Case No. 610/00/LRA

THE LABOUR RELATIONS ACT

IN THE MATTER OF: An arbitration concerning the dismissal of Fonda Vincent

BETWEEN:

FORT GARRY SCHOOL DIVISION NO. 5,

Employer,

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1112,

Union.

AWARD

Appearances

Randolph McNicol, Q.C. and Dan Ryall, counsel for the Employer.

Kathy McIlroy, counsel, and Steve Edwards, National Representative, for the Union.

Nature of the proceedings

This is an expedited arbitration under section 130 of the Manitoba *Labour Relations Act.* The grievor, Ms Fonda Vincent, was employed for some 11 years as a school bus driver. Her record was unblemished until the 1999/2000 school year, at which point she encountered serious personal difficulties which spilled over into her work performance. On June 8, 2000 she was suspended without pay (Exhibit "5") and on June 22, 2000 she was dismissed (Exhibit "4") for habitual lateness and absence without proper notification. The Board of Trustees reviewed and affirmed its decision on September 14, 2000 (Exhibit "6"), During the course of the school year, the grievor had been given three verbal reprimands, two written reprimands, and two short suspensions without pay, mostly for lateness and absence. The Union grieved on June 13, 2000 (Exhibit "3") and on September 22, 2000 I was appointed to act as sole arbitrator.

The Union conceded that there was a basis for discipline, but argued that termination was excessive and that proper progressive discipline steps had not been followed in this case. The remedy sought was reinstatement with compensation.

The hearing took place on November 10, 2000 and January 3, 2001 in the City of Winnipeg. At the outset, the parties acknowledged that I had been properly appointed and clothed with jurisdiction. An order was made excluding witnesses.

Evidence of the Employer

Murray Cunningham, School Division Transportation Officer, testified first for the Employer. He has served in this capacity since 1987 and is responsible for the administration, policy and operation of the Divisions 17 buses, as well as a complement of personnel including 15 regular drivers, a head driver, a mechanic, a secretary and on-call spare drivers. The grievor was a regular part-time driver.

Mr. Cunningham described the daily routine prescribed for drivers. For most drivers, including the grievor, starting time was 7:30 AM, and by that time the driver was expected to report in personally to head driver Steve Hazelwood or call in by radio from the bus in the yard. Messages were to be checked at this time, as the transportation system was fluid and there were frequent changes of arrangements with caregivers. As well, the *Highway Traffic Act* and the *Public Schools Act* each require that bus condition be checked prior to operation. The morning pre-trip check takes 10-15 minutes and involves a lengthy list of safety items, with any problem areas to be logged. Mr. Cunningham stated that it would be "indefensible" for a driver to neglect the pre-trip inspection, which is a basic safety procedure.

If a driver was unable to be at work, she was required to call Mr. Cunningham by 6:30 AM so that a spare driver could be contacted in sufficient time to carry out the run. This policy has been in place for 8 years. It was rare for a driver not to call in when sickness or other problems arose. If necessary, the head driver or mechanic could fill in to take a route.

The grievor began her employment with Fort Garry School Division in 1989. At the beginning of the 1999/2000 school year, she selected bus # 14, which carries both disabled (wheelchair) and ambulatory students. Her first morning pickup was at 8:05 AM with about 10 stops and termination at Dalhousie School at 8:50 AM. The noon run began at Ecole Crane at 11:30 AM for kindergarten students, on to Ralph Maybank for more K-level passengers, drop-offs at the homes and termination back at the yard around 12:15 PM. The afternoon run began at Fort Richmond Collegiate. For part of the year the grievor also handled a run to a local swimming pool, ending around 2:30 to 3: 15 PM. The final afternoon run started at 3:35 PM at Fort Richmond Collegiate, went on to Dalhousie School at 3:43 PM with the last drop-off around 4:20 PM, followed by a return to the yard for the post-trip inspection.

During the 1999/2000 year, all but two of the grievor's students were special needs children. For these students, the transportation department has a very close liaison with family members and scheduling is especially important, since many students must be physically handed over to caregivers at the point of disembarking.

Problems with the grievor arose early in the new school year. She was frequently late. The head driver's log showed that in the first two weeks of school, on five occasions she reported in more than 10 minutes late (Exhibit "7"). This is significant because once the driver is 10 minutes late, it is not possible to complete the full pre-trip inspection and still get to the first pickup on time. For the month of September overall, the grievor was on time 3 times and late 12 times. As a result, on September 29, 1999, Mr. Cunningham sent her a non-disciplinary letter (Exhibit "9") outlining performance concerns in four areas (timely arrival at work, 6:30 AM phone call to report absence, uniform required and pre-trip/post-trip inspections), stating that "in each area there have been several instances in the past month of you being unwilling or unable to comply with these standards." Mr. Cunningham offered to meet with the grievor and her shop steward if there were any concerns about the accuracy of his comments. The letter ended with this statement: "Be advised that immediate correction is required." No meeting was requested by the grievor to discuss the letter, but Mr. Cunningham said that they did often talk. She felt he was treating her more severely than other drivers.

Problems continued during the month of October. On October 6, 1999, the grievor was reprimanded in writing (Exhibit "10") for calling in absent at 7:15 AM on October 5, 1999, long after the 6:30 AM deadline, and for failing to appear at work the next day until 10:15 AM. The grievor told Mr. Cunningham that on the second day she slept in. She was warned that failure to correct these problems

would result in further disciplinary action. Nevertheless, on October 28, 1999, she neither called in nor appeared for work, resulting in the mechanic Ray Lamoureaux taking her run that morning. At 8:05 AM the grievor flagged down her bus at the first stop and persuaded Mr. Lamoureux to take her car back to the yard while she commenced the run. As a consequence, following a meeting with the grievor, Mr. Cunningham issued a 1-day suspension without pay, to be served on November 2, 1999. No grievance was filed. The suspension letter (Exhibit "11 ") concluded in these terms: "Any further occurrences of lateness or absences without prior approval will result in further disciplinary action to the fullest measure allowed under the Collective Agreement."

There was another written reprimand on November 3, 1999 (Exhibit "12") arising from safety log entries during October, unrelated to the absenteeism and lateness issue. However, Mr. Cunningham testified that on November 5, 1999 he verbally reprimanded the grievor for leaving work without properly notifying the head driver. She had spoken to the shop steward instead. On November 16, 1999, the grievor failed to appear for the noon run when an appointment with her son's psychologist ran late. Mr. Cunningham said that he tried to be supportive and understanding of the grievor's family problems, and acknowledged that doctors can run late, so he only imposed a verbal reprimand. He said that the "Fonda-watch" was on, meaning that the other drivers would notice she was late and let him know so that someone could cover her route.

On January 18, 2000 Mr. Cunningham met with the grievor regarding her ongoing absenteeism. She told him that she needed extra time off due an illness, but Mr. Cunningham was unaware of the grievor's medical condition. In the past she had alluded to migraine headaches and flu. Mr. Cunningham asked the grievor to provide a doctor's letter "indicating you have a medical condition likely to result in high absenteeism." (Exhibit "13") He also offered to investigate alternative employment with the Division if this was indicated by the medical prognosis. However, the Employer never received an adequate medical report.

Continuing absences during the last week of January led to another, more formal meeting on February 2, 2000 involving the grievor, Mr. Cunningham and Irene Bernard acting as steward. On January 24, the grievor called in late - at 6:40 AM - while on route to Selkirk, Manitoba on a family emergency. She booked off for the next day, January 25, but then on January 26, she called at 7:04 AM to say she hadn't slept in four days and wouldn't be in unless they really needed her. On January 31 the grievor again called in late - at 7:34 AM, stating that she had been involved in a car accident. According to Exhibit "14", minutes of the meeting which were signed by the grievor and Ms Bernard, the grievor did not dispute the foregoing facts but "put forward that she had no choice." At the end, she became upset and said, "Fine - suspend me."

The next day, Mr. Cunningham issued a letter imposing a 2-day suspension without pay. He acknowledged that there were extenuating circumstances presented but insisted upon receiving sufficient notice from the grievor regarding such absences. The letter (Exhibit "15") concludes as follows:

> Ms Vincent, I have given clear and specific instructions. On your return to work I hope you will immediately improve your performance. If there is no improvement **you will be subject to further disciplinary action** (emphasis in original)

On March 17, 2000 a non-disciplinary meeting was held with the grievor, again with Union representative Irene Bernard present, to address the grievor's absences and the possibility of an underlying medical condition. Mr. Cunningham reiterated his request from January 18, 2000 for an informative medical report, saying that apparently the grievor's doctor did not understand what was

required to document an accommodation under the *Human Rights* Code. On March 23, 2000, Mr. Cunningham wrote to the grievor and outlined the required medical report as follows:

> Ms Vincent, I need not know the diagnosis or the treatment but I must have documentation from your Doctor that either:
>
> > A person's physical or mental condition is a disability under the Code if the condition is permanent, ongoing, episodic, or of some persistence and is a substantial or significant limit on that person in carrying out some of life's important functions or activities (such as employment).
> >
> > Common conditions that last for a short period of time, have no long term effects, and have a minor significance in carrying out life's important functions, are not considered disabilities under the Code. For example, a cold or flu typically falls in this category.
>
> The Doctor must provide a professional opinion as to the prognosis for recover (sic). If the disability is not known to be permanent, the Doctor should specify a date for review.
>
> Ms Vincent, this is a powerful and compelling Act which deserves careful and specific wording by your Doctor.
>
> If you or your Doctor have concerns in this regard I would recommend you call the Human Rights Commission at 945-3007. Please provide this documentation as soon as possible and not later than April 10, 2000. (Exhibit "17").

Mr. Cunningham testified that he "went overboard" trying to be supportive of the grievor.

The report which was provided by the grievor's physician, Dr. Boguslaw Starzecki, dated April 25, 2000, was hand written and states as follows (Exhibit "18"):

> To whom it may concern,
>
> This is to certify that Ms Fonda Vincent is under my care. She is suffering from a chronic illness and on some days she is too sick to work.

Meanwhile, another verbal reprimand was issued to the grievor by Mr. Cunningham on about March 22, 2000. She failed to appear for her noon run and later explained that she was delayed with a child's medical appointment. Mr. Cunningham said that while recognizing these things can happen, he still expects to be notified, and therefore issued the reprimand.

In May there were 11 absences without proper time off procedures as well as one late without sufficient notification. On May 23, 2000 Mr. Cunningham advised the grievor by letter of another non-disciplinary meeting (Exhibit "19"). He wrote that the doctor's note was not adequate for purposes of human rights accommodation. "The purpose of this meeting is to determine what an acceptable level of attendance is

and to determine if there are steps the employer can be taking to assist you." When the meeting was convened on May 31, 2000, with the grievor, Mr. Cunningham and Ms Bernard in attendance, the grievor said that her doctor refused to send the requested report due to "patient confidentiality" (Minutes, Exhibit "20"). Mr. Cunningham offered to have the Division arrange for a medical report, but the grievor declined. He then told the grievor that in the absence of appropriate documentation, an employer was required to treat all employees alike and demand regular attendance. They discussed a reasonable target for maximum absences and agreed upon not more than three per month. Mr. Cunningham stated that he would be monitoring the grievor's attendance on a monthly basis.

The grievor never did provide the Division with information concerning her underlying medical condition. Mr. Cunningham testified that there had been past references to a surgical procedure, flu and migraines, but he had no documentation with respect to condition, prognosis or specific medications. He was very worried that he was "personally and professionally at risk" for the way he was handling the grievor's situation, and wanted badly to do it right. He was also concerned about the attitude of the other drivers, who he thought didn't understand his treatment of the grievor.

On May 29, 2000 there was another incident when the grievor was absent for a scheduled 3:10 PM pickup. Mr. Cunningham said that the "Fonda-watch kicked in" and at 3:14 PM he reached her at home. She said that she forgot it was Monday. On Mondays there was a different afternoon pickup time on her schedule. As a result of this incident, Mr. Cunningham wrote a letter cautioning the grievor (Exhibit "21 ") but not imposing any discipline. "For reasons of my own, I choose not to take such action." He testified that given the prior suspensions, a more severe penalty would have to be applied, and this would be grieved. Senior administration and the Board would then have to review his actions. It turned out that another driver was available who knew the child being picked up and there was no safety problem. However, Mr. Cunningham explained in detail the complexity of serving special needs children and the difficulty caused when the assigned driver fails to appear as scheduled.

According to Exhibit "8" (a listing of the grievor's absences for the full school year, based on school Division records including the head driver's log), the grievor was absent without time off on the morning of June 1, 2000 and again for the day on June 2, 2000. On June 7, 2000, the grievor took a group out on a field trip and returned at about 2:30 PM. What took place next was characterized by the Employer as the culminating incident which justified termination of the grievor's employment.

At 3:46 PM Fort Richmond School called to say that bus # 14 had not arrived to pick up Paul R., a wheelchair bound student with multiple handicaps including profound developmental disability. He was supposed to be boarded at 3: 3 5 P.M. Other children assigned to the grievor's run that day also had significant disabilities and behavioral problems requiring special knowledge and attention on the driver's part. Mr. Cunningham called the grievor at home and called the drivers at Dalhousie School, which is the grievor's scheduled stop at 3:43 PM. He learned that the grievor was last seen heading south on Pembina Highway after the field trip. There was no spare wheelchair bus available, so Mr. Cunningham began rapidly shifting routes and calling parents in an effort to get everyone home as required. As a result, he was forced to cancel the pickup of a blind child at Arthur A. Leach School, which enraged the boy's mother when she found out. To this day Mr. Cunningham has not been able to find out how the boy got home, but he was not harmed in the process.

Meanwhile, Mr. Cunningham needed bus # 14. On a hunch, he dispatched Steve Hazelwood, the head driver and Ray Lamoureaux, the mechanic, to the grievor's home on Hood Drive in St. Norbert, hoping to retrieve the bus. He had not heard from them when the grievor came on the radio system at 4:10 PM asking for a time check, but not providing any explanation for her absence. Then she called in by phone to say her watch had stopped. By this time the arrangements were all in motion to cover the grievor's absence, and she lived too far away to assist at that point, so Mr. Cunningham ordered her back to the yard.

When the grievor arrived back, she gave a different excuse, saying she had fallen asleep behind Fort Richmond Collegiate. Steve and Ray also returned, and told Mr. Cunningham that they thought they had seen bus # 14 near the grievor's house. Mr. Cunningham then informed the grievor that he had no choice and would have to suspend her with a recommendation to the Board that she be dismissed. He set a meeting for the next day at 8:15 AM, invited the grievor by phone message and informed the Union.

On June 8, 2000, Irene Bernard appeared in her capacity as local president, and said that the grievor was aware of the meeting. Steve Hazelwood was also there. At 8:17 AM Mr. Cunningham logged the time and left the premises when the grievor did not appear for the meeting. He asked Mr. Hazelwood to call if the grievor arrived, and at 8:23 AM Mr. Hazelwood advised that the grievor was in the yard but did not come into the office. Later that day Mr. Cunningham issued the following letter of suspension (Exhibit "5"):

> June 8, 2000
>
> Dear Ms Vincent:
>
> Today, June 8, 2000 at 8:15 AM we were to have a meeting.
> You were late or absent.
>
> Yesterday, June 7, 2000 you did not arrive for your PM route.
> You were late or absent.
>
> In view of previous incidents, including suspensions, I have no choice but to suspend you without pay with a recommendation to the Board for your dismissal in accordance with Article 19.01 of the Collective Agreement.
>
> Yours truly,
>
> Murray Cunningham
> TRANSPORTATION OFFICER

In cross examination, Mr. Cunningham said that he was aware of the grievor's marital separation which took place during the 1999/2000 year. He knew her son had been diagnosed with Tourette's Syndrome and she was attending meetings with her son's physician. While she was reporting stress, he was not aware of her suffering from depression and was not aware of any medication for depression.

Ms McIlroy asked whether the forms referenced in Articles 20.04 and 20.07 of the collective agreement were ever provided to the grievor by the Employer. Mr. Cunningham replied that Article 20.07 concerns cases of suspected abuse of sick leave. Article 20.04 is about documentation for illness in excess of three working days. He did not ask the grievor to complete these forms.

Mr. Cunningham confirmed that other drivers have missed shifts or pickups, resulting in discipline. He testified that he used the same progressive approach, but never had to recommend dismissal because in the other cases, the problems were corrected. In this case, he honestly believed that the grievor might have an underlying medical condition, so his ongoing efforts to get the relevant information were non-disciplinary in nature.

Concerning the pickup arrangements for disabled students at the end of the day, Mr. Cunningham agreed that there are para-professional staff assigned to wait with the children until they are on the bus. The driver is then responsible for the safe boarding of the students and their safety once on board.

The next Employer witness, appearing under subpoena, was Raymond Lamoureux, driver-mechanic and a member of the bargaining unit. He testified about the October 28, 1999 incident when he took over the grievor's morning run, and then was flagged down by the grievor around 8:00 AM so that she could takeover the bus. He was about 2-3 minutes away from the first pickup when she caught up with him. This was the first time such a thing has happened since he began working at the Division in 1997. He said that the grievor did not do a pre-trip inspection before driving off in bus # 14 that morning.

Mr. Lamoureaux was also involved on June 7, 2000 when Steve Hazelwood asked him to drive out to the grievor's house in St. Norbert to get bus # 14. When they arrived the bus was not there. However, just as they left the house he saw the bus travelling down Ducharme, about a block away, heading for Pembina Highway. They then returned to the shop. Upon their return, the grievor was driving bus # 14 into the yard. Mr. Cunningham asked him to stay, and while he was at the back of the shop, he heard the grievor and Mr. Cunningham having some conversation about "the watch".

In cross examination, Mr. Lamoureaux said that prior to leaving with bus # 14 on the grievor's morning route in October, he did the pre-trip inspection himself, as the bus cannot leave the yard until this has been done. The grievor did not ask him whether the pre-trip had been done when she took over the bus herself, but she would have assumed that he had done it.

Finally, Steve Hazelwood, head driver and another bargaining unit member, appeared under subpoena for the Employer. He has been employed with Fort Garry for 16 years and has served as head driver for 10 years.

On June 7, 2000, he and Ray Lamoureaux drove out to the grievor's house looking for her bus. It wasn't there but as they were about 50 metres from the grievor's home and leaving, he saw a wheelchair school bus about 200 metres away going down Ducharme. Mr. Hazelwood testified that he couldn't identify the bus as a Fort Garry School Division bus. However, they had with them a portable radio unit tuned to the Division's system, and at that point they heard a very clear transmission consisting of the grievor calling in. Given the clarity of the signal, "possibly" it came from the bus they saw on Ducharme.

In cross examination, Mr. Hazelwood said that there are other drivers who routinely log in after the standard 7:30 AM start time. If you are in the yard on time, you can do the hood check, which takes 2-3 minutes, and then log in or walk in. There is a five minute grace period if you are in the yard.

Regarding the November 5, 1999 incident when the grievor left work, Mr. Hazelwood stated that the grievor became ill at the shop and he gave permission for her to leave and go home.

At this juncture, the Employer closed its case.

Evidence of the Union

The first and sole witness for the Union was the grievor, Fonda Vincent. She said that she has been employed with the Division since 1988 or 1989 and considers herself to be an excellent employee. Prior to 1999, she had no disciplinary action taken against her. She had a pretty good relationship with her co-workers.

The grievor described her job function, consisting of a 7:30 AM start, the pre-trip check, heading out on the route at 8:00 AM, pickups and drop-offs, and the return for post-trip inspection. She drove the same students every day.

During the 1999/2000 school year she had problems with Murray Cunningham over her absences from work. She listed a variety of reasons for being absent, including marriage and health problems, her son, an accident, several tumor removals, and a virus she caught in 1998 in Mexico that made her sick every year. Mr. Cunningham kept asking for medical information, and she told him to write down what it was they needed, but he never gave her the forms.

Asked why she was terminated, the grievor stated that it was because she fell asleep on her bus.

To explain her difficulties during October 1999, the grievor testified that her oldest boy was thrown off the stage at a rave and landed with his hands on a girl's chest, which then led to him being charged with sexual assault and being suspended form Grant Park High School. She didn't feel that she could tell Mr. Cunningham everything that was happening in her life - all the things which were causing her such trouble. She also had a tumor removed at this time.

Turning to the period of time around the end of January 2000, the grievor explained that her father - a trucker - was on the road near Falcon Lake, Manitoba, when he experienced chest pains. Her mother called and asked her to come along to pick up the truck. She called Mr. Cunningham and he said to go, so she did. She missed additional time while her father was in the hospital.

The grievor said that her first suspension was issued when she failed to call in until 10:30 AM on a working day. She was on sleeping pills and anti-depressants at the time, and was in such turmoil that her days and nights were mixed up. "It just happened. I'm never late for my pickups." When she called in, Mr. Cunningham said to stay home as he already had someone to replace her. She was upset by that. However, she did not grieve the suspension because she was at fault and she didn't think it was that serious.

Regarding the May 29, 2000 incident when she forgot to be at the pickup by 3:10 PM (the Monday pickup), the grievor said that Steve Hazelwood usually told her about it, but this time he didn't, so she didn't go.

As to the `culminating incident' in June 2000, the grievor testified as follows. She did the morning and a field trip drop-off at La Barriere Park, returned for the lunch run, went home for lunch, picked up the field trip at 2:15 PM, and returned the students to the school. She then had about a 45 minute wait on the bus until the last run. It was a very hot summer day, so she went to a Seven-Eleven store, and then parked the bus. She was sick with a bronchial problem. She went to the back of the bus to open the windows and fell asleep. She woke up at about 3:50 PM and realized she was late. She didn't call in to Mr. Cunningham on air because he would embarrass her in front of everyone. Instead she went into the Seven-Eleven to use the regular phone. After that she used the radio phone and Mr. Cunningham directed her to return to the yard. She was then suspended without pay and informed that dismissal would be recommended.

The grievor said that she had never fallen asleep on her bus before. She stated that another driver once fell asleep on his bus downtown, and the Division just sent another bus downtown in his place, and told him to report on his afternoon run. Mr. McNicol objected at this point to the leading of evidence which contradicted Mr. Cunningham on points where Mr. Cunningham was not challenged in cross examination. I held that this objection, based on the rule in *Browne v. Dunn*, was well founded, but that I would consider this as a matter going to the weight of the evidence, and not its admissibility, an option permitted by the jurisprudence.

The grievor testified that for the past month she has been employed at the Post Office. Other things in her life are now OK. Her doctor has cleared her to work and she was no longer on medication.

In cross examination, the grievor said that she understood the 7:30 AM start time, but in fact many drivers park, chat, lift the hood, check the fluids, and then call in to Steve Hazelwood, so that very few drivers are marked in by 7:30 AM. On this point and many others to follow during his cross examination, Mr. McNicol confronted the grievor over testimony which was not put to Employer witnesses so that they could address it during their evidence. Continuing, the grievor said that she had been late only twice in all her years as a driver, and was often early. She defined "late" as meaning not making the first pickup on time. When pressed about September 1999, she agreed that she may have been habitually late during that time period. She acknowledged receiving and understanding the September 29, 1999 non-disciplinary letter from Mr. Cunningham (Exhibit "9") dealing with lateness, absence and other issues.

Regarding the October 6, 1999 written reprimand, the grievor admitted calling in late on October 5, saying she had to rush out to Dauphin, Manitoba due to her grandmother's stroke. She denied that she had promised to be at work the next day, saying Mr. Cunningham had approved her absence on October 4. She did not grieve the reprimand because she didn't know how serious this was, and also Mr. Cunningham said not to worry. He was acting as her boss but also as a friend. He said he had to do it because the other drivers were saying he was showing favoritism towards her.

Questioned about the October 28, 1999 incident where she met the spare driver at 5:05 AM on the route, the grievor thought she was at the daycare, but couldn't remember what happened. She did receive the suspension letter (Exhibit "11 "), understood it and didn't challenge the factual statements made in the letter.

The grievor did not remember the two verbal reprimands in November 1999, nor the written reprimand concerning log book entry breaches (Exhibit" 12"). She maintained that she never had any problems with her log book.

The grievor was adamantly opposed to the use of Exhibit "14" (minutes of the February 2, 2000 meeting which led to the 2-day suspension penalty). She insisted that Mr. Cunningham had promised they were "just talking". She denied signing the minutes, but upon being shown her signature, she conceded that she did sign, and also that she made several notations on the page to correct some of the facts from her perspective. Ultimately she confirmed the accuracy of the factual recitation, and also confirmed receiving and understanding the 2-day suspension (Exhibit "15") on February 3, 2000. She still denied knowing that her job was ever on the line. She knew things could not go on indefinitely this way, but she thought her life would come together.

The grievor agreed that she received and understood Mr. Cunningham's letter dated January 18, 2000 (Exhibit "13", re meeting held the same day) requesting a doctor's letter to confirm that she had a medical condition which was contributing to absenteeism. At the same time, she insisted that Mr. Cunningham was refusing to "write down what the doctor needed" and she testified that her doctor said this information was confidential between physician and patient. On February 7, 2000, Dr. Starzecki provided a brief note to the grievor, which was marked during cross examination as Exhibit "22", but had not been previously made available to the Employer. The handwritten note reads in full:

> Ms Fonda Vincent has missed some days at work due to illness.
> She is under my care for the illness.

The grievor criticized Mr. Cunningham for saying to her during this period of time that her doctor was incompetent at writing notes. She said her doctor thought that his note was sufficient. However, in cross examination, the grievor conceded that this note does not say that she has an ongoing medical condition, which was the confirmation the Employer was attempting to obtain from her.

The grievor agreed that the same issues were discussed again at the meeting on March 17, 2000. Mr. Cunningham asked for medical confirmation and she asked him to "write it down". She was going for an MRI and other scans at the time to investigate her migraines, so her doctor didn't know the cause of her condition. On April 25, 2000, Dr. Starzecki wrote (Exhibit "18") that the grievor was "suffering from a chronic illness" without elaborating on the illness in any way, but the grievor testified that she thought this would be enough for now. "I'm not the doctor." She agreed that she never did provide a full medical report.

The grievor said that Mr. Cunningham suggested she consider applying for sick leave, but she never did apply. She described his efforts this way: "He was being compassionate".

The grievor acknowledged the March 22, 2000 verbal reprimand for missing her noon run, but said that she had been given time off by Mr. Cunningham for a clinic appointment. Mr. Cunningham said to her at the time that he didn't remember that he approved the time off.

Concerning the missed 3:10 PM run on Monday, May 29, 2000, the grievor said that she forgot it was Monday. This was the swimming run. She did the afternoon school run, but forgot the earlier obligation. Pressed by Mr. McNicol, the grievor admitted that remembering her scheduled runs was *her* responsibility, but she said it was also the head driver's responsibility to remind the drivers.

Turning to the `culminating incident' on June 7, 2000 and her several excuses for lateness on the afternoon run, the grievor denied that in fact she was at home with the bus, something which is not allowed. She denied she was sleeping at home. Asked why she didn't apologize for the events of that day, she said, "I never had a chance to apologize to Murray. I was sick. I had a cold. He fired me." As to her failure to appear for the June 8, 2000 morning suspension meeting, the grievor said that she wasn't being paid and was suspended. She did come to the yard but would not come in the office because. Mr. Cunningham had screamed at her the previous day.

With respect to her current health condition, the grievor said that she still gets migraines when she doesn't eat properly, and takes medication when the headaches occur. This was contrary to her testimony in chief, when she stated that she was no longer on medication.

Looking back, the grievor said that she probably should not have been driving a school bus at all during this difficult period. There were days she drove after being up all night and sleeping during the day. She said that she had explained this to Mr. Cunningham at the time.

In re-examination, the grievor referred to the letter dated June 5, 2000 (Exhibit "21") in which "for reasons of my own", as he put it, Mr. Cunningham chose not to impose any discipline for yet another missed route. She said that sometimes Mr. Cunningham was "your friend" and other times he was "your boss". The grievor did not realize at this point in time that she was on the brink of dismissal.

The Union closed its case at the conclusion of the grievor's testimony, and the Employer chose not to call rebuttal evidence.

Final argument of the Employer

Mr. McNicol submitted that termination of the grievor was entirely justified, given the numerous instances of lateness, absence without notice and at times a complete failure to attend to her duties. The Employer imposed reprimands as well as suspensions, and then there was a culminating incident on June 7, 2000. The grievor's conduct shows that she is incapable of ensuring the care and safety of the vulnerable children for whom the Division is responsible. In the end, Mr. McNicol argued, the interests of these children must come before all else.

The June 7, 2000 incident alone would justify discharge, even without the grievor's deplorable record. The welfare of the students was jeopardized when the grievor failed to appear for her run. One blind child was not picked up by the Division's bus, because of the scramble to adjust the routes, and to this day Mr. Cunningham does not know how the boy got home. The boy's mother won't speak to Mr. Cunningham. For these students, adhering to the routine is vital, but the grievor simply couldn't stick to the routine - for which she had a variety of excuses. But the result was that things could have ended up very seriously on June 7.

Mr. McNicol reviewed the grievor's explanations for the June 7 incident, both of which he described as non-credible. First she said her watch stopped, which she now admits was a lie. Then she claimed to have fallen asleep behind Fort Richmond Collegiate in the bus. However, Ray Lamoureaux testified that he saw bus # 14 rounding the corner near the grievor's house in St. Norbert, and he was not challenged on this point in cross examination. According to the Employer, the truth is that the grievor was at home with the bus, and therefore she lied again at the arbitration.

The Division did use progressive discipline in an appropriate way, but the grievor didn't learn from the discipline, or just didn't care. Her testimony showed that she cannot accept personal responsibility. It's always someone else's fault. She said she had medical problems, but produced no medical evidence to the Employer, despite several requests. To reinstate the grievor would send a message that such sub-standard performance is tolerated. That would put at risk the children who are entrusted to the Division's care. No parent would ever tolerate this course of conduct with respect to their child, and the school Division stands *in loco parentis* when the students are at school or being conveyed to or from school by the Division's transportation program. See *Education Administration Miscellaneous Provisions Regulation,* M.R. 468/88R, section 32, 33(1), and *School Buses Regulation,* M.R. 465/88R, section 13.

The Division relied upon the basic governing principles of labour law as set forth in Brown and Beatty, *Canadian Labour Arbitration, Third Edition,* at 7:3110 and 7:3140:

> Where an employer has enforced its rules and policies uniformly and has not acted discriminatorily, it may suspend, demote, and in certain instances discharge an employee who is absent from work on one or more occasions without permission, without justifiable excuse, or without having provided his employer with adequate notice.
>
> **…..**
>
> In the absence of some legitimate justification, an employee who fails to report for work punctually may be disciplined, and if his tardiness persists he may be discharged.

While employers may not discipline an employee who is absent due to *a bona fide* illness or injury (innocent absenteeism), arbitrators have recognized the right to discharge where, for medical or other reasons, the employee is incapable of regular attendance or performance of required tasks. The

relationship is contractual, and at a certain stage, it is unfair to impose the cost of accommodating the employee's condition upon the employer (at 7:3200).

Mr. McNicol submitted that the onus of proving medical reasons for absence or lateness lies upon the grievor. In the present case, there is no useful medical evidence. Again, the grievor has tried to shift responsibility for the missing evidence, blaming her doctor, Mr. Cunningham for not "writing it down" or the Division for not providing a sick leave form.

The Employer relied on a number of arbitral authorities in support of its position. In *Re Canadian Regional Airlines Ltd. and Canadian Union of Public Employees (*1998) 72 L.A.C. (4th) 167 (Smith), there was no progressive discipline in the face of several instances of failure to report for work and failure to produce medical notes. The union argued that the company had failed in its duty and therefore could not terminate, but the arbitrator sustained the dismissal, on the following basis:

> I am further satisfied that the Company was not required to exercise progressive discipline in these circumstances. The purpose of applying progressive discipline to avoid the ultimate remedy of discharge is to provide some warning to the grievor that certain behaviour is not tolerable, and give the Grievor some incentive to reform her conduct. In this case the Grievor was given clear warnings that certain conduct would not be tolerated by the Company
>
> ...I am of the opinion that I can draw the conclusion that the Company clearly made known to the Grievor its requirements but the Grievor persisted and repeated the behaviour which she had already been told could result in disciplinary action. (at p. 189-90)

The culminating incident doctrine was applied in *Re Sunworthy Wallcoverings and Communications, Energy and Paperworkers Union, Local 304 (1996) 59* L.A.C. (41h) 151 (Simmons), where discharge was upheld as the penalty for returning 15 minutes late from lunch. The grievor had a history of absences and had been suspended three times before for 5, 6 and 7 days respectively, leading the arbitrator to find: "It is clearly obvious that the grievor had not learned anything from the previous suspensions that he had incurred" (at p.158). In *Re Miracle Food Mart and United Food & Commercial Workers International Union, Locals 175 & 633* (1995) 48 L.A.C. (4') 87 (Newman), the grievor was responsible for opening the store to let in the night crew, but he didn't show up for work and he failed to call in. There had been a series of warnings and suspensions. Discharge was upheld. Mr. McNicol pointed out that the impact of the grievor's misconduct *in Miracle Food Mart* was some temporary inconvenience and disruption - not a threat to the well-being of vulnerable children, as in the present case -but the ultimate penalty was imposed for this culminating incident.

The grievor was 35 minutes late for work and failed to call in his absence in *Re Culinar Foods Inc. and American Federation of Grain Millers, Local 242 (1995) 48 L.A.C. (4th) 99* (Brandt). The company used a stated progression of penalties up to a 5-day suspension; at which point employees were on notice that discharge would be next. The arbitrator noted that when the culminating incident is relatively minor, discharge may seem to be unduly harsh, but "it is better to say that the grievor has been fired because he has reached the last step of a progressive discipline policy that has throughout warned him of the possibility of termination ..." (at p. 106). As for mitigation, there was little in the grievor's favour aside from 13 years of service. Termination was sustained.

Two Manitoba awards were cited. Absences without leave led to termination in *Re Hudson Bay Mining & Smelting Co. Ltd. and United Steelworker& Local 7106 (1991) 24 L. A. C. (4')* 14 (Chapman) and habitual lateness was the basis for discharge in *Re Brink's Canada Ltd. and General Teamsters, Local 979 (1990)* 11 L.A.C. (4') 395 (Freedman). Both arbitrators sustained the employers' action. Arbitrator Freedman noted (at p. 406): "Each act of discipline was supposed to be a deterrent to [the grievor] but it did not have the desired result."

Finally, in *Re Ball Packaging Products Canada Inc. and United Food & Commercial Workers' Union,* Local 175 (1989) 8 L.A.C. (4m) 315 (Clement), the grievor had a series of warnings and suspensions for punctuality and absence problems, and was dismissed when she slept in, failed to attend for work and failed to call the plant. At the hearing she raised her ongoing marital conflict as the cause of her workplace problems, but the arbitrator found that the company had been reasonable in assisting her and progressive discipline had been followed. "While compassion would dictate that she be `given another chance', the circumstances of this case do not permit that latitude to be exercised by this board in this matter" (at p. 321). Discharge was upheld.

In conclusion, Mr. McNicol said that there was no indication in the evidence that progressive discipline was having any effect on the grievor in the present case. She showed no remorse, even at the arbitration hearing. Any parent would terminate her services under these circumstances. Given the loco *parentis* duties of the school division, discharge was justified.

Final argument of the Union

The Union conceded the existence of grounds for discipline. As framed by Ms McIlroy, the issue in this case is whether arbitral discretion should be exercised to substitute a lesser penalty. The Union submitted that as a long serving employee with a clear service record until the 1999/2000 school year, the grievor was entitled to some leniency when her personal life unravelled. In response to my question, Ms McIlroy clarified that no issue was being raised by the Union with respect to the school division's duty of reasonable accommodation. Rather, the focus of the grievor's case is on the Employer's failure to properly apply the principles of progressive discipline.

Reviewing the evidence concerning the alleged culminating incident on June 7, 2000, Ms McIlroy admitted that the grievor was late for the final afternoon run, but she argued that no safety issue arises here as claimed by the Employer. Disabled students are not left unsupervised at the pickup site outside the school. Teacher aides accompany them until the transfer of custody to the school bus driver is successfully accomplished. There was no evidence of problems created at the drop-off end of the run. Parents or caregivers were there to receive their children. While there was obviously a serious inconvenience created by the grievor's failure to attend in timely fashion, this must be distinguished from a threat to the safety and well-being of the students.

The grievor's evidence was that she was a fine employee until a combination of personal problems overwhelmed her in 1999. There was no contrary evidence from the Employer with respect to her prior years of service. The grievor described a marital separation, loss of her son in a custody dispute, depression illness, and another son's difficulty with Tourette's syndrome. She suffered from frequent migraine headaches. Her father became ill and she was required to assist the family. Mr. Cunningham admitted he was aware that the grievor was having personal problems. To his credit, he was compassionate.

The Union submitted that in these circumstances, the Employer had a duty to provide the grievor with the form referred to in Article 20 of the Collective Agreement. Article 20.04 provides as follows:

Proof of illness

An employee may be required to produce the Board's approved sick leave form completed by a duly qualified medical practitioner for any illness in excess of three (3) working days certifying that such employee is unable to carry out his duties due to illness.

Given the difficulties the grievor was experiencing in obtaining a satisfactory medical report from her doctor, the Division should have provided her with this form as a guide for the doctor to follow in responding to Mr. Cunningham's questions. This was the form which, in the Collective Agreement, the parties agreed should be used for such circumstances.

Turning to the issue of progressive discipline, Ms McIlroy began by arguing that I should only consider the *"official" disciplinary* record, which she defined as excluding the three verbal reprimands issued by Mr. Cunningham on November 5, 1999 (leaving work without proper permission), November 16, 1999 (fail to appear for noon run) and March 22, 2000 (again, fail to appear for noon run). These are not documented in a way which the employee can review and challenge, and therefore should not be included.

In Re Industrial Family (Hamilton) Credit Union Ltd. and Office & Professional Employees International Union, Local 343 (1995) 51 L.A.C. (4') 443 (Hebdon), the arbitrator expressed concern that with verbal communications between a supervisor and an employee, it may not be established that there was a clear warning given that the employment relationship is at risk (at page 447). In that case, the verbal discussions were accorded little weight. Similarly in *Re Houston Forest Products Co. and International Woodworkers of America, Local 1-424 (1984)17 L.A.C. (3d)* 211(Germaine), informal verbal cautions were not considered as part of the grievor's disciplinary record (at p.217-218). To the same effect, see Krashinsky and Sack, *Discharge and Discipline,* at page 6, defining the disciplinary record as excluding oral reprimands unless the employee is advised that they may be used against her in future. In Weatherill, *A Practical Guide to Labour Arbitration Procedure (2nd Edition),* at page 66, the author states: "The discipline record should consist simply of the notices of discipline which had been issued to the grievor."

As a result, the relevant sequence of discipline imposed for the events described in the evidence is as follows, according to the Union:

October 6, 1999	Written reprimand (late call-in, no-show).
October 29, 1999	1-day suspension (late, intercept bus en route and relieve driver-mechanic).
November 3, 1999	Written reprimand (safety log entries)
February 3, 2000	2-day suspension (late call-in on January, 26 and January 31).
June 5, 2000	Letter in personnel file, no discipline (no show for Monday 3:10 PM pickup).
June 7, 2000	Suspension without pay and termination (late/no-show for PM run).

The Union argued that after the 2-day suspension in February, the Employer should have imposed a more severe penalty for the next occurrence - the June 5 no-show. This would have brought home to the grievor the seriousness of her breaches. She would have known that she was in jeopardy of losing her job completely. Instead, Mr. Cunningham delivered a contradictory message by essentially doing nothing. For reasons not explained to the grievor, he chose not to take any disciplinary action. He made no reference to the imminence of discharge. Indeed, his letter (Exhibit "21 ") contained no warning at all, unlike prior disciplinary letters.

Ms McIlroy submitted that because of the failure to apply progressive discipline in the proper manner, the grievor was lulled into a false sense of security about her misconduct. She didn't realize how close she had come to termination. Mr. Cunningham was "too nice" - a friend one day, a boss the next. Being nice is not a problem, as long as management is also very clear. As explained in *Re Airport Inn and Newfoundland Association of Public Employees* (1992) 28 L.A.C. (4th) 186 (Alcock) (at p. 190):

> Typically, a progressive discipline system consists of a series of steps ... , each of which carries a progressively more severe penalty until the last step, namely, discharge, is reached.
>
> It is the employer's responsibility to acquaint employees with the reasonable rules of the work place as well as the disciplinary measures which will follow if the rules are violated. Each time an employee breaks a minor rule, it should be brought to her attention immediately and she should be disciplined in accordance with the relevant step of the progressive discipline system.

Additional authorities cited by the Union on this point include *Re Intelicom Security Services and United Food and Commercial Workers Union, Local No. 832 (Archambault) [1998]* M.G.A.D. No. 24 (Peltz) at paragraph 128-129 and *Re Bethania Mennonite PCH and Bethania Nurses Local 103 of the Manitoba Nurses' Union [1999]* M.G.A.D. No. 2 (Teskey) *at paragraph 72.*

Moreover, progressive discipline requires *consistency by* the employer in conveying its message to the employee. As stated *in Re Alcan Smelters & Chemicals Ltd. and Canadian Association of Smelter & Allied Workers, Local 1 (1991) 23 L.A.C.* (4th) 257 (Hope), "an employer is expected to be consistent and to apply a progressive approach in the sense of escalating responses to repeated acts of misconduct with the aim of bringing home to the employee that a continuation of the pattern will lead to dismissal" (at p. 265-66). The same point was made in *Re Mercury Builder's Supplies and Teamsters Union, Local 879 (1990)* 18 L.A.C. (4th) 168 (McKechnie) (at p. 185).

In addition, the Union argued that another employee of the Division had similarly fallen asleep on his bus but not been dismissed. As discussed in *Re Transcona-Springfield School Division No. 12 and Canadian Union of Public Employees, Local 3465 [1996]* M.G.A.D. No. 74 (Hamilton) at paragraph 121, such differential treatment can amount to discrimination, even if the employer did not act in bad faith or intend to discriminate against the grievor.

The Union submitted that there were sufficient mitigating factors in the present case to justify reinstatement of the grievor. She has given long service. She was remorseful, according to Ms McIlroy. There were ongoing medical and personal problems which, while not excusing the grievor's failure to maintain good attendance and punctuality, should be taken into account as mitigating factors. In *Re Burns Meats and United Food and Commercial Workers Union, Local No. 832 (Caplette) [1997]* M.G.A.D. No. 3 (Rennie), the arbitrator found that there had not been proof of a causative link between

the medical problems and the grievor's behaviour, but held that " ... to give some benefit of the doubt to the Grievor, I will consider his medical condition to be a generally mitigating factor... "(at para. 46).

In conclusion, Ms McIlroy referred to the comments of the arbitrator in *Houston Forest* Products, supra, as follows (at p. 212):

> Given its experience with [the grievor], it is not difficult to understand why the company had concluded that she would not respond to any further corrective discipline. But, it is one thing to observe that I understand why the company lost its patience and another to agree with its conclusion that the employment relationship is irreparable . ...

The arbitrator in that case characterized his duty as being `to independently assess all of the relevant considerations and determine whether discharge was the appropriate response or, alternatively, whether a lesser, corrective measure should be designed to repair the employment relationship in a manner which accommodates the interests of both parties" (at p. 212). The Union sought just such a review in the present case and urged that the grievor be reinstated.

Employer's reply argument

Mr. McNicol disputed the Union's contention that the verbal reprimands cannot be included in the discipline record, and pointed out that in any event, the grievor here did not dispute the basic allegations.

As to the argument that proper progressive discipline steps had not been followed, the Employer submitted that this simply ignores the overall evidence. The Division acted as a benevolent employer, but the grievor chose to take no heed when discipline was invoked. The June 5, 2000 letter from Mr. Cunningham was not a free pass to fall asleep on the job and miss a scheduled run, which would be the effect of adopting the Union's argument. Moreover, if discipline was always required to be escalating, this would force the parties into a harsh and linear approach in the workplace.

Regarding the supposed duty of the Division to provide the sick leave forms, this would not have made any difference, since the grievor's doctor had already seen a detailed statement of the required information from Mr. Cunningham (Exhibit "17"), but the resulting medical report was totally inadequate.

Mr. Cunningham was aware that the grievor had personal problems, but he did not know about her (claimed) depression and had no information about anti-depressant medications. His lack of information was the reason he tried so hard over a period of several months to obtain basic documentation of any underlying medical condition.

As to alleged discriminatory treatment, Mr. McNicol responded that according to the evidence, when other drivers had performed below standard, they too were disciplined in a corrective fashion. No one else had been terminated because, unlike the grievor, the other employees had responded positively to discipline.

Findings and conclusion

The evidence in this case reveals an ongoing pattern of late call-ins, late arrivals at work, and absences without proper approvals, spanning the full 199912000 school year. As a long serving employee, the grievor was aware of the rules and procedures applicable within the transportation department of the Division. While she suggested in her testimony that many other drivers were regularly late for morning

check-ins, the evidence does not support any such finding, other than an apparent short grace period (in the range of 5 minutes) as long as the driver was already in the yard. However, the complaints by the Employer against the grievor go well beyond this level of nominal tardiness. The grievor sometimes called in too late for the Transportation Officer to make timely alternate arrangements. Sometimes she simply failed to show up for scheduled runs. In May 2000, she registered 11 absences without a time off being submitted. Virtually all of these failings were admitted by the grievor in various meetings and discussions with Mr. Cunningham, and not contested during the hearing before me. I therefore find that the grievor's performance record for this time period was far below the acceptable standard, to the degree that her conduct created a serious disruption in the smooth delivery of transportation services by the Division.

There was reference throughout the case to various personal and medical problems which, according to the grievor, prevented her from maintaining a proper attendance record. The actual medical basis for the grievor's problems is undocumented in the record before me. The two medical notes from Dr. Starzecki (February 7, 2000 and April 25, 2000) provide no meaningful information. The grievor's own testimony about her medical condition was unfortunately lacking in detail and coherence. No fresh medical report was tendered in evidence during the hearing. No confirmation was provided as to medications which the grievor was taking at particular times, or at all. Moreover, with respect to personal and family problems, few particulars were given which would allow me to form an impression about the level of stress which the grievor was undergoing, and no corroborating evidence of any kind was adduced.

The Union admitted that the grievor's conduct was culpable. This therefore was not a case of innocent absenteeism. Cause for discipline was conceded. Mitigation was argued, which I will address later, but I note at this stage that the evidence did not provide much basis for assessing and finding mitigation on grounds of medical condition or personal distress.

The grievor minimized the significance of her attendance problems. She stated several times that she was a good employee and that she was almost always on time (defined as making the first pick-up on time). Ms McIlroy argued that the grievor's erratic attendance caused inconvenience, but never threatened the safety and well-being of the children for whom she was responsible. By contrast, the Employer cited its obligation to act *in loco parentis* and argued that the grievor's actions, especially on June 7, 2000, *did* put children's well-being at risk. Most of the students regularly transported by the grievor were disabled children with serious physical or mental problems, and an acute need for accurate scheduling and specialized handling, preferably by someone familiar with their needs. Considering the evidence, I find that the Employer's characterization of the grievor's misconduct is more realistic. While no child was hurt as a result of the turmoil created by the grievor, the issue rises above the level of inconvenience. Most troubling to me is that during the course of her testimony, the grievor never appeared to appreciate that her haphazard attendance record caused any problems at all for other people, whether it be inconvenience to parents or the transportation department, or jeopardy to the well-being of children.

The Union suggested that the Division engaged in discriminatory treatment against the grievor because only the grievor was terminated for falling asleep and missing her run, whereas another driver had committed a similar mistake and not been disciplined so severely or at all. However, as noted by Arbitrator Hamilton *in Transcona-Springfield, supra,* "It is not discrimination to make reasonable distinctions between employees based on their degree of participation, degree of culpability or prior work record" (at para. 121). There is no evidence to establish that the material circumstances of the grievor's case substantially conform to the circumstances of other drivers who were treated more leniently. When the point was put to Mr. Cunningham in cross examination, he said that other drivers have also been disciplined, but they responded positively and so no further, more severe disciplinary action was required.

I do accept Ms McIlroy's argument that in dealing with the grievor's record of discipline, the verbal reprimands must be excluded, since it was not established that in issuing these reprimands, Mr. Cunningham made clear the full implications of a reprimand for the future of the grievor's employment status. However, I am not prepared to ignore the verbal reprimands entirely, since I believe they form part of the overall picture in this case, along with the various non-disciplinary letters and meetings which took place during the course of the year. This requires some elaboration.

The Employer in this case made a good faith effort to explore whether there was a need for reasonable accommodation of the grievor due to a medical condition. The Employer was repeatedly requested by the grievor to accommodate her medical problems. Mr. Cunningham, to use his words, "went overboard" in trying to meet the Employer's duty to accommodate. As the grievor herself said, Mr. Cunningham was trying to be compassionate. Notwithstanding her request for accommodation, however, the grievor neglected or refused to provide any medical documentation.

As I see it, this left the Division in a bind. The grievor was falling far short of acceptable attendance at work, for which she would normally be disciplined with increasing severity, except that she was simultaneously claiming to have a medical condition which precluded normal attendance. Mr. Cunningham was squeezed between the Division's mandate to deliver safe and efficient service, on the one hand, and the duty of reasonable accommodation, on the other. He was also facing grumbling in the workplace from other drivers upset that the grievor was patently not meeting required standards while they continued to cover for her - the "Fonda-watch". Mr. Cunningham knew that unless he was making an accommodation in accordance with the *Human Rights Code*, he had no business as a transportation manager turning a blind eye to violations of the Division's rules and procedures.

On the witness stand, Mr. Cunningham was extremely uncomfortable while giving evidence about how he tolerated the grievor's shortcomings, to the potential risk and detriment of the children she carried. He said a number of times that he felt personally and professionally at risk as a result.

In the end, there was no argument by the Union based on reasonable accommodation. The Union did suggest that the Employer should have provided to the grievor the sick leave form referenced in Article 20 of the collective agreement, in order to help the grievor's doctor respond with the required medical information. No copy of the form was put into evidence, and therefore I cannot say whether it would have made a difference, as compared to the instructions already provided by Mr. Cunningham. Moreover, sick leave was not in issue. I conclude that nothing turns on the sick leave form.

The only defense raised to the discharge was an alleged failure to apply progressive discipline. I find, however, that the issues of discipline and accommodation are connected, in that the Employer seemed to restrain itself in the meting out of discipline because of the unresolved accommodation issue. Mr. Cunningham was "too nice", as Ms McIlroy put it. Right up until the May 31, 2000 meeting, he was still trying to gather the necessary medical information. Only when he was stymied again - this time by Dr. Starzecki claiming "patient confidentiality" - did he relent and advise the grievor that she would not be treated differentially any longer. She would be held to not more than 3 absences per month and would be monitored monthly.

In light of the foregoing, I conclude that the formal discipline record must be restricted in the way the Union argued. However, this is not the end of the matter. As I see the central issue in this case, it is this: did the grievor have a reasonable opportunity to be guided and corrected by the Employer, through counseling and discipline, in order to restore an acceptable attendance record, prior to the imposition of discharge? I believe that framed this way, the question distills the essence of the progressive discipline principle. In answer to this question, the Division said that the grievor had more than a reasonable opportunity. The Union maintained that the grievor did not have a fair opportunity, primarily because of the mixed message conveyed by Mr. Cunningham in his June 5 letter declining to discipline the grievor.

In answering this core question, under the unique circumstances of this case, it seems artificial to look only at the formal discipline record without the surrounding context, as I have outlined it above.

Turning to the June 5 letter, I agree with the Union that it fails the test for appropriate progressive discipline. Taken alone as a response to another in a long series of absences, it was inconsistent and conveyed the wrong message to the grievor. As I wrote in my award *in Intelicom Security Services, supra,* at paragraph 129:

> The whole object of progressive discipline is to put the employee on notice that the conduct in question is not going to be tolerated, and will be subject to increasingly serious discipline if such conduct persists. This prevents an employee from being lulled into a false sense of security, as may have happened here. Bullying behaviour, disrespectfulness and noncompliance with procedures on the grievor's part led to weak responses by management. Without for a moment excusing these actions by the grievor, I must observe that he was never told bluntly that disciplinary consequences were going to result. Without progressive discipline, a defaulting employee is able to respond to his dismissal with a plea that the employer has acted unjustly and harshly, precisely what the grievor says here. On the other hand, by acting firmly to impose reasonable discipline as problems arise, an employer hopes to correct an employee's misguided ways, and restore productive effort in the workplace. Failing a positive response on the employee's part, at least the employer has laid the foundation to justify more serious discipline, including discharge if necessary.

This was the Union's point in the present case. There is some force to Ms McIlroy's argument that on June 5, 2000, Mr. Cunningham should have told the grievor, in blunt terms, that she was on the verge of losing her job. Presumably this message would be accompanied by a third, more substantial suspension without pay.

Having said all this, I return to the broader context of the narrative in this case. The Employer's error in dealing with the May 29, 2000 misconduct must not be examined in isolation. Keeping in mind the evidence in its totality, I find that the grievor was simply not receptive to the Employer's message, and therefore it would not have made any difference how the June 5 action was packaged. I find that since September 29,1999, the Employer had been trying to communicate to the grievor that a reasonable attendance and punctuality level was mandatory. An effort was made to convey the message through non-disciplinary counselling (in which I now include the verbal reprimands) and also through written reprimands and unpaid suspensions. As mentioned, the Division also sought to accommodate any medical problem the grievor might have, but the grievor did not cooperate.

In the end, the grievor did not see any of this as *her* problem. It was not her responsibility. That attitude was quite evident even while she testified before me during the hearing. As a result, I reluctantly conclude that nothing at that time would have succeeded in correcting the grievor's misconduct. Resort to termination was not unreasonable.

I am unable to find many strong mitigating factors here. Long and capable service is certainly one important factor which stands in the grievor's favour, but it is essentially the only one. I assume there has been financial hardship, but there was little specific evidence on this point. I cannot find any evidence of remorse. On June 7, 2000, after missing her run, she told several stories, and without making a finding, I am at least skeptical about the second version - that the grievor fell asleep in her bus

near the school. There is strong evidence that she was actually at home with the bus, which if true means that she tied in evidence before me.

There was never an apology tendered - not to Mr. Cunningham, nor to the Division, nor to the parents of the children affected on June 7, nor to the grievor's fellow drivers who scrambled to cover for her. No expression of remorse was made by the grievor during the arbitration hearing. During her evidence, from start to finish, she engaged in a denial of all responsibility, which I must construe as an aggravating factor. Regrettably, I detected no insight into the seriousness of the past year's failings on her part. In addition, she was inconsistent with respect to her own current medical condition, first saying she was cleared for work and off her medication, but later admitting that she still suffered from migraines and was taking pills at times. No medical evidence was tendered to confirm her present ability to return to work, which is significant given the grievor's own admission that at times last year, she was so unstable that she probably should not have been driving.

The foregoing recital of factors and arguments may seem harsh and unfeeling on my part. This is not my intent. I find this to be a very sad case. The grievor has my fullest sympathy. Clearly the grievor was in personal distress during the 1999/2000 year. I sense that her pain has not entirely abated. I perceive her to be an intelligent, proud and capable individual, and she may well have been embarrassed by the state to which her work performance had fallen. Certainly she had done well on the job for many years in the past. The loss of her school division job was obviously very upsetting. Work is a vital component of most people's dignity and self worth. I wish there was more that I could do, but I am constrained as an arbitrator. I can only express the sincere hope that in Ms Vincent's life, "This too shall pass." Hopefully life will be better again for the grievor and her family, and she will become re-established in work and otherwise.

In balancing the requisite factors, I am unable to conclude that the penalty of discharge, though undoubtedly onerous in its effect on the grievor, is excessive or disproportionate under all the circumstances. In this case, it is not just the economic or business interests of the Employer which are at stake, but more importantly, there are vulnerable children who depend on the Division and its drivers to provide safe and reliable transportation service.

This factor may not "come before all else", as Mr. McNicol argued, but it certainly is a factor entitled to substantial weight in my consideration of whether the grievor ought to be reinstated as a driver.

Award

For all the reasons stated herein, the grievance is dismissed. The parties will share in the arbitrator's fees and expenses.

In conclusion, I wish to thank the legal counsel and the other representatives of the parties for their participation in presenting this difficult case.

DATED this 9th day of January, 2001 at Winnipeg, Manitoba.

ARNE PELTZ, Arbitrator