll-off driver. The truck he was driving was equipped with a DriveCam. The DriveCam is a video recording device that continuously records two simultaneous views. One is a dash cam view in front of the truck, and the other is of the driver. While the DriveCam records the two views, it only saves images once the DriveCam is triggered by an event. These events are either sudden acceleration or deceleration exceeding a certain limit. Once triggered, the DriveCam keeps the eight seconds of video before the triggering event and the four seconds after the event for review.

The DriveCam video is reviewed by a third-party. If there is something of concern in that review, the Company is notified by email of the third-party's observations and a copy of the clip in question. The Company can then act on the clip, which can lead to either non-disciplinary coaching or discipline.

In this case, the clip was reviewed by the Company on August 6, 2019, the Tuesday after the long weekend. In the 12 second clip, the Grievor brakes sharply for a red light, triggering the DriveCam. The Grievor can be seen taking a Jagermeister bottle from his lunch bag beside him, transferring it from his right to left hand while tightening the cap. Jagermeister is a German herbal liqueur. Ian Burge, Route Manager, initially reviewed it and quickly brought it to the District Manager, Gavin Ryan's, attention. After consulting with HR, Mr. Ryan had the Grievor, who was on his way to his first waste pickup of the day, to pull over and wait for Ian Burge and

another manager named Casey to come pick him up. They did so, with Casey driving the pickup vehicle with the Grievor and Mr. Burge driving the Grievor's truck back to the depot. Mr. Ryan's obvious concern was that the Grievor had been drinking on the job on the Friday and may have been under the influence on that Tuesday.

The Grievor, the two managers, and Brad Young, a Union Representative, met in the boardroom. The Grievor was questioned and denied drinking alcohol on August 2 or at any other time while driving. He stated that he was drinking tea out of the Jagermeister bottle shown in the clip. Mr. Burges asked to search the Grievor's lunch bag, and the Grievor refused, but said the bottles could be removed and examined. The Grievor did consent to the Company truck being searched.

Mr. Ryan then joined the meeting. Mr. Ryan asked to remove the bottles and the Grievor consented again. On opening the lunch bag, Mr. Ryan said that he could smell alcohol, specifically Jagermeister, coming from the lunch bag. No other witness testified to smelling alcohol.

Mr. Ryan examined the bottles and smelt only tea. The Grievor's locker was also searched, but nothing of significance was found. The Grievor was then escorted to a testing centre for a breathalyzer test, which was negative.

The Grievor was sent home for the day. In a miscommunication, he was told to return to work for a normal shift the next morning, Wednesday August 7, 2019. However, once again after he started his route he was called back to the depot and told to go home for the day. He was brought in to work the following day, Thursday, August 8, 2019, and was terminated.

The Grievor alleges he was terminated without cause as the Jagermeister bottles were used for green tea, never alcohol.

It is clear from the termination letter and the testimony of Mr. Ryan that the Company was concerned primarily about the use of the Jagermeister bottle for both the implication that the Grievor was drinking on the job, as well as the risk of the public seeing a Company driver drinking out of an easily identifiable alcohol bottle and the damage that it could do the Company's reputation. However, the Company, in both its termination letter to the Grievor and in its witnesses' testimony, was also concerned about how the Grievor was driving the truck at the time the video was captured.

The clip shows the Grievor lifting the bottle out of his lunch bag, transferring it from his right hand to his left, then steering with his left wrist while he gears down with his right, braking to a sharp stop for a red light. In the termination letter, the Company states: "Aside from being distracted and not safely operating the vehicle with both hands, we have significant concerns that you were in fact consuming alcohol."

In his testimony, Mr. Ryan specifically mentioned the Grievor's driving with his wrist, and there was significant evidence regarding how important safety is to the Company. I am satisfied that driving with one's wrist while holding a bottle, any bottle, would be in violation of the Company's policies regarding both distracted driving as well as safe operation of the vehicle. These policies can be found in both the Company's "Operations and Safety Guide Book" and their "Code of Conduct."

However, Mr. Ryan also concluded from the video that the Grievor was moving at an excessive speed through a construction site, based on the traffic cones visible in the clip. A close examination reveals that this is not a construction site, but rather that the turning lane visible in

the video was closed. This was clarified by the Grievor's testimony. While this is a minor point, I am concerned that Mr. Ryan was relying on a false assumption to support the Company's decision to terminate the Grievor, when it would have been easy to verify whether it was a construction zone.

The Grievor's defence that the bottle was used for tea is unusual. However, the Grievor had undergone a traumatic health issue in 1997, coupled with some family issues at the same time, that made him a proponent of drinking green tea to avoid further health complications. But why the Jagermeister bottle? The Grievor's testimony was that glass did not affect the health benefits of the tea that stainless steel or plastic would, and that the green colour also slowed down the degrading of the tea. The Jagermeister bottle was also quite robust and would not easily break, and its square shape made it convenient for packing in his lunch bag. I found this aspect of the Grievor's testimony, while unusual, to be credible.

The Union's case also relied on the allegation that "everyone" knew that the Grievor used Jagermeister bottles for his tea and water, including management. However, the Union produced only one management witness, Paul Muldowney, a former route manager who no longer works for the Company to testify that they had seen the Grievor use a Jagermeister bottle and may have spoken with him about it. I did not find this evidence sufficient to establish that the management of the Company was aware of the Grievor's use of the bottle such that they were condoning it.

The Union did provide witnesses who testified that they had seen the Grievor use a Jagermeister bottle in the years prior to the incident.

In any event and to speed up the proceedings, the Company and Union agreed to two stipulations regarding this aspect of the case. The first was that the Company conceded that the numerous witnesses the Union intended to call (all employees but none were management level)

would testify to witnessing the Grievor using Jagermeister bottles at work. The second was that the Union conceded that those same witnesses could have agreed that operating a company vehicle with a Jagermeister bottle in the cab of the truck and to drink from would not be professional.

Because of this evidence, I find that on the balance of probabilities the Grievor had used Jagermeister bottles to drink out of during his employment. I also find that the substance in question was green tea as the Grievor's evidence on this point was credible. I also find that management was not aware, generally, of his use of the Jagermeister bottle and did not condone its use in any way.

Notwithstanding the Grievor's credibility regarding the contents of the bottle, I did not find the Grievor convincing for much of his other testimony. He testified that he would always remove the label before using the bottle but did not in this case. He did not have a good explanation as to why he did not remove the label in this case, as his explanation that he was replacing a bottle that had just broken did not explain why he did not take a few extra minutes to remove the label before using. This Grievor must bear some responsibility for this lack of judgment.

Similarly, the Grievor explained that he had fabric sleeves to cover the body of the Jagermeister bottle. Unfortunately, Jagermeister had recently changed the shape of their bottle, around three years before this incident, and the sleeves did not fit the new bottle shape. Again, the Grievor should have been aware of the potential reputational loss to the Company if he was seen drinking out of a Jagermeister bottle by the public or the police and should have made more efforts to conceal the label or distinctive bottle shape if he wanted to use this type of bottle.

This frankly foolish lack of judgment is deserving of some discipline. However, as the Grievor was not drinking on the job as I have already determined, this discipline should not be as severe as termination and should be varied.

In varying the discipline in this case, I will be considering the Grievor's time with the company, his performance record, his discipline record, the circumstances of the incident, and the Grievor's evidence on the stand. There are no other relevant factors in varying the discipline.

The Grievor has been with the Company for 18 years, which is a substantial period and points toward mitigating the penalty.

With respect to the Grievor's work performance, the Company submitted four reports of Coaching Sessions for the Grievor as evidence of the Company's continued adherence to safety and how the DriveCam is used. There was some confusion regarding one report for an incident that occurred on July 31, 2019. The coach date was stated to be August 12, 2019, which is clearly incorrect as the Grievor had been terminated by this date. I find that this error has no relevance to the case at hand. The Coaching Sessions are not evidence of previous discipline, and they do not support any conclusion of the Grievor's prior performance being either exceptionally bad, good or average. The Coaching Session Reports have no weight in coming to my decision.

The Union raised the issue of the Grievor's past performance record, outside of the twelve-month sunset provision set out at clause 8.16 of the collective agreement, by submitting performance awards given to the Grievor. It did so to show that the Grievor's past performance was, if not exemplary, good. In response, the Company submitted the Grievor's discipline record outside of the sunset period to rebut that the Grievor's performance was meritorious. Does the sunset provision prohibit me from considering this discipline record?

The relevant sections of the provision are not determinative. They read:

Past practice of accidents remaining on an employee file for 12 months will continue but all steps of progressive discipline will be observed ...

Accidents will be treated as one stream of discipline... All other incidents that have discipline associated with them will be treated as a second stream of discipline and these will begin with a verbal warning ...

It is also understood by both parties that there is a sun setting clause of twelve months applied to each stream of discipline. Under this sun setting clause discipline dropping off after twelve months would reduce the level of discipline remaining in an employee's file by one position as well as any further actions of discipline would move the employee to the next higher level.

The parties can obviously negotiate in their collective agreement how an employee's work file will be treated in the grievance and arbitration process. In this case, there is a twelve month "dropping off" of the discipline. As a result of this provision, I am precluded from considering this discipline for the purposes of progressive discipline and substituting a penalty if I find that the termination was not just and reasonable. Am I also precluded from considering this evidence solely for the purpose of rebutting the Union's submission of the Grievor's past work performance?

The Union did not provide any case law on this point, and the Employer provided only *Canada Post Corp v. C.U.P.W.*¹ This case speaks only to the admissibility of seniority, not performance, with respect to a sunset provision. It concludes that this evidence is admissible and its consideration by an arbitrator is a matter of weight. However, I am not concerned about seniority evidence, but rather a previous discipline history submitted as evidence to rebut the Union's evidence of awards issued to the Griever.

¹ 2010 CarswellBC 3574, [2010] C.L.A.D. No. 74, 202 L.A.C. (4th) 375.

While the Company argues that I can use this evidence to rebut the Union's assertion as a "good employee", I do not agree. The sunset provision is clear that discipline outside the 12-month period drops off, and I should and can not consider this evidence. To do so, even for the limited purpose suggested by the Company, calls into question the whole point of sunset clauses, which is to wipe the slate clean for the employee for the betterment of both the employee and the Company. Note that this only applies to discipline evidence. Non-discipline evidence is something that I could consider.

In any event, this issue would not carry much weight in my analysis. The purpose of the Company in entering the evidence was to allege that the Grievor's past performance awards were not indicative of a "lily-white" employee. As there is already a one-day suspension that is within twelve months of the incident being grieved which I can consider, the Grievor is not a "lily-white" employee. I will not be considering the disciplinary evidence that falls outside the sunset period in my decision.

While the performance awards of the Grievor are indicative of an above-average employee and would lead to a mitigation of the penalty, this is not a significant matter in my consideration for reasons that follow.

With respect to the circumstances of the incident, it is clear to me that the Company's primary concern at the time was the possibility that the Grievor was drinking. The possible reputational effects if the public had seen the Grievor drinking from the bottle closely followed. The distracted driving, hard braking, driving with only a wrist to control the wheel, and drinking anything at all while driving are all significant safety issues which the Company mentions in passing in the termination letter, but spent considerable time on during the hearing. These are all

actions which, on their own, may have justified the Company in imposing discipline, but not to the point of termination.

In addition to these elements, the Grievor did himself no favours on the stand. While I generally found the Grievor to be credible, his lack of taking responsibility for his actions that were unprofessional as outlined in the previous paragraph but clearly within his control was disappointing to say the least. While the Company argued this behaviour was egregious enough to maintain the termination, I did not find the behaviour to be at that level. However, this behaviour was sufficient to lessen the degree by which I would mitigate the termination.

As a result of these considerations, I find that the Company did not have just cause to terminate the Grievor. I am ordering a substitution of a five-day suspension in place of the termination, and a reinstatement of the Grievor with no loss of seniority.

The parties had agreed to bifurcate the hearing, separating the issues of compensation for the Grievor's time out of work from the initial matter of the termination. They will attempt to settle the matter between themselves within three weeks of the issuance of this award. If they are unable to come to an agreement, they will bring the matter before me at soon as possible. I shall remain seized of the matter if the parties have any difficulty in implementing this award.

Dated at Grand Bend, the 1st day of June 2021.

A handwritten signature in black ink, appearing to read "Mike Rayner", written over a horizontal line.

Mike Rayner